

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 52-014 and 52-015
	)	
(Bellefonte Nuclear Power Plant,	)	March 23, 2009
Units 3 and 4)	)	
	)	

**TVA’S ANSWER TO LATE-FILED CONTENTION NEPA-S**

In an order dated September 12, 2008, the Board rejected Intervenors’ proposed Contentions NEPA-L and NEPA-P on the grounds that they impermissibly challenged (1) the adequacy of the Commission’s Waste Confidence Rule in 10 C.F.R. § 51.23 on environmental impacts of temporary storage of spent nuclear fuel (“SNF”) after cessation of reactor operation, and (2) the adequacy of the Commission’s generic determination of the environmental impacts of the uranium fuel cycle as contained in Table S-3 in 10 C.F.R. § 51.51.<sup>1</sup> On March 9, 2009, the Intervenors filed “Joint Petitioners’ New Contention NEPA-S” (“Contention NEPA-S”), which again challenges the Waste Confidence Rule and Table S-3.<sup>2</sup> Contention NEPA-S is based on comments submitted by the Intervenors and others regarding an ongoing rulemaking related to: (1) a proposed update of the Waste Confidence Decision,<sup>3</sup> and (2) a proposed revision of the Waste Confidence Rule.<sup>4</sup>

<sup>1</sup> *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 NRC \_\_\_, slip op. at 60-62, 70-72 (Sept. 12, 2008).

<sup>2</sup> Contention NEPA-S at 4.

<sup>3</sup> Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

<sup>4</sup> Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) (“Proposed SNF Rule”).

The Tennessee Valley Authority (“TVA”) opposes the admission of Contention NEPA-S because it does not satisfy the late-filed contention requirements, it attempts to re-argue a contention that was previously rejected by the Board, and it impermissibly challenges existing rules and an ongoing rulemaking. Additionally, the Intervenor have not provided an adequate justification for their request to hold Contention NEPA-S in abeyance or refer it to the Commission.

## I. DISCUSSION

### A. Contention NEPA-S Does Not Satisfy the Late-Filed Contention Requirements

A late-filed contention must comply with 10 C.F.R. § 2.309(f)(2).<sup>5</sup> Section 2.309(f)(2) states that new contentions may only be filed with leave of the presiding officer after showing:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Contention NEPA-S does not satisfy any of these requirements.<sup>6</sup>

Contention NEPA-S pertains to the proposed revision to the Waste Confidence Rule and associated Waste Confidence Decision, which were published in the *Federal Register* on

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<sup>5</sup> Because Contention NEPA-S was filed after the date for submitting hearing petitions, Intervenor must also demonstrate that Contention NEPA-S satisfies 10 C.F.R. § 2.309(c)(1). *See* Memorandum and Order (Ruling on Request to Admit New Contention) at 5-6 (Oct. 14, 2008) (unpublished); *see also Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Intervenor have not addressed this regulation, and Contention NEPA-S should be rejected for that reason alone.

<sup>6</sup> Additionally, Contention NEPA-S is in noncompliance with other procedural requirements. Contention NEPA-S exceeds the 10-page limit established by the Board for new or amended contentions. *See* Memorandum and Order (Prehearing Conference and Status of General Schedule) at 3 (Nov. 10, 2008) (unpublished) (“General Schedule Order”). The Board has previously admonished the Intervenor for exceeding this limit. *See* Memorandum and Order (Ruling on Request to Amend Contention NEPA-N) at 6 n.3 (Jan. 26, 2009) (unpublished).

October 9, 2008.<sup>7</sup> The Board has stated that a motion to admit a new contention must be filed within 30 days of “the event that provides the triggering basis for submitting a new or amended contention.”<sup>8</sup> Therefore, to be considered timely, Contention NEPA-S should have been filed no later than November 2008. Contention NEPA-S is at least four months late, and should be rejected for failure to satisfy 10 C.F.R. § 2.309(f)(2)(iii).

The Intervenors claim that the trigger date should be February 6, 2009, the date on which they filed their comments on the ongoing rulemaking.<sup>9</sup> However, the trigger date is the date when the underlying information became available to the public, which certainly is not later than when the rulemaking became public.<sup>10</sup> In essence, the Intervenors are attempting to base the timeliness of a late-filed contention on a document that they prepared themselves. If this were allowed, then the time limits for late-filed contentions would be meaningless, because an intervenor always could prepare a document and then use that document as a basis for tolling the time limits for a new contention.

