

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Vogtle Electric Generating Plant, Unit 3)

Docket No. 52-025

STAFF ANSWER OPPOSING MOTION TO REOPEN AND AMENDED CONTENTION

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December 17, 2020

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The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) herein answers the motion to reopen the record and for leave to file an amended contention (Motion) filed by Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff (BREDL) on December 7, 2020. The Motion should be denied because it repeats arguments previously rejected by the Atomic Safety and Licensing Board and is otherwise unsupported.

In sum, BREDL mistakes predecisional, internal Staff deliberations for final Staff conclusions. When these predecisional documents were generated, the Staff was experiencing a brief period of difficulty understanding information associated with the license amendment request (LAR) that the licensee, Southern Nuclear Operating Company (SNC), had made available for audit. In particular, important information was illegible, not in a useful format, or required clarification from SNC. Over a very short time, the Staff resolved these issues through continued engagement with SNC. As such, the Staff's conclusions are found not in the predecisional documents cited by BREDL, but in the Staff's Safety Evaluation, in which the Staff explains how SNC provided sufficient information in the LAR to support the findings necessary to issue the license amendment and how the audited information was consistent with SNC's

description of settlement in the LAR. In addition, BREDL's Motion is untimely. Thus, the Motion fails to satisfy the requirements of 10 C.F.R. §§ 2.326 and 2.309(c) and (f).

BACKGROUND

On February 7, 2020, SNC submitted the LAR to change the required minimum seismic gap in a localized area between the Vogtle Unit 3 Auxiliary and Annex Buildings from 3 inches to 2-1/16 inches at elevations 141' to 154'.¹ On March 10, 2020, the NRC published a notice in the *Federal Register* that provided an opportunity to request a hearing and petition for leave to intervene.² On May 7 and 8, 2020, just before the filing deadline, BREDL contacted the Staff to make a Freedom of Information Act (FOIA) request for information related to a Staff regulatory audit associated with the LAR.³ On May 8, 2020, the Staff provided some publicly available documents associated with the LAR and replied that (1) the Staff could not provide information made available for audit in Westinghouse's Electronic Reading Room because this information was not submitted on the docket and was not in the Staff's possession; (2) "[t]he NRC staff's safety review of [LAR] 20-001 will rely on information placed on the docket by the licensee"; (3) a report summarizing the audit would be made available in the future; and (4) BREDL's request would be considered under FOIA.⁴

BREDL timely filed its Petition on May 11, 2020, and proffered two contentions opposing SNC's amendment request.⁵ SNC opposed BREDL's Petition, arguing that BREDL had not

¹ See Request for License Amendment and Exemption: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR-20-001) (Feb. 7, 2020) (ADAMS accession no. ML20038A939) (LAR 20-001).

² 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).

³ Email exchange between Louis Zeller, BREDL, and Cayetano Santos, NRC (May 7-8, 2020) (ML20142A383).

⁴ *Id.* The Staff provided the Audit Report to the BREDL representative once it was publicly available. Email from Cayetano Santos, NRC, to Louis Zeller, BREDL (May 28, 2020) (ML20149K540).

⁵ See Petition for Leave to Intervene and Request for Hearing by [BREDL] Regarding [SNC]'s Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (May 11, 2020) (ML20132D303) (Petition).

demonstrated standing or included an admissible contention.⁶ The Staff did not oppose BREDL's argument on standing but opposed the Petition on the ground that BREDL had not submitted an admissible contention.⁷ The Board denied BREDL's Petition and terminated the proceeding, holding that while the Petitioner had demonstrated standing, its proposed contentions did not satisfy 10 C.F.R. § 2.309(f)(1).⁸

The Staff issued the requested license amendment and corresponding exemption on August 4, 2020.⁹ BREDL appealed the Board's decision to reject proposed Contention 2.¹⁰ The Staff and SNC opposed BREDL's appeal and this matter is currently before the Commission.¹¹

The NRC provided an interim response to BREDL's FOIA request on September 22, 2020, that consisted of 167 pages of records.¹² The NRC provided a final response to the FOIA request on November 6, 2020, that consisted of 7 pages of records.¹³ BREDL filed the instant Motion on December 7, 2020, along with declarations supporting standing, a declaration by Arnold Gundersen (Gundersen Declaration), and Mr. Gundersen's curriculum vitae.¹⁴

⁶ [SNC's] Answer Opposing Petition to Intervene and Request for Hearing (June 5, 2020) (ML20157A261).

⁷ NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing (June 5, 2020) (ML20157A138) (Staff Answer to Petition).

