

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright
Christopher T. Hanson

In the Matter of

SOUTHERN NUCLEAR OPERATING
COMPANY, INC.

(Vogtle Electric Generating Plant, Unit 3)

Docket No. 52-025-LA-3

CLI-20-18

MEMORANDUM AND ORDER

Today we address the appeal of Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff (BREDL) from the Atomic Safety and Licensing Board's denial of its hearing request on Southern Nuclear Operating Company, Inc.'s (SNC's) application for an amendment to the Vogtle Electric Generating Plant Unit 3 (Vogtle Unit 3) combined license.¹ For the reasons discussed below, we affirm the Board's decision.

¹ After the Board denied BREDL's hearing request and terminated the proceeding, BREDL filed a motion to reopen the proceeding while its appeal was pending before us. See *Motion to Reopen Proceeding and Request to Amend Contention by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001* (Dec. 7, 2020) (Motion to Reopen). BREDL's Motion to Reopen will be addressed in a separate decision.

I. BACKGROUND

On February 7, 2020, SNC applied for an amendment to its license for Vogtle Unit 3, a Westinghouse Electric Company Advanced Passive 1000 (AP1000) reactor, and requested an exemption from regulations governing the AP1000 design.² The application proposed to change a requirement that the Vogtle Unit 3 auxiliary and annex buildings be constructed with a three-inch minimum seismic gap between them.³ The purpose of the three-inch gap is to help ensure the buildings do not interact in the event of an earthquake.⁴

As built, the two buildings are closer together than three inches over a limited area.⁵ Specifically, a variation in a thirteen-foot section of the auxiliary building wall leaves a minimum gap of 2-3/16 inches between the auxiliary building and the annex building.⁶ This difference does not conform with design information in the Vogtle Unit 3 Updated Final Safety Analysis Report (UFSAR) or the AP1000 certified design, which is incorporated by reference into our regulations.⁷ SNC performed a technical evaluation⁷ and determined the smaller, as-built gap would still ensure the two buildings do not interact during an earthquake and would thus satisfy the same safety function as a three-inch gap.⁸ Based on that technical evaluation, SNC requested a license amendment to permit a smaller seismic gap over the specified area as well

² See Letter from Brian H. Whitley, SNC, to NRC Document Control Desk (Feb. 7, 2020), Encl. 1 (Application), Encl. 2 (Exemption Request) (ADAMS accession no. ML20038A939).

³ Application at 4-5.

⁴ *Id.* at 3-4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 5; Exemption Request at 2-3; see also 10 C.F.R. pt. 52, appx. D, "Design Certification Rule for the AP1000 Design."

⁸ Application at 6-9.

as an exemption from the three-inch seismic gap requirement incorporated by reference into our certified-design regulations for the AP1000.

The NRC Staff docketed SNC's application on February 21, 2020,⁹ and published a notice of an opportunity for a hearing on SNC's license amendment request on March 10, 2020.¹⁰ BREDL requested a hearing on May 11, 2020 and proposed two contentions.¹¹

As part of its technical review of the application, the Staff conducted an audit of underlying licensee-controlled data and calculations not included in the application itself. The audit sought to determine whether SNC had shown that a reduction in the seismic gap between the auxiliary and annex buildings could be safely permitted or if SNC would need to submit additional technical information on the docket to address any apparent discrepancies between its application and the underlying data and calculations.¹² After confirming that the technical evaluation in SNC's application was consistent with SNC's underlying data and calculations and

⁹ Email from Cayetano Santos, NRC, to Brian Whitley, SNC, "Acceptance Review of Southern Nuclear Operating Company's Request for License Amendment and Exemption: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (EPID No. L-2020-LLE-0009)" (Feb. 21, 2020), at 2 (ML20052H043) (Docketing Decision).

¹⁰ See Vogtle Electric Generating Plant, Unit 3: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene, 85 Fed. Reg. 13,944 (Mar. 10, 2020).

¹¹ *Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001* (May 11, 2020) (BREDL Petition).

