UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-11-08

MEMORANDUM AND ORDER

This proceeding concerns the combined license (COL) application of Southern Nuclear Operating Company (Southern), for the proposed Vogtle Electric Generating Plant (Vogtle), Units 3 and 4. Our initial contested proceeding in connection with this application closed in June 2010.[1] A second licensing board was established in August 2010 after three public interest groups, the Blue Ridge Environmental Defense League, Georgia Women's Action for New Directions, and the Center for a Sustainable Coast (collectively, Appellants), sought admission of a new contention. The second board

[1] The proceeding closed upon the expiration of the time period for seeking review of the licensing board's grant of summary disposition on the sole remaining contention in that proceeding. *See* LBP-10-8, 71 NRC 433 (2010).

denied Appellants' request to admit this new contention.[2] Appellants now challenge the Board's decision.[3] For the reasons presented below, we affirm the Board.

I. BACKGROUND

In its decision, the Board recounts the procedural history of our contested proceeding on this license application, including the termination of that proceeding, and the designation of a second, new licensing board to consider Appellants' August 12, 2010, pleading.[4] As the Board explains, Appellants sought admission of a new contention, as follows:

> Safety Contention 2 (SAFETY-2):
>
> [Southern's COL application] fails to demonstrate that [Vogtle] Units 3 and 4 can be operated safely because the containment and containment-coating inspection regime proposed in the [Final Safety Analysis Report], *see* [COL application] at pp. 6.1-1 – 6.1-4, fails to provide assurance against corrosion-caused penetrations of the containment that would lead, in the event of an accident, to leakage to the environment of radioactive materials in excess of regulatory requirements.[5]

To support this contention, Appellants relied on a report prepared by Arnold Gundersen,[6] submitted to the NRC's Advisory Committee on Reactor Safeguards (ACRS) on April 21, 2010, and discussed during an ACRS subcommittee meeting held

---

[2] LBP-10-21, 72 NRC ___ (Nov. 30, 2010) (slip op.).

[3] *Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by Joint Intervenors* (Dec. 9, 2010) (Appeal).

[4] *Proposed New Contention by Joint Intervenors Regarding the Inadequacy of Applicant's Containment/Coating Inspection Program* (Aug. 12, 2010) (Attachments amended Aug. 13, 2010) (August 2010 Pleading).

[5] August 2010 Pleading at 4.

[6] Gundersen, Arnold, "Post Accident AP1000 Containment Leakage, An Un[-]reviewed Safety Issue" (Apr. 21, 2010) (Fairewinds Report), attached to August 2010 Pleading as Exh. 3.

on June 25, 2010, as well as on an affidavit by Mr. Gundersen discussing the same information.[7] In their August 2010 Pleading, Appellants argued that July 13, the date the transcript of this meeting became available, was the proper starting point for calculating the thirty-day window[8] for filing their proposed new contention, and that therefore their request was timely. Regarding our 10 C.F.R. Part 2 threshold requirements, their pleading addressed only the standards in § 2.309(f)(2), governing new or amended contentions.

The Board found that Appellants had standing, but that they did not satisfy the other rules governing the filing—our reopening standards, our standards governing nontimely intervention petitions, our contention admissibility standards, or—to the extent arguably applicable—our standards for new or amended contentions.[9] Appellants' timely appeal followed. Both Southern and the NRC Staff oppose the appeal.[10]

---

[7] *Declaration of Arnold Gundersen Supporting Blue Ridge Environmental Defense League's New Contention Regarding AP1000 Containment Integrity on the Vogtle Nuclear Power Plant Units 3 and 4* (Aug. 13, 2010) (Gundersen Affidavit).

[8] A thirty-day window is in line with our general practice in analogous situations (*see, e.g.*, *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007)). It also is consistent with the first *Vogtle* board's requirement that motions seeking the admission of new or amended contentions be filed within thirty days of the date the information that forms the basis for the contention becomes available. *See* (Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008), at 6 n.6 (unpublished)).

[9] The Board also granted Appellants' motion for leave to file its reply pleading out of time, based on the last-minute unexpected withdrawal of counsel. LBP-10-21, 72 NRC at ___ (slip op. at 13-14). The grant of this motion is not at issue on appeal.

[10] *See Southern Nuclear Operating Company's Brief in Opposition to Appeal* (Dec. 20, 2010) (Southern Answer); *NRC Staff Brief in Opposition to Petitioners' Appeal and Request for Oral Argument* (Dec. 20, 2010) (NRC Answer).