⁸ *Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Unit 3), LBP-20-8, 92 NRC ___, __ (Aug. 11, 2020) (slip op. at 28) (ML20223A385).

⁹ Issuance of License Amendment (Aug. 4, 2020) (ML20132A032 (package)).

¹⁰ [BREDL]'s Notice of Appeal and Brief in Support of Appeal from the [Board] Decision Denying Admissibility of Contentions in License Amendment Proceeding (Sept. 4, 2020), (ML20248J166) (Appeal).

¹¹ NRC Staff Answer in Opposition to [BREDL's] Appeal of LBP-20-8 (Sept. 28, 2020) (ML20272A257); [SNC's] Brief in Opposition to Appeal (Sept. 29, 2020) (ML20273A315).

¹² FOIA NRC-2020-000234, Interim Response Form 464 (Sept. 22, 2020) (ML20272A120); FOIA NRC-2020-000234, Interim Response Records (Sept. 22, 2020) (ML20272A121).

¹³ FOIA NRC-2020-000234, Final Response Form 464 (Nov. 6, 2020) (ML20315A081). FOIA NRC-2020-000234, Final Response Records (Nov. 6, 2020) (ML20315A082).

¹⁴ Motion to Reopen Proceeding and Request to Amend Contention by [BREDL] Regarding [SNC's] Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001 (Dec. 7, 2020) (ML20342A389) (Motion). BREDL filed a corrected Motion on December 10, 2020 (ML20345A363) to reflect a December 7, 2020, date for the Gundersen Declaration.

DISCUSSION

As discussed below, the Motion should be denied because it is untimely, is unsupported, and otherwise repeats arguments previously rejected by the Board. The only new evidence BREDL offers consists of predecisional Staff documents that BREDL mistakes for final Staff conclusions. Further, these predecisional documents were created at a time during the Staff's safety review of the LAR when the Staff had difficulty reading and interpreting some audited information. But the Staff successfully engaged with SNC to resolve these difficulties in April 2020 during the audit. As documented in the Staff's Safety Evaluation, issued August 4, 2020, SNC provided sufficient information in the LAR to support the findings necessary to issue the license amendment, and the Staff independently confirmed that the audited information was consistent with SNC's representations in the LAR regarding settlement. The Staff explained this situation to BREDL during consultation for this Motion, as reflected in the attachment to this filing.¹⁵ BREDL offers no other independent support for its claims, and BREDL's claims of misconduct against the Staff and SNC are, likewise, baseless and unsupported.¹⁶ Thus, the Motion fails to satisfy 10 C.F.R. §§ 2.326, 2.309(c) and (f).¹⁷

I. Legal Standards

Because the proceeding has been terminated, BREDL must satisfy the reopening requirements in 10 C.F.R. § 2.326, the timeliness requirements for amended contentions in

¹⁵ Attachment 1, Staff Consultation Email.

¹⁶ The Staff referred the claims of misconduct against the Staff to the Office of the Inspector General and referred the claims of misconduct against SNC in accordance with the NRC's allegations process. The NRC's process for receiving allegations is ordinarily non-public, in order to protect the identity of the individual and preserve the integrity of the process. In this circumstance, however, because BREDL identified its concerns in a public adjudicatory proceeding, the Staff here informs the presiding officer of the steps it has taken.

¹⁷ The Staff does not contest BREDL's standing because BREDL's arguments and supporting declarations do not differ substantially from those offered in support of its original Petition. The Board found that BREDL's original Petition had established standing. *Vogtle*, LBP-20-8, 92 NRC at ___ (slip op. at 18).

10 C.F.R. § 2.309(c), and the contention admissibility requirements in § 2.309(f).¹⁸ A motion to reopen must satisfy the following criteria in § 2.326(a):

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Reopening the record is an extraordinary action, and the movant bears a heavy burden.¹⁹ A motion to reopen requires a greater level of support than a contention.²⁰ In accordance with § 2.326(b), the motion must be accompanied by affidavits “set[ting] forth the factual and/or technical bases for the movant's claim” that each of the criteria in § 2.326(a) are met. Also, each affidavit “must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.”²¹ The supporting evidence must be admissible under 10 C.F.R. § 2.337 by being “relevant, material, and reliable.”²²

To show that an amended contention demonstrates “good cause” in accordance with § 2.309(c), the petitioner must show (1) that the information supporting the contention was previously unavailable, (2) this information is materially different from previously available information, and (3) the contention has been submitted in a timely fashion based on the availability of this information. To meet the contention admissibility requirements in § 2.309(f)(1), the petitioner must (1) specifically state the legal or factual issues in controversy, (2) briefly explain the contention's basis, (3) demonstrate that the issues raised in the contention are

¹⁸ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-17-7, 85 NRC 111, 116 (2017); 10 C.F.R. §§ 2.309(c), (f), 2.326.

