

**UNITED STATES OF AMERICA  
U.S. NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of:  
Southern Nuclear Operating Company  
License Amendment Application for  
Combined License NPF-91  
Vogtle Electric Generating Plant Unit 3

Docket No. 52-025-LA-3

September 4, 2020

**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**

**Introduction**

Pursuant to 10 C.F.R. § 2.311(c), the Blue Ridge Environmental Defense League, Inc. and its chapter Concerned Citizens of Shell Bluff (“BREDL” or “Petitioner”) provide this notice of appeal to the Nuclear Regulatory Commission from the Atomic Safety and Licensing Board’s August 10, 2020, Memorandum and Order (Denying Intervention Petition and Terminating Proceeding), LBP-20-08.

**Factual and Procedural Background**

On February 9, 2012, the Nuclear Regulatory Commission approved Southern Nuclear Operating Company’s application for a license to construct and operate two additional reactors, Westinghouse AP1000 Units 3 and 4, at Plant Vogtle, which is located on the banks of the Savannah River in Shell Bluff, Georgia. Vogtle Electric Generating Plant Unit 3 (“VEGP-3”) is still under construction.

On February 7, 2020, the Southern Nuclear operating Company (“SNC”) submitted a request seeking a license amendment and exemption for VEGP-3. On March

10, 2020, the Federal Register published the corresponding license amendment application, opportunity to comment, request a hearing, and petition for leave to intervene. The proposed amendment request from SNC would revise the VEGP-3 combined license Appendix C (and plant-specific Tier 1) and corresponding Tier 2\* and Tier 2 information in the Updated Final Safety Analyses Report.<sup>1</sup>

On May 11, 2020, BREDL timely filed a petition for leave to intervene and request for hearing regarding license amendment request LAR-20-001. Subsequently, NRC Staff and SNC filed answers and on June 12 BREDL filed its reply. The Atomic Safety and Licensing Board ordered an initial prehearing and telephonic oral arguments were held on July 1, 2020. On August 4, NRC Staff issued a Notice of Issuance of License Amendment, informing the Board that the NRC Staff had issued Amendment No. 182 for VEGP Unit 3 (LAR-20-001). On August 10, the ASLB issued Memorandum and Order LBP-20-08, denying Petitioner's intervention, dismissing the two contentions and terminating the proceeding.

## **Argument**

### *A. Summary of the decision of which review is sought*

BREDL appeals the Board's denial of admissibility of Contention 2, "Basemat, Foundation and Construction Factors Create Unacceptable Operational Risk to Public Health and Safety." LBP-20-08 at 27. BREDL's petition lists four requirements which should be fulfilled before construction of Vogtle Unit 3 is completed:

1. Reevaluation of the structural integrity of the entire Nuclear Island,
2. Performance of complete root cause analysis of the new stresses on the basemat  
of the Nuclear Island,

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<sup>1</sup> Federal Register / Vol. 85, No. 47 / 13944 (Tuesday, March 10, 2020)

3. Presentation of the root cause analysis information in public licensing hearings, and
4. An independent licensing review and analysis of the stress conditions placed on other components on the site that are no longer level.

Gundersen Declaration at 11. A seismic dishing analysis of the Nuclear Island has never been performed on the Vogtle docket. Gundersen Declaration at 11-12.

*B. Matters of fact or law raised before the presiding officer and, if they were not, why they could not have been raised*

During its review, BREDL learned that “non-docketed information” had been used in the NRC Staff assessment of LAR-20-001 and placed this fact before the ASLB.

BREDL Reply June 12, 2020 at 2. The Staff Audit Report states:

The staff from the Structural, Civil, Geotech, Engineering Branch (ESEA) conducted an audit from March 10 to April 30, 2020, via the Westinghouse Electric Company electric reading room. The purpose of the audit was to gain a better understanding of the proposed changes and to review related documentation and non-docketed information in order to evaluate the acceptability of the proposed changes to the license.<sup>2</sup>

Despite requests, Petitioner has not been provided with access to this information which is necessary for its review. Clearly, NRC Staff used the information to understand and evaluate the LAR. The NRC Staff’s use of a private Westinghouse portal to review information meant these documents were not public agency records and were inaccessible to BREDL. But the ASLB admitted that “...such applicant documents likely would be subject to disclosure in this proceeding only as discoverable material if a

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<sup>2</sup> Memorandum from Cayetano Santos Jr., Project Manager to Victor Hall, Chief, Vogtle Project Office, SUBJECT: Audit Report for VEGP Unit 3, May 26, 2020, ML20141L698

pertinent BREDL contention were to be admitted.” *See* Additional Views of Bollwerk, Administrative Judge at 2-3, August 10, 2020. Further discussion follows *infra*.

