UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of		
STP NUCLEAR OPERATING COMPANY	Docket Nos.	50-498-LR 50-499-LR
(South Texas Project, Units 1 and 2)	May 4, 2015	

STP NUCLEAR OPERATING COMPANY RESPONSE OPPOSING MOTION TO REOPEN AND "PLACEHOLDER" CONTENTION REGARDING CONTINUED STORAGE RULE

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I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.309(i), 2.323(c), and 2.326, STP Nuclear Operating Company ("STPNOC") files this Answer opposing both the motion to reopen the record ("Motion")[1] and the petition to intervene ("Petition")[2] filed by Sustainable Energy and Economic Development Coalition, Inc. ("SEED") on April 24, 2015.[3] SEED seeks to reopen the record and admit a "placeholder" contention challenging the NRC's reliance on the Continued Storage Rule[4] and associated Generic Environmental Impact Statement ("GEIS")[5] to re-license South

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1 *See* SEED Coalition's Motion to Reopen the Record of License Renewal Proceeding for South Texas Units 1 and 2 (Apr. 24, 2015) ("Motion").

2 *See* SEED Coalition's Hearing Request and Petition to Intervene in License Renewal Proceeding for South Texas Units 1 and 2 (Apr. 24, 2015) ("Petition").

3 Although 10 C.F.R. § 2.309(i) allows for 25 days for an answer to a hearing request, STPNOC is submitting this Answer early and is responding in a single filing to both the Petition and the Motion given the necessary overlap between the issues raised in SEED's filings and given that similar filings have recently been rejected by the Commission.

4 *See* Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) ("Continued Storage Rule").

5 NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Final Report (Sept. 2014) ("GEIS").

Texas Project ("STP") Units 1 and 2.[6] Substantively identical motions and petitions have been filed by other petitioners in a number of other proceedings, including motions and petitions that were rejected by the Commission in *Callaway* (CLI-15-11) and *Fermi* (CLI-15-12) prior to the filings by SEED.[7]

SEED states that it does not seek to litigate the proposed contention and expects that its contention will be denied for addressing a generic issue.[8] It nonetheless claims that the contention is the only procedural means for ensuring 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 1 and 2 license renewal proceeding."[9] For the reasons discussed below, both the Petition and the Motion should be rejected in their entirety.

First, the Petition should be rejected as untimely under 10 C.F.R. § 2.309(c). The proposed contention is based on SEED's challenges to the Continued Storage Rule and GEIS, which the Commission issued over seven months ago. Nothing has changed in the interim to provide good cause for this late filing.

Second, the Motion does not satisfy any of the requirements in 10 C.F.R. § 2.326 to reopen the closed record in this proceeding. The Motion is untimely for the same reasons as the Petition. The Motion does not address any significant safety or environmental issue; SEED admits its only purpose is procedural posturing—seeking to create an appeal opportunity where none may exist as of right. The Motion does not demonstrate that a materially different result would be or would have been likely had the proposed contention been considered initially,

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6 Petition at 1-2.

7 *See Union Elec. Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC __, slip op. (Apr. 23, 2015); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC __, slip op. (Apr. 23, 2015).

8 Petition at 2.

9 *Id.*

because, as SEED concedes, it raises issues that impermissibly challenge a generic rulemaking. The Motion also is not accompanied by the affidavits required by Section 2.326(b).

