August 3, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Union Electric Co.	)	50-483-LR
	)	
(Callaway Plant Unit 1)	)	

NRC STAFF'S ANSWER TO MISSOURI COALITION FOR THE ENVIRONMENT'S MOTION FOR LEAVE TO FILE NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's July 26, 2012, Order (Extending Time to Answer Motion to Admit New Contention), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the "[The Missouri Coalition for the Environment's ("MCE")] Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway Nuclear Power Plant (July 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A359)("Petition"). The Petition raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the new contention would be admissible if the Board rules on it after the D.C. Circuit issues the mandate for that decision. But, if the Board rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Board should dismiss it without prejudice to timely refiling upon issuance of the court's mandate.

BACKGROUND

A. Procedural History

On December 15, 2011, Ameren filed an application to renew the Callaway operating license for an additional 20 years from its current expiration date of October 18, 2024.[1] On April 24, 2012, MCE filed a timely request for hearing and petition to intervene. *See* Missouri Coalition for the Environment's Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Apr. 24, 2012) (ADAMS Accession No. ML12115A371)("Initial Petition"). On May 21, 2012, the Staff and Ameren filed answers opposing MCE's hearing request and intervention petition on the grounds that MCE had submitted no admissible contentions. *See* NRC Staff's Answer to Missouri Coalition for the Environment's Hearing Request and Petition to Intervene (May 21, 2012) (ADAMS Accession No. ML12142A368); Ameren's Answer Opposing Missouri Coalition for the Environment's Hearing Request and Petition to Intervene (May 21, 2012) (ADAMS Accession No. ML12142A158).

On July 9, 2012, MCE filed the instant Petition based upon *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). Subsequently, on July 18, 2012, the Board ruled that although MCE had demonstrated standing to intervene, the three contentions in its Initial Petition were inadmissible. *See* Licensing Board Memorandum and Order (Ruling on Standing and Hearing Petition Contention Admissibility), LBP-12-15, __ NRC ___ (2012) (ADAMS Accession No. ML12199A376) (slip op. at 2).

On July 23, 2012, the Board issued an Order requiring the Staff and Ameren to show cause why MCE's Petition should not be deemed conceded/unopposed. *See* Memorandum

[1] *See* Callaway Plant Unit 1, Facility Operation License NPF-30, License Renewal Application (Dec. 15, 2011) (ADAMS Accession No. ML113530372); Callaway Plant Unit 1 Applicant's Environmental Report, Operating License Renewal Stage (Dec. 15, 2011) (ADAMS Accession No. ML113540349).

and Order (Request to Show Cause as to Why New Contention Motion Should Not Be Deemed Conceded/Unopposed)" (unpublished) (ADAMS Accession No. ML12206A401). Both Ameren and the Staff timely responded to that Order. *See* Ameren's Response to Request Show Cause and Ameren's Unopposed Motion for Extension (July 24, 2012) (ADAMS Accession No. ML12206A608); NRC Staff's Response to Request to Show Cause as to Why New Contention Should Not Be Deemed Conceded Unopposed (ADAMS Accession No. ML12209A159).

On July 26, 2012, the Board extended the time for Ameren and the Staff to answer MCE's Petition. *See* Order (Extending Time to Answer Motion to Admit New Contention) (July 26, 2012) (ADAMS Accession No. ML12208A229) at 2.

B. 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 productive harmony." 42 U.S.C. § 4331(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. *Minnesota v. NRC*, 602 F.2d 412, 414-15, 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

MCE based the proposed contention on the D.C. Circuit Court of Appeals' recent decision in *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 Callaway 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, the license may not be renewed.

Petition at 4. 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 the contention was filed after the initial deadline for submitting contentions in this proceeding, MCE asserts that it meets the standards of § 2.309(f)(2) for late-filed contentions. Petition at 6-7. Considering the holding of the D.C. Circuit and that the Petition was filed within 30 days of the ruling, the Staff agrees that MCE has sufficiently demonstrated the timeliness of their filing under that regulation and consistent with the Board's May 4, 2012 Initial Prehearing Order.

Under 10 C.F.R. § 2.335(a) a licensing board may not admit any contention that challenges a Commission rule or regulation, unless a waiver is requested under 10 C.F.R. § 2.335(b). Absent issuance of the court's mandate vacating 10 C.F.R. § 51.23(a), MCE's contention is a challenge to a Commission regulation and barred by § 2.335(a). MCE recognizes this stating that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Petition at 2. 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 Elec. Illuminating Co.* (Perry Nuclear Power Plant,

Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[2] 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.[3] *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 to seek rehearing). As a result, under Rule 41(b), the mandate will not likely 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 the Board to exclude MCE's contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when this Board rules on the Petition.[4]

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[2] *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").

[3] 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 & Elec. 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.

[4] *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 (continued. . .)

If the D.C. Circuit's mandate issues before the Board 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 4-6. 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 ("'Licensing 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 Board 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 4, 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 MCE refiles 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.

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

CONCLUSION

For the foregoing reasons, the Staff agrees with MCE that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *New York v. NRC*. However, if the Board rules before that time, the contention must be rejected as an impermissible challenge to NRC regulations. 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,

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO MISSOURI COALITION FOR THE ENVIRONMENT'S MOTION FOR LEAVE TO FILE NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE" in the above captioned proceeding have been served upon the following by the Electronic Information Exchange, this 3rd day of August, 2012:

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