UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-498-LR
STP NUCLEAR OPERATING COMPANY	)	50-499-LR
	)	
(South Texas Project, Units 1 and 2)	)	August 3, 2012

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

I. INTRODUCTION

On July 9, 2012, Sustainable Energy and Economic Development Coalition ("SEED") submitted its "Petition for Intervention to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2" ("Petition" or "Proposed Contention"). Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC's Waste Confidence Decision ("WCD") and Temporary Storage Rule ("TSR") update,[1] the Proposed Contention claims that the Environmental Report ("ER") for renewal of the Operating Licenses ("OLs") for STP Units 1 and 2 omits 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."[2] Other groups filed essentially-identical contentions on the same day in numerous other licensing proceedings.

Pursuant to 10 C.F.R. § 2.309(h), STP Nuclear Operating Company ("STPNOC") files this Answer opposing the Proposed Contention. As demonstrated below, the Proposed

1 *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

2 Petition at 6.

Contention should be rejected as a threshold matter because SEED improperly filed it with the Board, which no longer has jurisdiction over this proceeding.[3] Additionally, the Proposed Contention fails because the record is closed in this proceeding, and SEED did not submit a motion to reopen the closed record, contrary to 10 C.F.R. § 2.326. Moreover, even if SEED had submitted one, such a motion to reopen is without basis.

SEED also fails to satisfy the Commission's 10 C.F.R. §§ 2.309(f)(2) and (c)(1) timeliness requirements. The D.C. Circuit has not issued a mandate in *New York* and, therefore, the *New York* decision has no legal effect in this proceeding. Accordingly, SEED has not demonstrated that the information upon which the Proposed Contention is based is materially different than information previously available, nor has SEED demonstrated that the non-timely factors weigh in favor of considering the Proposed Contention at this time.

In addition, the Proposed Contention should be rejected because SEED fails to satisfy the Commission's 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. Specifically, because the D.C. Circuit has not issued a mandate in *New York*, the Proposed Contention lacks legal basis and constitutes an impermissible challenge to the TSR, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a). Additionally, even if the D.C. Circuit's mandate issues, the Proposed Contention should be rejected because longstanding Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes the admission of a contention that concerns an issue that is, *or is about to become*, the subject of a rulemaking. The Commission's longstanding practice is to address long-term waste storage issues generically through rulemaking. Finally, to the extent any uncertainty exists on these issues, the Board should certify an appropriate question to the

[3] Although SEED improperly filed the Proposed Contention with the Board, STPNOC files this Answer with the Board in recognition that every tribunal has the inherent authority to determine, in the first instance, its own jurisdiction. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980).

Commission pursuant to 10 C.F.R. § 2.319(l), rather than admit the Proposed Contention or hold it in abeyance.

II. BACKGROUND

A. STP Units 1 and 2 Proceeding

The STP Units 1 and 2 OLs expire at midnight on August 20, 2027 and December 15, 2028, respectively.[4] On October 25, 2010, STPNOC submitted its License Renewal Application, requesting that the NRC renew the OLs for STP Units 1 and 2 for an additional 20 years; *i.e.*, until midnight on August 20, 2047 and December 15, 2048, respectively.[5] SEED filed a Petition to Intervene on March 14, 2011.[6] On August 26, 2011, the Board ruled that SEED had failed to proffer an admissible contention, and therefore denied the Petition to Intervene.[7]

B. Waste Confidence

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[8] the Commission issued its initial WCD and TSR.[9] Since that time, the TSR has made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in any reactor licensing proceeding.[10] The Commission has thus clearly and consistently chosen to address

---

4 Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Numbers 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. 2426, 2426 (Jan. 13, 2011) ("Hearing Notice").

5 *Id.*

6 *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 1 & 2), LBP-11-21, 74 NRC __, slip op. at 2 (Aug. 26, 2011).

7 *Id.* at 2, 27.

8 *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

9 *See Rulemaking on the Storage and Disposal of Nuclear Waste* (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

10 *Compare* Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. at 34,694, *with* 10 C.F.R. § 51.23(b).

waste storage issues generically through the TSR instead of litigating issues in individual licensing proceedings.[11]

In response to an October 2008 proposed revision to the WCD and TSR,[12] SEED and several non-parties submitted comments on the proposed revisions.[13] After considering public comments, the Commission issued the WCD and TSR revisions in December 2010.[14]

Four states, an Indian community, and several environmental groups (but not SEED) challenged that rulemaking in the D.C. Circuit. On June 8, 2012, the D.C. Circuit issued a decision in *New York v. NRC*, vacating and remanding the WCD and TSR update. No mandate, however, has issued and parties are still evaluating their options, including potentially seeking rehearing or rehearing en banc.[15]

Notwithstanding the still-evolving developments in *New York*, on June 18, 2012, SEED filed a petition with the Commission in response to that decision requesting suspension of final

---

[11] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (2010) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

[12] Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008).