II. DISCUSSION

A. Preliminary Matters

Appellants, in their brief on appeal, adopt certain prior pleadings in the proceeding "by reference," arguing that "[a]ny consideration by the Commission must be made in context of the previous filings[,] with due consideration of the legal and factual arguments made in those filings."[11] Our rules, at 10 C.F.R. § 2.311(b), require briefs on appeal to conform to the requirements stated in 10 C.F.R. § 2.341(c)(2). Section 2.341(c)(2) limits briefs to thirty pages in length, absent Commission order directing otherwise.[12] Briefs on appeal should be comprehensive, concise, and self-contained; we will not augment Appellants' brief by incorporating "by reference" other pleadings or arguments contained in such other pleadings.[13] While we consider the entire record on appeal—including in this instance the pleadings Appellants ask us to adopt by reference—our decision responds to the arguments made explicitly in Appellants' appellate brief.[14]

---

[11] Appeal at 2 (identifying particular filings).

[12] The page count excludes tables of content and citation, appropriate exhibits, and statutory or regulatory extracts. *See* 10 C.F.R. § 2.341(c)(2).

[13] "[A]n issue is not properly briefed by incorporating by reference papers filed with the Licensing Board." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 924 n. 42 (1987) (citations omitted).

[14] *See also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 278 n.205 (2010).

Appellants also request—citing 10 C.F.R. § 2.343 but offering no justification to support the request—that we allow oral argument on this appeal.[15] Appellants have not shown how oral argument will assist us in reaching a decision, as is required.[16] And, in the face of a thorough written record containing adequate information on which to base our decision, we see no need for oral argument here.

B. Analysis

Resolution of this appeal turns on whether the Board erred in concluding that the Appellants' August 2010 Pleading did not satisfy our 10 C.F.R. § 2.326 reopening standards, our § 2.309(c) standards for nontimely filings, and our § 2.309(f)(1) contention admissibility standards. We agree with the Board that Appellants did not satisfy these standards and therefore affirm the Board's decision.

Like issues related to standing and contention admissibility, the question whether a pleading satisfies the requirements of § 2.326—and therefore justifies reopening a closed proceeding—is a threshold issue. In the absence of clear error or abuse of discretion, we defer to our boards' rulings on such threshold issues.[17] We will not sustain an appeal that fails to show a board committed clear error or abuse of discretion.

---

[15] Section 2.343 provides, "[i]n its discretion, the Commission may allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative." Appellants in this case are not "parties," but we need not reach the question whether this fact bars their request.

[16] *Shearon Harris*, CLI-10-9, 71 NRC at 251 (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993) and *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992)).

[17] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

Appellants make no such showing. Instead of "clearly identifying the errors in the decision below and ensuring that [their] brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for [their] claims,"[18] Appellants provide general arguments and conclusory statements asserting the substantive merits of their proposed contention. This is insufficient to support an appeal.

Appellants open their brief with general arguments that reframe the rejected contention in terms of compliance with the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). Appellants argue that the Board's decision to reject their proposed contention SAFETY-2 did not comply with the purposes of the AEA because the license application does not comply with the AEA's safety standards. Appellants assert that they "proved by . . . Affidavit and engineering report [of their expert,] Mr. Gundersen, that the 'structures, systems and components' of the reactors proposed for the Vogtle Plant are not adequate to prevent the accidental release of radioactive materials."[19] Appellants criticize the Board for appearing "to dismiss the new contention based on the experience of the members rather than on reports and studies already conducted, and certainly not on expert testimony in an evidentiary hearing."[20] Appellants maintain that the Board's decision to reject the contention did not comply with NEPA—even though NEPA compliance never was a part of the contention as

---

[18] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

[19] Appeal at 5.

[20] *Id*. at 14.

proposed—because the decision ignores the scenario for release of radioactive material postulated in SAFETY-2.

We make three observations with respect to these arguments. First, Appellants may not amend their contentions on appeal.[21] Therefore, to the extent Appellants' explanation alters or amends the proposed contention, the amendment must be rejected. Second, Appellants' conclusory statement that they "proved" their position is not sufficient to show clear error or abuse of discretion on the part of the Board. Third, the evaluation of a contention that is performed at the contention-admissibility stage should not be confused with the evaluation that is later conducted at the merits stage of a proceeding. At the contention-admissibility stage, a Board evaluates whether a petitioner has provided sufficient support to justify admitting the contention for further litigation. The facts and issues raised in a contention are not "in controversy" and subject to a full evidentiary hearing unless the proposed contention is admitted. Here, the Board applied our threshold reopening, nontimely filing, and contention admissibility standards to find that contention SAFETY-2 should not be admitted for hearing. In making this decision, the Board appropriately applied its technical and legal expertise to evaluate the proposed contention and the support provided for that contention. The Board properly took, as the starting point for this evaluation, the analysis of the proposed contention relative to our reopening standards.

