UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**February 27, 2012**

SOUTHERN NUCLEAR OPERATING COMPANY'S
RESPONSE TO MOTION TO STAY

In accordance with 10 C.F.R. § 2.342(d), Southern Nuclear Operating Company ("SNC") responds to "Petitioners' Motion to Stay the Effectiveness of the Combined License for Vogtle Electric Generating Plant Units 3 and 4 Pending Judicial Review" ("Motion to Stay"), filed on February 17, 2012, by Southern Alliance for Clean Energy, Blue Ridge Environmental Defense League ("BREDL"), Center for a Sustainable Coast, and Georgia Women's Action for New Directions (collectively, "Petitioners").[1] As explained below and supported by accompanying declarations, the Motion to Stay should be denied because it 1) is procedurally barred, and 2) fails to demonstrate that the Nuclear Regulatory Commission's ("NRC" or "Commission") factors for granting a stay weigh in Petitioners' favor.

I. Procedural Background

Petitioners were previously parties to the contested portion of the Vogtle Units 3 and 4 combined license ("COL") proceeding. After the Atomic Safety and Licensing Board ("Board") granted summary disposition of the only admitted contention, the contested portion of the Vogtle

[1] Petitioners filed their Motion to Stay "[p]ursuant to Section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705(d) [sic]." Motion to Stay, at 1. The standard for a stay is provided in 10 C.F.R § 3.242.

COL proceeding was terminated.[2] Petitioners sought to reopen the record in August 2010,[3] but the Board denied the motion to reopen,[4] and that denial was affirmed by the Commission.[5]

In April 2011, Petitioners (along with several other individuals and entities) filed an Emergency Petition to Suspend All Pending Reactor Licensing Decisions ("Petition to Suspend"), asking the NRC to suspend all licensing decisions pending its complete review of the Fukushima Dai-ichi accident and implementation of any related lessons learned.[6] In July 2011, the NRC released the Near-Term Task Force Report on the Fukushima Dai-ichi accident.[7] On August 11, 2011, Petitioners moved to reopen the record in the Vogtle Units 3 and 4 COL proceeding and requested admission of a new contention alleging that the NRC failed to supplement the Environmental Impact Statement ("EIS") to consider the Task Force Report.[8] Similar requests were filed in several other NRC dockets. On September 9, 2011, the NRC denied the Petition to Suspend ("CLI-11-05"),[9] and, on October 18, 2011, the Board denied Petitioners' Motions to Reopen ("LBP-11-27"), citing CLI-11-05.[10] Petitioners petitioned for

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[2] *So. Nuclear Operating Co.* (Vogtle Elec. Generating Plants, Units 3 and 4), LBP-10-8, 71 NRC 433, 436, 446–47 (2010).

[3] Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant's Containment/Coating Inspection Program [Corrected Aug. 13, 2010] (Aug. 12, 2010).

[4] *So. Nuclear Operating Co.* (Vogtle Elec. Generating Plants, Units 3 and 4), LBP-10-21, 72 NRC ___, slip op. at 41 (Nov. 30, 2010).

[5] *See So. Nuclear Operating Co.* (Vogtle Elec. Generating Plants, Units 3 and 4), CLI-11-08, 74 NRC ___, slip op. at 25 (Sept. 27, 2011).

[6] Petition to Suspend, at 1–2 (Apr. 14–18, 2011).

[7] NRC, Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) ("Task Force Report").

[8] For ease of reference, although BREDL filed a separate motion to reopen from the other Petitioners, because the motions are nearly identical, they will be referred to collectively as "Motions to Reopen."

[9] *See generally Union Elec. Co. d/b/a/ Ameren Mo.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC ___ (Sept. 9, 2011) (slip op.).

[10] *See PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant) *et al.*, LBP-11-27, 74 NRC ___ (Oct. 18, 2011) (slip op.).

review of LBP-11-27, and that petition is still pending before the NRC.[11] Notably, Petitioners did not seek NRC reconsideration or judicial review of CLI-11-05 nor did they request a stay of the Vogtle Units 3 and 4 COL pending NRC review of LBP-11-27.

While the contested portion of the Vogtle proceeding remained closed, the uncontested portion of the proceeding continued. Petitioners were not parties to the uncontested portion of the proceeding.[12] The NRC held a Mandatory Hearing on the Vogtle Limited Work Authorization ("LWA") and COL applications on September 27–28, 2011. On December 22, 2011, the NRC affirmed the rulemaking certifying the amendment to the AP1000 design referenced in the Vogtle 3 and 4 COL application ("COLA") and made the rule immediately effective upon publication in the Federal Register on December 30, 2011.[13] On February 9, 2012, the NRC issued CLI-12-02, directing the NRC Staff to issue the Vogtle LWAs and COLs, which the NRC staff did on February 10, 2012.

II. Procedural Invalidity of the Motion to Stay

Characterized by Petitioners as a motion to stay the effectiveness of CLI-12-02 and the Vogtle Units 3 and 4 COL, Petitioners' Motion to Stay actually amounts to an untimely request for reconsideration of CLI-11-05 or an untimely stay request based on LBP-11-27. Petitioners were by definition not parties to the uncontested proceeding concluded by CLI-12-02, thus they do not have standing to stay CLI-12-02.[14] In addition, the Motion to Stay requests precisely the same relief the NRC denied Petitioners in CLI-11-05,[15] *i.e.,* that the NRC should not allow

[11] *See generally* Petition for Review of LBP-11-27 (Nov. 2, 2011).

[12] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC 5, 49–50 (2005).

[13] 76 Fed. Reg. 82,079 (Dec. 30, 2011).

[14] Pursuant to 10 C.F.R. § 2.342, only "parties" to an adjudicatory hearing may request a stay.