Furthermore, Contention NEPA-S does not satisfy the requirements in Section 2.309(f)(2)(ii) that the new information be materially different than the information previously available. In this regard, Intervenors argue that the information in Contention NEPA-S is materially different because it had not “previously been integrated into a single document.”<sup>11</sup>

However, contrary to Intervenors’ apparent belief, there is nothing in Section 2.309(f)(2) that

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<sup>7</sup> Waste Confidence Decision Update, 73 Fed. Reg. at 59,551; Proposed SNF Rule, 73 Fed. Reg. at 59,547.

<sup>8</sup> General Schedule Order at 3.

<sup>9</sup> Contention NEPA-S at 1, 10.

<sup>10</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 309 n.2 (2000) (indicating that the appropriate trigger date for a late-filed contention challenging an issue raised by rulemaking is the date the proposed rule is issued). Additionally, as the Commission has ruled, a late-filed contention “is not an occasion to raise additional arguments that could have been raised previously.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002).

<sup>11</sup> Contention NEPA-S at 10.

would allow a late-filed contention that merely “integrates” information that was previously available. Intervenors must show that the information contained in their contention “is materially different than information previously available.” Intervenors have not even attempted to make such a showing.

Finally, Intervenors have not made the showing required by 10 C.F.R. § 2.309(f)(2)(i) - - they have not shown that the information in Contention NEPA-S was not previously available. In this regard, Intervenors have only argued that their *comments* on the rulemaking were not previously available - - they have not attempted to show that the *information on which their comments were based* was not previously available. Since Section 2.309(f)(2)(i) refers to the availability of “information” and not of subsequent analysis and comments on the information, Contention NEPA-S does not comply with this requirement.<sup>12</sup>

In summary, Contention NEPA-S does not satisfy any of the requirements in 10 C.F.R. § 2.309(f)(2). Accordingly, the contention should be rejected.

**B. The Board Already Rejected a Similar Contention and the Intervenors Have Not Justified Reconsideration**

In Intervenors’ petition to intervene, Contention NEPA-L attacked the NRC’s Waste Confidence Rule, arguing that the NRC has not made an assessment “regarding the degree of assurance now available that radioactive waste generated by the proposed reactors ‘can be safely disposed of.’”<sup>13</sup> The Board rejected Contention NEPA-L as outside the scope of the proceeding and an impermissible challenge to a Commission regulation.<sup>14</sup>

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<sup>12</sup> The Commission recently stated that “a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC \_\_\_, slip op. at 15 (Mar. 5, 2009).

<sup>13</sup> Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy, at 69 (June 6, 2008).

<sup>14</sup> *Bellefonte*, LBP-08-16, slip op. at 61.

In Contention NEPA-S, the Intervenor again challenge the existing Waste Confidence Rule as well as the proposed revision to the Rule. Specifically, Contention NEPA-S argues that the “NRC has no technical basis for finding reasonable confidence that spent fuel can and will be safely disposed of at some time in the future.”<sup>15</sup> Thus, Intervenor’s Contention NEPA-S uses language almost identical to Contention NEPA-L, and Contention NEPA-S is nothing more than a thinly-veiled attempt to resurrect the previously rejected Contention NEPA-L. As such, it essentially constitutes a motion for reconsideration of Contention NEPA-L, without addressing any of the requirements for such a motion in 10 C.F.R. § 2.323(e) (*i.e.*, “compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid”).<sup>16</sup>

In this regard, the proposed revision to the Waste Confidence Rule does not constitute a compelling circumstance. The proposed revision does not call into question the adequacy of the existing Rule. The existing Rule provides a generic determination that spent fuel can be stored safely without significant environmental impacts for “at least 30 years beyond the licensed life for operation.”<sup>17</sup> The proposed revision “strengthen[s] [the Commission’s] confidence in the safety and security of SNF storage” and “confirm[s] the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.”<sup>18</sup> As a result, the proposed revision states that “the Commission no longer finds it useful to include this [30-year] time limitation in its

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<sup>15</sup> Contention NEPA-S at 4.