Third, the Petition does not include an admissible contention. As a threshold matter, the proposed contention is outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it impermissibly challenges the Continued Storage Rule. SEED has not submitted a waiver petition pursuant to 10 C.F.R. § 2.335(b), much less made a *prima facie* showing that any of the "stringent" requirements for a waiver of the rule has been met.[10] The proposed contention also fails to challenge the STP Units 1 and 2 License Renewal Application, and therefore does not demonstrate a genuine dispute with the applicant on a material issue, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Finally, SEED's Motion and Petition are particularly troubling because they are nearly identical to filings that the Commission recently rejected in *Callaway* (CLI-15-11) and *Fermi* (CLI-15-12) on April 23, 2015. SEED submitted its filings *after* the Commission issued those decisions. Nonetheless, SEED did not discuss those decisions, much less attempt to distinguish them. The Commission concluded in *Callaway* and *Fermi* that the proposed contentions impermissibly challenged an NRC regulation and failed to demonstrate a genuine dispute with the applicant, the motions to reopen did not raise a significant environmental issue and had not demonstrated that a materially different result would be likely if the contention had been considered initially, and a placeholder contention is not necessary to ensure that the challenges are considered.[11] For the same reasons, the current Motion and Petition should be denied.

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[10] *See* 10 C.F.R. § 2.335(b)-(d); *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 & 2), CLI-13-7, 78 NRC 199, 207 (2013).

[11] *See Callaway*, CLI-15-11, slip op. at 4-6; *Fermi*, CLI-15-12, slip op. at 4-5.

II. BACKGROUND

A. The NRC's Ongoing Review of the License Renewal Application

The operating licenses ("OLs") for STP Units 1 and 2 expire at midnight on August 20, 2027 and December 15, 2028, respectively.[12] 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.[13] The NRC Staff published the Draft Supplemental Environmental Impact Statement in December 2012 and the Final Supplemental Environmental Impact Statement ("FSEIS") in November 2013.[14] The NRC Staff published its Safety Evaluation Report ("SER") with open items in February 2013, but has not yet published the final SER.[15]

B. Adjudicatory Proceeding

SEED filed a Petition to Intervene on March 14, 2011.[16] The Atomic Safety and Licensing Board ("Board") ruled that SEED had failed to proffer an admissible contention, and therefore denied the Petition to Intervene.[17]

The current Petition is the fourth filing by SEED over the years related to waste confidence issues and the Continued Storage Rule. All of the previous filings have been denied by either the Board or the Commission.

In 2012, SEED filed with the Board a motion to admit a new environmental contention that challenged the alleged failure of STPNOC's Environmental Report to address the

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12 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).

13 *Id.*

14 *See* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/south-texas-project.html.

15 *See id.*

16 *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 1 & 2), LBP-11-21, 74 NRC 115, 120 (2011).

17 *Id.* at 119, 138.

environmental impacts that may occur if a spent fuel repository does not become available.[18] The proposed contention was based on the U.S. Court of Appeals for the District of Columbia Circuit's decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012),[19] which invalidated and remanded the NRC's Waste Confidence Decision Update[20] and related final rule.[21] Following approval of the final Continued Storage Rule and the associated GEIS, the Commission dismissed the proposed contention.[22] On September 19, 2014, the NRC issued the final Continued Storage Rule[23] and published a notice of the availability of the GEIS.[24]

On September 29, 2014, SEED filed a new contention, a suspension petition, and a motion to reopen claiming that the NRC is required by the Atomic Energy Act of 1954, as amended, to make "predictive safety findings" regarding the safety of permanent spent nuclear fuel disposal before issuing any reactor licensing decision.[25] The Commission rejected these filings on February 26, 2015.[26]

On January 28, 2015, SEED and several other organizations requested that the Commission order the supplementation of the final environmental impact statements in this

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18 *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).

19 *See id.*

20 Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

21 Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

22 *See Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __, slip op. at 12 (Aug. 26, 2014).

23 *See* Continued Storage Rule, 79 Fed. Reg. at 56,238.

24 Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).

25 *See* Petitioners' Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings in the Relicensing Proceeding at South Texas Project Electric Generating Statio[n] Units 1 and 2 (Sept. 29, 2014); Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014); Motion to Reopen the Record for South Texas Project Units 1 & 2 Nuclear Power Plant (Sept. 29, 2014).