[15] *See* CLI-11-05, slip op. at 22–25.

construction under any new licenses until any Fukushima-related requirements have been issued.[16] Petitioners could have requested reconsideration of CLI-11-05 within ten days of that decision or could have petitioned the Court of Appeals for review of that decision under section 189 of the Atomic Energy Act (42 U.S.C. § 2236) within 60 days of the decision.[17] Petitioners did neither and for that reason waived their right to judicial review of issues addressed in CLI-11-05 and to request a stay of that decision.

The only Commission decision as to which Petitioners' right to obtain review under section 189 of the Atomic Energy Act has not expired is the denial of their Motions to Reopen the contested portion of the Vogtle proceeding. In LBP-11-27, the Board concluded that there was no current duty, given the information known, under the National Environmental Policy Act ("NEPA") to supplement the Vogtle Final Supplemental Environmental Impact Statement ("FSEIS"), and that Petitioners would not become parties to the Vogtle COL proceeding.[18] Accordingly, the contested proceeding remained closed until the Vogtle Units 3 and 4 COL was issued,[19] and Petitioners were not parties to the uncontested proceeding. Petitioners' right to judicial review is therefore limited to whether their Motions to Reopen was properly denied in LBP-11-27, but that judicial review must await a Commission decision on Petitioner's request that the Commission review that decision.[20] Moreover, Petitioners could have requested a stay under 10 C.F.R. § 2.342 within 10 days of the issuance of LBP-11-27, but did not, and the current motion is not timely as to that decision. Rather than filing a timely request for a stay

[16] Petition to Suspend, at 1–2.

[17] *See* 10 C.F.R. §§ 2.323(e), 2.345; 28 U.S.C. § 2344.

[18] LBP-11-27, slip op. at 12–13.

[19] *Id*. at 15–16.

[20]The NRC's regulations clearly contemplate the issuance of LWAs and COLs despite the pendency of petitions for review, such as Petitioners' pending petition for review of LBP-11-27. 10 C.F.R. § 2.340(i).

pending NRC review of LBP-11-27 under 10 C.F.R. § 2.342, Petitioners request that the NRC stay the effectiveness of its CLI-12-02 pending judicial review of the same finding—that there is no duty to supplement the Vogtle FSEIS. The Motion to Stay should be rejected as an untimely attempt to stay the effectiveness of LBP-11-27.

III. Substantive Deficiency of the Motion to Stay

Petitioners have failed to show that the NRC's four factors for granting a stay weigh in their favor. Petitioners have not "made a **strong showing** that [they are] **likely** to prevail on the merits" or demonstrated that they will be irreparably injured unless a stay is granted.[21] Additionally, Petitioners have not shown how the significant harm to SNC and its customers is outweighed by issuance of the stay. Finally, issuance of a stay is not in the public interest.

A. Petitioners are Unlikely to Succeed on the Merits of their Petition for Judicial Review.

Petitioners have not shown a strong likelihood of success on the merits, let alone that success on the merits is a "virtual certainty."[22] In fact, for the four independent reasons discussed below, it is a "virtual certainty" that Petitioners' petition for judicial review will fail.

1. The Petitioners Have Not Exhausted Administrative Remedies.

First, as a threshold matter, Petitioners are unlikely to succeed on the merits due to lack of jurisdiction. As discussed above, Petitioners are limited on judicial review to issues raised before and decided by the NRC—that is, those issues raised in the Motions to Reopen and

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[21] 10 C.F.R. § 2.342(e) (emphasis added); s*ee also Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6–8 (1994); *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 120 (1998)).

[22] *Amergen Energy Co., LLC* (Oyster Creek), CLI-08-13, 67 NRC at 400 (explaining that where movants fail to show irreparable injury, they must show that their success on the merits is a "virtual certainty") (citing *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), LBP-04-2, 59 NRC 77, 80 (2004)).

subsequent petitions for review of LBP-11-27.[23] Because both NRC regulations and CLI-12-02 make clear that Petitioners' petitions for review of LBP-11-27 are still pending, and Petitioners' proposed contentions are still under review by the NRC, Petitioners are not a "party aggrieved by" CLI-12-02.[24] Pursuant to the Hobbs Act (28 U.S.C. § 2342 *et seq.*), Petitioners' petition for judicial review of CLI-12-02 will likely be summarily rejected due to their failure to exhaust their administrative remedies (*i.e.,* await Commission action on their petitions for review). Furthermore, although Petitioners raised the issues in LBP-11-27 before the NRC, Petitioners' still-pending petition for review of LBP-11-27 renders it non-final for purposes of judicial review.[25] Where a request for agency review or reconsideration renders a decision non-final, a petition for judicial review of that decision filed while that request is still pending is incurably premature and due to be dismissed.[26] Therefore, Petitioners' petition for judicial review is likely to be dismissed because it is not a "party aggrieved" by CLI-12-02, and LBP-11-27 is not "final" for purposes of judicial review.

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[23] *See Coal. for Pres. of Hispanic Broad. v. F.C.C.*, 931 F.2d 73, 76–77 (D.C. Cir. 1991) ("In general, failure to exhaust administrative remedies bars judicial review . . . .").

[24] *See* 28 U.S.C. § 2344; *Massachusetts v. United States*, 522 F.3d 115, 132 (1st Cir. 2008) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)) (explaining that in order to satisfy the exhaustion requirement, a petitioner is required to follow "'all steps that the agency holds out, and do[ ] so properly (so that the agency addresses the issues on the merits).").

[25] *See United States v. Alexander*, 743 F.2d 472, 477 (7th Cir. 1984) ("[I]f there is an administrative appeal, the initial decision of the administrative law judge is not the 'final agency decision.'"); *Wade v. F.C.C.*, 986 F.2d 1433, 1433 (D.C. Cir. 1993) ("It is well established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency's order; a petition for judicial review filed during the pendency of a request for agency reconsideration will be dismissed for lack of jurisdiction.").