¹² See Memorandum from Cayetano Santos, NRC, to Victor Hall, NRC, "Audit Report for Vogtle Electric Generating Plant Unit 3, Request for License Amendment and Exemption: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR 20-001)" (May 26, 2020), Encl. at 1, 3 (ML20141L698) (Audit Report).

determining that no additional information was required to decide the matter, the Staff approved SNC's amendment request on August 4, 2020.¹³

Shortly thereafter, the Board found BREDL had standing to intervene but that neither of its proposed contentions were admissible.¹⁴ Accordingly, the Board denied BREDL's hearing request and terminated the adjudicatory proceeding.¹⁵ BREDL appealed the Board's denial of Contention 2.¹⁶

II. DISCUSSION

A. Standard of Review

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.¹⁷ We generally defer to the Board's threshold determinations on contention admissibility unless an appeal demonstrates an error of law or abuse of discretion.¹⁸

B. BREDL Contention 2

In proposed Contention 2, BREDL asserted that the foundation of the nuclear island—a concrete basemat upon which the containment, shield building, and auxiliary building are constructed—is settling and may have caused the reduction of the required three-inch seismic

¹³ See Audit Report at 3; Letter from Cayetano Santos, NRC, to Brian H. Whitley, SNC (Aug. 4, 2020) (ML20132A032 (package)).

¹⁴ LBP-20-8, 92 NRC __, __ (Aug. 10, 2020) (slip op. at 14-18, 21-27).

¹⁵ *Id.* at __ (slip op. at 28).

¹⁶ *Blue Ridge Environmental Defense League's Notice of Appeal and Brief in Support of Appeal from the Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in License Amendment Proceeding* (Sept. 4, 2020), at 2-3 (BREDL Appeal).

¹⁷ 10 C.F.R. § 2.311(c).

¹⁸ See, e.g., *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, and 3), CLI-17-5, 85 NRC 87, 91 (2017); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 482 (2016).

gap between the auxiliary and annex buildings.¹⁹ BREDL therefore argued that “other systems and structures must also have become deformed yet have not been evaluated.”²⁰ BREDL called for a halt to the construction of Vogtle Unit 3 until, among other things, “an entirely new licensing review and full analysis of the new stress conditions placed on other components on the site that are no longer level as a result of the disproportionate sinking have been concluded.”²¹

The Board found Contention 2 inadmissible for several reasons. The Board found that Contention 2 raised issues outside the scope of the proceeding.²² The Board explained that the purpose of this proceeding was to determine whether the Vogtle Unit 3 combined license should be amended to allow a smaller seismic gap between a limited portion of the auxiliary and annex building walls.²³ Contention 2 raised issues beyond this limited scope because it raised concerns that the nuclear island foundation was sinking or settling.²⁴ The Board observed that SNC had not requested any change to the safety parameters and monitoring programs governing foundation settlement in its amendment request.²⁵ Therefore, the Board found BREDL’s claims were inadmissible.²⁶

¹⁹ See BREDL Petition at 13-15.

²⁰ *Id.* at 15.

²¹ *Id.* at 12-13.

²² LBP-20-8, 92 NRC at ___ (slip op. at 24).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at ___ (slip op. at 25).

²⁶ *Id.* at ___ (slip op. at 24).

The Board also found Contention 2 inadmissible because it did not raise a genuine dispute with SNC's application.²⁷ The Board noted that SNC's application included an analysis of foundation settlement and its relationship to the seismic gap between the auxiliary and annex buildings.²⁸ This analysis, which was based on information gathered over the past several years from a site-specific settlement monitoring program described in the Vogtle Unit 3 UFSAR, concluded that differential settlement between the foundations of the auxiliary and annex buildings would have no adverse impact on the gap between them.²⁹ The Board found that BREDL had not disputed SNC's analysis and did not offer support for its claim that settlement was not considered in the design of Vogtle Unit 3.³⁰ The Board found BREDL's assertions insufficient to raise a genuine dispute of material fact with SNC's application and therefore ruled them inadmissible.³¹

Finally, the Board found Contention 2 inadmissible because BREDL did not provide a concise statement of specific facts or expert opinions upon which it would rely.³² Although BREDL included the expert declaration of Arnold Gunderson, the Board found it offered only "bare assertions" that SNC's modeling was insufficient.³³ The Board also found that Mr. Gunderson's declaration did not cite to portions of SNC's application with which he disagreed or

²⁷ *Id.* at __ (slip op. at 25).

²⁸ *Id.* at __ (slip op. at 25-26).

²⁹ See Application at 8.

³⁰ LBP-20-8, 92 NRC at __ (slip op. at 25-26).

³¹ *Id.* at __ (slip op. at 25).

³² *Id.* at __ (slip op. at 26).

