UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Peter B. Lyons
Dale E. Klein
Kristine L. Svinicki

In the Matter of		
SOUTHERN NUCLEAR OPERATING CO.	Docket Nos.	52-025-COL 52-026-COL
(Vogtle Electric Generating Plant, Units 3 and 4)		

CLI-09-13

MEMORANDUM AND ORDER

The Licensing Board has referred to us its ruling denying two contentions challenging the completeness of a combined license application (COLA) because it references design control document (DCD) revisions still under review by the Commission. For the reasons set forth below, we decline to review the Board's rulings with respect to these contentions.

I. BACKGROUND

This proceeding concerns the application of Southern Nuclear Operating Company (SNC) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two new nuclear reactor units at the Vogtle Electric Generating Plant (Vogtle) site in Georgia. Five organizations—the Center for a Sustainable Coast, Savannah Riverkeeper, the Southern Alliance for Clean Energy, the Atlanta Women's Action for New Directions, and the Blue Ridge

Environmental Defense League (collectively, Petitioners)—jointly sought the right to intervene.[1]

On March 5, 2009, the Board issued LBP-09-3, which found that Petitioners had demonstrated standing and had submitted one admissible contention, Contention SAFETY-1.[2] Based on these findings, the Board granted the petition to intervene.

The Board also rejected Petitioners' contentions MISC-1 and MISC-2.[3] Contention MISC-1, as submitted, stated:

> SNC's COLA is incomplete because many of the major safety components and operational procedures of the proposed [Vogtle] Units 3 and 4 either (1) have been omitted altogether or (2) are conditional at this time and will be for the indefinite future. Modifications to such safety components or operational procedures could cause substantial changes to the COLA. Regardless of whether the design of [Vogtle] Units 3 and 4 is certified or not, a meaningful technical and safety review of the COLA cannot be conducted without the full disclosure of the final and complete reactor design.[4]

Likewise, Contention MISC-2 stated:

> SNC's COLA is incomplete because many of the major safety components and procedures at the proposed [Vogtle] Units 3 and 4 either (1) have been omitted altogether or (2) are conditional at this time and will be for the indefinite future. Moreover, in connection with Westinghouse's submission of Revision 17, SNC is now required to either adopt Revision 17 or resubmit its COLA as a plant-specific design. Either course of action will require substantial changes to the COLA, which as currently drafted incorporates Revision 16 – a revision no longer being reviewed by the NRC Staff. Regardless of whether the design of [Vogtle] Units 3 and 4 is certified or not, a meaningful technical and safety review of the COLA cannot be conducted without the full disclosure of the final and complete reactor design.[5]

---

[1] *Petition for Intervention* (Nov. 17, 2008) (Petition).

[2] *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC __ (Mar. 5, 2009) (slip op.). SNC's and the Staff's appeals of the Board's decision to admit Contention SAFETY-1 are under consideration.

[3] Petitioners styled these contentions "Technical Contention 1" and "Technical Contention 2," but the Board renamed them "MISC-1" and "MISC-2" without objection. *See* LBP-09-3, 69 NRC __ (slip op. at 4).

[4] Petition at 8.

[5] *Id*. at 11.

These contentions refer to DCD Revision 16 and Revision 17, respectively.[6] The Board concluded that both contentions were inadmissible because they impermissibly challenged "Commission regulatory requirements" and because they failed to raise a "specific, sufficiently-supported, material issue" regarding the COLA.[7] Noting that appeals touching on similar issues in other COL proceedings were pending with the Commission, the Board referred its rulings to us for immediate consideration, citing our preference for the generic consideration and resolution of issues in new reactor licensing proceedings.[8]

II. DISCUSSION

Under our rules, the Board may refer a ruling to the Commission if it determines that "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense," or if the ruling involves "a novel issue that merits Commission review at the earliest opportunity."[9] We will review a referred ruling only if it raises "significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding."[10] In this case, we decline to review the referred rulings, because we find that

---

[6] *See* LBP-09-3, 69 NRC __ (slip op. at 14). These revisions are part of the ongoing AP1000 design certification amendment review.