[26] *See Riffin v. Surface Transp. Bd.,* 331 F. App'x 751, 752 (D.C. Cir. 2009) (citing *Gorman v. NTSB*, 558 F.3d 580, 586 (D.C. Cir. 2009)); *see also E. Navajo Dine Against Uranium Mining v. NRC*, No. 99-11990, 1999 U.S. App. LEXIS 25177, at *2–3 (D.C. Cir., Sept. 27, 1999) (unpublished) ("Petitioners sought judicial review of non-final agency orders at the same time they pursued an appeal before the agency. The appeal to the Nuclear Regulatory Commission (NRC) of the Presiding Officer's four 'partial initial decisions' on issues pertaining to the licensing proceeding rendered the Presiding Officer's decisions nonfinal. . . . Moreover, the issuance of the Commission's July 23 decision does not render the Presiding Officer's four initial decisions final.").

2. Petitioners Have Not Shown Error with Respect to LBP-11-27.

As stated above, Petitioners' right to appeal is limited to issues related to LBP-11-27. This means the sole issue available for review is whether the Board correctly denied Petitioners' Motions to Reopen. Petitioners do not even state in the Motion to Stay what error they propose to show with respect to LBP-11-27. In judicial review of NRC denials of motions to reopen, the NRC's construction of its reopening standards is entitled to deference.[27] Specifically, in order to prevail on judicial review of LBP-11-27, Petitioners will have to make a "clear showing of abuse of discretion or of extraordinary circumstances."[28] Petitioners have made no such showing with respect to LBP-11-27, nor explained how they planned to do so in their Motion to Stay.

Specifically, the Board denied Petitioners' Motions to Reopen in LPB-11-27 because it found that "it remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible . . . environmental implications of that event regarding such operation."[29] The Board went on to note that Petitioners had not raised any specific concern with respect to Vogtle Units 3 and 4 which would call for a different conclusion.[30]

The Motion to Stay similarly does not explain how the Task Force Report (or Fukushima) "present 'a seriously different picture of the environmental impact of the proposed project [Vogtle Units 3 and 4] from what was previously envisioned.'"[31] As noted by SNC in its

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[27] *N.J. Env'tl Fed'n v. NRC*, 645 F.3d 220, 234 (3d Cir. 2011).

[28] *Id.* (internal citation and quotation marks omitted) ("Overall, [Petitioners] failed to meet the exacting standard to justify reopening the administrative record.").

[29] LBP-11-27, slip op. at 13.

[30] *Id.* at 13–14.

[31] CLI-11-05, slip op. at 31 (citing *Hydro Res., Inc.* (Coors Road), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989); *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987))).

original response to the Motions to Reopen, the consequences of severe accidents at Plant Vogtle were considered in the Vogtle Early Site Permit ("ESP") EIS,[32] as were seismic issues.[33] Furthermore, in the Vogtle COL FSEIS, the NRC Staff determined in its analysis of the no action alternative that, even if the COL were denied, "the power will still be needed as discussed in Chapter 8 of the ESP EIS . . . ."[34] Further, the NRC "staff affirm[ed] its conclusion in Section 9.2.5 of the ESP EIS . . . that, from an environmental perspective, none of the viable energy alternatives would be clearly preferable to construction of a new base-load nuclear power generation plant at the VEGP ESP site."[35] Beyond their *ipse dixit* assertion, Petitioners have offered no evidence to demonstrate that the Task Force Report calls any of these conclusions into question, nor have they proffered evidence of an environmental consequence revealed by the Task Force Report which the Vogtle NEPA analysis did not consider.

The Motion to Stay does not explain how the Board erred in concluding that the Task Force Report has not presented "a seriously different picture" of the environmental consequences related to Vogtle Units 3 and 4 than those considered in the ESP EIS. Nor could Petitioners ever make such a showing. Presuming that the NRC's ultimate adoption of new requirements in response to the Task Force Report did require some action for Vogtle Units 3 and 4, the actions would be intended to make an accident resulting from a Fukushima-like natural disaster less likely and/or the effects of an accident less severe. Therefore, the Staff's consideration of the environmental consequences of severe accidents would be rendered *more* conservative (because

[32] *See* FEIS for an ESP at the Vogtle Elec. Generating Plant Site § 5.10.2 (Aug. 2008).

[33] Vogtle Site Safety Analysis Report ("SSAR"), Revision 5 (Dec. 2008), § 2.5.1; *see also So. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-09-19, 70 NRC 433, 520–34 (2009).

[34] FSEIS for COLs for Vogtle Elec. Generating Plant Units 3 and 4, § 9.1 (Mar. 2011).

[35] *Id.* § 9.2.

it would consider severe accidents before these new requirements). Petitioners' failure to show reversible error in LBP-11-27 will be fatal to Petitioners' request for judicial review.

3. Petitioners Do Not Show Error in CLI-12-02.

As explained above, Petitioners are **not parties** to the mandatory, uncontested hearing which CLI-12-02 concluded,[36] and Petitioners' request for judicial review will be limited to resolution of their Motions to Reopen and related petitions for review of LBP-11-27. The Commission explicitly stated that CLI-12-02 did not resolve the pending petitions for review of LBP-11-27.[37] Consequently, Petitioners may not petition for judicial review of CLI-12-02.

Even assuming Petitioners' request for judicial review were entertained by the Court of Appeals, the NRC's decision in CLI-12-02 confirming the Staff's decision that supplementation of the Vogtle EIS was not required would be affirmed. "[G]enerally, the initial decision whether a supplemental EIS is required should be made by the agency, not by a reviewing court."[38] The court's review of agency action "under NEPA is governed by the APA."[39] Contrary to the Petitioners' bald assertion that the NRC's action is subject to de novo review, "[t]he APA instructs courts to set aside agency action only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' 5 U.S.C. § 706(2)(A)."[40] The court will only "ask whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision

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[36] *See* CLI-12-02, slip op. at 1 ("Our decision today concludes the *uncontested* portion of this proceeding…") (emphasis added).

[37] *See id.* at 6 n.21.

[38] *Cuomo v. NRC,* 772 F.2d 972, 974–75 (D.C. Cir. 1985) (citation omitted).

[39] *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003).