26 *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC __, slip op. at 31 (Feb. 26, 2015).

proceeding and several other proceedings to reference the GEIS.[27] The Commission denied that request, noting that "[t]he Continued Storage Rule and GEIS were developed through a robust, two-year notice-and-comment process that was one of the most extensive in NRC history," and that the two-volume GEIS "provides extensive detail regarding the environmental impacts of continued storage."[28]

SEED filed the current Motion and Petition on April 24, 2015. It seeks admission of a "placeholder" contention challenging NRC's reliance on the Continued Storage Rule and GEIS for STP license renewal.[29] The proposed contention states:

> While the text of the South Texas Units 1 and 2 FSEIS is outdated with respect to its discussion of spent fuel storage impacts, 10 C.F.R. § 51.23(b) provides that the Continued Spent Fuel Storage GEIS is incorporated by reference into the South Texas Units 1 and 2 FSEIS. For all of the reasons stated in SEED Coalition et al.'s Comments on the Draft Waste Confidence GEIS, the NRC lacks a lawful basis under NEPA for licensing South Texas Units 1 and 2, because the NRC relies on the generic conclusions of the Continued Spent Fuel Storage Rule and GEIS for it[s] analysis of the environmental impacts of spent fuel storage.[30]

SEED then identifies seven alleged "failures" from those comments to support the proposed contention.[31] As shown below, the Motion and Petition are procedurally and substantively infirm and should be denied, similar to the previous filings by SEED related to the Continued Storage Rule.

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27 Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage (Jan. 28, 2015).

28 *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC __, slip op. at 8 (Apr. 23, 2015).

29 Petition at 1-2.

30 *Id.* at 7 (citation omitted).

31 *Id.* at 7-8.

III. LEGAL STANDARDS

A. Timeliness

Pursuant to the hearing notice in this proceeding and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired in March 2011, over four years ago. As the Commission explained in *Vermont Yankee*: "We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions."[32]

A new hearing request and contention filed after the original deadline must meet the requirements of 10 C.F.R. § 2.309(c)(1)(i)-(iii). Section 2.309(c)(1) states:

> Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
>
> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

B. Motions to Reopen

The general 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;

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[32] *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 338 (2011).

(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.

When it codified its rules for reopening a record in 1986, the Commission described reopening a record as an "extraordinary action," emphasized the "heavy burden" on the petitioner, and noted the D.C. Circuit Court's characterization of these requirements as "high" and "stringent."[33] 10 C.F.R. § 2.326(b) further requires that the motion be accompanied by affidavits that support *each* of the bases satisfying the criteria in Section 2.326(a).

C. Contention Admissibility

A newly-proposed contention must meet the strict admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi). Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Further, each contention must:

(1) provide a specific statement of the legal or factual issue sought to be raised;

(2) provide a brief explanation of the basis for the contention;

(3) demonstrate that the issue raised is within the scope of the proceeding;

(4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

(5) 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

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[33] *See* Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-539 (May 30, 1986) ("The purpose of this rule is not to foreclose the raising of important safety issues, but to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise, it is doubtful whether a proceeding could ever be completed."); *see also Va. Elec. & Power Co.* (Combined License for North Anna Unit 3), CLI-12-14, 75 NRC 692, 700 (2012) ("The courts of appeals have repeatedly approved our practice of . . . holding new contentions to the higher 'reopening' standard."); *Vt. Yankee*, CLI-11-02, 73 NRC at 337-38 (characterizing the Section 2.326 requirements as a "deliberately heavy" burden to ensure finality).

(6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[34]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[35] The NRC's contention admissibility rules are "strict by design."[36] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[37]

IV. THE PETITION AND MOTION SHOULD BE REJECTED

A. The Petition Is Untimely

Because SEED submitted the Petition years after the initial deadline for petitions to intervene in this proceeding, it must demonstrate good cause for filings after the deadline by satisfying the requirements in 10 C.F.R. § 2.309(c)(1). SEED has not satisfied any of those requirements and, therefore, the Petition should be rejected.