[7] *See id.*

[8] *Id.*, 69 NRC __ (slip op. at 20), citing Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,971-72 (Apr. 17, 2008) (New Reactor Policy Statement). We recently decided the *Shearon Harris* appeal, remanding the contention to the Licensing Board for further consideration consistent with our opinion. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC __ (May 18, 2009) (slip op.). The *Summer* appeal remains pending.

[9] 10 C.F.R. § 2.323(f).

[10] 10 C.F.R. § 2.341(f). *See Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units (continued. . .)

their consideration would not advance the orderly disposition of this proceeding. We recently have had the opportunity to review this very issue in a number of other COL matters, and need not revisit it here.[11]

In any event, however, we understand the Board's referral to concern not the Board's admissibility rulings, but rather a procedural issue arising from a situation that may occur in the future as a result of the agency's parallel consideration of a standard design certification rule and a COLA: Where a petitioner has framed an admissible COLA-related safety contention following the completion of a design certification rulemaking – or, perhaps, in the absence of a certified design – how would a presiding officer address potential uncertainty in the application of our rules for filing late contentions under 10 C.F.R. § 2.309(c), or, if applicable, for reopening the record pursuant to 10 C.F.R. § 2.326?[12]

We appreciate the Board's concern. When the unique circumstances of a case could result in the compromise of a participant's hearing rights, we have taken action to ensure that

---

(. . .continued)

3 and 4), CLI-09-3, 69 NRC __ (Mar. 5, 2009) (slip op. at 4).

[11] *See, e.g.*, *Detroit Edison Co.* (Fermi Unit 3), CLI-09-4, 69 NRC __ (Feb. 17, 2009) (slip op.); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1 (2008). *See also Luminant Generating Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), Nos. 52-034-COL and 52-035-COL (Apr. 27, 2009) (unpublished); Letter from Andrew Bates to Diane Curran, Esq., and James Blackburn, Jr. (Dec. 30, 2008).

[12] *See* LBP-09-3, 69 NRC __ (slip op. at 18, 19 & n.13)(observing "both contentions . . . reflect Joint Petitioners[']concern about whether, under the more stringent admissibility requirements that apply generally to contentions that are submitted after a timely hearing petition, they will have a "realistic opportunity" to interpose a post-[design certification rulemaking] challenge to the completeness and adequacy of the SNC COLA relative to any DCD revisions resulting from such a rulemaking.").

hearings are fair and accommodate the rights of participants.[13] While it appears that the Board would have us prescribe hearing procedures for post-certification design-related contentions, we find that such an exercise is premature. The AP1000 design certification amendment rulemaking is ongoing, and is scheduled to continue for some time.[14] During the pendency of that proceeding, and in the absence of a concrete dispute in this COL proceeding, the nature of the equities – and whether they would be the same in every COL case – is unknown. Therefore, we find it is premature to consider whether additional detailed guidance is necessary for the adjudication of such contentions. However, we are mindful of our responsibilities, and, as stated in the New Reactor Policy Statement:

> The Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. To this end, the Commission will act in individual proceedings, as appropriate, to provide guidance to licensing boards and parties, and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.[15]

In this way, we will avoid an application of our procedural rules that could inadvertently prejudice any participant due to factors beyond its control.

---

[13] *E.g.*, *Shaw Areva MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC __ (Feb. 4, 2009)(slip op. at 9-13). The precise relief afforded in the *MOX* case may not be appropriate in other contexts. *See id.* at __ (slip op. at 3) ("The peculiar procedural circumstances and the unusual nature of the equities favoring Intervenors combine to render this decision *sui generis*. As such, it should not be considered precedential.").

[14] *See generally* Letter to R. Sisk, Westinghouse Electric Co., from D.B. Mathews, Office of New Reactors, "Revision to Review Schedule for AP1000 Design Certification Amendment (Docket 52-006)" (Apr. 3, 2009) (ADAMS accession number ML090770458).

[15] New Reactor Policy Statement, 73 Fed. Reg. at 20,973.

III. CONCLUSION

As discussed above, we *decline* to review the Board's referred rulings with respect to Contentions MISC-1 and MISC-2.

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of June, 2009.