---

[21] *See, e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 122-23 (2009).

1. Reopening Criteria

Our rules place a heavy burden on petitioners who ask to have a record reopened.[22] Section 2.326(a) makes it clear that a motion to reopen will not be granted unless all of the following criteria are satisfied:

> (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.[23]

Additionally, pursuant to § 2.326(b), "[t]he motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. . . . Each of the criteria must be separately addressed, with a specific explanation of why it has been met."[24] In their pleading proffering SAFETY-2, Appellants did not address this requirement. During oral argument, Appellants suggested the Board could fill in the blanks itself by examining the Gundersen Affidavit and the Fairewinds Report to find something to satisfy each of the § 2.326(a) criteria.[25] The Board "decline[d] this offer to hunt for information that the

---

[22] *E.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-69 (2008).

[23] 10 C.F.R. § 2.326(a).

[24] 10 C.F.R. § 2.326(b).

[25] Tr. at 35-36.

agency's procedural rules require be explicitly identified and fully explained."[26] We concur with the Board's decision on this point.

On appeal, Appellants claim that their August 2010 Pleading satisfied the requirements of § 2.326(b) because Mr. Gundersen is an expert in the appropriate disciplines for the contention and for the requirements of § 2.326(a).[27] It is true that those providing affidavits pursuant to § 2.326(b) must be competent individuals or appropriately qualified experts, and it also is true that Mr. Gundersen's status as an "expert[] in the disciplines appropriate to the issues raised" has not been challenged here.[28] But satisfying one part of § 2.326(b) is not enough. The balance of the rule also must be satisfied. The August 2010 Pleading could have been rejected solely on the basis of the Appellants' failure to comply fully with § 2.326(b).

As we have stated before, "the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention."[29] "New information is not enough . . . to reopen a closed hearing record at the last minute; the information must be significant and plausible enough to require reasonable minds to inquire

---

[26] LBP-10-21, 72 NRC at ___ (slip op. at 26) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC ___, ___ (Aug. 5, 2010) (slip op. at 31)).

[27] Appeal at 14.

[28] 10 C.F.R. § 2.326(b).

[29] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005). *See also Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC ___, ___ (Mar. 10, 2011) (slip op. at 4-5) (when an intervenor "seeks both to reopen the record and to submit a new contention" the intervenor must satisfy both the "deliberately heavy" burden that applies when an intervenor seeks to reopen a closed record and the "higher standard" that applies when an intervenor seeks to introduce new contentions after the regulatory deadline).

further."[30] This is equally true where, as here, not only has the evidentiary record closed, but the entire proceeding has closed.[31] "[T]o justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition."[32] In our view, the Board's decision gives thorough consideration to the explicit requirements for motions to reopen contained in § 2.326(a), addressing each requirement in turn and providing a reasoned basis for concluding that Appellants failed to satisfy each one.

With respect to the first of these—timeliness—the Board considered Appellants' claim that the thirty-day clock started on July 13, 2010, as well as countervailing claims that the contention could have been proffered as early as November 2008 (when the original intervention petitions were submitted) or shortly after September 2009 based on availability of the information cited and relied on in the Fairewinds Report.[33] To justify the timing of their pleading, Appellants relied on their interpretation of statements made by Mr. Harold Ray, Chairman of the ACRS subcommittee on the AP1000 design certification, at the subcommittee's July 13, 2010, meeting (during which Mr. Gundersen testified on the topic of the Fairewinds Report). On that occasion, Mr. Ray explained

---

[30] *Private Fuel Storage*, CLI-05-12, 61 NRC at 350.

[31] Appellants attempt to draw a distinction between this case and *Millstone,* CLI-09-5, 69 NRC 631, attaching significance to the fact that in *Millstone* the petitioners never had a contention admitted whereas here there was at one time an admitted contention. Appeal at 10. We find this distinction irrelevant. Here, as in *Millstone*, where the record has been closed, our strict reopening standards must be satisfied.

[32] *Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)).