As explained above, the proposed contention challenges the Continued Storage Rule at 10 C.F.R. § 51.23(b) and the referenced GEIS and the treatment of those issues in the STP FSEIS.[38] The Commission, however, published the final Continued Storage Rule codifying the current requirements in Section 51.23(b) and the associated GEIS in September 2014—seven months prior to SEED submitting the Petition. Similarly, the NRC published the FSEIS for STP license renewal in November 2013—well over a year prior to the Petition. SEED has not identified any new information beyond these documents that supports the proposed contention.

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34 *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—is only applicable to proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of proposed contentions in this proceeding.

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

36 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-1, 55 NRC 1 (2002).

37 Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

38 Petition at 7.

There is no good cause under Section 2.309(c)(1) for this extensive delay in submitting the Petition. In this regard, SEED has conceded that it "has already raised its concerns" many months ago in the form of comments on the proposed Continued Storage Rule and GEIS.[39] As a result, SEED has not submitted the Petition in a timely fashion (typically considered 30-60 days) based on the availability of this information. SEED also has not discussed why it could not have submitted its contention shortly after issuance of the Continued Storage Rule and GEIS.

SEED argues that the Petition "is timely because it does not depend at all on past information," but instead "depends on an event that will occur in the future."[40] That claim is disingenuous, given that the Statement of Contention directly challenges the Continued Storage Rule and GEIS and incorporation of those documents in the FSEIS,[41] and SEED repeats arguments from its earlier comments on the draft Continued Storage Rule and GEIS that it submitted in December 2013.[42] Moreover, SEED has not identified any authority that would allow it to submit a premature filing of a contention based on a future event.

Even if the Petition were based on SEED's petition to the U.S. Court of Appeals for review of the Continued Storage Rule, that action took place in October 2014—six months prior to SEED submitting the Petition. Thus, the Petition is untimely if based upon the petition for review by the Court.

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39 *Id.* at 2.

40 *Id.* at 10.

41 *Id.* at 7.

42 *Id.* at 7-8.

B. The Motion Does Not Satisfy the Standards for Reopening the Record

The record of this proceeding is closed. Although SEED has submitted a Motion seeking reopening of the record, the Motion does not satisfy the "high" and "stringent" reopening standards.[43]

1. The Motion Is Not Timely

The first reopening criterion in Section 2.326(a) requires the petitioner to show that its motion is timely.[44] SEED has not done so. As discussed above in Section IV.A, the Petition is untimely because it relies on the Continued Storage Rule, GEIS, and FSEIS, all of which have been available for many months, and SEED has not identified any intervening event or information that would extend the deadline for filings based on those documents. For those same reasons, the Motion is untimely. SEED could have submitted the Motion and Petition many months ago. SEED also repeats the same arguments it made in the Petition to claim that the Motion does not depend on past information, but only on future action by the U.S. Court of Appeals.[45] That argument should be rejected for the same reasons discussed above in Section IV.A regarding the timeliness of the Petition.

2. The Motion Does Not Address a Significant Safety or Environmental Issue

The second reopening criterion requires a petitioner to establish that the motion addresses a "significant safety or environmental issue."[46] It is well established that the motion to reopen standards convey a "heavier burden" on petitioners than do the contention admissibility

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43 *See* Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. at 19,538.

44 *See* 10 C.F.R. § 2.326(a)(1). For the motion to be timely, the petitioner must show that "the issue sought to be raised could not have been raised earlier." *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366–67 (1984); *see also Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-1, 35 NRC 1, 7-8 (1992) (finding a motion to reopen untimely where the supporting evidence was presented earlier in the proceeding).

45 Motion at 3-4.

46 *See* 10 C.F.R. § 2.326(a)(2).

standards of 10 C.F.R. § 2.309(f)(1).[47] The Commission will consider an untimely motion only if the matter is "exceptionally grave."[48] In codifying that exception, the Commission defined an "exceptionally grave" issue as one that raises "a sufficiently grave threat to public safety," and noted its anticipation "that this exception will be granted rarely and only in truly extraordinary circumstances."[49]

The Motion does not raise such a significant safety or environmental issue, nor does it claim that it raises any issue that is "exceptionally grave." Indeed, SEED concedes that it does not even seek to litigate these issues and that it already has raised these concerns in other contexts.[50] Moreover, the relief requested by SEED is a "placeholder" contention, not resolution of a significant safety or environmental issue.

