August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
STP NUCLEAR OPERATING COMPANY	)	Docket No. 50-498-LR and 50-499-LR
	)	
(South Texas Project Electric Generating Station Units 1 and 2)	)	
	)	

NRC STAFF ANSWER TO INTERVENOR'S PETITION FOR INTERVENTION TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT STP UNITS 1 & 2

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to Petition for Intervention to File a New Contention Concerning Temporary storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2 ("Petition")[1] filed by Sustainable Energy and Economic Development Coalition and Susan Dancer (collectively, "SEED" or "Petitioner"). The Petition raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the Petition should be denied because the Petition does not demonstrate standing to intervene pursuant to 10 C.F.R. § 2.309(d)(1)(i) and it fails to meet the standards for reopening a closed record, as required by 10 C.F.R. § 2.326.

However, should the Commission determine that standing and the reopening standards have been met; the Staff considers the new contention to be admissible assuming the

[1] *See* Petition for Intervention to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2 (July 9, 2012) ("Petition") (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A392).

Commission issues its ruling after the D.C. Circuit issues the mandate in *State of New York*. But, if the Commission rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Commission should dismiss it without prejudice to timely refiling upon issuance of the court's mandate.

BACKGROUND

I. Procedural History

This proceeding arises out of the application of South Texas Project Nuclear Operating Company ("Applicant" or "STPNOC") to renew its operating licenses for South Texas Project ("STP") Electric Generating Station Units 1 and 2.[2] STP Units 1 and 2 are located near the city of Wadsworth, in Matagorda County, Texas. STP Units 1 and 2 are pressurized water reactors, designed by Westinghouse Electric Corporation. The current license for STP Unit 1 expires on August 20, 2027, and the current license for STP Unit 2 expires on December 15, 2028. STP's LRA seeks authorization to allow each unit to operate for an additional 20 years beyond the period specified in the current license.[3]

On December 9, 2010, the NRC published a notice of receipt of the STP LRA.[4] On January 13, 2011, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.[5] The notice of acceptance for docketing stated that petitions for leave to intervene and requests for hearing were due within 60 days. The 60-day

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[2] Letter from G. T. Powell, Vice President, Technical Support and Oversight, South Texas Project Electric Generating Station, STP Nuclear Operating Company, dated October 25, 2010, transmitting application for license renewal for STP Units 1 and 2, operating licenses NPF-76 and NPF-80, respectively (ADAMS Accession No. ML103010256) ("LRA" or "Application").

[3] LRA at 1.1-13.

[4] STP Nuclear Operating Company; Notice of Receipt and Availability of Application for Renewal of South Texas Project, Units 1 and 2 Facility Operating Licenses Nos. NPF-76 and NPF-80 for an Additional 20-Year Period, 75 Fed. Reg. 76,757 (Dec. 9, 2010).

[5] Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. Nos. NPF-76 and NPF-80 for an Additional 20-Year Period, STP Nuclear Operating Company, South Texas Project, Units 1 and 2, 76 Fed. Reg. 2,426 (Jan. 13, 2011).

period for filing ended on March 14, 2011. On March 14, 2011, and in accordance with the NRC E-Filing rule, SEED and Susan Dancer jointly filed a petition for leave to intervene.[6] SEED sought representational standing on behalf of SEED member Susan Dancer in this proceeding.

On March 23, 2011, an Atomic Safety and Licensing Board ("Board") was established to rule on petitions for leave to intervene and hearing requests, and to preside over any proceeding that may be held in this matter.[7]

In its decision published on August 26, 2011, the Board found that SEED had established representational standing,[8] but that none of the four contentions submitted by SEED Coalition was admissible.[9] Order at 7 and 27. SEED was notified by the Board that it had 10 days from the service of the Order to file an appeal with the Commission pursuant to 10 C.F.R. § 2.311.

The deadline for filing an appeal of the Board's decision with the Commission has passed without SEED submitting an appeal.

On June 18, 2012, SEED filed "Petition to Suspend Final Decisions in All Pending Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings" behalf of Ms. Dancer[10] before the Commission.

II. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in

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[6] *See* Petition to Intervene at 1.

[7] South Texas Project Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board, 76 Fed. Reg. 17,460 (Mar. 29, 2011).

[8] The Board acknowledged standing by the Petitioners but would have required SEED to provide Ms. Dancer's address before moving forward. Order at 6-7.

