

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

SOUTHERN NUCLEAR OPERATING  
COMPANY, INC.

(Vogtle Electric Generating Plant, Unit 3)

Docket No. 52-025-LA-3

CLI-21-06

**MEMORANDUM AND ORDER**

Today we address a motion by the Blue Ridge Environmental Defense League and its chapter Concerned Citizens of Shell Bluff (BREDL) to reopen the proceeding on the application of Southern Nuclear Operating Company, Inc. (SNC) for an amendment to the Vogtle Electric Generating Plant Unit 3 (Vogtle Unit 3) combined license.<sup>1</sup> Both SNC and the NRC Staff oppose the motion.<sup>2</sup> For the reasons set forth below, we deny the motion.

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<sup>1</sup> *Motion to Reopen Proceeding and Request to Amend Contention by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001* (Dec. 7, 2020) (BREDL Motion).

<sup>2</sup> *Southern Nuclear Operating Company's Answer Opposing BREDL's Motion to Reopen the Record and Request to Amend Contention* (Dec. 17, 2020) (SNC Answer); *Staff Answer Opposing Motion to Reopen and Amended Contention* (Dec. 17, 2020) (Staff Answer).

## I. BACKGROUND

On February 7, 2020, SNC applied for an amendment to its license for Vogtle Unit 3, a Westinghouse Electric Company Advanced Passive 1000 (AP1000) reactor and requested an exemption from regulations governing the AP1000 design.<sup>3</sup> SNC proposed to change a requirement that the Vogtle Unit 3 auxiliary and annex buildings be constructed with a three-inch minimum seismic gap between them.<sup>4</sup> As built, the two buildings are closer together than three inches over a limited area.<sup>5</sup> Specifically, a variation in a thirteen-foot section of the auxiliary building wall leaves a minimum gap of 2-3/16 inches between the auxiliary building and the annex building. SNC performed a technical evaluation and determined that the smaller gap would still ensure the two buildings do not interact during an earthquake and would thus satisfy the same safety function as a three-inch gap.<sup>6</sup> After completing its review of SNC's technical evaluation, the Staff approved SNC's amendment request on August 4, 2020.<sup>7</sup>

BREDL requested a hearing on SNC's application and proposed two contentions.<sup>8</sup> The Board found BREDL had standing to intervene but that both of its proposed contentions were

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<sup>3</sup> See Letter from Brian H. Whitley, SNC, to NRC Document Control Desk (Feb. 7, 2020), Encl. 1 (Application), Encl. 2 (ADAMS accession no. ML20038A939).

<sup>4</sup> Application at 4-5.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> *Id.* at 6-9.

<sup>7</sup> See Letter from Cayetano Santos, NRC, to Brian H. Whitley, SNC (Aug. 4, 2020) (ML20132A032 (package)).

<sup>8</sup> *Petition for Leave to Intervene and Request for Hearing by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001* (May 11, 2020) (BREDL Petition).

inadmissible.<sup>9</sup> Accordingly, the Board denied BREDL's hearing request and terminated the adjudicatory proceeding.<sup>10</sup>

On appeal, BREDL challenged the Board's finding that proposed Contention 2 was inadmissible.<sup>11</sup> BREDL asserted in Contention 2 that the foundation of the nuclear island—a concrete basemat upon which the containment, shield building, and auxiliary building are constructed—is settling and may have caused the reduction of the required three-inch seismic gap between the auxiliary and annex buildings.<sup>12</sup> BREDL called for a halt to construction at Vogtle Unit 3 until the effects of settlement on other structures could be fully investigated.<sup>13</sup> The Board found proposed Contention 2 inadmissible because it raised issues outside the scope of the proceeding, did not raise a genuine dispute with the license amendment application, and was not supported by specific facts or expert opinion.<sup>14</sup> We affirmed the Board's decision.<sup>15</sup>

In our decision affirming the Board, we noted that BREDL had also filed a motion to reopen the proceeding with an amended Contention 2, which we would address separately.<sup>16</sup> Although we often refer such motions to the Board, we will rule on them where we consider it appropriate.<sup>17</sup> Due to the similarity between the amended Contention 2 set forth in BREDL's

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<sup>9</sup> LBP-20-8, 92 NRC \_\_, \_\_ (Aug. 10, 2020) (slip op. at 14-18, 21-27).

<sup>10</sup> *Id.* at \_\_ (slip op. at 28).

<sup>11</sup> See *Blue Ridge Environmental Defense League's Notice of Appeal and Brief in Support of Appeal from the Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in License Amendment Proceeding* (Sept. 4, 2020).

<sup>12</sup> See BREDL Petition at 13-15.

<sup>13</sup> *Id.* at 12-13.

<sup>14</sup> LBP-20-8, 92 NRC at \_\_ (slip op. at 24-26).

<sup>15</sup> CLI-20-18, 92 NRC \_\_, \_\_ (Dec. 22, 2020) (slip op.).

<sup>16</sup> *Id.* at \_\_ (slip op. at 1).