SEED argues that the Motion and proposed contention "raise the significant environmental issue that the South Texas Units 1 and 2 FSEIS is not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal."[51] However, given that the requested relief is a placeholder contention, and given that SEED is seeking to litigate the same issues that have already been rejected by the Commission as part of the rulemaking for the Continued Storage Rule, the Motion obviously does not raise a significant environmental issue.

The Commission reached the same logical conclusion in *Callaway* on a similar contention and motion to reopen: "Because [the petitioner] has not submitted an admissible

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47 *See, e.g.*, *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC 141, 169 (2011) ("[O]ur rules deliberately place a heavy burden on proponents of contentions, who must challenge aspects of license applications with specificity, backed up with substantive technical support; mere conclusions or speculation will not suffice. An even heavier burden applies to motions to reopen.").

48 10 C.F.R. § 2.326(a)(1).

49 Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. at 19,536.

50 Motion at 1-2.

51 *Id.* at 4.

contention, it necessarily has not satisfied our reopening standards because it has not raised a significant environmental issue . . . ."[52] The same result is appropriate here.

3. The Motion Does Not Demonstrate that a Materially Different Result Would Be Likely Had the Proposed Contention Been Considered

Consistent with the third criterion, a motion to reopen must be denied if the petitioner fails to show that a "materially different *result*" would have occurred or been likely to occur if the newly proffered evidence were considered initially.[53] In other words, the petitioner must demonstrate that consideration of the new evidence or contention would likely result in the denial or conditioning of the license application at issue.[54] This standard is meaningfully higher than that of Section 2.309(c) for new or amended contentions, which requires only that the new *information* be materially different from that which was previously available.

SEED has not demonstrated that the proposed contention would result in the rejection or conditioning of the STP License Renewal Application. As discussed above, SEED is re-raising the same issues that have already been rejected by the Commission as part of the rulemaking for the Continued Storage Rule. Therefore, it follows that a materially different result would not have occurred if SEED had raised its contention earlier.

SEED speculates that if the U.S. Court of Appeals grants the pending appeal of the Continued Storage Rule and GEIS and vacates them, then "the NRC will withdraw the South Texas Units 1 and 2 FSEIS as [a] base for licensing South Texas Units 1 and 2, and therefore withdraw the South Texas Units 1 and 2 COL [sic]."[55] However, speculation about a future court decision does not provide a sufficient basis for reopening the record now, because it does

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52 *Callaway*, CLI-15-11, slip op. at 4 n.17.

53 10 C.F.R. § 2.326(a)(3) (emphasis added).

54 *See, e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 23 (2008), *aff'd*, CLI-08-28, 68 NRC 658 (2008).

55 Motion at 4.

not "demonstrate" that a materially different result would occur if the Commission were to consider the contention now.

Furthermore, as discussed below in Section IV.C, the proposed contention is not admissible. As the Commission ruled in *Callaway* on a similar contention and motion to reopen: "Because [the petitioner] has not submitted an admissible contention, it necessarily has not satisfied our reopening standards because it . . . has not demonstrated that a materially different result would be likely if the contention had been considered initially."[56] The same logical result is compelled here.

4. The Motion Is Not Supported by Affidavits

When submitting a motion to reopen the record, a petitioner must include affidavits with the motion that set forth the factual or technical bases for the petitioner's claim that the three criteria discussed above have been satisfied.[57] The affidavit requirement ensures that a petitioner submits a motion to reopen that sets forth "a degree of particularity in excess of the basis and specificity requirements contained in [10 C.F.R. § 2.309(f)(1)] for admissible contentions."[58] The Commission has distinguished the "more rigorous evidentiary standard" of Section 2.326(a) from those general admissibility requirements.[59] Indeed, the Commission has explained that a presiding officer reviewing a motion to reopen must "apply its expertise and make a record-based judgment on the evidence," and that to prevail, the evidence provided with the motion

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56 *Callaway*, CLI-15-11, slip op. at 4 n.17.