*C. Petitioner's view that the decision is erroneous*

BREDL’s Contention 2 was dismissed by the ASLB despite its pleading that relevant information was unavailable to the interested public and/or was to be released pending review. Although a petitioner is not entitled to discovery in framing contentions, NRC practice and procedure guidance<sup>3</sup> states:

At the contention formulation stage of the proceeding, an intervenor may plead the absence or inadequacy of documents or responses which have not yet been made available to the parties. The contention may be admitted subject to later refinement and specification when the additional information has been furnished or the relevant documents have been filed.

Commonwealth Edison Company (Byron Nuclear Power station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980). Further, when the information becomes available, prompt filing of a contention is justified.<sup>4</sup>

On September 3, 2020, the Petitioner received an email from the NRC’s FOIA Analyst stating that its request for VEGP-3 information, NRC-2020-000234, was in its final stage of review by the Office of General Counsel. Earlier, BREDL submitted NRC Forms 509 and 629 and made an advance payment of \$726.30 for estimated search and

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<sup>3</sup> NUREG-0386, Digest No. 10, §2.9.5.8. ML003731299

<sup>4</sup> “When information is not available, there will be good cause for filing a contention based on that information promptly after the information becomes available. However, the five late-filing factors must be balanced in determining whether to admit such a contention filed after the initial period for submitting contentions.”

Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983); Philadelphia Electric Co. (Limerick Generating station, Units 1 and 2), ALAB-806, 21 NRC 1183, 1190 (1985).

duplication fees. In its May 11, 2020, acknowledgment letter to BREDL, the FOIA office estimated completion of its request would be on or before June 9, 2020.<sup>5</sup>

*D. Why Commission review should be exercised*

What halted BREDL's petition was the lack of availability of significant information which SNC made available to the NRC Staff to view but not to official NRC agency files. BREDL timely sought FOIA access to six SNC documents listed in the Staff's May 26, 2020 audit report. According to the report, these documents, which were made available for Staff review as non-docketed information via an SNC/WEC electronic reading room, were used by the Staff as part of the post-docketing application review process to verify the information and conclusions in the SNC licensing request.

The ASLB acknowledged that BREDL had gone to some lengths to obtain this undocketed but relevant information in the belief that it was germane to its petition against issuing the license amendment request. Memorandum and Order, LBP-20-08 at 21 fn. 48.<sup>6</sup> But in providing his formal additional views, Judge Bollwerk articulated a *non sequitur*; i.e., concluding that the undocketed and publicly unavailable information, which was part of the NRC Staff's review of SNC's request and which Petitioner sought in support of Contention 2, would become discoverable only after a contention was admitted. LBP-20-08, Additional Views of Bollwerk, Administrative Judge, at 2-3.

A cognitive dissonance is exposed in Judge Bollwerk's observation that:

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<sup>5</sup> Acknowledgement Letter from FOIA Officer Stephanie A. Blaney, Office of the Chief Information Officer to Louis A. Zeller, Executive Director, BREDL, May 11, 2020.

<sup>6</sup> "Relative to the preparation of its contentions, BREDL asserts that its 'review and analysis [has] been seriously hampered due to the lack of any complete engineering analyses or accurate information provided for review by SNC.' BREDL Petition at 6. Further, to highlight its efforts to try to gain access to such information, BREDL points to its outstanding Freedom of Information Act (FOIA) request seeking information associated with a May 26, 2020 NRC Staff audit report in which the Staff indicated it used non-docketed information obtained from SNC in assessing the SNC LAR."