[40] *Id.*

implicates substantial agency expertise and is entitled to deference."[41] "[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[42]

In CLI-12-02, the Commission, in keeping with its conclusion in CLI-11-05, confirmed the reasonableness of the Staff's conclusion that neither the Fukushima events themselves nor the NRC's Near Term Task Force recommendations necessitated a supplement to the Vogtle FSEIS. The Petitioners mischaracterize CLI-12-02 and allege that the "NRC offers a single ground for its refusal to prepare a supplemental EIS to address the environmental implications of the Fukushima accident and Task Force Report for Vogtle 3&4," and determine that this "single ground" was because Fukushima-like accidents in the United States have an "extremely low probability."[43] This assertion is clearly false, given that the NRC, in CLI-11-05, had already specifically addressed the need for Fukushima- and Task Force-related NEPA analysis on grounds other than the low probability of a similar event. Even taking Petitioners' argument at face value, however, their assertion of error is unfounded.

Petitioners distort the NRC's statement in CLI-12-02, which was, actually, in full:

> The Staff explained that its severe accident analysis includes scenarios involving radiological releases into the environment. Consistent with Commission policy and NEPA requirements, this analysis looks at probability-weighted consequences. Severe accidents, like the accident at Fukushima Dai-ichi, are potentially high consequence but extremely low probability accidents, so

[41] *Id.* Petitioners wrongly argue that the NRC's decision not to supplement the EIS will be subject to *de novo* review. Motion to Stay, at 11. In fact, the *de novo* standard may apply where the agency determines the federal action is not subject to NEPA, but that standard does not apply to agency determinations about environmental impacts of the action where, as here, the agency has conducted a NEPA review of the action. *See Citizens Against Rails-to-Trails v. Surface Transp. Bd.,* 267 F.3d 1144, 1150–51 (D.C. Cir. 2001).

[42] *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1989).

[43] Motion to Stay, at 14.

> considering their consequences without simultaneously accounting for risk "would distort the purpose of disclosing the reasonably anticipated impacts of the project." The Staff explained that it evaluates the impacts of severe accidents in terms of health effects, economic costs, and land contamination—all in the context of risk. Moreover, the focus of the risk analysis is "on the probability and consequences of the postulated accident, not on independent damage attributable to the external event that may have initiated that accident." Importantly, while the Staff has not conducted a formal probabilistic risk assessment or any other quantitative evaluation as part of the AP1000 DCD, it has considered a range of postulated severe accidents and consequences of these accidents.[44]

The NRC did not rest its decision, as Petitioners contend, solely on the ground that a Fukushima-like accident is of "extremely low probability," and, therefore, no supplemental EIS is required. Rather, the Commission recognized in CLI-12-02 that a NEPA analysis of such accidents should be weighted according to their probability as well as their consequences. In CLI-12-02, the NRC clearly considered whether the Vogtle NEPA analysis already performed required supplementation because of Fukushima and concluded that it did not, based on the NRC's regulatory requirements implementing NEPA—reiterating the Commission's same finding in CLI-11-05 (applied there to reactor licensing proceedings generically). Accordingly, the Commission concluded that the FSEIS for Vogtle Units 3 and 4 already accounts for the environmental consequences of a severe accident, including one arising from a natural disaster.[45] Petitioners have failed to show how the Task Force Report—which, as explained in LBP-11-27, was the cited basis for Petitioners' contention (not the Fukushima accident itself)—would require any addition to Staff's environmental analysis, as cited by the Commission, and have not shown any abuse of discretion or arbitrariness in the NRC's decision not to require a supplemental EIS.

[44] CLI-12-02, slip op. at 74–75 (internal citations omitted).

[45] *See id.*

4. The NRC Fulfilled its NEPA Obligation.

The core hurdle which makes Petitioners unlikely to succeed on the merits of their petition for judicial review is the fact that both the Board in its ruling in LBP-11-27 and the Commission's decision in CLI-12-02 correctly found that the NRC has fully complied with NEPA. The determination that no supplemental EIS was needed, regardless of whether considered in the context of CLI-11-05, LBP-11-27, or CLI-12-02, will "be set aside only upon a showing that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[46] The record of both the Vogtle contested and uncontested proceedings shows that the NRC considered the Fukushima accident and made a reasoned determination that no supplemental EIS was needed. First, as discussed above, the NRC directly addressed this issue in CLI-11-05. Next, the Board addressed with specificity in LBP-11-27 the issue raised by Petitioners regarding whether the Task Force Report requires supplementation of the Vogtle EIS. In addition, the topic was addressed at length in the Vogtle Units 3 and 4 mandatory hearing.[47] As explained by the NRC in the excerpt quoted above from CLI-12-02, the conclusion to these considerations was that nothing in the Task Force Report nor about Fukushima itself constituted new and significant information for the Vogtle Units 3 and 4 NEPA analysis and, therefore, that no supplemental EIS was required according to NRC regulations at 10 C.F.R. § 51.92. Given that the NRC's NEPA determination has been based on an extensive and well-recorded record of decision, a reviewing court will likely find that the NRC satisfied NEPA by taking the requisite "hard look" at the Task Force Report and the Fukushima regulatory review.[48]

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[46] *DOT v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (citation omitted).

[47] *See* Mandatory Hearing Tr. 63:19–64:9; 79:24–82:7; 296:12–297:16; 303:14–20; 326:19–330:7; 355:11–356:14 (Sept. 27-28, 2011); *see also* Ex. SNCR00011 at 15–17; Ex. NRC000015 at 8, 11–12.