¹⁹ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC 1, 9 (2019); *Fermi*, CLI-17-7, 85 NRC at 115-16.

²⁰ *Fermi*, CLI-17-7, 85 NRC at 116.

²¹ 10 C.F.R. § 2.326(b).

²² *Fermi*, CLI-17-7, 85 NRC at 116 (quoting 10 C.F.R. § 2.337(a)); 10 C.F.R. § 2.326(b).

within the scope of the proceeding and material to the findings the NRC must make to support the action, (4) concisely state the alleged facts or expert opinions that support the contention, together with references to the specific sources and documents the petitioner relies on, and (5) show that there is a genuine dispute with the licensee on a material issue of law or fact.²³

II. The Motion Does Not Meet Any of the Reopening Criteria and Is Unsupported

BREDL's Motion meets none of the criteria for reopening because it is untimely, does not address a significant safety issue, and does not demonstrate that a materially different result would have been likely had the newly proffered information been considered originally. Also, the Gundersen Declaration fails to meet 10 C.F.R. § 2.326(b) because it is based on unsupported factual assertions and opinions. Fundamentally, the Motion fails because its factual basis is faulty. BREDL mistakes predecisional, internal Staff documents for final Staff conclusions. As documented in the Staff's Safety Evaluation, the Staff found that the LAR contained sufficient information to support issuance of the amendment, and the Staff independently confirmed that the audited information was consistent with the LAR's statements on settlement. BREDL does not provide any independent factual support for its Motion, and the accusations of misconduct it directs at the Staff and SNC are unsupported. Thus, the Motion falls well short of the reopening standards and should be denied.

A. The Motion is Based on Unsupported Factual Claims and Opinions

The evidence supporting a motion to reopen must be admissible, and to be admissible, the evidence must be reliable.²⁴ BREDL cites predecisional staff documents to support its Motion, but this evidence does not demonstrate a safety concern because these predecisional documents reflect issues that were resolved during the safety review of the LAR. BREDL mistakes these predecisional documents for final Staff conclusions, but the Staff's final

²³ The Staff's answer to BREDL's initial Petition discusses the § 2.309(f)(1) factors in greater detail. Staff Answer to Petition at 12-14.

²⁴ *Fermi*, CLI-17-7, 85 NRC at 116; 10 C.F.R. § 2.326(b); see also 10 C.F.R. § 2.337(a).

conclusions are in the Safety Evaluation, which BREDL does not challenge here (and indeed, may not challenge in this license amendment proceeding). As discussed in the Safety Evaluation, the Staff ultimately concluded that the LAR provided sufficient information to support issuance of the amendment and that the LAR's description of settlement was consistent with the audited information. The Gundersen Declaration also fails to meet § 2.326(b) because the opinions Mr. Gundersen bases on BREDL's mistaken factual assertions are by necessity also insufficient to support the Motion, and because his claims of misconduct are unsupported.

The Staff used the audit to confirm the veracity of the settlement discussion in the LAR. The Staff's brief difficulties reading and interpreting information made available through the Electronic Reading Room during the audit and the need for clarification from SNC are reflected in internal Staff emails provided to BREDL pursuant to FOIA on September 22, 2020, and in the Staff's May 26, 2020, Audit Report. For example, internal emails from March 17 and 23, and April 15, 16, and 22, 2020, describe the Staff's difficulties reading and interpreting information (for example, important figures were illegible, certain data was not available in a useful format for audit purposes, and certain information required clarification from SNC).²⁵ As discussed in the Audit Report, SNC made additional settlement information available through the Electronic Reading Room because "some of the figures in the original documents were difficult to read and interpret."²⁶ The Audit Report also stated that the Staff conducted three "audit clarification teleconferences" with SNC and Westinghouse "to better understand the reports, calculations, and data provided in the portal."²⁷ These discussions addressed "settlement monitoring data"

²⁵ FOIA NRC-2020-000234, Interim Response Records at 49-52, 93-96.

²⁶ Audit Report, encl. at 3 (ML20141L698) (explaining why SNC provided audit document item 6, titled "Settlement Monitoring Figures").