[13] Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, Blue Ridge Environmental Defense League, C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by 2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, Southern Alliance for Clean Energy, and the Sustainable Energy and [Economic] Development Coalition Regarding NRC's Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations (Feb. 6, 2009), *available at* ADAMS Accession No. ML09068091.

[14] Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

[15] *See New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc).

licensing decisions in pending proceedings and additional public participation opportunities.[16] Both STPNOC and the NRC Staff responded to the petition on June 25, 2012.[17] That petition remains pending before the Commission.

III. LEGAL STANDARDS

As discussed below, SEED must satisfy the requirements in: (1) 10 C.F.R. § 2.326 for reopening the record; (2) 10 C.F.R. §§ 2.309(f)(2) and (c), governing timeliness of late-filed contentions; and (3) 10 C.F.R. § 2.309(f)(1) to demonstrate contention admissibility. Failure to satisfy any of these requirements compels the rejection of the Proposed Contention.[18]

A. Licensing Board Jurisdiction over Adjudicatory Proceedings

A licensing board has jurisdiction only over those matters that the Commission commits to it in the hearing notice and referral order that identifies the subject matters of the hearing.[19] Once a licensing board denies a petition to intervene and the period in which the Commission could exercise its right to review the record expires, jurisdiction passes back to the Commission, including jurisdiction over any new petitions, contentions, or motions.[20]

---

16 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012). This petition was filed in numerous other proceedings as well.

17 STP Nuclear Operating Company's Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012); NRC Staff's Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012).

18 *See, e.g.*, *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, slip op. at 6-7 (June 7, 2012) (stating that contentions must meet the "strict contention standards under 10 C.F.R. § 2.309(f)," including the admissibility and timeliness standards).

19 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985)).

20 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35 (2006) (finding a motion improperly filed with the licensing board because "the Board has already dismissed the case and no longer has jurisdiction over the matter"); *Metro. Edison Co.* (Three Mile Island Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1326-27 (1982) (holding that a licensing board retains jurisdiction over a matter "at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or an appeal board can exercise its right to review the record"); *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), Docket Nos. 52-027-COL & 52-028-COL, Order (Regarding Mr. Wojcicki's February 27, 2009 Filing; Notice of Termination of

B. Requirements to Reopen the Record

As noted above, the Board denied SEED's previous petition to intervene filed in this proceeding and, therefore, SEED is not a party to this proceeding. In fact, there is no active contested proceeding. Under very similar circumstances—where a Board already denied a petition to intervene—the Commission held that a petitioner seeking to file a new petition or seeking to submit new or amended contentions must address the standards for motions to reopen.[21] The requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

> (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.[22]

In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent."[23] As part of this burden, the request

---

Proceeding), at 1 (Mar. 3, 2009) (unpublished) (holding that order denying petitions to intervene "had the substantive effect of terminating the . . . proceeding before the Board").

[21] *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (holding that, when the Board has "already denied the intervention petition, a motion to file new or amended contentions must address the motion to reopen standards") (internal quotations omitted); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 37 (2006) (applying reopening factors to new contentions filed after petition to intervene had been denied); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-1, 35 NRC 1, 3, 7 (1992) (applying reopening factors to new contentions filed after adjudicatory proceedings dismissed pursuant to settlement).

[22] 10 C.F.R. § 2.326(a); *see also Va. Elec. & Power Co.* (Combined License for North Anna Unit 3), CLI-12-14, 75 NRC __, slip op. at 11 (June 7, 2012) ("The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last 'live' contention, and of holding new contentions to the higher 'reopening' standard."). Although the Commission once held that only a "party" may move to reopen a closed record, in a subsequent decision the Commission indicated that a non-party may seek late intervention by addressing both the standards for late intervention in 10 C.F.R. § 2.309(c) and the standard for reopening the record in 10 C.F.R. § 2.326(a). *See Millstone*, CLI-09-5, 69 NRC at 124.