[48] *See Town of Winthrop v. F.A.A.*, 535 F.3d 1, 12–13 (1st Cir. 2008) (upholding the FAA's decision that an SEIS was not warranted when a new study regarding the health impacts of a newly-recognized air

B. Petitioners Will Not Suffer Irreparable Harm Absent Issuance of a Stay.

Petitioners have failed to demonstrate how they will suffer irreparable harm if the Commission does not stay the issuance of the COL pending the D.C. Circuit's consideration of their petition for judicial review. A party seeking a stay must show it faces imminent, irreparable harm that is both "certain and great."[49] It is not enough for Petitioners to point to "an irreversible change to the status quo"—they must show that this change to the status quo is of enough significance to constitute irreparable harm.[50] Petitioners have failed to demonstrate any material harm—much less "great" harm—that would result to the environment or otherwise if construction were allowed during pendency of judicial review. Petitioners, relying on the Declaration of Dr. Arjun Makhijani,[51] assert that, without a stay, irreparable harm will arise from construction at the Vogtle site, *due to the impact to air quality and large amount of natural resources required for construction.* Even assuming the harm Petitioners allege did occur, the impacts to the environment from construction will be SMALL.

For example, the Vogtle ESP EIS concludes that "the impacts from construction activities on air quality at the VEGP site would be SMALL," that "the impact on the local air quality from the increase in vehicular traffic related to construction activities would be temporary and SMALL," and that the impact of Hydrological Alterations, water use, and water

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pollutant was released following the agency's issuance of its initial EIS and stating that "[a]n SEIS is not, after all, a research document").

[49] *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (citing *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1295 (2d Cir. 1995); *U.S. Dep't of Energy* (High-level Waste Repository), CLI-05-27, 62 NRC 715, 718(2005); *Cuomo v. NRC,* 772 F.2d at 976 (quoting *Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C.Cir. 1985))).

[50] *Cuomo v. NRC*, 772 F.2d at 976.

[51] Decl. of Dr. Arjun Makhijani in Support of Motion to Stay Effectiveness of Vogtle COL Approval ¶¶ 4.1.1–4.1.7 (Feb. 16, 2012) ("Makjijani Decl.").

quality during construction would each be "SMALL."[52] In sum, to the extent that any of the air quality impacts from construction are, in fact, irreversible, they are not significant enough to create the irreparable harm needed to support a stay. These "harms" that Petitioners claim will result if a stay is not issued are actually impacts that were already analyzed and considered in the existing Vogtle EIS and were found not to be great.

Petitioners point to no harm **that is linked to the NRC's denial of Petitioners' claim** that the NRC should have reopened the record to supplement the NEPA analysis in light of the Task Force Report Recommendations. Even if the Vogtle EIS were to be supplemented to consider the Task Force Report, the environmental effects cited by Petitioners as "injury" (air quality impacts, commitment of natural resources) would not be lessened or altered.[53] Petitioners have not offered any "particularized analysis" to support the conclusion that the NRC's NEPA determination regarding the small construction impacts would change after a supplement to consider the Task Force Report recommendations.[54] Additionally, the Vogtle COLA FSEIS found that the commitment of natural resources for the *entire construction* of Vogtle Units 3 and 4 "while irretrievable, would be of small consequence with respect to the availability of such resources."[55] The SMALL impacts which result from construction are not "great" enough to satisfy the standard for demonstrating irreparable harm.[56]

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[52] FEIS for an ESP at the Vogtle Elec. Generating Plant Site §§ 4.2–4.3 (Aug. 2008).

[53] Furthermore, many of these impacts cited by Petitioners are already governed by separate permits, such as Clean Air Act or Clean Water Act permits, where these impacts have been determined to meet applicable requirements. No action by the NRC would serve to alter or amend these separate permits.

[54] *See Cuomo*, 772 F.2d at 976–77.

[55] FSEIS for COLs for Vogtle Elec. Generating Plant Units 3 and 4 § 11.5 (Mar. 2011).

[56] *See Cuomo*, 772 F.2d at 976 (stating that the alleged injury must be "great" and explaining that "an irreversible change from the status quo" must be of enough "significance" to "amount to irreparable harm").

Accordingly, extensive analysis well beyond that typically available for a stay decision has resulted in the conclusion that any possible harms are SMALL, and because any such harms would not change if Petitioners got the result they request in the Motion to Stay, Petitioners have failed to make the required showing of irreparable harm absent a stay.

C. Issuance of a Stay Would Cause Significant Harm to SNC.

The balance of harms does not weigh in favor of granting a stay. Petitioners claim that there would be no harm to Southern Company as a result of a stay, and, additionally, that any harm from a stay is "essentially economic."[57] Dr. Makhijani does not have the necessary knowledge and understanding regarding Southern Company's investment in Vogtle Units 3 and 4, the role of an electric utility's customers in construction projects, or the effect of a work stoppage on construction to make the opinions he espouses. Furthermore, as shown in the attached affidavit of Joseph A. "Buzz" Miller ("Miller Aff."), Dr. Makhijani mischaracterizes the harm to Georgia Power Company and its customers that would result from a stay.

First, SNC and the Vogtle Units 3 and 4 Owners and their customers will be significantly harmed by a stay of construction.[58] That harm is not mitigated by the recovery by Georgia Power Company of the certified cost of construction in rates paid by customers. An extended stay would cause the parties with economic responsibility for the project—Georgia Power Company, its contractor, and its customers—to suffer significant economic harm due to construction delays.[59] Such a stay would also disrupt the hiring and training of workers, which would cause great inefficiencies in attracting, hiring, and training qualified workers.[60]

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[57] Motion to Stay, at 17 (citing Makhijani Decl. § 4.2).

[58] Miller Aff. ¶¶ 4–6.

[59] *See generally* Miller Aff.

[60] *Id.* ¶ 4.

Additionally, the resources committed to carrying the Vogtle Units 3 and 4 construction project, such as site security, insurance, and materials storage, would continue during a stay, resulting in significant additional costs.[61] For SNC, issuance of stay would cause direct, immediate, and substantial harm.[62] More significant than costs, however, a stay of construction disrupts continuity, which makes achieving industrial safety and the NRC's standards for safety and quality more difficult.[63]

Furthermore, as explained below, the information currently available regarding likely Fukushima-related future requirements do not support Petitioners' speculation that Vogtle Units 3 and 4 will be subject to significant backfits. Not only would a stay cause certain harm to Georgia Power Company and its customers, but it would do so without providing any benefit in the nature of significant avoided backfit costs.