³³ *Id.*

to any sources supporting his assertion that the nuclear island foundation may be settling disproportionately.³⁴

On appeal, BREDL does not challenge any of the Board's reasons for finding Contention 2 inadmissible. Instead, BREDL asserts that SNC's license amendment application was incomplete as submitted because it did not include the underlying technical data and calculations reviewed by the Staff during its audit.³⁵ BREDL argues that under these circumstances, the standard for an admissible contention is lowered and that we should admit Contention 2 for an evidentiary hearing.³⁶ Alternatively, BREDL requests that we dismiss the license amendment application *sua sponte* or grant "leave to BREDL to intervene together with access via discovery to the unavailable documents and anticipatory leave for BREDL to amend its petition following that discovery."³⁷

BREDL's argument that SNC's license amendment application was incomplete is impermissibly raised for the first time on appeal.³⁸ BREDL did not argue before the Board that the application should be rejected as incomplete or assert that SNC was required to include in its application the underlying data and calculations audited by the Staff.³⁹ BREDL stated only that its analysis of the application was "hampered due to the lack of any complete engineering analyses. . . provided for review by SNC" and that BREDL would therefore "reserve the right to

³⁴ *Id.* at ___ (slip op. at 26-27).

³⁵ BREDL Appeal at 6-7.

³⁶ *Id.* (citing *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853 (1981)).

³⁷ *Id.* at 7.

³⁸ See *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009) (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)).

³⁹ BREDL Petition at 6.

modify” its contentions once the Staff made information about its audit public.⁴⁰ The Board acknowledged BREDL’s statement as “an apparent reference to the opportunity afforded BREDL under the agency’s rules of practice to submit new or amended contentions regarding information not previously available.”⁴¹ BREDL’s appeal does not assert Board error on this point.⁴² And BREDL was provided the Staff’s audit report and had the opportunity to file new or amended contentions based on the report but did not do so.⁴³

BREDL also argues on appeal that the Board erred by finding Contention 2 inadmissible despite finding BREDL is “entitled to access all information relied upon by the NRC Staff in accepting a license amendment request” and agreeing that “BREDL was denied that access.”⁴⁴ To support its claim that the Board found BREDL was incorrectly denied access to information, BREDL’s appeal points to the additional views of Judge Bollwerk. However, Judge Bollwerk’s additional views do not support BREDL’s argument. Rather, Judge Bollwerk observed that “in this instance the access afforded BREDL to SNC documentary material seemingly was in accord with agency regulatory procedures and the Staff’s own review process guidance.”⁴⁵ Specifically, the Staff accepted the application for review on February 21, 2020, based on the content of the application alone, which was available to BREDL for review in framing its

⁴⁰ *Id.* at 6-7.

⁴¹ See LBP-20-8, 92 NRC at ___ (slip op. at 21 n.48).

⁴² To the extent that BREDL asserts that the Board failed to consider BREDL’s claims as a contention of omission, we find no support in either BREDL’s petition or its appeal for the proposition that SNC was required to include in its application the underlying data and calculations that the Staff audited in this case. *Cf.* 10 C.F.R. § 2.309(f)(1)(vi) (requiring a contention of omission be supported by reasons for the petitioner’s belief that the omitted information is “required by law”).

⁴³ See email from Cayetano Santos, NRC, to Lou Zeller, BREDL (May 26, 2020) (ML20149K540).

⁴⁴ BREDL Appeal at 6.

⁴⁵ LBP-20-8, 92 NRC at ___ (slip op., additional views of Judge Bollwerk at 5).

contentions.⁴⁶ BREDL does not point to a finding by the Board that BREDL had been denied access to information in the application, and we find no Board error on this basis.

We also deny BREDL's request that we dismiss *sua sponte* SNC's application because it did not include underlying data and calculations audited by the Staff. BREDL's request effectively seeks our review of the Staff's decision to docket SNC's application, which is a decision committed to the Staff's discretion and not typically reviewable in an adjudicatory proceeding.⁴⁷ We disagree with any implication that the Staff's audit practices in this case interfered with BREDL's ability to frame meaningful contentions. As we have previously acknowledged, Staff audits are a sound regulatory practice reflected in the Staff's internal licensing guidance and are routinely used as part of the Staff's independent technical review.⁴⁸ We therefore see no reason to exercise our inherent supervisory authority to dismiss SNC's application or grant BREDL's request for leave to intervene.

⁴⁶ See Docketing Decision at 2.

⁴⁷ See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 3 n.2 (2008).

⁴⁸ See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-07-12, 65 NRC 203, 208 (2007); "Regulatory Audits," NRR Office Instruction LIC-111, rev. 1 (Oct. 31, 2019) (ML19226A274).

III. CONCLUSION

For the reasons given above, we *affirm* the Board's decision.

IT IS SO ORDERED.

For the Commission



Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December 2020.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-20-18)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland,
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