[9] *STP Nuclear Operating Co.* (South Texas Project Electric Generating Station Units 1 and 2), LBP-11-21, 74 NRC __ (Aug. 26, 2011)(slip op.) ("Order").

[10] Petition to Suspend Final Decisions In All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (ADAMS Accession No. ML12170A905).

productive harmony." 42 U.S.C. § 433(a). NEPA requires the NRC to prepare an environmental impact statement ("EIS") to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report ("ER") as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *State of Minnesota v. NRC*, 602 F.2d 412, 414-415, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("Waste Confidence Decision") and a temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. *See* Petition at 4; 10 C.F.R. § 51.23(a). The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" from

any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

DISCUSSION

I. Standing to Intervene

The Board discussed the Commission's standards governing standing in ruling on SEED's initial contentions. Order at 4-5. In addition, Commission case law provides that a petitioner who is admitted as a party in one proceeding must re-establish standing once the original proceeding is dismissed -- he may not simply rely on standing established in the prior proceeding. *Texas Utils. Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993).[11]

In its Petition, SEED seeks representational standing in this proceeding.[12] Ms. Dancer appears to seek participation as a member of SEED and not in an individual capacity. SEED states that it is a non-profit organization based in Austin, Texas, that advocates for safe energy alternatives with members who reside within 50 miles of STP Units 1 and 2.[13] It designated Susan Dancer as its member on whose behalf it seeks to intervene.[14] Susan Dancer states that she resides in Blessing, Texas, approximately ten miles from the STP Units 1 and 2,[15] No

[11] In *Comanche Peak*, the Petitioner had been admitted as a party to the Comanche Peak Unit 2 operating license proceeding, and was later withdrawn from the proceeding by request. CLI-93-4, 37 NRC at 158-59. The proceeding then continued until the parties reached a settlement agreement dismissing the operating license proceeding. *Id*. at 159. The Petitioner filed a petition for late intervention in the same proceeding, and subsequently filed a petition asking the Commission for the opportunity for a new hearing, both of which were denied. *Id*. Afterward, the Petitioner filed yet another petition for late intervention. *Id*. The Commission determined that the Petitioner had not demonstrated that it had standing based on the documents filed in its previous attempt to re-intervene, and that the petition was thus deficient. *Id*. at 163. However, the Commission declined to rely on that flaw to dismiss the petition, instead relying on the Petitioner's failure to meet other requirements. *Id.*

[12] Petition at 1 and 3.

[13] *Id*. at 1.

[14] *Id* at 1 and 3.

physical address is given by Ms. Dancer. [16] SEED, however, provides an old affidavit of Ms. Dancer dated "June __ 2012" and entitled "Standing Declaration in Support of Motion to Suspend Licensing Decisions."[17] The affidavit authorizes SEED to represent Ms. Dancer in the Motion for Suspension but makes no mention that she authorizes SEED to represent her in a hearing in support of any specific contentions.[18] Additionally, paragraph five of Ms. Dancer's affidavit states, "Therefore, I have authorized the SEED Coalition to request the U.S. Nuclear Regulatory Commission to suspend the licensing decision for South Texas Units 1 & 2 unless and until it has completed analyses of the environmental impacts of spent fuel storage that were ordered by the U.S. Court of Appeals in the *State of New York v. NRC,* Nos. 11-1045, on June 8, 2012." Ms. Dancer's affidavit does not authorize SEED to file a petition to intervene and request a hearing on a contention, but rather authorizes SEED to represent her in the suspension request. As a result, SEED cannot show that it has been authorized to represent Ms. Dancer for its petition for hearing on a contention on her behalf. Consequently neither SEED nor Ms. Dancer should be granted standing to intervene.

II. Motions to Reopen

For its proposed new contention to be considered, SEED Coalition must satisfy the motion to reopen criteria in § 2.326 in addition to the contention admissibility criteria. As explained below, SEED Coalition's failure to address the factors of § 2.326 is fatal to its Petition.

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[15] Standing Declaration in Support of Motion to Suspend Licensing Decisions, dated June ___, 2012 (ADAMS Accession No. ML12191A391). This undated document appears to be the identical affidavit filed in the prior motion.

[16] The physical address at which she resides, is a criterion required under 10 C.F.R. § 2.309(d)(1)(i). Since, Ms. Dancer has not presented this information, SEED and Ms. Dancer should not be entitled to a presumption of standing in this license renewal proceeding. However, as stated before on footnote number 8, the Board in this proceeding argued that Ms. Dancer need not give her exact address as this would be inconsistent with the Commission's hearing notice warning that she not provide any personal privacy information. Furthermore, the Board reasoned that if it found one of the proposed contentions admissible, the Board could later require her to provide the address in a manner consistent with maintaining the confidentiality of the information. Order at 7.