<sup>16</sup> Moreover, if Contention NEPA-S is treated as a motion for reconsideration, it is untimely since it was not filed within ten days, as required by 10 C.F.R. § 2.323(e).

<sup>17</sup> 10 C.F.R. § 51.23(a).

<sup>18</sup> Proposed SNF Rule, 73 Fed. Reg. at 59,548-549.

generic determination that SNF can be stored safely and without significant environmental impacts after the end of a reactor's licensed operation."<sup>19</sup>

Thus, the proposed revision extends the generic determination in the existing Rule until "a disposal facility can reasonably be expected to be available."<sup>20</sup> Since the proposed revision not only confirms but actually removes a limitation in the existing Rule, it does not provide "compelling circumstances" for reconsideration of the Board's ruling related to the Waste Confidence Rule. Accordingly, there is no basis for the Board to reconsider its previous ruling rejecting the admissibility of contentions related to the Waste Confidence Rule in this proceeding.

**C. Contention NEPA-S Impermissibly Challenges Existing Regulations and the Ongoing Rulemaking**

**1. Contentions that Challenge Existing Regulations or Ongoing Rulemaking Must Be Rejected**

Contention NEPA-S consists entirely of attacks on the existing Waste Confidence Rule and Table S-3,<sup>21</sup> and on the ongoing rulemaking related to the Waste Confidence Rule and the accompanying Waste Confidence Decision.<sup>22</sup>

As held by the Board in this proceeding, "[a] contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible."<sup>23</sup> This holding is supported by 10 C.F.R. § 2.335, which states that absent a waiver, "no rule or regulation of the Commission . . . is subject to attack by way of

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<sup>19</sup> *Id.* at 59,549.

<sup>20</sup> *Id.* at 59,551.

<sup>21</sup> Contention NEPA-S at 4-5, 10, Exhibit A.

<sup>22</sup> *Id.* at 1-10, Exhibit A.

<sup>23</sup> *Bellefonte*, LBP-08-16, slip op. at 15.

discovery, proof, argument, or other means in any adjudicatory proceeding.”<sup>24</sup> Similarly, the Commission has upheld the rejection of contentions that sought to litigate issues subject to a pending rulemaking.<sup>25</sup> Since Contention NEPA-S challenges existing rules and an ongoing rulemaking, it is inadmissible.

The Intervenors acknowledge this shortcoming with Contention NEPA-S. They state: “Joint Intervenors recognize that the issues raised by our Comments—and therefore by this contention—are generic in nature. Therefore we do not seek to litigate them in this individual proceeding.”<sup>26</sup> This concession by Intervenors alone supports rejection of Contention NEPA-S.

## **2. Contention NEPA-S Should Not Be Held in Abeyance**

The Intervenors suggest that “the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding.”<sup>27</sup> However, holding the contention in abeyance would not remedy the deficiencies of Contention NEPA-S, and there is no basis for holding a deficient contention in abeyance.

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<sup>24</sup> Even if Intervenors had requested a waiver, they would not qualify for one. The Commission has stated that “[w]aiver of a Commission rule is simply not appropriate for a generic issue.” *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 8 (2003) (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)). Similarly, the Commission has stated that a waiver may only be granted under circumstances that are “unique” to a facility rather than “common to a large class of facilities.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988)). As the Intervenors have admitted, nothing raised in Contention NEPA-S is unique to Bellefonte and this contention is entirely generic. *See* Contention NEPA-S at 3 (“Joint Intervenors recognize that the issues . . . are generic in nature.”).

<sup>25</sup> *See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 86 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998)).

<sup>26</sup> Contention NEPA-S at 3.

<sup>27</sup> *Id.*

The only argument that the Intervenor provide for holding Contention NEPA-S in abeyance is that if they are dismissed from this proceeding prior to completion of the rulemaking, then they “will be required to appeal the substantive issues raised by [their] contention before the issues are ripe.”<sup>28</sup> However, Intervenor’s argument is based upon a faulty premise. If the Board rejects this contention, then the Intervenor would be able to appeal the decision on admissibility of Contention NEPA-S, not any substantive issues raised in the contention.