<sup>17</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 23-24 (2006).

motion to reopen and those previously found inadmissible, we find referral to the Board unnecessary, and we deny the motion for the reasons explained below.

## II. DISCUSSION

### A. Legal Standards for Reopening

A motion to reopen will be granted only if it is timely filed, addresses a significant safety or environmental issue, and demonstrates that a materially different result would have been likely had the new information been considered initially.<sup>18</sup> In addition, the motion must be accompanied by an affidavit given by “competent individuals with knowledge of the facts alleged or by experts in the disciplines appropriate to the issues raised,” which sets forth the factual and/or technical bases for the claim that these criteria have been met.<sup>19</sup> New or amended contentions set forth in a motion to reopen must also meet our contention admissibility requirements; however, the evidentiary support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements.<sup>20</sup>

### B. Motion to Reopen

BREDL’s motion to reopen sets forth an amended Contention 2, which asserts that the seismic gap between the auxiliary and annex buildings has narrowed “due to the unanticipated and unmeasured sinking of the Vogtle Unit 3 foundation” and that the reduction in the seismic gap cannot be characterized as a “static dimension change” or “simple construction error.”<sup>21</sup> The Board previously found virtually identical assertions inadmissible because they were unsupported by specific facts and therefore did not raise a genuine dispute with the evaluation

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<sup>18</sup> 10 C.F.R. § 2.326(a).

<sup>19</sup> *Id.* § 2.326(b).

<sup>20</sup> *See id.* §§ 2.309(c), (f), 2.326(d); *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2)*, CLI-17-7, 85 NRC 111, 116 (2017).

<sup>21</sup> BREDL Motion at 11; *see also id.* at 18.

of foundation settlement contained in SNC's application.<sup>22</sup> However, BREDL argues it now has new information obtained through a Freedom of Information Act (FOIA) request, showing an "exceptionally grave issue" regarding the ability of Vogtle Unit 3 to withstand an earthquake.<sup>23</sup>

Specifically, BREDL cites information from an internal briefing paper dated April 23, 2020, prepared by the Staff. This internal briefing paper includes statements by the Staff that the seismic gap between the auxiliary and annex buildings is "small" and "can reduce further due to settlement," that "[t]here is no settlement data between these two structures," and that "the predicted settlement is significantly different [than] what has been observed."<sup>24</sup> BREDL argues that these and other statements in the document are evidence that "supports and amplifies" BREDL's previously rejected contentions, which also questioned the ability of Vogtle Unit 3 to withstand an earthquake and more broadly asserted that the site and the reactor are unsafe.<sup>25</sup> BREDL argues that had the Staff provided the Board these preliminary views, the

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<sup>22</sup> LBP-20-8, 92 NRC at \_\_ (slip op. at 25-26). The Board's decision, which we previously affirmed, also found Contention 2 inadmissible because it raised issues outside the scope of the proceeding. *Id.* at \_\_ (slip op. at 27); see also CLI-20-18, 92 NRC at \_\_ (slip op. at 5-7, 10).

<sup>23</sup> BREDL Motion at 3, 11-14. See FOIA NRC-2020-000234, Interim Response Form 464 (Sept. 22, 2020); FOIA NRC-2020-000234, Interim Response Records (Sept. 22, 2020) (ML20272A119 (package)); FOIA NRC-2020-000234, Final Response Form 464 (Nov. 6, 2020); FOIA NRC-2020-000234, Final Response Records (Nov. 6, 2020) (ML20315A080 (package)). BREDL's motion and accompanying declaration make several claims about the Staff's response to its FOIA request. See, e.g., BREDL Motion at 10, 19-20 (stating that the Staff has not provided information located in the Westinghouse electronic reading room); *Declaration of Arnold Gundersen to Support the Motion to Reopen Proceeding and Request to Amend Contention by the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff Regarding Southern Nuclear Operating Company's Request for a License Amendment and Exemption for Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements, LAR-20-001* (Dec. 7, 2020), at ¶¶ 10.3, 10.6 (Gundersen Declaration) (questioning the Staff's FOIA timeliness and redactions). To the extent that BREDL seeks to challenge the Staff's response to BREDL's FOIA request, such challenges are outside the scope of this proceeding and inadmissible. Challenges to the Staff's response to a FOIA request are governed under a separate appeal process. See 10 C.F.R. § 9.29.

<sup>24</sup> FOIA NRC-2020-000234, Final Response Records at 1.

<sup>25</sup> BREDL Motion at 3, 13, 19; Gundersen Declaration at ¶¶ 10, 29.

