

BEFORE THE COMMISSION

June 25, 2012

I. INTRODUCTION

² *New York v. NRC*, No. 11-1045, 2012 WL 2053581 (D.C. Cir. June 8, 2012); *see also* Clerk's Order, *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012) (unpublished) (withholding mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc).

Environmental Impact Statement (“EIS”) prepared by NRC on remand; and (3) provide at least 60 days for raising site-specific contentions in individual licensing proceedings.³

Pursuant to 10 C.F.R. § 2.323(c) and the Commission’s June 19, 2012 Order, Nuclear Innovation North America LLC (“NINA”) files this Answer opposing the Petition filed in the STP Units 3 and 4 combined license (“COL”) proceeding. As discussed below, the Petition is premature because *New York* is not yet final, and Petitioners fail to justify the drastic action of suspending final licensing decisions in ongoing licensing proceedings. Regardless of how the Commission proceeds to address *New York*—through either a rulemaking or case-by-case path—denial of the Petition will not hamper implementation of any potential rule or policy change regarding long-term spent fuel storage environmental impacts. Furthermore, whether long-term spent fuel storage issues are addressed generically or in individual licensing proceedings, NRC’s established processes allow for fair and efficient resolution of such issues without the need to suspend final licensing decisions. Moreover, no basis exists to conclude that a final decision in the STP Units 3 and 4 COL proceeding would present any immediate threat to public health and safety. Finally, special procedures for public participation in the environmental review process or for filing contentions are unnecessary because existing NRC regulations sufficiently address such issues.

II. BACKGROUND

On September 20, 2007, STP Nuclear Operating Company (“STPNOC”)⁴ submitted an Application to the NRC for COLs for STP Units 3 and 4.⁵ Public Citizen, the SEED Coalition,

³ Petition at 12.

⁴ STPNOC was the original lead applicant for STP Units 3 and 4. NINA became the lead applicant in early 2011, and the case caption in this proceeding was revised. *See* Licensing Board Order (Revising Case Caption) (Feb. 7, 2011) (unpublished). The Petition incorrectly includes the earlier case caption.

and several other individuals and organizations filed a joint Petition to Intervene, which proposed a number of contentions.⁶ The only remaining issue in this proceeding relates to foreign ownership, control, or domination of STP Units 3 and 4.⁷

III. LEGAL STANDARDS

As an initial matter, the Petition does not comport with any pleading form contemplated or authorized by the NRC Rules of Practice.⁸ Commission precedent, however, makes clear that suspension of licensing decisions is not warranted absent compelling circumstances.⁹ In considering requests to, among other things, suspend licensing decisions following the Fukushima accident, the Commission considered whether denying such requests would prevent appropriate implementation of any pertinent rule or policy changes, prove an obstacle to fair and efficient decisionmaking, or jeopardize public health and safety.¹⁰

IV. ARGUMENT

A. The Petition Should Be Denied as Premature

Based on the D.C. Circuit's recent *New York* decision, Petitioners argue that NRC no longer has a "valid basis for any NRC reactor licensing decision."¹¹ The D.C. Circuit, however, has not yet issued its "mandate" formally returning the proceeding to the Commission. In fact, in accordance with Federal Rule of Appellate Procedure 41(b), the mandate will not issue until the

⁵ South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934, 7934 (Feb. 20, 2009).

⁶ Petition for Intervention and Request for Hearing (Apr. 21, 2009).

⁷ See *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC ___, slip op. (Sept. 30, 2011).

⁸ The Petition in fact states that it is *not* a request for a stay pursuant to 10 C.F.R. § 2.342 or a request for any other form of equitable relief recognized by the Commission. See Petition at 4.

⁹ *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___, slip op. at 19 (Sept. 9, 2011).

¹⁰ *Id.* at 19-21.

¹¹ Petition at 3.

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.¹² As such, the mandate will not issue, at the earliest, until late July 2012.¹³ Because the mandate is the certified copy of the final judgment and the order that makes the decision effective, the *New York* decision establishes no binding legal “requirements” at this time, contrary to Petitioners’ assertion.¹⁴ As such, the Petition is premature and should be denied.

Recognizing that their request is premature, Petitioners ask the Commission to hold the Petition in abeyance pending the mandate’s issuance.¹⁵ Such a request, however, is inconsistent with Commission precedent. Specifically, in *Diablo Canyon*, the Commission denied a similarly premature motion seeking relief in advance of an appellate court’s mandate.¹⁶ As the Commission recognized, a premature relief request should be denied because the facts relevant to the request may change before the mandate issues.¹⁷ So too here, where further judicial review, administrative action, or both, may well obviate the need for Petitioners’ requested relief.¹⁸

¹² 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).

¹³ *See* Fed. R. App. P. 40(a)(1) (indicating that in cases where a federal agency is a party, the time seeking rehearing is 45 days after entry of judgment, unless an order shortens or extends the time).

¹⁴ *See* Petition at 4.