Furthermore, the regulations and Commission precedent do not support holding Contention NEPA-S in abeyance. When a proposed contention attacks a Commission rule or raises an issue within the scope of a rulemaking proceeding, the appropriate response is to reject the contention as contrary to 10 C.F.R. § 2.335, not to hold it in abeyance. There is nothing in 10 C.F.R. § 2.335 that authorizes holding such a contention in abeyance pending completion of a rulemaking.<sup>29</sup> The Intervenor do not cite to any case law, and we are aware of none, that would allow a licensing board to hold such a contention in abeyance.<sup>30</sup> Additionally, holding Contention NEPA-S in abeyance would serve as an improper suspension of the entire proceeding if the rulemaking is not completed by the end of the proceeding.<sup>31</sup>

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<sup>28</sup> *Id.* at 3 n.1.

<sup>29</sup> 10 C.F.R. § 2.802(d) allows a person who submits a petition for rulemaking to “request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.” However, this regulation is of no assistance to the Intervenor, since the Intervenor did not submit a petition for rulemaking and have not submitted a request to the Commission to suspend this proceeding (nor have they justified such a request).

<sup>30</sup> Recently, the Commission declined to grant a request to hold a contention in abeyance because the contention was otherwise inadmissible. *See Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC \_\_\_, slip op. at 9-13 (Feb. 4, 2009); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466-67 (1982) (explaining that a licensing board is not authorized to conditionally admit contentions that do not meet the admissibility criteria). Contention NEPA-S suffers from this same defect.

<sup>31</sup> The Commission has characterized such suspensions of proceedings as a “drastic course of action” that is only warranted for “immediate threats to public health and safety.” *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000). The Commission has

The only circumstance under which the Commission has authorized a licensing board to hold a contention in abeyance is if a contention is submitted in a combined license (“COL”) proceeding and raises an issue encompassed by a pending design certification rulemaking that is incorporated by reference in the COL application.<sup>32</sup> The reason for this exception is to ensure that the contention is considered in the COL proceeding if the applicant decides to pursue a custom design instead of relying upon the pending design certification rulemaking.<sup>33</sup> Those circumstances are not present with Contention NEPA-S.

In summary, the Intervenors have not provided any legal basis for admitting Contention NEPA-S and then holding it in abeyance. Accordingly, Intervenors’ request should be denied.

### **3. Contention NEPA-S Should Not Be Referred to the Commission**

The Intervenors also argue that “[i]f the ASLB does not determine that it has the authority to admit the contention because it presents a challenge to a generic rule, we request the ASLB to refer the contention to the Commission.”<sup>34</sup> The Intervenors have not satisfied the requirements for referral of an issue to the Commission.

In general, the regulations state that the Commission will review a referred ruling only if it “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”<sup>35</sup> These circumstances are not present here. The issues raised by Contention NEPA-S are not novel, and in fact are resolved by 10 C.F.R. § 51.23 and Table S-3. Resolution of the issues also would not materially advance the

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expressed its reluctance to suspend proceedings given the “substantial public interest in efficient and expeditious administrative proceedings.” *Oconee*, CLI-99-11, 49 NRC at 339.

<sup>32</sup> Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

<sup>33</sup> *See id.* at 20,966.

<sup>34</sup> Contention NEPA-S at 3-4.

<sup>35</sup> 10 C.F.R. § 2.341(f)(1).

orderly disposition of the proceeding because, as acknowledged by the Intervenors, these issues are generic and should not be litigated in the Bellefonte COL proceeding. Indeed, by their request to hold the contention in abeyance the Intervenors would delay this proceeding, not advance it.

More specifically, 10 C.F.R. § 2.335(d) governs certification of contentions to the Commission that involve an attack on the Commission's regulations. That section authorizes certification only if there is a *prima facie* showing that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted. Intervenors have not made such a *prima facie* showing with respect to the Bellefonte COL proceeding, and therefore have not justified certification of this contention to the Commission.

## II. CONCLUSION

Contention NEPA-S does not satisfy the late-filed contention requirements, attempts to re-litigate a contention previously rejected by the Board, and impermissibly challenges existing rules and an ongoing rulemaking. Therefore, Contention NEPA-S should be rejected.

Respectfully submitted,

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Dated in Washington, D.C. this 23rd day of March 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2009 a copy of “TVA’s Answer to Late-Filed Contention NEPA-S” was filed electronically with the Electronic Information Exchange on the following recipients:

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