[23] Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

to reopen must be accompanied by an affidavit that separately and specifically supports each of the applicable criteria in Section 2.326(a).[24]

C. Timeliness Requirements

Pursuant to the Hearing Notice and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired over a year ago. Therefore, the Proposed Contention must satisfy 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), which govern nontimely requests and/or petitions and contentions. SEED bears the burden of successfully addressing the "stringent" non-timely criteria.[25]

A late-filed contention must meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) through (iii), which provide that a petitioner may submit a new or amended contention only with leave of the presiding officer upon a showing that:

> (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.

Section 2.309(c) sets forth an eight-factor balancing test for nontimely filings.[26] The burden is on SEED to demonstrate "that a balancing of these factors weighs in favor of granting

---

[24] 10 C.F.R. § 2.326(b).

[25] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); *see also Pilgrim*, CLI-12-15, slip op. at 13 ("At the threshold contention admission stage, the burden for providing support for a contention is on the petitioner."); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 5 & n.19 (Mar. 10, 2011).

[26] These factors are: (i) Good cause, if any, for the failure to file on time; (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (v) The availability of other means whereby the requestor's/petitioner's interest will be protected; (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties; (vii) The extent to which the

the petition."[27] The eight factors in Section 2.309(c)(1) are not of equal importance. The first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[28]

D. Contention Admissibility Standards

Any new contention also must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[29] A brief discussion of the key contention admissibility requirements is set forth below.

The Commission has recently reiterated that its rules on contention admissibility are "strict."[30] "[T]he NRC in 1989 revised its rules to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.' The agency deliberately raised the contention-admissibility standards to relieve the hearing delays that such contentions had caused in the past."[31] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from another proceeding involving another reactor,' even

---

requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

27 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

28 *Pilgrim*, CLI-12-15, slip op. at 25 n.96 ("The standard for new or amended contentions involves a balancing of eight factors set forth in 10 C.F.R. § 2.309. The factor given the most weight is whether there is 'good cause' for the failure to file on time."); *see also Millstone*, CLI-09-5, 69 NRC at 125-26.

29 That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

30 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 31 (Mar. 27, 2012); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (characterizing the contention admissibility rules as "strict by design").

31 *Davis-Besse*, CLI-12-08, slip op. at 3-4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[32]

The purpose of the six 10 C.F.R. § 2.309(f)(1) admissibility criteria is to focus litigation on concrete issues and thereby ensure a clear and focused record for decision.[33] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[34] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[35] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[36]

IV. THE PROPOSED CONTENTION SHOULD BE REJECTED

A. SEED Improperly Filed the Proposed Contention with the Board

As discussed above, on August 26, 2011, the Board denied SEED's initial Petition to Intervene.[37] SEED did not appeal or otherwise seek review of the Board's ruling. Nor did the Commission act on its own authority to review this aspect of the Board's decision.[38] Thus, in October 2011, after expiration of the period in which the Commission could exercise its right to review the record, the contested proceeding ended and the Board's jurisdiction over this proceeding lapsed.[39] Accordingly, STPNOC respectfully submits that the Board no longer has

---

32 *Davis-Besse*, CLI-12-08, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

33 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

34 *Id.*

35 *See, e.g.*, *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

36 *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

37 *South Texas Project*, LBP-11-21, slip op. at 2, 27.

38 *See* 10 C.F.R. § 2.341(a)(2).

39 *See, e.g.*, *Millstone*, CLI-06-4, 63 NRC at 35 (finding a motion improperly filed with the licensing board because "the Board has already dismissed the case and no longer has jurisdiction over the matter").

jurisdiction over this proceeding and, therefore, the Board should dismiss the Proposed Contention.[40]

B. SEED Does Not Meet the Standards to Reopen the Record Under 10 C.F.R. § 2.326

Even if the Board were to consider SEED's filing, the Proposed Contention should be denied for failing to even address—much less meet—the requirements set forth in 10 C.F.R. § 2.326 to reopen a closed record. As discussed above, in *Millstone*, the Commission explained that, if the Board has "already denied [an] intervention petition, a motion to file new or amended contentions must address the motion to reopen standards."[41] SEED has not addressed any of the factors in 10 C.F.R. § 2.326(a) and has not included an affidavit addressing why the three reopening criteria have been met.

For these reasons alone, the Board should reject the Proposed Contention. Furthermore, as discussed briefly below, even if SEED had attempted to address the reopening standards, it plainly does not meet them.