²⁷ *Id.*

and “predicted settlement values.”²⁸ One clarifying teleconference occurred on April 28, 2020, after the Staff generated the documents on which BREDL is relying.²⁹

The audit concluded on April 30, 2020, and, as the Staff noted in its Audit Report, “the NRC staff did not identify any outstanding issues or the need for the licensee to submit any additional information on the docket.”³⁰ As documented in a May 1, 2020, email provided to BREDL through FOIA, the technical staff members of the audit team had agreed on a “path forward.”³¹ Thus, the issues reflected in the April 23, 2020, documents BREDL cites were completely resolved within about a week. The Safety Evaluation documents the Staff’s conclusions as follows:

- During the audit, the Staff confirmed statements in the LAR regarding the gap during a seismic event between the auxiliary and annex buildings.³²
- By auditing settlement data and related documents, the Staff confirmed that the actual and predicted settlement are “within the acceptable limits given in Table 5.0-1, ‘Site Parameters,’ of the AP1000 [design control document] and [updated final safety analysis report]. Consequently, the staff expects that settlement will be well controlled within the acceptable settlement limits throughout the entire construction sequence and through plant operation.”³³
- Through its audit of settlement data and plots, the Staff confirmed the LAR’s claims that (1) the pattern of deflection for the Nuclear Island basement “would tend to cause the perimeter walls to lean towards the center of the Nuclear Island,” and (2) “the walls of the Annex Building near the Nuclear Island are not exhibiting a tendency to lean towards the Nuclear Island.”³⁴ Consequently, the Staff concluded that “the differential settlement of the foundations of the Nuclear Island and the Annex Building will not adversely affect the seismic gap between these two structures by reducing the currently available gap, especially at the area of nonconformance.”³⁵

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*, encl. at 1, 3.

³¹ FOIA NRC-2020-000234, Interim Response Records at 17. Pravin Patel and Amitava Ghosh were the technical members of the Staff’s audit team. Audit Report, encl. at 1.

³² Staff Safety Evaluation for LAR 20-001, at 4 (Aug. 4, 2020) (ML20132A078).

³³ *Id.* at 6.

³⁴ *Id.*; LAR 20-001, encl. 1 at 8 (Feb. 7, 2020) (ML20038A939).

³⁵ Staff Safety Evaluation for LAR 20-001, at 6.

The record shows that the Staff performed a rigorous and independent audit, remained open to new information, addressed and resolved its own questions, and ultimately confirmed the LAR's statements on settlement.

Accordingly, BREDL has mistaken predecisional Staff deliberations for final Staff conclusions. The Staff's final conclusions show that the audited information is consistent with the LAR's description of settlement and that there is no significant safety issue. Moreover, BREDL provides no other independent factual support for its claims regarding observed settlement. Consequently, the factual evidence supporting the Motion and Mr. Gundersen's opinions founded on this evidence are insufficient to demonstrate that a materially different result would be or would have been likely had BREDL's evidence been considered initially. The Commission has held that "where a contention is based on a factual underpinning in a document which has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source."³⁶ Thus, the basis for BREDL's Motion is insufficient to support the proposed contention, much less the more stringent evidentiary requirements for a motion to reopen.³⁷

The Gundersen Declaration also fails to comply with the requirement in 10 C.F.R. § 2.326(b) that the affiant have knowledge of the facts alleged. Mr. Gundersen makes many unsupported accusations of misconduct against the Staff and SNC, but he demonstrates no personal knowledge of the underlying settlement information, the interactions between the Staff and SNC, or the Staff's review processes. The documents Mr. Gundersen relied on show only that the Staff carefully evaluated settlement information and reconsidered its position as it conducted its safety evaluation of the LAR and gained a better understanding of the information

³⁶ *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-89-03, 29 NRC 234, 241 (1989).

³⁷ *Fermi*, CLI-17-7, 85 NRC at 116 ("The level of support required for a motion to reopen is greater than that required for a contention[.]")

supporting its issuance. Thus, Mr. Gundersen's unsupported claims of misconduct neither comply with § 2.326(b) nor overcome the presumption of regularity afforded to the Staff's review of this LAR.³⁸

B. The Motion Does Not Raise a Significant Safety Issue or Demonstrate the Likelihood of a Materially Different Result

The Motion neither raises a significant safety issue nor demonstrates the likelihood of a materially different result. As explained above, the Motion is based on unsupported factual assertions and opinions, and the Staff's independent assessment of SNC's settlement information confirmed the accuracy of the LAR's description of settlement. Also, BREDL's Motion and supporting declaration recite arguments already rejected by the Board. As shown below, in the Staff's answer to the Amended Contention, much of BREDL's Amended Contention and its bases are virtually identical to arguments the Board rejected for Contentions 1 and 2.³⁹ Similarly, the Gundersen Declaration reasserts claims previously rejected by the Board.⁴⁰ As such, the Motion fails to satisfy 10 C.F.R. § 2.326(a)(2)-(3).