D. Issuance of a Stay is Not in the Public Interest.

Contrary to Petitioners' assertions, consideration of public interest does not weigh in favor of granting the motion to stay. Dr. Makhijani concludes, and Petitioners argue, that a stay serves the public interest because the cost-benefit analysis after considering that Fukushima-related retrofits might essentially cause an abandonment of Vogtle Units 3 and 4 in favor of other sources for power, that backfits postponed until late in construction will be more costly for customers, and that considering safety-related improvements first is the best policy.

As to the first and second conclusions, both of which relate to the cost of backfits, Dr. Makhijani's opinion is completely unfounded. There is simply no evidence that any significant design-related backfit will be imposed on new nuclear units such as Vogtle Units 3 and 4. To the

[61] *Id.* ¶ 5.

[62] *Id.* ¶ 3.

[63] *Id.* ¶ 4.

contrary, the Task Force Report finds that COLs currently under review already meet most of the Task Force Report's recommendations. Moreover, for those recommendations that may be applicable to new reactors employing the AP1000 design, the NRC concluded that any new requirements can be implemented before operation.[64] Along with the Task Force Report itself, on February 17, 2012, the Staff sent to the Commission SECY-12-0025, "Proposed Orders and Requests for Information in Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Tsunami" ("SECY-12-0025"). As stated in SECY-12-0025, the NRC Staff proposes to require "Vogtle, prior to fuel load, to address requirements for mitigation strategies to sustain core cooling, containment and SFP cooling capabilities functions indefinitely" and "to provide additional design information to ensure missile and falling debris protection, equipment qualification for extended water saturation conditions, display indications, and the capability to connect portable power supplies" to its safety related level instruments."[65] None of Staff's proposed requirements for Vogtle Units 3 and 4 substantively affect the underlying design and, therefore, do not raise any credible possibility of significant future backfits. To the contrary, SECY-12-0025 evidences that most of the likely requirements arising from the Task Force Report and related Fukushima review are inapplicable, or only partially applicable, to new nuclear units such as Vogtle Units 3 and 4.

There is no basis in the Task Force Report, or otherwise, to conclude that the Vogtle reactor design will change due to NRC requirements arising from the Task Force Report related

[64] CLI-12-02, slip op. at 83 n.363 ("To the extent that these recommendations are not already addressed in the AP1000 certified design, we expect that any applicable site-specific requirements arising from these recommendations—whether imposed by order or by rule—will be applied to the Vogtle licenses, as necessary, prior to the commencement of plant operations.").

[65] *See* SECY-12-0025, at 11–12.

to flooding or seismic events, as Dr. Makhijani asserts.[66] Dr. Makhijani's implied claim that seismic upgrades may be applicable to Vogtle Units 3 and 4 is contrary to evidence already on the record, wherein Staff testified that "use of the new source model would not result in differences in the seismic hazard characterizations that would affect the plant design for this site."[67] In fact, the Task Force Report encouraged certification of the AP1000 design "without delay" to promote safety.[68] As to Petitioners' third assertion, regarding the "policy" of addressing all requirements before issuing a new license, this is directly at odds with the NRC's determination in CLI-11-05, which specifically discussed the agency's post-Three Mile Island response and still concluded that reactor licensing need not be suspended. Petitioners' belief that the NRC's policy decision is in error does not constitute a legitimate public interest.

On the other hand, the letter from Georgia State Senator Jesse C. Stone ("Stone Letter"), attached to the Miller Affidavit, discusses issues which clearly do constitute legitimate public interest concerns. Vogtle Units 3 and 4 will employ many workers during construction, and this increase in employment is good for the area surrounding Vogtle.[69] Specifically, workers increase other business traffic in the site area, resulting in more indirect jobs in the area and a significant increase in associated tax revenue for the local community.[70] The local economy will be seriously harmed by a stay of construction at the site, which would not only reduce the

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[66] Task Force Report, at 71 ("The Task Force concludes that **all of the current early site permits already meet the requirements of detailed recommendation 2.1, relating to the design-basis seismic and flooding analysis**, and all of the current COL and design certification applicants **are addressing them adequately** in the context of the updated state-of-the-art and regulatory guidance used by the staff in its reviews.") (emphasis added).

[67] SECY-12-0025, at 11; *see also* Mandatory Hearing Tr. 119:13–120:7. Notably, SECY-12-0025 confirms that the NRC Staff "considers that [Task Force Report] Recommendation 2.1 has been addressed as part of the completed" Vogtle COL review. *Id.*

[68] Task Force Report at 71–72.

[69] *See* Stone Letter; Miller Aff. ¶¶ 4, 7.

[70] *See* Stone Letter; Miller Aff. ¶ 7.

economic benefits created by an influx of workers, but would also delay the new units' contribution to the local tax base.[71] Along with the negative impacts to the local economy, delay would negatively impact Georgia Power Company's and the Vogtle co-owners' customers by delaying the introduction of much-needed baseload generation that the new units will provide.[72]

In addition to the Stone Letter, it is noteworthy that 28 different local officials submitted comments to the NRC supporting Vogtle Units 3 and 4's licensing, while not a single local official submitted comments opposing the licensing.[73] Of those 28 comments submitted, 21 specifically supported licensing "without delay." Many of these comments emphasized the positive impact construction in particular has on their community. For example, Matt Aiken, District 1 City Commissioner for the city of Augusta stated, "The expansion of the plant would create hundreds of new permanent jobs and thousands more jobs during the five-year construction phase. Our community is already thriving because some 1750 craft laborers are already on site." John R. Graham, Chairman of the Warren, Georgia County Commission explained, "With our current high unemployment rate, Warren County citizens need every opportunity to find a job. We are close enough that our citizens can benefit from all the construction jobs and with the jobs that these two units will provide once they are constructed."