First, the Proposed Contention does not satisfy the requirement in 10 C.F.R. § 2.326(a)(1) to be timely. This is discussed in detail in the next section, which demonstrates that the Proposed Contention is untimely under 10 C.F.R. §§ 2.309(c) and (f)(2). In summary, the Proposed Contention is premature because the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Accordingly, any motion to reopen is not timely.[42]

---

40 *See Millstone*, CLI-09-5, 69 NRC at 120-21 (noting that, absent a new referral to the Board, the Commission would have retained jurisdiction over new or amended contentions filed after the Board had already denied a petition to intervene).

41 *Id.* at 120 (internal quotations omitted); *see also Millstone*, CLI-06-4, 63 NRC at 37 (applying reopening factors to new contentions filed after petition to intervene had been denied); *Comanche Peak*, CLI-92-1, 35 NRC at 3, 7.

42 Because SEED does not address the nontimely contention standards in 10 C.F.R. § 2.309(c), it also fails to meet the requirement in 10 C.F.R. § 2.326(d) to address these standards in a motion to reopen. This provides an independent basis for rejecting the Proposed Contention.

Second, SEED does not present any new information that suggests the existence of a significant safety or environmental issue in this proceeding, contrary to 10 C.F.R. § 2.326(a)(2). To raise a significant environmental issue, "new information must paint a '*seriously* different picture of the environmental landscape.'"[43] Nothing in the Proposed Contention identifies any seriously different picture of the environmental landscape. Indeed, the Proposed Contention does not even discuss actual environmental impacts at STP Units 1 and 2, but instead focuses on legal requirements and alleged omission of information. Accordingly, the Proposed Contention fails to raise a significant safety or environmental issue.

Third, SEED fails to demonstrate that a materially different result would be likely, contrary to 10 C.F.R. § 2.326(a)(3). As noted above, the D.C. Circuit has not yet issued its mandate, and therefore a materially different result is not possible at this time. Moreover, SEED does not address any specific environmental impacts for STP Units 1 and 2, much less how those impacts would require a materially different result in this proceeding. Therefore, a materially different result is not possible here.

For these reasons, SEED has not submitted the required motion to reopen the closed record in this proceeding, and one would not be granted even if it had been submitted. Therefore, the Proposed Contention is deficient and should be rejected.

C. The Proposed Contention Is Untimely

1. The Proposed Contention Fails to Satisfy the 10 C.F.R. § 2.309(f)(2) Timeliness Requirements

The D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. In fact, the mandate will not issue, at the earliest, until late August 2012, if at all.[44]

---

[43] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

[44] *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); *New York*, 681 F.3d 471 (No. 11-

Because it is the mandate that makes the decision effective, the *New York* decision has no legal effect on this proceeding.[45] Accordingly, the Proposed Contention has not raised any materially different information, and therefore fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii). For these reasons, the Proposed Contention is premature and does not satisfy the Section 2.309(f)(2) requirements.

2. The Proposed Contention Fails to Satisfy the 10 C.F.R. § 2.309(c)(1) Timeliness Requirements

The Proposed Contention also must satisfy the non-timely criteria in 10 C.F.R. § 2.309(c)(1)(i)-(viii).[46] SEED entirely ignores the requirements of Section 2.309(c). This failure to address the requirements of Section 2.309(c) is alone a sufficient basis to reject the untimely arguments, as the Commission has affirmed rejection of late-filed contentions for failure to address the non-timely criteria.[47]

Nonetheless, even if the Section 2.309(c)(1) factors are considered, the Proposed Contention should be dismissed as untimely. The most important of the Section 2.309(c)(1) factors, good cause, requires a "judgment about when the matter is sufficiently factually concrete and *procedurally ripe* to permit the filing of a contention."[48] SEED fails to demonstrate that the Proposed Contention is procedurally ripe because the D.C. Circuit has not yet issued its mandate

---

1045), Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

45 *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 466 (1976) (explaining that "[a] court acts only through its mandate" and that "[w]hen a mandate is stayed, a decision has no binding effect") (citation omitted).

46 *See* 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.").

47 *See, e.g.*, *Millstone*, CLI-09-5, 69 NRC at 126 ("The Board correctly found that failure to address the requirements [of 10 C.F.R. §§ 2.309(c) and (f)(2)] was reason enough to reject the proposed new contentions."); *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.10 (1998) ("Indeed, the Commission has itself summarily dismissed petitioners who failed to address the . . . factors for a late-filed petition.").