[33] *See Southern Nuclear Operating Company's Answer to Proposed New Contention by Certain Former Joint Intervenors* (Aug. 23, 2010), at 11-16; *NRC Staff's Answer to Petition* (Sept. 2, 2010), at 10-11.

that some of the matters discussed by Mr. Gundersen were part of the ACRS's consideration of the proposed certified design, while some would be considered as part of the ACRS's review of the COL application.[34] Mr. Ray stated that the coating applied to the containment was "an important element of [the] whole system" and that Mr. Gundersen's "points . . . about accessibility for inspection are ones [the ACRS subcommittee had] yet to look at," and "that that would be taken up as part of the COL," rather than the design certification.[35] Appellants misinterpreted Mr. Ray's statements to mean that the question needed to be raised in a COL *adjudicatory* proceeding if it were ever to be considered,[36] and argued that Mr. Ray's statements constituted "new information" supporting a new contention. The Board rejected this argument and concluded that April 21, 2010, when the Fairewinds Report was made available to the ACRS, was the correct starting point.[37]

On appeal, Appellants reiterate their claim that "no one could have known" the ACRS chairman's opinion on the "proper forum" for considering containment coating and

---

[34] Transcript, Advisory Meeting on Reactor Safeguards (ACRS), Subcommittee on the Westinghouse AP1000 [Design Control Document] and Vogtle Units 3 and 4 [Combined License] (June 25, 2010), at 54-55 (ACRS Transcript), attached to August 2010 Pleading as Exh. 5.

[35] ACRS Transcript at 58.

[36] Consistent with 10 C.F.R. § 52.87, the ACRS conducted a separate review of the Vogtle COL application and the Staff's Advanced SER associated with the application, in parallel with its review of the AP1000 certified design. *See* Southern Answer at 13. *See generally Report on the Safety Aspects of the Southern Nuclear Operating Company Combined License Application for Vogtle Electric Generating Plant, Units 3 and 4* (Jan. 24, 2011) (ADAMS Accession No. ML110170008).

[37] The Board did not reach the question whether the contention could have been raised even earlier (as Southern and the NRC Staff maintained, *see supra*, n.33). *See* LBP-10-21, 72 NRC at ___ (slip op. at 23). This question is not before us today.

coating inspection issues prior to June 25, 2010.[38] Appellants now also characterize Mr. Gundersen's testimony before the ACRS as "generic," and argue that only after the transcript of the June 25 meeting became available did Mr. Gundersen analyze the specific ramifications of the report for the Vogtle COL application.[39] In other words, not until the transcript became available did Appellants' expert analyze the implications of the April 2010 Fairewinds Report—that is, his own report—for the Vogtle application. Appellants provide no justification for the delay.

Appellants characterize the process they employed in reaching their decision to file a new contention, as "the cumulative putting together [of] the pieces of the 'puzzle.'"[40] As they list them, the pieces of this "puzzle" are: the "preliminary analysis by Mr. Gundersen on containment flaws in the AP1000 reactors"; "the discussion of the issue with the members of the ACRS"; and "the subsequent specific analysis of the Vogtle program."[41] But the discussion with the ACRS members did not alter the technical

---

[38] Appeal at 11.

[39] *Id*. at 11.

[40] *Id*. at 12.

[41] *Id*. Appellants also point to NRC Information Notice 2010-12, "Containment Liner Corrosion" (June 18, 2010) (IN 2010-12) for the proposition "that even the NRC Staff had not realized the gravity of the problem and its widespread prevalence throughout the industry until some time after the filing of the new contention." Appeal at 12. Leaving aside the fact that the containment liner corrosion problems documented by the Staff in the information notice date to 2008 and 2009, the discussion in the notice does not appear, on its face, to be relevant to the AP1000 design. All three examples discussed in the information notice relate to containments where a steel liner is enclosed in a concrete shell. IN 2010-12 at 1-3. The information notice points out that "containment liner corrosion is often the result of liner plates being in contact with objects and materials that are lodged between or embedded in the containment concrete." IN 2010-12 at 4. In contrast, in the AP1000 design there is no concrete shell surrounding the steel containment—in fact, the absence of a concrete shell as a (continued . . .)

information available to Appellants, and the record reflects no reason why the Vogtle site-specific analysis could not have been accomplished immediately after, or concurrent with, the preparation of the Fairewinds Report. In short, we see no puzzle with missing pieces, but rather a failure on the part of Appellants to analyze diligently information readily available as of April 21, 2010, to determine its relevance to the Vogtle COL application.[42]

As the Board stated, petitioners "have an ongoing, independent responsibility to identify and interpose issues into [a] proceeding on a timely basis. . . . [Appellants] chose in April 2010 to present their . . . concerns to the ACRS without, as they could have, also seeking to introduce them into this proceeding for consideration as to whether they constituted an appropriate subject for further litigation."[43] We agree with the Board that as of April 21, 2010, Appellants had sufficient information to formulate their proposed contention SAFETY-2. As a result, the Board did not err in finding that Appellants' proposed contention, submitted four months later, was not timely, and that the first criterion of 10 C.F.R. § 2.326(a) was not satisfied.