The Vogtle ESP EIS also noted the positive benefits of the new units, such as that the "large pool of jobs would inject millions of dollars into the regional economy, thus reducing unemployment and creating business opportunities for housing and service-related industries,"[74] increase "regional tax revenue benefit realized by Burke County," and provide "approximately

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[71] *See* Stone Letter.

[72] Miller Aff. ¶ 6.

[73] *See* Notice to the Parties (Oct. 26, 2011) (regarding comments received from interested State, local government body, or affected, federally-recognized Indian Tribe"), *available at* ML11299A189.

[74] FEIS for an ESP at the Vogtle Elec. Generating Plant Site § 4.5.3.1 (Aug. 2008).

1153 new jobs within about a 80-km (50-mi) radius of the plant . . . ."[75] The public interest clearly weighs in favor of allowing construction to proceed without delay.

IV. Motion for Housekeeping Stay

Petitioners have revived their request for the "housekeeping stay" previously rejected by the Secretary of the Commission.[76] With essentially identical citation, Petitioners request a housekeeping stay "to allow them to submit their stay request to the U.S. Court of Appeals."[77] Petitioners should not be given such a temporary stay after just having failed to meet the necessary substantive requirements for a stay.

V. Conclusion

The Motion to Stay is both procedurally improper and substantively unjustified. SNC respectfully requests that the NRC deny the Motion to Stay in its entirety. SNC further requests the motion for a housekeeping stay be denied.

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton
M. Stanford Blanton
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
Phone: 205-251-8100
E-mail: sblanton@balch.com

Kathryn M. Sutton
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: ksutton@morganlewis.com

[75] *Id.* § 11.6.1.2.

[76] *See So. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), Docket Nos. 52-025-COL & 52-026-COL (Feb. 10, 2012).

[77] Motion to Stay, at 20.

COUNSEL FOR
SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 27th day of February, 2012.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket Nos. 52-025 and 52-026
Southern Nuclear Operating Company, Inc.	)	
	)	
(Vogtle Electric Generating Plant, Units 3 and 4)	)	

AFFIDAVIT OF JOSEPH A. "BUZZ" MILLER

I, Joseph A. "Buzz" Miller, do hereby state as follows:

1. I am Executive Vice President for Nuclear Development at Southern Nuclear Operating Company and for Georgia Power Company. I have held the position of Executive Vice President for Nuclear Development at Southern Nuclear since 2006, and the same position at Georgia Power Company since 2009. I hold a B.S. degree in chemical engineering from Auburn University and am a graduate of the MIT reactor technology course for utility executives. As Executive Vice President for Nuclear Development, I am responsible for overseeing the construction of Vogtle Units 3 and 4 in order to generate electricity to serve the needs of the customers of Georgia Power Company and the Co-Owners of the new units. I have extensive knowledge of and experience in the principal strategic and economic considerations that inform the decision to license, build, and operate electric generating facilities in general, and Vogtle Units 3 and 4 in particular, and I understand the likely consequences of any delays to this project. I have official and personal knowledge of the matters discussed herein.

2. The Southern Company is the parent holding company of Southern Nuclear Operating Company which builds and operates nuclear electric generating plants on behalf of The Southern Company and its subsidiaries. Georgia Power Company is a subsidiary of The Southern Company and one owner of Vogtle Units 3 and 4. The Co-Owners of Vogtle Units 3 and 4 are Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and The City of Dalton.

3. This affidavit describes the likely consequences of staying the effectiveness of the Combined Licenses issued by the Nuclear Regulatory Commission that authorize the construction and operation of Vogtle Units 3 and 4. Issuance of a stay would cause direct, immediate, and substantial harm.

4. Today, approximately 1,200 craft workers are performing construction on the Vogtle Units 3 and 4 site, with several thousand additional craft workers to be added during the life of the construction project. A stay would disrupt the

continuity of the construction project. There would be a decrease in the number of craft personnel working during the stay, resulting in an unstable workforce for the project because qualified and trained workers will be forced to seek employment elsewhere. Continuing the construction sequence uninterrupted supports both project quality and safety. A stay which unnecessarily disrupts training and continuity of construction makes maintaining the standards of quality that the Nuclear Regulatory Commission demands more difficult. In other words, a stay of construction would do more than pause ongoing activity. It would actually require duplication of efforts and the introduction of inefficiencies, such as retraining workers and hiring replacement workers for those who acquired employment on other projects during the stay.

5. A stay would also increase the construction costs of this $14 billion project. For example, even while construction is halted, security must be maintained onsite, utilities for the site must be maintained, and insurance costs are ongoing. Given the magnitude of the construction of Vogtle Units 3 and 4, the costs to indefinitely store materials onsite as necessary to ensure they remain compliant with quality standards is significant. Construction delays will also affect the project's schedule, which would, for example, result in postponed shipments and potentially higher prices when those shipments are rescheduled. Accordingly, the public has an interest in seeing the project completed with a minimum of interruptions so that costs are minimized, the schedule is maintained, and the supply of electricity is ensured.

6. The customers of Georgia Power Company and the Co-Owners would also be harmed. These customers have an interest in the planning and development of reliable baseload electrical generating capacity. Vogtle Units 3 and 4 are an economical and integral part of Georgia Power Company's integrated plan to meet the forecasted energy demands of its customers. Georgia expects to add more than 4 million new residents by the year 2030. The new Vogtle nuclear units are a key resource for supplying the baseload power that will be needed to serve the customers of Georgia Power Company and the Co-Owners. Nuclear power plants produce an uninterrupted supply of electricity for extended periods of time, contribute to the stability of the transmission grid, and have high reliability factors. Issuing a stay harms the public interest by delaying the availability of this new baseload generation.