48 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 437 (1999) (emphasis added) (denying as premature a motion to amend a contention to contest an applicant exemption request that had yet to be granted).

returning the proceeding to the Commission. As discussed above, the mandate will not issue, at the earliest, until late August 2012, if at all. Therefore, the *New York* decision has no legal effect on this proceeding. Accordingly, because the issues raised in the Proposed Contention are not ripe, SEED has not demonstrated good cause supporting the submission of the Petition.

Because SEED fails to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors would have to weigh heavily in their favor for the Proposed Contention to be admitted.[49] They do not. The Proposed Contention, if admitted, would require initiation of a contested hearing on an entirely new subject matter, with mandatory disclosures and the involvement of new experts and personnel, on an issue that impacts the nuclear industry as a whole. Accordingly, admission of the Proposed Contention could significantly and unnecessarily delay this proceeding. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor seven), weighs heavily against SEED.[50]

Furthermore, SEED provides no indication that its participation would contribute to the development of a sound record (factor eight). The Commission has stated that to make a showing on this factor, a petitioner should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[51] SEED has failed to satisfy any of those requirements. Thus, SEED provides no basis to suggest it is capable of assisting in the development of a sound record concerning the long-term spent fuel storage issues raised in the Proposed Contention.

---

[49] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

[50] *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993) (holding that "the potential for delay if the petition is granted, weighs heavily against" petitioners because "[g]ranting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule").

[51] *See Braidwood*, CLI-86-8, 23 NRC at 246.

In addition, should the Commission proceed with a rulemaking, as it has consistently done in the past on this issue, that generic proceeding would provide SEED with adequate means to protect its interests (factor five). As such, that factor also weighs in favor of denying the Proposed Contention.[52]

In summary, having failed to establish good cause and make a compelling showing on the remaining factors, the balance of the untimely factors weighs against SEED. Therefore, the Proposed Contention should be denied.

D. The Proposed Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

In addition to the non-timely filing requirements, SEED also must demonstrate that the Proposed Contention is admissible under 10 C.F.R. § 2.309(f)(1). As discussed below, SEED fails to satisfy the Commission's substantive admissibility requirements.

1. The Proposed Contention Lacks Legal Basis and Challenges the TSR, Contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a)

Based on the D.C. Circuit's recent *New York* decision, SEED claims that the ER for STP Units 1 and 2 license renewal improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.[53] However, as discussed above, the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Because it is the mandate that makes the decision legally effective, no evaluation or other action is "required" by the *New York* decision at this time, contrary to SEED's assertion.[54] Accordingly, the contention lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii). Indeed,

---

[52] *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

[53] Petition at 6.

[54] *See id.*

the Commission has specifically held that it is premature for a party to request relief based upon a court decision before the mandate issues.[55]

Furthermore, because the mandate has not yet issued, the Proposed Contention constitutes an impermissible challenge to the TSR. The contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.[56] The currently effective regulation, however, makes clear that "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis."[57] Unless and until the mandate issues, the current TSR remains in effect. Accordingly, as long as that regulation is effective, the Proposed Contention constitutes an impermissible challenge to that regulation and should be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

Recognizing that the Petition lacks a legal basis, SEED "requests that consideration of the contention be held in abeyance pending issuance of the mandate."[58] An abeyance, however, would be inconsistent with NRC case law. In the *Indian Point* proceeding, the Commission directed the Board to deny two waste confidence contentions notwithstanding a similar request by an intervenor to hold the contention admissibility ruling in abeyance pending future potential action.[59] Licensing boards also have rejected requests to admit previous waste confidence

---

55 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006) (denying premature motion seeking procedural relief in advance of an appellate court's mandate).

56 *See* Petition at 6.

57 10 C.F.R. § 51.23(b).

58 Petition at 4-5.

59 *See Indian Point*, CLI-10-19, 72 NRC at 100; Answer of the State of New York to Hudson River Sloop Clearwater, Inc.'s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-

contentions and hold them in abeyance pending prospective later developments.[60] Likewise, SEED's abeyance request should be rejected.

SEED also fails to address the considerable uncertainty underlying the Petition's central assumptions, including when (and whether) the mandate will issue. An admissible contention cannot be based on such guesswork. As discussed above, the Commission refuses to admit contentions "based on little more than speculation."[61] This speculation provides an additional basis for rejecting the Proposed Contention and not holding it in abeyance.