C. The Motion is Untimely

BREDL's Motion does not meet the timeliness requirements of either 10 C.F.R. §§ 2.326(a)(1) or 2.309(c).⁴¹ BREDL claims that its motion to reopen and Amended Contention are timely because they are based on information that is materially different from previously available information and "was not available to Petitioner or the public until November 6, 2020," and because BREDL filed the Motion within thirty days of the November 6, 2020 FOIA

³⁸ *U.S. Dep't of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 606 (2009) (stating that "adjudicatory bodies presume, absent strong and concrete evidence otherwise, that government agencies and their employees will do their jobs honestly and properly").

³⁹ See *infra*, Discussion, Section III.

⁴⁰ See, e.g., Gundersen Declaration at 7, 9, 12, 16-18, 20 (¶¶ 15, 16.1, 17.1.4, 17.1.5, 18, 22, 22.1, 22.2, 25.7).

⁴¹ Because BREDL seeks to reopen the record to file an amended contention, the Staff is considering the timeliness arguments for the motion to reopen and Amended Contention together.

response.⁴² However, the information BREDL relies on was the same as, or not materially different from, information provided in the NRC's September 22, 2020 FOIA response, which was provided to BREDL 76 days before the Motion was filed. Thus, the Motion is untimely.⁴³

The Motion cites eight specific statements, items (a) through (h), from the documents provided on November 6, 2020.⁴⁴ Seven of these statements, items (b) through (h), are from a "clean copy" of a briefing paper included with the final FOIA response.⁴⁵ However, this same document was included in the interim FOIA response of September 22, 2020, as the Staff informed BREDL during consultation on this Motion.⁴⁶ The eighth statement cited by BREDL, item (a), is the following struck-out text from an earlier version of the briefing paper: "The staff had two clarification calls, ~~but the staff could not determine the seismic gap predicted in future.~~"⁴⁷ This specific statement was not provided in earlier documents but is not materially different from information previously provided. As discussed above, the May 26, 2020, Audit Report and the FOIA documents provided on September 22, 2020, demonstrate that the Staff was temporarily experiencing difficulty reading and interpreting the licensee's settlement information.⁴⁸ It follows that the Staff was briefly unable during the audit to predict the seismic gap in the future.

⁴² Motion at 4-5.

⁴³ Section 2.326(a)(1) allows consideration of an untimely motion to reopen the record that presents an exceptionally grave issue, but as discussed above, the Motion does not raise a significant safety issue, much less an exceptionally grave one.

⁴⁴ Motion at 13-14. Mr. Gundersen cites the same statements. Gundersen Declaration at 8-11.

⁴⁵ FOIA NRC-2020-000234, Final Response Records at 2-3 (Nov. 6, 2020) (corresponds to pages 169-70 of the FOIA response records in their entirety).

⁴⁶ Attachment 1, Staff Consultation Email, at 1 (citing FOIA NRC-2020-000234, Interim Response Records at 79-80 (Sept. 22, 2020)).

⁴⁷ FOIA NRC-2020-000234, Final Response Records at 5 (Nov. 6, 2020) (corresponds to page 172 of the FOIA response records in their entirety).

⁴⁸ Audit Report, encl. at 3 (explaining why SNC provided audit document item 6, "Settlement Monitoring Figures"); FOIA NRC-2020-000234, Interim Response Records at 49-52, 93-96 (Sept. 22, 2020).

Thus, BREDL could have filed its Motion earlier because the supporting information is not materially different from information available by September 22, 2020. Filing 76 days after the information became available is not warranted by the nature and volume of records included in the interim FOIA response. Nor is BREDL's filing consistent with the standard 30-day timeliness expectation that appears in the Board's Initial Prehearing Order.⁴⁹

Finally, BREDL argues that it did not base its filing on the interim FOIA response "[i]n the interest of reliance on complete information and the husbanding of resources for both NRC and the Petitioner[.]"⁵⁰ But timeliness for an amended contention is based on when the information became available.⁵¹ Also, an intervenor may not delay filing its contention on the ground that more information may become available later.⁵² By raising this argument, BREDL effectively concedes that the Motion was not "submitted in a timely fashion *based on the availability of the subsequent information.*"⁵³

For the above reasons, the Motion does not satisfy 10 C.F.R. §§ 2.326(a)(1) or 2.309(c).