Board would have found SNC's application deficient "due to the lack of data, an incomplete application, or a lack of substantial analyses" regarding foundation settlement and would have admitted Contention 2 for evidentiary hearings.<sup>26</sup>

However, the referenced Staff statements are not final positions, rather, they reflect preliminary issues that the Staff identified and ultimately resolved during its safety review.<sup>27</sup> The Staff identified these issues after a preliminary review of documents and data that SNC made available to the Staff through an electronic reading room maintained by Westinghouse. The Staff planned to audit information in the electronic reading room and found that "important figures were illegible, certain data was not available in a useful format for audit purposes, and

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<sup>26</sup> BREDL Motion at 3, 12. BREDL's pleadings in this case contain various assertions of impropriety by the Staff. For example, BREDL claims that the new information it obtained through FOIA shows that the Staff knew of information supporting Contention 2 but did not provide it during a pre-hearing conference before the Board on contention admissibility. *Id.* at 11-12. BREDL also claims that our regulations at 10 C.F.R. § 13.34(h) required the Staff to make the April 23, 2020, briefing paper available to BREDL. *Id.* at 10, 20. However, the regulation BREDL cites is inapplicable to a licensing proceeding. BREDL was not entitled to discovery of predecisional Staff documents to support contention preparation. *See Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 416 (2007)*. Accordingly, BREDL has not shown impropriety on this basis.

BREDL also claims that the Staff and SNC made assertions to the Board that are disproven by documents BREDL received in response to its FOIA request. BREDL Motion at 19. BREDL does not specify which assertions have been disproven or provide citations to pages where the FOIA documents contradict positions asserted before the Board, however. To the extent BREDL considers the Staff's internal briefing paper to justify BREDL's claim, we note that the Staff resolved the preliminary issues set forth in that paper before the Board received pleadings or heard arguments on contention admissibility.

Finally, after the Staff and SNC answered BREDL's motion to reopen, BREDL filed a reply that raises previously investigated claims of impropriety by the Staff in matters predating and unrelated to this proceeding. *See Reply of the Blue Ridge Environmental Defense League and its Chapter Concerned Citizens of Shell Bluff to Answers of NRC Staff and Southern Nuclear Operating Company to Motion to Reopen LAR 20-001 (Dec. 28, 2020)*, at 3. Because our rules provide BREDL no right of reply, and because the investigation BREDL cites is unrelated to this proceeding, we do not consider BREDL's reply further. *See* 10 C.F.R. § 2.323(c).

<sup>27</sup> Staff Answer at 6-10; SNC Answer at 10-20.

certain information required clarification from SNC.”<sup>28</sup> The Staff addressed these issues by reviewing additional information in the electronic reading room and holding three teleconferences with SNC and Westinghouse to better understand the data presented.<sup>29</sup> As a result, by the time BREDL filed its hearing request and well before the Board heard arguments on contention admissibility, the Staff had “completely resolved” and no longer held the preliminary views described in the April 23, 2020, briefing paper.<sup>30</sup>

The Staff documented resolution of these issues in an audit report and in its final safety evaluation report.<sup>31</sup> The safety evaluation report concludes that actual and predicted values for foundation settlement at Vogtle Unit 3 are within the acceptable limits of the AP1000 design control document.<sup>32</sup> The safety evaluation report also states that “settlement will be well controlled within the acceptable settlement limits throughout the entire construction sequence and through plant operation” and 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.”<sup>33</sup>

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<sup>28</sup> Staff Answer at 7 (citing FOIA NRC-2020-000234, Interim Response Records at 49-52, 93-96).

<sup>29</sup> *Id.* at 7-8.

<sup>30</sup> *Id.* at 8 (citing FOIA NRC-2020-000234, Interim Response Records at 17); Memorandum from Cayetano Santos, NRC, to Victor Hall, NRC, “Audit Report for Vogtle Electric Generating Plant Unit 3, Request for License Amendment and Exemption: Unit 3 Auxiliary Building Wall 11 Seismic Gap Requirements (LAR 20-001)” (May 26, 2020), Encl. (ML20141L698) (Audit Report).

<sup>31</sup> See Audit Report, Encl.; Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 182 to the Combined License No. NPF-91 (Aug. 4, 2020) (ML20132A078) (SER).

<sup>32</sup> SER at 3-6.

<sup>33</sup> *Id.* at 6.

In summary, BREDL claims that the Staff's internal briefing paper contains new information that supports BREDL's original contentions. However, the paper BREDL cites represents the Staff's initial concerns and not its final position. The Staff resolved the issues identified in its paper after auditing settlement data and concluding that SNC's request to change the seismic gap between the auxiliary and annex buildings could be safely approved. BREDL's motion does not dispute the Staff's analysis or set forth any independent factual or legal basis for BREDL's claims of a significant safety issue. Therefore, we find that the internal briefing paper does not provide the missing factual basis for BREDL's Contention 2 or raise a significant safety issue that would warrant reopening this proceeding.

### III. CONCLUSION

For the reasons given above, we *deny* BREDL's motion to reopen.

IT IS SO ORDERED.

For the Commission



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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15<sup>th</sup> day of March 2021.



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Southern Nuclear Operating Company ) Docket No. 52-025-LA-3  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Commission Memorandum and Order (CLI-21-06)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland,  
this 15<sup>th</sup> day of March 2021.

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Office of the Secretary of the Commission