2. The Proposed Contention Raises Issues that Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

Even if the mandate were to issue, Commission precedent clearly dictates that the Board cannot admit a contention that raises an issue that is, or is about to become, the subject of a rulemaking.[62] As the Commission made clear in *Indian Point*, its longstanding practice has been to address long-term waste storage issues generically through rulemaking rather than litigating issues case-by-case in individual adjudicatory proceedings.[63] The Commission does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[64] Thus, if the mandate issues, the contention would still be inadmissible because it may reasonably be expected that the Commission will continue this practice and institute a rulemaking addressing the issues on remand.

Level Radioactive Waste at Indian Point at 16 (Nov. 19, 2009), *available at* ADAMS Accession No. ML100820028.

60 *See, e.g.*, *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 977 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 251 (2009); *Luminant Generation Co.* (Comanche Peak Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 341 (2009).

61 *Davis-Besse*, CLI-12-08, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

62 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Oconee*, CLI-99-11, 49 NRC at 345.

63 *See Indian Point*, CLI-10-19, 72 NRC at 99 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

64 *See Indian Point*, CLI-10-19, 72 NRC at 100.

The *New York* decision rejected the notion that the Commission must examine each site individually and allows the Commission to continue its traditional generic approach.[65] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. SEED presents no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about STP Units 1 and 2. To the contrary, SEED expressly declines to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.[66] Thus, unless and until the Commission directs otherwise, *Indian Point* governs the Board and the Board should presume the Commission will proceed generically through rulemaking. Accordingly, the Board should deny the Proposed Contention pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

STPNOC recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision.[67] Therefore, to the extent the Board has any uncertainty concerning whether the Commission will proceed with a generic rulemaking, the Board should certify a question pursuant to 10 C.F.R. § 2.319(l) to the Commission for its determination.[68] Such certification also would avoid the potential for inconsistent treatment with the various other proceedings in which similar contentions have been filed.

---

65 *New York*, 681 F.3d at 483.

66 *See* Petition at 7.

67 SEED itself placed this issue before the Commission for decision in its June 18, 2012 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings. The Board should defer to Commission direction on this issue.

68 *See* 10 C.F.R. §§ 2.319(l), 2.341(f)(1). The mandate would invalidate the 2010 WCD and TSR update. According to precedent, the old WCD and TSR may remain effective because the D.C. Circuit has not undertaken review or issued a decision vacating the old TSR. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757-58 (D.C. Cir. 1987) (holding that a decision vacating an agency rule "necessarily reinstated" the previous rule); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacating an agency rule has the "effect of reinstating the rules previously in force"); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 238-39 (D.D.C. 2011) (holding that once the court vacated an agency rule for failing to conduct a NEPA review prior to finalizing the rule, the prior rule would be reinstated despite the argument that the prior rule suffered from the same legal

V. CONCLUSION

As discussed above, SEED filed the Petition in the improper forum and failed to submit a motion to reopen the closed record in this proceeding, as required by 10 C.F.R. § 2.326. SEED also fails to satisfy the standards for non-timely contentions in 10 C.F.R. §§ 2.309(f)(2) and (c)(1). Furthermore, the Proposed Contention fails to meet the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). For all of these reasons, the Proposed Contention should be denied in its entirety.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Signed (electronically) by Steven P. Frantz

Steven P. Frantz
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5460
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

COUNSEL FOR STP NUCLEAR OPERATING COMPANY

Dated in Washington, DC
this 3rd day of August 2012

flaws because the prior rule was not before the reviewing court). To the extent any uncertainty exists concerning this issue, the Board can likewise certify such a question to the Commission for its determination.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-498-LR
STP NUCLEAR OPERATING COMPANY	)	50-499-LR
	)	
(South Texas Project, Units 1 and 2)	)	August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "STP Nuclear Operating Company's Answer Opposing Petition for Intervention to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2" was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

Administrative Judge
Ronald M. Spritzer, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ronald.Spritzer@nrc.gov

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Nicholas.Trikouros@nrc.gov

Administrative Judge
Larry R. Foulke
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Larry.Foulke@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Andrea Z. Jones
Maxwell C. Smith
Richard S. Harper
E-mail: Andrea.Jones@nrc.gov;
Maxwell.Smith@nrc.gov;
Richard Harper@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Karen Hadden
SEED Coalition
1303 San Antonio, #100
Austin, TX 78701
E-mail: karen@seedcoalition.org

Robert V. Eye
Brett A. Jarmer
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com
brett@kauffmaneye.com

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5059
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

COUNSEL FOR STP NUCLEAR OPERATING COMPANY