⁴⁹ Initial Prehearing Order at 5 n.13 (ML20140A258) (May 19, 2020) (providing that a motion seeking the admission of new or amended contentions "should be filed within 30 days of the date upon which the information that is the basis of the motion becomes available to the petitioner/intervenor"). Although this Order may not impose a direct legal requirement after termination of the proceeding, the Order articulated a standard expectation for timeliness that BREDL's Motion does not come close to meeting. In a similar situation involving a new contention in a previously terminated proceeding, the licensing board applied a 30-day standard because it was the standard generally used by licensing boards and was the standard articulated in the Initial Prehearing Order for that proceeding. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC 616, 645-46 & n.15 (2010). On appeal, the Commission affirmed the licensing board's determination that the filing was untimely. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 223-25 (2011).

⁵⁰ Motion at 10.

⁵¹ 10 C.F.R. § 2.309(c).

⁵² See, e.g., 10 C.F.R. § 2.309(f)(2) (requiring contentions to be based on information available at the time the petition is filed); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 34 & n.30 (2010) (Petitioners must base environmental contentions on the environmental report and may not defer filing contentions because the Staff's environmental impact statement might contain different analyses).

⁵³ 10 C.F.R. § 2.309(c)(1)(iii) (emphasis added); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564-65 (2005) ("To demonstrate good cause, a petitioner must show not only why it could not have filed within the time specified in the notice of opportunity for hearing, but also that it filed as soon as possible thereafter.")

III. The Amended Contention is Untimely, Lacks a Factual Basis, and Repeats Arguments Previously Rejected by the Board

The Amended Contention consists of three parts: (1) the statement of contention; (2) two sections addressing the newly proffered basis for the Motion, one titled “New Information” and the other titled “Relevant Documents Obtained After ASLB Proceeding Closed”; and (3) a section titled “Satisfaction of 10 CFR § 2.309(f)” arguing that the Amended Contention satisfies § 2.309(f)(1).⁵⁴ As discussed previously, the Amended Contention is untimely. Also, Parts (1) and (3) of the Amended Contention repeat arguments already rejected by the Board, and Part (2) of the Amended Contention is based on information that does not support BREDL’s claims. Thus, the Amended Contention is inadmissible.

Part (2) relies on Staff documents provided to BREDL through FOIA on November 6, 2020. But as explained above, these documents do not raise a significant safety issue. The Staff addressed and resolved the difficulties it had reading and interpreting information in the Electronic Reading Room.⁵⁵ The Staff concluded that the audited information was consistent with the LAR’s discussion of settlement, and BREDL offers no independent support for its claims regarding observed settlement. Thus, the evidence BREDL offers does not support contention admissibility.⁵⁶ Similarly, Mr. Gundersen’s opinions based on this evidence do not demonstrate a genuine dispute with the application. In addition, BREDL does not attempt to explain how the new information satisfies 10 C.F.R. § 2.309(f)(1).⁵⁷ Moreover, the Amended Contention does not explain the significance of the new information beyond general assertions such as: “These documents reveal evidence that Southern Company’s LAR 20-001 makes the site and the

⁵⁴ Motion at 11, 11-14, and 14-19.

⁵⁵ See *supra*, Discussion, Section II.A.

⁵⁶ *Seabrook*, CLI-89-03, 29 NRC at 241.

⁵⁷ As explained below, the only arguments tied to § 2.309(f)(1) were cobbled together from BREDL’s originally submitted Contentions 1 and 2, with immaterial changes.

reactor under construction patently unsafe to operate[.]”⁵⁸ Nor does the Motion explain how the Gundersen Declaration supports compliance with § 2.309(f)(1).⁵⁹ Thus, Part (2) of the Amended Contention does not meet § 2.309(f)(1)(v) or (vi) because it does not cite documents or expert opinion that actually support the contention and does not establish a genuine, material dispute with the LAR.