[N]othing in the acceptance review instructions appears to authorize the Staff when making a docketing decision to consider applicant information not in the possession of the agency. All this suggests that in preparing a hearing request challenging a license application, a petitioner such as BREDL, while arguably not entitled to access more applicant information than the Staff had before it in making its docketing determination, also would not be entitled to any less, either by virtue of the information being publicly available in the agency's licensing docket (or otherwise publicly accessible in its ADAMS document management system) or via an appropriate protective order in the case of any docketed non-public information.

*Id.* at 4-5 (emphasis added).

The ASLB thus charged the institutional vulnerability of BREDL's petition against BREDL. Petitioner timely sought to have access to the information that would allow it to present a fully-informed petition buttressed by expert opinion,<sup>7</sup> but despite those efforts, could not obtain the same information that the NRC Staff had relied on in rendering its approval prior to the filing deadline. This doomed the petition, through no fault of BREDL, which was in due course shredded by the NRC's "strict by design" dictum for contention admissibility. The ASLB admitted that BREDL is entitled to access all information relied upon by the NRC Staff in accepting a license amendment request for processing as a prerequisite to intervening with a contention, agreed that BREDL was denied that access, and yet instead of judicially upholding the fundamental fairness requirement imposed by NRC procedure, committed a gross injustice.

Whether or not a basis for contentions has been established must be decided by considering the contentions in the context of the entire record of the case up to the time the contentions are filed. Thus, when an application for a license amendment is itself incomplete, the standard for the admission of contentions is lowered, because it is easier

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<sup>7</sup> See Declaration of Arnold Gundersen, May 11, 2020

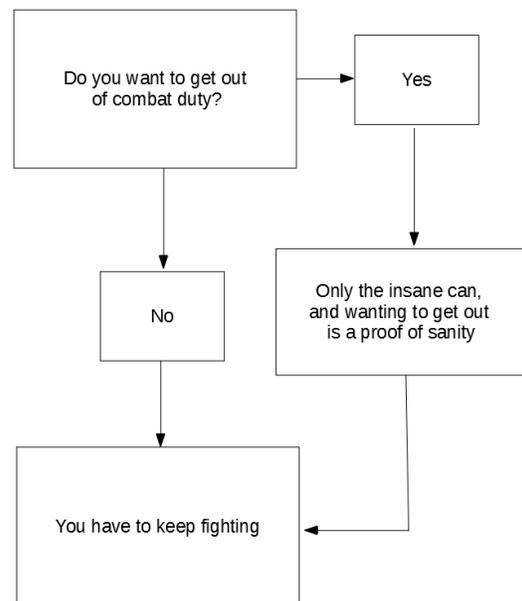
for petitioners to have reasons for believing that the application has not demonstrated the safety of the proposed procedures for which an amendment is sought. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 & 2), LBP-81-45, 14 NRC 853 (1981).

SNC’s application was incomplete as submitted and required verification that was provided by means of non-record information. Despite the NRC Staff’s reliance on non-public-accessible information, the LAR as submitted remains unverifiable. The principle of *Point Beach* should be applied here—the standard for contention admission lowered—and BREDL should be granted admission of Contention 2.

At a minimum, justice here requires either *sua sponte* dismissal of the LAR for want of compliance with established agency practice, or a grant of leave to BREDL to intervene together with access via discovery to the unavailable documents and anticipatory leave for BREDL to amend its petition following that discovery.

## Conclusion

ASLB Chief Judge Bollwerk cited with approbation the fundamental issue of fairness applied to all parties, the turning of “square corners” in contests before the Board, the Commission and, indeed, all levels of government interaction with the people it serves. *Id.* at 5. A *Catch-22* scenario<sup>8</sup>—a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations—in which



<sup>8</sup> *Catch-22* graphic courtesy of Wikipedia

you can have the information you need only after the decision is made is not only unfair, it is insane.

BREDL was granted standing by the ASLB but its petition to intervene was unfairly dismissed. Based on the foregoing, BREDL hereby requests that the Commission reverse the Board's decision and admit Contention 2 for evidentiary hearing. Further, BREDL requests access to all relevant documents in this matter.

Respectfully submitted,

  
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Louis A. Zeller

September 4, 2020  
Date

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**CERTIFICATE OF SERVICE**

I hereby certify that the  
**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**  
has been filed through the Electronic Information Exchange system  
this 4<sup>th</sup> day of September, 2020.



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