57 *See* 10 C.F.R. § 2.326(b).

58 *Diablo Canyon*, 19 NRC at 1366; *see also* 51 Fed. Reg. at 19,535 (". . . the Commission is requiring that motions to reopen be accompanied by affidavits setting forth with particularity the bases for the movant's claim").

59 *See Vt. Yankee*, CLI-11-02, 73 NRC at 347.

"must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results of the proceeding."[60]

Not only has SEED failed to satisfy these requirements, it has not even attempted to do so. In fact, SEED has not provided any affidavits whatsoever to support the Motion. It argues that affidavits are not necessary "because the bases for this motion are purely legal."[61] This argument fails because Section 2.326(b) requires affidavits to address "each of the criteria" in Section 2.326(a). In this regard, the affidavits were needed to address why the Motion was timely, why the issue raised in the proposed contention is a significant environmental issue, and why a materially different result would have been likely had the proposed contention been considered. All of these issues involve facts that should have been addressed by affidavits. Accordingly, the Motion should be denied.

C. The Proposed Contention Is Not Admissible

1. The Proposed Contention Constitutes an Impermissible Challenge to the Continued Storage Rule and Therefore Does Not Satisfy Criterion (iii) of 10 C.F.R. § 2.309(f)(1)

The Commission stated unequivocally with respect to the Continued Storage Rule that its "generic determinations will not be revisited and may not be challenged in individual licensing proceedings without the grant of a waiver under 10 CFR 2.335."[62] Contrary to that explicit prohibition, SEED now proposes a contention challenging the Continued Storage Rule.

Specifically, SEED seeks admission of a contention that challenges reliance on "the generic conclusions of the Continued Spent Fuel Storage Rule and GEIS" in the STP license

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60 *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 498-99 (2012).

61 Motion at 5.

62 Continued Storage Rule, 79 Fed. Reg. at 56,243.

renewal proceeding.[63] In this regard, Section 51.23(a) of the Rule directly states that "[t]he Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG–2157, 'Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel.'" Moreover, Section 51.23(b) of the Rule states that the impact determinations in the GEIS "shall be deemed incorporated" into the EISs for individual projects. SEED's attempt to admit a placeholder contention to challenge NRC's reliance on the GEIS in this proceeding, therefore, is a direct challenge to the Rule.

As provided in 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[64] Indeed, with respect to the GEIS, the Commission has stated that "[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings."[65]

SEED has not requested a waiver, much less satisfied the stringent requirements governing such a waiver request. In order to seek waiver of a rule in a particular adjudicatory proceeding, a petitioner must submit a petition pursuant to 10 C.F.R. § 2.335. The requirements for a Section 2.335 petition are as follows:

> The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular

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63 Petition at 7.

64 The Commission consistently has affirmed licensing boards' rejections of proposed contentions that challenge generically-applicable rulemaking determinations, including those codified in 10 C.F.R. § 51.23. *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-10-19, 72 NRC 98, 100 (2010) (directing the board, upon certification of the issue, to deny admission of a proposed contention due to the NRC's then-pending rulemaking on waste confidence issues).

65 *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC __, slip op. at 9 (Aug. 26, 2014); *see also id.* at 9 n.27 (stating that "[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings").

> proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.[66]

Further, such a petition "*must be accompanied by an affidavit* that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted," and "*must state with particularity* the special circumstances alleged to justify the waiver or exception requested."[67] SEED has not submitted such an affidavit, nor has it identified any "special circumstances."

