

April 24, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY OF THE COMMISSION

In the Matter of)
Nuclear Innovation) Docket Nos. 52-012-COL,
North America, LLC) 52-013-COL
(South Texas Project Units 3 and 4))

**SEED COALITION’S MOTION TO REOPEN THE RECORD
OF COMBINED LICENSE PROCEEDING FOR
SOUTH TEXAS UNITS 3 AND 4 NUCLEAR POWER PLANT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.326, SEED Coalition hereby moves to reopen the record in this proceeding to admit a new contention challenging the legal adequacy of the Final Environmental Impact Statement for Combined Licenses (“COLs”) for South Texas Project Units 3 and 4 (NUREG-1937, Feb. 2011) (ML11049A000) (“South Texas 3-4 FEIS”). SEED Coalition’s Hearing Request and Petition to Intervene in Combined License Proceeding for South Texas Units 3 and 4 Nuclear Power Plant (April 23, 2015) (“Hearing Request/Petition to Intervene”). SEED Coalition contends that under NEPA, the South Texas Units 3 and 4 FEIS does not provide the NRC with an adequate legal basis for licensing South Texas Units 3 and 4 because it relies for its evaluation of the environmental impacts of spent fuel storage and disposal on the Continued Storage of Spent Nuclear Fuel Rule (79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Continued Spent Fuel Storage Rule”)) and the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157, September 2014) (“Continued Spent Fuel Storage GEIS”).¹

¹ The NRC issued the Continued Spent Fuel Storage Rule and GEIS on remand from the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (“*New York I*”).

As discussed in SEED Coalition’s Hearing Request/Petition to Intervene, while SEED Coalition seeks admission of its contention, SEED Coalition does not seek to litigate the substantive content of its contention in an adjudicatory hearing. Instead, SEED Coalition has already raised its concerns about the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS in comments on draft versions of those documents, and the NRC has already either rejected or disregarded SEED Coalition’s comments in the final versions of the Rule and GEIS. SEED Coalition also has appealed the final versions to the U.S. Court of Appeals for the District of Columbia Circuit. *See Beyond Nuclear v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).² The sole purpose of SEED Coalition’s contention is to lodge a formal challenge to the NRC’s reliance, in the South Texas Units 3 and 4 FEIS, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS for purposes of licensing South Texas Units 3 and 4. This motion is necessary because the hearing record is closed.

Several overlapping factors, set forth in three regulations, govern motions to reopen and admit new contentions. *See* 10 C.F.R. §§ 2.309(c), 2.309(f), and 2.326. This motion and the accompanying contention satisfy each of these factors.

II. JURISDICTION

Until issuance of its initial final decision, a Licensing Board has jurisdiction to reopen a proceeding. *See* 10 C.F.R. §§ 2.318(a), 2.713(a), 2.319(m), and 2.341; *Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-699, 16 NRC 1324, 1326, 1327 (1982). After that, jurisdiction lies with the Commission. Therefore, SEED Coalition has filed this Motion before the Secretary of the Commission.

² *Beyond Nuclear v. NRC* was consolidated with four other cases and is now captioned *New York v. NRC*, Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (“*New York II*”).

III. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(a).

10 C.F.R. § 2.236(a) provides three criteria which must be satisfied for this motion to be granted:

- (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.

Id. This motion and the accompanying contention satisfy all three criteria, as discussed below.

A. This Motion is Timely.

Pursuant to 10 C.F.R. § 2.326, motions to re-open the record must be “timely.” The NRC judges timeliness of motions to reopen the record by the same standards as for contentions. 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012).³ This motion to reopen and the attached contention are timely because they do not depend at all on past information. Instead, they are “placeholders” that depend on an event that will occur in the future: the U.S. Court of Appeals’ decision in *New York II*. SEED Coalition’s contention seeks the denial (or revocation) of a COL for South Texas Units 3 and 4 in the event that the Court of Appeals reverses the Continued Spent Fuel Storage Rule and/or GEIS.

³ NRC regulations 10 C.F.R. § 2.309(c) and § 2.309(f)(2) call for 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.

B. This Motion and the Accompanying Contention Address a Significant Environmental Issue.

This motion and the accompanying contention raise the significant environmental issue that the South Texas Units 3 and 4 FEIS is not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal. As discussed in SEED Coalition's comments on the proposed version of the Continued Spent Fuel Storage Rule and the draft version of the Continued Spent Fuel Storage GEIS, the analysis referenced by the South Texas Units 3 and 4 FEIS is seriously deficient to satisfy NEPA. *See* Hearing Request/Petition to Intervene at 9-10.

C. This Motion and the Accompanying Contention Would Likely Produce a Materially Different Result in this Proceeding.

The purpose of SEED Coalition's contention is to ensure that in the reasonably likely event that the U.S. Court of Appeals grants SEED Coalition's petition for review of the Continued Spent Fuel Storage Rule and GEIS and vacates them for failure to comply with NEPA, the NRC will withdraw the South Texas Units 3 and 4 FEIS as base for licensing South Texas Units 3 and 4, and therefore withdraw the South Texas Units 3 and 4 COL. Thus, admission of this contention would likely produce a materially different result in this proceeding.

IV. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(b).

10 C.F.R. § 2.326(b) requires that a motion to reopen the record must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of Section 2.326(a) have been satisfied. SEED Coalition has not submitted affidavits, because the bases for this motion are purely legal: As discussed in SEED Coalition's Contention, the sole purpose of SEED Coalition's Contention – and therefore of this motion – is to ensure that any court decision resulting from SEED Coalition's appeal of the generic Continued Spent Fuel

Storage Rule and GEIS will also be applied to the individual South Texas Units 3 and 4 COL proceeding, which relies on the Continued Spent Fuel Storage Rule and GEIS.

V. THIS MOTION AND THE ACCOMPANYING CONTENTION SATISFY THE STANDARDS FOR CONTENTIONS FILED AFTER THE DEADLINE SET FORTH IN 10 C.F.R. §§ 2.326(d) AND 2.309(c).

10 C.F.R. § 2.326(d) provides that “[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).”⁴ As discussed above in Section III.A, this Motion and SEED Coalition’s placeholder Contention are timely because they are based on information that does not yet exist: the U.S. Court of Appeals’ decision in *New York II*. If the U.S. Court of Appeals reverses the Continued Spent Fuel Storage Rule and GEIS, then the filing of this contention will have ensured that the South Texas Units 3 and 4 COL decision is also reversed, because the South Texas Units 3 and 4 FEIS relies on the Continued Spent Fuel Storage Rule and GEIS.

VI. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(B)

Undersigned counsel Robert Eye certifies that on April 21, 2015, he contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this motion. Counsel for both parties stated that they would oppose it.

⁴ See note 3 above for the requirements of 10 C.F.R. § 2.309(c).

VII. CONCLUSION

For the foregoing reasons, SEED Coalition's Motion to Reopen the Record should be granted.

Respectfully submitted,

Signed (electronically) by:

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April 24, 2015

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2015, a copy of the above and foregoing Motion to Reopen the Record was served by the Electronic Information Exchange.

Signed (electronically) by:

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