Parts (1) and (3) of the Amended Contention are based on BREDL’s previously-rejected Contentions 1 and 2.⁶⁰ Part (1) of the Amended Contention is identical to the statement of Contention 2.⁶¹ Part (3) of the Amended Contention was cobbled together from Contentions 1 and 2, with immaterial changes:

- The Amended Contention and Contention 2 have identical arguments for compliance with § 2.309(f)(1)(i), except the Amended Contention omits the following text: “There must be an opportunity for a hearing on the amendment. § 52.98(f).”⁶²
- The first two sentences of the Amended Contention’s argument for compliance with § 2.309(f)(1)(ii) are taken from Contention 1’s argument for compliance with § 2.309(f)(1)(ii), with non-substantive changes.⁶³ Otherwise, the Amended Contention’s argument for compliance with § 2.309(f)(1)(ii) is taken from Contention 2’s argument for compliance with § 2.309(f)(1)(ii), except that “stopped” is changed to “halted.”⁶⁴
- The first and third paragraphs of the Amended Contention’s argument for compliance with § 2.309(f)(1)(iii) are taken from Contention 2’s arguments for compliance with § 2.309(f)(1)(iii), except for two changes in verb tense and the Amended Contention’s omission of: “The change process for the COL is set forth in 10 CFR 52.98.”⁶⁵ The second paragraph of the Amended Contention’s argument for compliance with

⁵⁸ Motion at 13.

⁵⁹ For his part, Mr. Gundersen provides only general statements regarding the significance of the new information and also does not explain how § 2.309(f)(1) is satisfied. See Gundersen Declaration at 8-12. Conclusory assertions, even from an expert, do not support contention admissibility. *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

⁶⁰ As discussed above, Mr. Gundersen also reasserts arguments previously rejected by the Board. See, e.g., Gundersen Declaration at 7, 9, 12, 16-18, 20 (¶¶ 15, 16.1, 17.1.4, 17.1.5, 18, 22, 22.1, 22.2, 25.7).

⁶¹ Compare Motion at 11 with Petition at 12.

⁶² Compare Motion at 14-15 with Petition at 12.

⁶³ Compare Motion at 15 with Petition at 9-10.

⁶⁴ Compare Motion at 15 with Petition at 12-13.

⁶⁵ Compare Motion at 15-16 with Petition at 13.

§ 2.309(f)(1)(iii) is identical to Contention 1's argument for compliance with § 2.309(f)(1)(iii).⁶⁶

- The Amended Contention and Contention 2 have identical arguments for compliance with § 2.309(f)(1)(iv), except for a few punctuation and capitalization differences.⁶⁷
- The Amended Contention and Contention 2 have the same arguments for compliance with § 2.309(f)(1)(v), except for a few non-substantive differences and the Amended Contention's omission of the following text: "...Southern Nuclear Corp. (SNC) is attempting to obfuscate the true facts. Merely amending its license and modifying requirements for the seismic gap between a portion of a wall in the Annex Building and the NI (Nuclear Island)...[.]"⁶⁸
- Regarding the Amended Contention's three-paragraph argument for compliance with § 2.309(f)(1)(vi): (1) the first paragraph is from Contention 1's argument for compliance with § 2.309(f)(1)(vi), with non-substantive changes; (2) the second paragraph is from Contention 1's argument for compliance with § 2.309(f)(1)(iv), with non-substantive changes and the Amended Contention's omission of a sentence and associated citation on material false statements; and (3) the third paragraph is from Contention 2's argument for compliance with § 2.309(f)(1)(vi), with non-substantive changes.⁶⁹

The Board has rejected these arguments, and the new information discussed in Part (2) does not support contention admissibility. Thus, the basis for the Board's conclusion that Contentions 1 and 2 were inadmissible continue to apply to Parts (1) and (3) of the Amended Contention.⁷⁰ This result would not change even if the new information did provide some factual support for BREDL's previously rejected arguments, because the Board determined that Contentions 1 and 2 were outside the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii).⁷¹

For these reasons, the Amended Contention is inadmissible.

⁶⁶ Compare Motion at 16 with Petition at 10.

⁶⁷ Compare Motion at 16-17 with Petition at 13-14.

⁶⁸ Compare Motion at 17-18 with Petition at 14-16.

⁶⁹ Compare Motion at 18-19 with Petition at 10, 11, and 17.

⁷⁰ See *Vogtle*, LBP-20-8, 92 NRC at __ (slip op. at 21-27).

⁷¹ See *id.* at __ (slip op. at 22, 24).

IV. BREDL's Complaints About the NRC's FOIA Responses Are Misplaced and Outside the Scope of the Proceeding

Finally, the Motion and the Gundersen Declaration present arguments concerning the NRC's FOIA responses that are misplaced or outside the scope of the proceeding. The Motion and Gundersen Declaration both claim that the NRC should have released more information under FOIA.⁷² But the NRC has in place a separate process governing appeals of agency FOIA determinations; BREDL's FOIA complaints are not cognizable in this proceeding.⁷³ In addition, BREDL argues that it should be provided information that the Staff accessed via Westinghouse's Electronic Reading Room because the NRC's rules of evidence for program fraud civil penalty proceedings provide that "[a]ll documents and other evidence offered or taken for the record shall be open to examination by all parties...."⁷⁴ But the regulation BREDL cites does not apply to this licensing proceeding. In any event, the Commission has held that petitioners are not entitled to discovery to support contention preparation but instead are to base their contentions on "on defects or omissions *in the application*."⁷⁵ BREDL has never filed a contention of omission in this proceeding. Thus, BREDL's arguments regarding the NRC's FOIA responses are misplaced and outside the scope of this proceeding.