In accordance with NRC precedent, a Section 2.335 petition "can be granted only in unusual and compelling circumstances."[68] The Commission decision in the *Millstone* case states the test for Section 2.335 petitions, under which the petitioner must demonstrate that it satisfies each of the following four criteria:

> (i) the rule's strict application "would not serve the purposes for which [it] was adopted"; (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities"; and (iv) a waiver of the regulation is necessary to reach a "significant safety problem."[69]

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66 10 C.F.R. § 2.335(b).

67 *Id.* (emphasis added).

68 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd*, CLI-88-10, 28 NRC 573, 597 (1988), *recons. denied*, CLI-89-3, 29 NRC 234 (1989) (citation omitted).

69 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989)); *see Exelon Generation Co.* (Limerick Generating Station, Units 1 & 2), CLI-13-7, 78 NRC 199, 207-09 (2013) (discussing the four *Millstone* factors); *Seabrook*, CLI-88-10, 28 NRC at 597; *see also Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 444-50 (2011) (denying intervenor's waiver request, filed contemporaneously with petition to intervene, for failure to show special circumstances at Diablo Canyon requiring site-specific analysis of the environmental impacts of spent fuel pool storage).

If the petitioner fails to satisfy any of the factors of the four-part test, then the matter may not be litigated, and "the presiding officer may not further consider the matter."[70] Even if it had submitted a waiver request, SEED has not identified any special circumstances with respect to the STP License Renewal Application that would justify waiver of the Continued Storage Rule. Furthermore, given the generic nature of the proposed contention, there is no basis for any argument that special circumstances exist in this proceeding. Indeed, SEED concedes that "the subject matter of the contention is generic."[71]

In summary, the proposed contention, by its terms, challenges the adequacy of the Continued Storage Rule and, as such, should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a). SEED has not submitted a waiver request pursuant to 10 C.F.R. § 2.335(b), much less satisfied the operative test for the waiver of a rule, as established in *Millstone*. Nor could it, given the clear lack of any special circumstances that would support a waiver of the rule in this proceeding.

This conclusion is consistent with the Commission's holding in *Callaway* in which it rejected a similar contention, concluding that "the proposed contention is not admissible under our rules of practice because it impermissibly challenges an agency regulation and is therefore outside the scope of this individual licensing proceeding."[72] A similar outcome is appropriate here.

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70 10 C.F.R. § 2.335(c); *see also Millstone*, CLI-05-24, 62 NRC at 560 ("The use of 'and' in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.").

71 Petition at 2.

72 *Callaway*, CLI-15-11, slip op. at 4; *see also Fermi*, CLI-15-12, slip op. at 4 ("[A] contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver.").

2. The Proposed Contention Does Not Satisfy Criterion (vi) of 10 C.F.R. § 2.309(f)(1)

Section 2.309(f)(1)(vi) requires that a proposed contention "include references to specific portions of the application (including applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute." To raise a genuine dispute admissible under Section 2.309(f)(1)(vi), a petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[73] The Commission has stated that "general assertions, without some effort to show why the assertions undercut findings or analyses in the [application], fail to satisfy the requirements of Section 2.309(f)(1)(vi)."[74] Section 2.309(f)(2) also allows new environmental contentions to be based on the FSEIS rather than the Environmental Report. Because SEED's proposed contention fails to challenge any portion of the License Renewal Application (including the Environmental Report) or the FSEIS, it has not demonstrated a genuine dispute with the applicant.

SEED does not identify any specific portions of the License Renewal Application or the FSEIS that it challenges. Instead, it challenges the reliance on the Continued Storage Rule and GEIS in the STP FSEIS.[75] In this regard, SEED identifies seven bases for the proposed contention, all of which challenge generic issues related to the GEIS.[76] None of those bases specifically relates to the STP License Renewal Application or to the FSEIS. Therefore, the

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73 Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Millstone*, CLI-01-24, 54 NRC at 358.

74 *See S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 21-22 (2010).

75 *See* Petition at 6.