We also agree with the Board that the second criterion of § 2.326(a)(1)—presentation of an exceptionally grave issue that should be considered even if

---

"secondary" barrier in the AP1000 is one of Mr. Gundersen's concerns. *See, e.g.*, Gundersen Affidavit at 3, ¶ 14, Fairewinds Report at 1-3, ACRS Transcript at 37-39.

[42] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC ___, ___ (Sept. 30, 2010) (slip op. at 14-15) (safety evaluation report did not add a "last piece" of information, but merely compiled and organized pre-existing information).

[43] LBP-10-21, 72 NRC at ___ (slip op. at 24).

untimely—was not satisfied.[44] On appeal, Appellants never explain how the Board's decision on this point was in error. Instead, they simply reiterate their view that the affidavit and supporting information they provided to the Board "clearly" demonstrated that the scenario raised in their proposed contention was "exceptionally grave in nature."[45] This conclusory language is not sufficient to support an appeal.[46]

Moreover, our review of the record supports the Board's conclusions. In his affidavit and in the Fairewinds Report, Mr. Gundersen reviewed historical problems with coatings applied to containments at currently operating reactors, critiqued the AP1000 containment design for, in his view, being a single barrier design, and questioned the adequacy of American Society of Mechanical Engineers (ASME) coating inspection programs. Neither Mr. Gundersen nor Appellants explained how historical problems with coating applications necessarily translate to coating or coating inspection problems for the Vogtle AP1000 containment. As the Board found, "the degree to which the information regarding current containment coating and inspection issues utilized in support of the [Fairewinds R]eport has any applicability to the AP1000 containment is far

---

[44] As the Board indicates, when a motion to reopen is untimely, the § 2.326(a)(1) "exceptionally grave" test supplants the § 2.326(a)(2) "significant safety or environmental issue" test. LBP-10-21, 72 NRC at ___ n.16 (slip op. at 25 n.16) (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988)).

[45] Appeal at 12. *See also Id*. at 15.

[46] *See, e.g.*, *Oyster Creek*, CLI-08-28, 68 NRC at 675-76; *Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 955-56 (1982) (citing *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 787 (1979)).

from clear, and certainly not compelling enough for us to consider this a matter that is 'exceptionally grave' within the meaning of section 2.326(a)(1)."[47]

Finally, we agree with the Board that the third reopening criterion—which requires a showing that there would have been a materially different result if the "new" information had been considered initially—also was not satisfied. Again, Appellants do not explain how the Board's decision regarding this criterion was in error. As the Board indicates, the information provided was not of a caliber sufficient to avoid a summary disposition motion.[48] Nothing in the Gundersen Affidavit or the Fairewinds Report links Appellants' concerns about the AP1000 design to the particulars of the Vogtle units in a way that merits resolution in this adjudicatory proceeding.

2. Criteria for Nontimely Filings

In addition to the three criteria listed in § 2.326(a) and the pleading specificity requirements in § 2.326(b), our reopening rule explicitly calls into play our rule governing nontimely filings. When a petitioner proposes a new contention after the record has closed, the petitioner must "address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing."[49] Section 2.326(d) provides that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy

---

[47] LBP-10-21, 72 NRC at ___ (slip op. at 25).

[48] *Id*. at 25. *See Oyster Creek*, CLI-08-28, 68 NRC at 674 (bare assertions and speculation are insufficient to support the heavy burden placed on the proponent of a motion to reopen to demonstrate that the motion should be granted).

[49] *Millstone*, CLI-09-5, 69 NRC at 124.

the requirements for nontimely contentions in § 2.309(c)."[50] Section 2.309(c), in turn, requires a balancing of eight factors.[51]

Five of these factors are at issue here.[52] The first of these is "good cause, if any, for the failure to file on time."[53] Next are the availability of other means of protecting the requestor's/petitioner's interest,[54] the extent to which other parties will represent the requestor's/petitioner's interests,[55] and "the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding."[56] The final factor at issue here is "the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record."[57]

These factors must be addressed with specificity.[58] Appellants' August 2010 Pleading did not address the requirements of § 2.309(c) and thus failed to satisfy its

---

[50] 10 C.F.R. § 2.326(d).

[51] 10 C.F.R. § 2.309(c)(i)-(viii).

[52] In its decision, the Board treated its decision to grant standing to the Appellants as resolving factors (ii), (iii), and (iv) of § 2.309(c)(1) in Appellants' favor because these factors track the standing requirements in § 2.309(d)(1)(ii), (iii), and (iv). LBP-10-21, 72 NRC at ___ (slip op. at 28). This determination is not at issue on appeal.