¹⁵ *Id.* at 4 n.1.

¹⁶ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006).

¹⁷ *See id.* at 108-09.

¹⁸ Moreover, the NRC will not make any licensing decision concerning COLs for STP Units 3 and 4 in the immediate future. Given this fact and the numerous potential intervening events that may take place before any licensing decision, the requested relief is premature for this additional reason.

B. The Petition Fails to Demonstrate Compelling Circumstances to Suspend Final Licensing Decisions

Even had the mandate already issued, the Commission should deny the Petition for failing to demonstrate compelling circumstances justifying suspending final licensing decisions. Petitioners ignore the leading and most recent Commission precedent that establishes the framework within which requests for suspension of licensing decisions must be evaluated. In *Callaway*, the Commission considered petitions that requested, among other things, suspending licensing decisions pending a Commission National Environmental Policy Act (“NEPA”) review following the Fukushima accident.¹⁹ As discussed below, none of the three criteria in *Callaway* justifies suspending final licensing decisions.

1. Continuing Final Licensing Decisions Will Not Prevent Appropriate Rule or Policy Change Implementation

Petitioners argue that, absent final action by the NRC on remand, the NRC no longer has a valid NEPA basis to issue any reactor licenses.²⁰ If and when the mandate issues, however, the Commission has broad discretion as to how it responds to the remand, whether through rulemaking or case-by-case.²¹ Suspending licensing is not necessary in either case.

If the Commission continues its long-standing practice of addressing NEPA-based waste issues generically through rulemaking, then, consistent with federal case law, licensing suspension is unnecessary to implement any rule changes.²² In *Minnesota v. NRC*, based upon an apparent NEPA violation, the D.C. Circuit ordered the NRC to consider long-term spent fuel

¹⁹ See *Callaway*, CLI-11-05, slip op. at 19-21.

²⁰ Petition at 3.

²¹ See, e.g., *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100-01 (1983) (finding that rulemaking is an appropriate method for complying with NEPA); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

²² See *Potomac Alliance v. NRC*, 682 F.2d 1030, 1031 (D.C. Cir. 1982) (affirming *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980)); Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. 61,372, 61,373 (Oct. 25, 1979).

storage issues.²³ On remand, the Commission instituted the first WCD rulemaking and issued a Notice of Proposed Rulemaking establishing that “licensing practices need not be altered” during the rulemaking because all licensing proceedings then underway would be subject to the final rulemaking determination.²⁴ Thus, the Commission allowed licensing to continue, because once the rulemaking eventually concluded, the WCD could be applied retroactively.²⁵ Between the Notice of Proposed Rulemaking and conclusion of the WCD proceeding, the NRC issued 17 reactor operating licenses (“OLs”).²⁶

Moreover, this practice passed the test of judicial scrutiny. Following the direction in the Notice of Proposed Rulemaking, the Atomic Safety and Licensing Appeal Board rejected a request to delay a spent fuel-related OL amendment pending the completion of the WCD proceeding.²⁷ The D.C. Circuit upheld the decision to proceed with licensing absent a final WCD in *Potomac Alliance v. NRC*, declining to stay challenged licensing actions.²⁸ Accordingly, this precedent demonstrates that licensing suspension is not required pending completion of rule changes.²⁹

²³ See *Minnesota*, 602 F.2d at 418-19.

²⁴ Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁵ See *North Anna*, ALAB-584, 11 NRC at 464-66; Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁶ See NUREG-1350, Vol. 23, Information Digest, 2011-2012, App. A at 102-13 (Aug. 2011).

²⁷ See *North Anna*, ALAB-584, 11 NRC at 464-66.

²⁸ See *Potomac Alliance*, 682 F.2d at 1031.

²⁹ Contrary to Petitioners’ claim, the Commission’s *Indian Point* decision does not support the conclusion that the NRC committed to suspend licensing in that (or any other) proceeding until the WCD Update rulemaking was completed. See Petition at 10 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC ___, slip op. (July 8, 2010)). Instead, after directing the Board to deny two proposed contentions concerning potential impacts of long-term spent fuel storage, the Commission simply observed that the *Indian Point* license renewal proceeding would not be completed before the then-pending WCD Update. See *Indian Point*, CLI-10-19, slip op. at 3. This prediction proved accurate, as the WCD Update was issued in December 2010 and the *Indian Point* proceeding continues. See Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Atomic Safety and Licensing Board; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3); Notice of Hearing (Application for License Renewal), 77 Fed. Reg. 36,015, 36,016 (June 15, 2012). Further, this Commission observation did not

Furthermore, should the Commission elect to address the *New York* decision on a case-by-case basis, the issues raised by *New York* will be resolved prior to any licensing action in the above proceeding. NRC regulations and case law establish procedures allowing participation in such proceedings.³⁰ Therefore, granting of the Petition is unnecessary even if the Commission elects to proceed on a case-by-case basis.