7. Plant Vogtle is the largest employer in Burke County, Georgia. The Vogtle Units 3 and 4 project will create 4,000 to 5,000 jobs at the site, including about 800 permanent jobs and approximately 3,500 construction jobs, resulting in about 25,000 direct and indirect jobs in the community. A stay will create an immediate, negative effect on this job creation and, therefore, would be harmful to the public. My opinion regarding the negative impact to the community surrounding Plant Vogtle is also supported by the letter I received from Georgia State Senator Jesse C. Stone, which I have attached to this affidavit. Senator Stone's letter confirms that the loss of jobs and tax revenue associated with a stay

of construction would not be in the public interest of Burke County and its citizens and the citizens of surrounding areas.

8. I declare under penalty of perjury that the facts set forth in this affidavit are true and correct to the best of my knowledge, information and belief.

Joseph C. Mullen

Sworn to and subscribed to before me this 27th day of February, 2012.

Lisa R. Eyle

Notary Public

My Commission expires: 7/2/2015

SENATOR JESSE STONE
District 23
320-B Coverdell Legislative Office Building
18 Capitol Square, S.W.
Atlanta, Georgia 30334
Tel: (404) 463-1314
Fax: (404) 463-1388

Jesse.Stone@senate.ga.gov

COMMITTEES:

Banking and Financial Institutions, Vice Chairman
Education and Youth, Secretary
Higher Education
Judiciary

The State Senate

Atlanta, Georgia 30334

February 27, 2012

Mr. Joseph A. Miller
Executive Vice-President
Nuclear Development
Georgia Power Company
241 Ralph McGill Blvd., NE BIN 10240
Atlanta, GA 30308

Dear Mr. Miller:

I am a State Senator representing eleven counties in east central Georgia, including Burke County, and I submitted a letter to the nuclear regulatory Commission last fall expressing my support for the Plant Vogtle expansion project. I have also participated in public meetings about the Vogtle project, and I was encouraged to learn earlier this month that the license for the new Vogtle units was issued. I am writing this letter because I have recently heard that a request was filed asking the Nuclear Regulatory Commission to stay construction on the new units. I am concerned about the negative effect that stopping work will have on the local community around the Vogtle site.

As a native resident of Burke County and as a State Senator representing Burke County, I can attest to the fact that the citizens of Burke County and surrounding areas have strongly supported the multi-billion dollar expansion of Plant Vogtle since Southern Company first expressed its interest in building the two new units. Plant Vogtle which employs about 900 people is one of the largest employers in Burke County, and I understand that the construction of the Vogtle Units 3 and 4 projects is estimated to employ well over 4,000 people, including permanently creating over 800 new jobs. These jobs are vital to the economy of Burke County and the surrounding areas.

I have seen how the ramp-up of construction of Vogtle Units 3 and 4 has already provided a much-needed boost in our local economy. Many local businesses have seen their revenues increase since work at the site began. Increased business revenue also causes a corresponding increase in tax revenue. These construction jobs and the new business and additional tax revenue they create are critical for the communities near Plant Vogtle.

A stay of construction at the Vogtle site will cause a significant, immediate harm to the local economy. The delay in completing the new units will also cause future harm to Burke County and, consequently, its citizens, because operating units contribute a large amount of local taxes. The tax revenue from increased business and eventually from the new units will allow local government to provide needed services in one of the poorest counties of the State of Georgia.

Sincerely,

Jesse Stone
Senator 23rd District

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**February 27, 2012**

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S RESPONSE TO MOTION TO STAY in the above-captioned proceeding have been served by electronic mail as shown below, this 27th day of February, 2012, and/or by e-submittal.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D-21
Washington, DC 20555-0001
Marian Zobler, Esq.
Ann Hodgdon, Esq.
Sara Kirkwood, Esq.
Patrick Moulding, Esq.
Marcia Carpentier, Esq.
Anita Ghosh, Esq.
Joseph Gilman, Paralegal
Karin Francis, Paralegal
E-mail: marian.zobler@nrc.gov
ann.hodgdon@nrc.gov;
sara.kirkwood@nrc.gov;
patrick.moulding@nrc.gov;

John Runkle, Esq.
Counsel for the Joint Intervenors
P. O. Box 3793
Chapel Hill, NC 27515
E-mail: jrunkle@pricecreek.com

Center for a Sustainable Coast, Georgia Women's Action for New Directions, and Southern Alliance for Clean Energy
Vogtle COL
Lawrence Sanders, Esq.
Mindy Goldstein, Esq.
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
E-mail:lsande3@emory.edu;
magolds@emory.edu

Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
Louis A. Zeller
E-mail: bredl@skybest.com

Morgan, Lewis & Bockius, LLP
Co-Counsel for Southern Nuclear Operating Company, Inc.

marcia.carpentier@nrc.gov;
anita.ghosh@nrc.gov;
joseph.gilman@nrc.gov;
karin.francis@nrc.gov

Southern Nuclear Operating Company, Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
John L. Pemberton, Esq.*
E-mail: jlpember@southernco.com

Southern Nuclear
Inverness Building 42 – Bin 357
Birmingham, Alabama 35242
Charles Pierce
E-mail: crpierce@southernco.com

Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, Alabama 35203-2014
M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
Chad Pilcher, Esq.
Millicent Ronnlund, Esq.
E-mail: sblanton@balch.com
plejeune@balch.com;
cpilcher@balch.com;
mronnlund@balch.com

1111 Pennsylvania Ave., NW
Washington, DC 20004
Kathryn M. Sutton, Esq.
Mary Freeze
E-mail: ksutton@morganlewis.com
mfreeze@morganlewis.com

Balch & Bingham, LLP
1901 6th Avenue, Suite 2600
Birmingham, AL 35203
C. Grady Moore III, Esq.*
Leslie Garrett Allen, Esq.
E-mail: gmoore@balch.com;
lgallen@balch.com

OGC Mail Center: OGCMailCenter@nrc.gov

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton

M. Stanford Blanton
BALCH & BINGHAM LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
Phone: 205-251-8100
E-mail: sblanton@balch.com

Kathryn M. Sutton
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: ksutton@morganlewis.com

COUNSEL FOR
SOUTHERN NUCLEAR OPERATING COMPANY

Dated this 27th day of February, 2012.