CONCLUSION

As discussed above, BREDL has failed to raise a significant safety issue or provide any reliable evidence to support its arguments. BREDL offers only unsupported assertions and a recitation of arguments previously rejected by the Board in this proceeding. Because BREDL's

⁷² See, e.g., Motion at 10, 19-20 (complaining that the NRC has not provided information located in Westinghouse's Electronic Reading Room); Gundersen Declaration at 4 (complaining about the NRC's FOIA redactions).

⁷³ See 10 C.F.R. § 9.29.

⁷⁴ Motion at 20 (quoting 10 C.F.R. § 13.34(h)).

⁷⁵ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 416 (2007).

Motion does not satisfy the reopening standards in 10 C.F.R. § 2.326 or the requirements for amended contentions in 10 C.F.R. § 2.309, its Motion should be denied.

Respectfully Submitted,

/Signed (electronically) by/

Michael A. Spencer

Counsel for NRC Staff

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U.S. Nuclear Regulatory Commission

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Dated at Potomac, MD,
this 17th day of December 2020

ATTACHMENT 1

Staff Consultation Email

From: [Spencer, Michael](#)
To: [Louis A. Zeller \(BREDL@skybest.com\)](mailto:Louis.A.Zeller@skybest.com)
Cc: [Ezell, Julie](mailto:Ezell,Julie); sblanton@balch.com; plejeune@balch.com; alovett@balch.com
Subject: Consultation on Motion to Reopen and Contentions Regarding Vogtle 3&4 Seismic Gap LAR
Date: Monday, December 07, 2020 11:16:00 AM

Mr. Zeller,

The staff has considered the motion to reopen and new contentions that you described to me over the phone on Friday, December 4, 2020, regarding the seismic gap LAR for Vogtle Units 3&4 that was submitted on February 7, 2020 (ML20038A939). The staff does not support your filing because it would not meet the reopening or contention standards.

You informed me that the filing would be based on documents made available to BREDL pursuant to FOIA on November 6, 2020. These documents are staff-generated documents dated April 23, 2020. The staff developed these documents during the audit of the licensee's settlement information. However, as stated in the staff's May 26, 2020 audit summary report (ML20141L698), the audit continued until April 30, 2020. As also discussed in the audit summary report, the staff engaged with the licensee in teleconferences "to better understand the reports, calculations, and data provided in the [licensee's] portal." As stated in the audit summary report, one of these teleconferences occurred on April 28, 2020, after the generation of the April 23 documents that you reference.

After the April 23 documents were generated, the staff continued to engage with the licensee because of the staff's difficulties in understanding the data the staff was auditing. Through continued engagement, the licensee was able to provide the staff additional data and explanations that allowed the staff to determine that the statements in the LAR regarding settlement were accurate. The staff's August 4, 2020 safety evaluation (ML20132A078) documented the staff's conclusion that the publicly available information in the LAR was sufficient to support issuance of the license amendment, and documented how the staff's audit determined that the licensee's settlement information was consistent with the statements in the LAR.

Thus, the documents on which your filing is based do not support an admissible contention or a motion to reopen the record.

Also, new or amended contentions and motions to reopen the record must be timely filed. It is not clear to the staff that the filing you intend would be timely. For example, one of the documents provided to you on November 6, 2020, is a briefing sheet that had previously been provided to you pursuant to FOIA on September 22, 2020 (see pages 79 to 80 in ML20272A121).

For the above reasons, the NRC staff does not support your planned filing. If you would like to discuss these matters further, please contact me by phone or email.

Thanks,
Michael

Michael Spencer
Senior Attorney

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

SOUTHERN NUCLEAR OPERATING CO.

(Vogtle Electric Generating Plant, Unit 3)

Docket No. 52-025

Certificate of Service

I hereby certify that the "Staff Answer Opposing Motion to Reopen and Amended Contention" has been filed through the E-Filing system this 17th day of December 2020.

/Signed (electronically) by/

Michael A. Spencer

Counsel for NRC Staff

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Dated at Potomac, MD,
this 17th day of December 2020