76 *See id.* at 7-8.

proposed contention should be denied because it simply does not demonstrate a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).[77]

V. CONCLUSION

As demonstrated above, the Petition is untimely under 10 C.F.R. § 2.309(c); the Motion does not satisfy the requirements in 10 C.F.R. § 2.326 for reopening the record of this proceeding; and the Petition does not include an admissible contention under 10 C.F.R. § 2.309, because it impermissibly challenges the Continued Storage Rule and it does not satisfy other contention admissibility requirements.

As the Commission concluded in *Callaway* with respect to an essentially identical contention:

> [T]he proposed contention is not admissible under our rules of practice because it impermissibly challenges an agency regulation and is therefore *outside the scope of this individual licensing proceeding*. [The petitioner] provides seven bases for its contention, all of which challenge the generic findings in the GEIS. None of the contention's bases pertain specifically to the Callaway license renewal application. The contention therefore *does not provide sufficient information to demonstrate a genuine dispute with the applicant on a material issue*. For these reasons, we decline to admit the contention.
>
> In [petitioner's] view, its "placeholder contention" is "the only procedural means" available for ensuring that any court decision resulting from the pending appeal of the Continued Storage Rule and GEIS will be applied to the Callaway license renewal matter. However, [the petitioner] *cannot litigate the Continued Storage Rule and GEIS here*. We addressed the environmental impacts of continued storage generically, via the rulemaking process, in accordance with NEPA and general principles of administrative law. [The petitioner] had—and took advantage of—the opportunity to provide comments on the proposed rule and draft GEIS. Now that the rule has been adopted, [the petitioner] has sought review of the rule and GEIS in the appropriate venue, the court of appeals. Absent a successful

[77] *Callaway*, CLI-15-11, slip op. at 4; *see also Fermi*, CLI-15-12, slip op. at 4 (stating that "because the contention does not engage the *Fermi* combined license application, Beyond Nuclear has not demonstrated a genuine dispute with the applicant on a material issue").

> petition that the rule should be waived in accordance with 10 C.F.R. § 2.335, [the petitioner's] challenges to the Continued Storage Rule and GEIS are appropriately brought before the court of appeals. *Should the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS, we would take appropriate action consistent with the court's direction. In the meantime, however, admission of a "placeholder" contention is not necessary to ensure that [the petitioner's] challenges to the Continued Storage Rule and GEIS receive a full and fair airing.*[78]

For these same reasons, the Petition and Motion should be rejected in their entirety.[79]

Respectfully submitted,

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

Signed (electronically) by Steven P. Frantz

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COUNSEL FOR STP NUCLEAR OPERATING COMPANY

Dated in Washington, D.C.
this 4th day of May 2015

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78 *Callaway*, CLI-15-11, slip op. at 4-5 (emphasis added) (citations omitted).

79 The Commission also does not permit placeholder contentions. The Commission has rejected pleadings intended to function as "placeholders" for future pleadings, stating that "our regulations do not contemplate such filings, which are tantamount to impermissible 'notice pleadings.'" *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009). The Commission recently reiterated this principle in *Byron/Braidwood*, rejecting the use of "placeholder" motions as impermissible under its Rules of Practice and "inconsistent with [its] longstanding interest in sound case management and regulatory finality." *See, e.g.*, *Exelon Generation Co., LLC* (Byron Nuclear Station, Units 1 & 2; Braidwood Nuclear Station, Units 1 & 2), CLI-14-06, 79 NRC __, slip op. at 5 (May 2, 2014). SEED specifically characterizes its proposed contention as a placeholder contention. *See, e.g.*, Petition at 1.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	Docket Nos.	50-498-LR
STP NUCLEAR OPERATING COMPANY		50-499-LR
(South Texas Project, Units 1 and 2)	May 4, 2015	

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the "STP Nuclear Operating Company Response Opposing Motion to Reopen and 'Placeholder' Contention Regarding Continued Storage Rule" was submitted through the NRC's E-filing system.

Signed (electronically) by Stephen J. Burdick

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