[53] 10 C.F.R. § 2.309(c)(1)(i).

[54] 10 C.F.R. § 2.309(c)(1)(v).

[55] 10 C.F.R. § 2.309(c)(1)(vi).

[56] 10 C.F.R. § 2.309(c)(1)(vii).

[57] 10 C.F.R. § 2.309(c)(1)(viii).

[58] 10 C.F.R. § 2.309(c)(2).

requirements.[59] Moreover, on appeal Appellants fail to show that the Board's analysis of § 2.309(c) was in error or constituted an abuse of discretion.

Of the eight factors, the Board accorded the greatest weight to the first factor—good cause—consistent with our case law.[60] The Board found its "reopening determination regarding . . . untimeliness . . . to be dispositive of the good cause showing here, particularly given that the delay in filing, albeit only three months, comes in the latter portion of this proceeding."[61] As a result, the "good cause" factor weighed against allowing the contention to be admitted. The Board found some support for Appellants' pleading in factors (v), (vi), and (vii), in that, assuming they offered an admissible contention, there are no other means to protect Appellants' interests, Mr. Gunderson appears to be able to assist in developing a sound record, and there are no other parties to represent Appellants' interests.[62] But the Board found that factor (viii) weighed against admission because the proposed contention would "clearly broaden[] the issues in the contested portion of this proceeding, which heretofore was closed, as well as potentially delay[] the proceeding while that matter is fully litigated."[63] Ultimately,

---

[59] As the Board pointed out, Appellants' failure to specifically address the § 2.309(c)(1) factors is a potentially fatal omission. LBP-10-21, 72 NRC at ___ n.18 (slip op. at 29 n.18) (citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993)).

[60] *See, e.g.*, *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 322-23 (2010).

[61] LBP-10-21, 72 NRC at ___ (slip op. at 28).

[62] *Id*. at ___ (slip op. at 29).

[63] *Id*.

the Board concluded that, on balance, application of the § 2.309(c)(1) factors did not support admission of the proposed contention.[64]

Appellants argue that they had good cause for their delay in submitting the proposed contention based upon their belief that their pleading was a timely response to the July 13 availability of the ACRS transcript. As discussed above, we reject Appellants' attempt to use the ACRS meeting, or its transcript, as an artificial bridge to extend the time in which a contention could be filed. We find no good cause justifying the nontimely filing of Appellants' contention. Moreover, the introduction of a new contention, well after the contested proceeding closed, would broaden the issues and delay the proceeding. We find no error in the Board's balancing of the § 2.309(c)(1) factors or in the Board's decision to deny admission of the nontimely contention.[65]

3. Contention Admissibility Standards

In addition to considering the filing as a motion to reopen and as a late petition, the Board also examined whether Appellants proffered an admissible contention under 10 C.F.R. § 2.309(f)(1). Once again, Appellants' August 2010 Pleading did not address these requirements. Our contention admissibility standards "are deliberately strict, and

---

[64] *Id*. at ___ (slip op. at 29-30).

[65] Appellants' August 2010 Pleading addressed the standards for admitting a new or amended contention, contained in § 2.309(f)(2) of our rules. In its decision, the Board suggests that this section may not apply here. We agree that it does not. At the time of Appellants' August 2010 Pleading, the contested portion of the proceeding was closed. There was, therefore, no proceeding in which to file a new or amended contention. Thus, Appellants' pleading was in reality a new intervention petition subject to 10 C.F.R. §§ 2.326, 2.309(c)(1), and 2.309(f)(1). The Board, "for the sake of completeness," assessed whether Appellants' pleading complied with the requirements of § 2.309(f)(2). The Board concluded that Appellants' failure to proffer their new contention in a timely manner after the Fairewinds Report was completed and provided to the ACRS meant that they did not satisfy § 2.309(f)(2)(iii). LBP-10-21, 72 NRC at ___ (slip op. at 31). We agree.

we will reject any contention that does not satisfy [our] requirements."[66] Section 2.309(f)(1) requires a request for hearing or petition for leave to intervene to explain proposed contentions with particularity.[67]

As the Board points out, "a contention that attacks a Commission rule, or [that] seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible."[68] Our rules, at 10 C.F.R. § 2.335, explicitly provide that "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding."[69]

With the requirements of § 2.309(f)(1) and the prohibition contained in § 2.335 in mind, the Board analyzed contention SAFETY-2, including the information presented in the Fairewinds Report and the Gundersen Affidavit. The Board concluded that SAFETY-2 was "not admissible in this proceeding because it improperly seeks to raise a challenge to aspects of the AP1000 standard design and NRC regulations regarding ASME inspections."[70] Appellants point to no specific error in the Board's decision. Instead, they complain generally that the Board "ignore[d] the reasoned analysis in the

---

[66] *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006).