[17] Petition at 3 and attached affidavit.

[18] *Id*.

Because the Board has terminated the proceeding, SEED cannot simply file a new contention, but rather, it must move to reopen the record. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-11-4, 73 NRC __, __ (slip op. at 40) (Feb. 24, 2011); *see Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 2-3, 5) (Sept. 27, 2011). Where the record of a proceeding is closed, a pleading that addresses only the § 2.309(f) standards but not the § 2.326 standards should be rejected. *See Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 2-3, 5). Licensing boards do not need to "hunt for information" in a pleading to find something to satisfy each of the § 2.326 criteria, which the rules explicitly require to be identified and fully explained. *Id.* at __ (slip op at 8-9). The Commission has noted that its "rules place a heavy burden on petitioners who ask to have a record reopened," and that a pleading "could have been rejected solely on the basis of the Appellants' failure to comply fully with § 2.326(b)." *Id*. (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-69 (2008)); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 125-26 (2009) (motion to reopen's failure to address the late-filing standards was "reason enough to reject" the proposed contentions). As SEED Coalition does not move to reopen the record or address any of the § 2.326 criteria, its proposed contention should be rejected.

III. Contention Admissibility

In the event the Commission finds that the standing and reopening standards have been met, the Staff has considered the admissibility of the contention under the general admissibility criteria of § 2.309(f)(1)and § 2.309(f)(2).

The Petitioner's proposed contention is based on the D.C. Circuit Court of Appeals' recent decision in *State of New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed

contention states as follows:

> The Environmental Report for STP Units 1 & 2 does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v. NRC,* No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

Petition at 6. At root, the Petition asserts that because the generic findings in the Commission's rulemaking have been vacated, "the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings." Petition at 4.

Although this new contention was filed after the initial deadline for submitting contentions in this proceeding, the Petitioners assert that they meet the standards of § 2.309(f)(2) for late-filed contentions. Petition at 9-10. Considering the holding of the D.C. Circuit and that the Petition was filed within 30 days of the ruling, the Staff agrees that the Petitioners have sufficiently demonstrated the timeliness of their filing under that regulation.

In ruling on SEED's initial contentions, the Board discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. Order at 8-9. The Petitioners recognize that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Petition at 4. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect..." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id*. at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court

decisions for which a mandate had not issued. *E.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[19] As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[20] *Id*. at 205.

Under the Federal Rules of Appellate Procedure, a "court's mandate must issue 7 days after the time to file a petition for rehearing expires or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later." FED. R. APP. P. 41(b). On July 6, 2012, at the Commission's request, the D.C. Circuit extended the period of time to file a petition for rehearing of *New York v. NRC* to August 22, 2012. *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate is not likely to issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require denial of the Petitioners' contention until the court issues the mandate. *Seabrook*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when the Commission rules on the Petition.[21]

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[19] *But see*, *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued," "...we have deferred our rulings on these requests").

[20] The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.' " *Pacific Gas & Elect. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

[21] *See* 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production

If the D.C. Circuit's mandate issues before the Commission rules on the contention's admissibility, upon the mandate's issuance, the contention as pled would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. *See* Petition at 7-9. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court's ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 345 (''[L]icensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

If the D.C. Circuit's mandate has not issued by the time the Commission rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Petition at 6-7, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If the Petitioners refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be admissible provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f) (2); *Oconee*, CLI-99-11, 49 NRC at 345.

CONCLUSION

For the foregoing reasons, the Petition should be denied because it fails to meet the

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and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding").

standards for establishing standing in 2.309(d)(1)(i) and reopening a closed record in 10 C.F.R. § 2.326. If the Commission determines that standing and reopening standards have been met, the Staff considers the new contention to be admissible assuming the Commission issues its ruling after the D.C. Circuit issues the mandate in *State of New York*. However, if the Commission rules before the mandate issues, then the Commission's existing regulations bar admission of the contention, and the Commission should dismiss it without prejudice to timely refiling upon issuance of the court's mandate. Finally, the admission of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO INTERVENOR'S PETITION FOR INTERVENTION TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT STP UNITS 1 & 2," have been served on the following by Electronic Information Exchange this 2nd day of August, 2012.

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