[67] *See generally* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[68] LBP-10-21, 72 NRC at ___ (slip op. at 32) (citing 10 C.F.R. § 2.335(a); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85, 89 (1974)).

[69] 10 C.F.R. § 2.335.

[70] LBP-10-21, 72 NRC at ___ (slip op. at 41).

Gundersen Affidavit" and rehash Mr. Gundersen's concerns.[71] These conclusory statements are insufficient to support an appeal. We find no error in the Board's conclusions.

Fundamentally, as the Board found, Appellants raise matters outside the scope of this COL proceeding. Mr. Gundersen's concerns about the AP1000 containment directly implicate its physical design—and the physical design of the containment fits squarely within the AP1000 design certification rule. According to Mr. Gundersen, the AP1000's containment design, which consists of a thick steel vessel, is comparable to a single-hulled oil tanker rather than a double-hulled oil tanker.[72] Mr. Gundersen argued that, if the steel containment vessel were cracked, radioactive gases would vent directly into the atmosphere should the plant experience a loss of coolant accident.[73] As the Board pointed out, the details, including safety-related benefits, of the AP1000's containment vessel and passive containment cooling system are discussed extensively in the AP1000 design control document (DCD), and these design features have been part of the design during the ongoing AP1000 rulemaking since at least DCD revision 15, which the Commission adopted as a certified design.[74] As a result, the Board reasonably concluded that "challenging these features of the AP1000 standard design is

---

[71] Appeal at 13.

[72] Gundersen Affidavit at 6, ¶ 30. *See generally* AP1000 Rev. 17 DCD, Tier 2 Material, at 3.1-7 (ML083230298).

[73] Gundersen Affidavit at 6, ¶ 30.

[74] LBP-10-21, 72 NRC at ___ (slip op. at 36) (citing Westinghouse Electric Co., LLC, AP1000 Design Control Document, Tier 2 Material, at 1.2-15 (rev. 17, Sept. 22, 2008) (ML083230208), Tier 1 Material at 2.2.2-2 (ML083230175)), and 72 NRC at ___ n.23 (slip op. at 36 n.23). *See* 10 C.F.R. Part 52, App. D, "Design Certification Rule for the AP1000 Design."

a matter for a design certification rulemaking, . . . not a [COL application] proceeding."[75] We find no error in the Board's conclusion.

We also find no error in the Board's assessment of Appellants' liner coating and coating inspection argument. Mr. Gundersen charged that ASME inspection techniques are an inadequate methodology for monitoring containment integrity. He asserted that the common element, historically, in liner and containment failures, has been the failure of ASME inspection techniques to detect problems before a crack or hole has become a through-wall failure.[76] He asserted further that protective coatings on containment systems have a history of failure despite the industry's belief that such coatings are a reliable barrier.[77] The Board found that this aspect of Appellants' contention also was an improper challenge to our regulations.

Our regulations incorporate by reference ASME inspection requirements. As the Board noted,[78] 10 C.F.R. § 52.79(a)(11) requires a COL application to include "[a] description of the program(s), and their implementation, necessary to ensure that the systems and components meet the requirements of the ASME Boiler and Pressure Vessel Code and the ASME Code of Operation and Maintenance of Nuclear Power

---

[75] LBP-10-21, 72 NRC at ___ (slip op. at 36) (citing 10 C.F.R. §§ 52.63(a)(1) and 52.63(a)(5), and *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008)). We recently approved the proposed amendment to 10 C.F.R. Part 52, App. D for publication in the *Federal Register*. *See* AP1000 Design Certification Amendment, Proposed Rule, 76 Fed. Reg. 10,269 (Feb. 24, 2011).

[76] Gundersen Affidavit at 5, ¶ 27.

[77] *Id.* at 6, ¶ 28.

[78] LBP-10-21, 72 NRC at ___ (slip op. at 38).

Plants in accordance with [§] 50.55a."[79] As the Board also noted,[80] §§ 50.55a(b) and 50.55a(g)(4) (on inservice inspections) incorporate by reference the requirements of section XI of the ASME Boiler and Pressure Vessel Code. Finally, "the AP1000 DCD expressly requires that the containment vessel be subject to inservice inspections in accordance with ASME Code, section XI, subsection IWE."[81]

On appeal, Appellants maintain that Mr. Gundersen's affidavit raises issues specific to the Vogtle application: that there are problems with the field application of protective coatings; that "the contractor for the Vogtle Plant has a record of ignoring problems with field application of protective coatings"; that visual inspections at Vogtle will be insufficient; that the COL application "does not state whether Vogtle will seek exemptions from the [ASME] for limited exams in hard to access areas"; and that the Vogtle application's interpretation of the ASME code requirements is a problem.[82]

With respect to the first two of these complaints, we find no evidence that prior experience with field application of protective coatings or prior experience with a particular contractor indicates that future work to be performed at the Vogtle site will be unsatisfactory. To the extent that Appellants appear to assert that there will be future misdeeds, they fail to show a nexus between their generalized complaints, the details of the COL application, and prospective coating application or contractor behavior—that is,

---

[79] 10 C.F.R. § 52.79(a)(11).

[80] LBP-10-21, 72 NRC at ___ (slip op. at 38-39).

[81] LBP-10-21, 72 NRC at ___ (slip op. at 39) (citing AP1000 Rev. 17 Design Control Document, Tier 2 Material, at 3.2-12 (ML083230299)).

[82] Appeal at 13.

management character or integrity—at the Vogtle site. Without such a link, Appellants have raised no viable issue.[83]

The remaining complaints simply reiterate Appellants' dissatisfaction with our rules and with the ASME inspection programs required under our rules. As the Board's explanation makes clear, the ASME inspection requirements are integral to our regulations.[84] Consequently, we affirm the Board's conclusion that SAFETY-2's challenge to the adequacy of ASME inspection requirements is an impermissible challenge to our regulations.[85]

* *

While the Staff's appeal was pending, we received a series of substantively identical petitions, filed in multiple dockets, which requested, among other things, that

---

[83] *See, e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001) (for management integrity and character to be a viable contention, there must be a direct and obvious relationship between these issues and the challenged licensing action).

[84] LBP-10-21, 72 NRC at ___ (slip op. at 38-39) (citing 10 C.F.R. §§ 52.79(a)(11), 50.55a, 50.55a(b), and 50.55a(g)(4), and AP1000 Rev. 17 Design Control Document, Tier 2 Material, at 3.2-12 (ML083230299)).

[85] Appellants also argue that the Board should have admitted their proposed contention by asserting that: "the [Board] found in essence the proposed contention had merit as it pointed directly to flaws in the [COL application] concerning the Vogtle inspection program and monitoring of maintenance." Appeal at 7. But the Board made no such finding. Rather, the Board simply ruminates on whether it ever would be possible to formulate a contention regarding a COL application's description of an inspection plan, without challenging a certified design or other NRC regulation. The Staff believed it would be possible, although Appellants in this instance did not formulate a viable contention. Southern maintained that inspection plans are not subject to adjudication, but only to operational oversight. The Board expressed disagreement with Southern's opinion, which it considered inconsistent with AEA § 189(a) and with certain regulatory requirements. LBP-10-21, 72 NRC at ___ n.28 (slip op. at 39 n.28). However, the Board's discussion nowhere implies that Appellants' proposed contention had substantive merit.

we suspend "all decisions" regarding the issuance of COLs, pending completion of several actions associated with the recent nuclear events in Japan. Two of these petitions were served in this proceeding (even though the proceeding had closed).[86]

We granted the requests for relief in part, and denied them in part. In particular, we declined to suspend this—or any other— adjudication, or any final licensing decisions, finding no imminent risk to public health and safety, or to common defense and security.[87] The agency continues to evaluate the implications of the events in Japan on U.S. facilities, as well as to consider actions that may be taken as a result of lessons learned in light of those events. Particularly with respect to new reactor licenses, we observed that "we have the authority to ensure that certified designs and combined licenses include appropriate Commission-directed changes before operation."[88]

---

[86] One petition was filed jointly by the Blue Ridge Environmental Defense League (BREDL), Center for a Sustainable Coast, Georgia Women's Action for New Directions, Savannah Riverkeeper, Southern Alliance for Clean Energy (joint petitioners); the other was filed by BREDL alone. *See generally Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (Apr. 14, 2011) (amendment and errata, together with a clean petition incorporating those changes, filed Apr. 18, 2011) (joint petitioners); *Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (Apr. 18, 2011) (BREDL). Both the joint petitioners and BREDL submitted the *Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident* (Apr. 20, 2011).

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

[88] *Id.* at ___ (slip op. at 24).

III. CONCLUSION

For the reasons detailed above, the Board's decision is *affirmed*.

IT IS SO ORDERED.

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of September, 2011.