Thus, these procedures demonstrate that, regardless of how the Commission elects to proceed, no compelling reason warrants suspending final licensing decisions.³¹

2. Continuing Final Licensing Decisions Will Not Prevent Fair and Efficient Decisionmaking Concerning the *New York* Remand Issues

Regardless of how the Commission proceeds, the NRC's established processes provide proven, fair, and efficient means to resolve long-term spent fuel storage environmental impact issues in response to the *New York* remand without the need to suspend final licensing decisions. For example, NRC's Rules of Practice provide for public comment on any generic rulemaking proceedings.³² Should the Commission decide on a case-by-case approach, NRC regulations, case law, and case-specific scheduling orders provide for ample public participation.³³ In addition, whether a rulemaking or case-specific approach is taken, NRC's NEPA regulations

establish a "precedent" that all licenses must be withheld until the WCD Update was completed. In fact, the NRC issued two renewed licenses (Cooper and Duane Arnold) after the *Indian Point* decision and before the final WCD Update. See NUREG-1350, Vol. 23, App. A at 103-04.

³⁰ See, e.g., 10 C.F.R. § 2.309(f)(2).

³¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008) (finding no reason to stay licensing decision where issuance of the license is not imminent and proposed contention pending before Board).

³² See 10 C.F.R. § 2.805(a).

³³ See *id.* § 2.309(f)(2); *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC ___, slip op. at 10 n.43 (Mar. 10, 2011) (indicating that the Commission and its Boards generally consider approximately 30 to 60 days as the limit for timely filings based on new information); *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), Initial Scheduling Order (Oct. 20, 2009) (unpublished).

provide public comment opportunities.³⁴ Just as the NRC continued to issue licenses during the first WCD proceeding and during the recent WCD Update, the Commission can continue to issue licenses during any *New York* remand proceeding. The Commission's policy of providing prompt, efficient, and fair resolution of adjudications demands as much.³⁵

3. Continuing Final Licensing Decisions Poses No Immediate Public Health and Safety Threat

The Petition provides no basis upon which to conclude that a final decision in the STP Units 3 and 4 COL proceeding would present any public health and safety threat, much less an immediate threat. Nor could the Petition so provide, because, as a general matter, the WCD does not address "immediate" risks but instead concerns the long-term storage of spent nuclear fuel. Moreover, to the extent that any rule changes are implemented following any generic proceedings, as discussed above, those rules can then be applied retroactively. Accordingly, there simply is no risk of any immediate threat to public health and safety.

C. Petitioners Fail to Establish the Need for Special Procedures

Aside from suspending final licensing decisions, Petitioners also ask the Commission for an opportunity to comment on any EA or EIS issued by the NRC, and establish deadlines for contentions raising site-specific concerns that are not sufficiently addressed in any generic rulemaking.³⁶ This request is unnecessary and should be denied. As discussed above, NRC regulations already establish ample and appropriate public participation opportunities.

Furthermore, to the extent Petitioners seek an additional opportunity to raise contentions in individual licensing proceedings even if the NRC proceeds with a generic rulemaking,

³⁴ See, e.g., 10 C.F.R. §§ 51.33(a)-(e), 51.73.

³⁵ See *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)).

³⁶ Petition at 11-12.

Commission precedent bars such contentions. As the Commission explained in *Indian Point*, when the Commission elects to proceed with WCD issues through rulemaking, it does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.³⁷ Thus, a contention that raises a matter that is, or is about to become, the subject of a rulemaking cannot be litigated in an individual licensing proceeding.³⁸

V. CONCLUSION

Suspending final licensing decisions is an extraordinary remedy that is not warranted and should not be granted. Not only is the Petition premature, it fails to demonstrate compelling circumstances justifying the requested action. Furthermore, NRC rules already provide appropriate public participation opportunities. Accordingly, for all of these reasons, the Petition 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

John E. Matthews

Stephen J. Burdick

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: 202-739-3000

Fax: 202-739-3001

E-mail: sfrantz@morganlewis.com

Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 25th day of June 2012

³⁷ See *Indian Point*, CLI-10-19, slip op. at 2.

³⁸ See *id.* at 2-3.

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the Petition, and that my efforts to resolve the issues have been unsuccessful.

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

Signed (electronically) by Steven P. Frantz

Steven P. Frantz

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone: 202-739-3000

Fax: 202-739-3001

E-mail: sfrantz@morganlewis.com

Counsel for Nuclear Innovation North America LLC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	
In the Matter of)	Docket Nos. 52-012-COL
)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC)	
)	
(South Texas Project Units 3 and 4))	June 25, 2012
_____)	

CERTIFICATION OF SERVICE

I hereby certify that, on this date, a copy of “Nuclear Innovation North America LLC’s Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings” was served electronically with the Electronic Information Exchange on the following recipients:

Administrative Judge
Michael M. Gibson, Chair
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mmg3@nrc.gov

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Administrative Judge
Dr. Randall J. Charbeneau
Atomic Safety and Licensing Board Panel
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Randall.Charbeneau@nrc.gov

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

Sara Kirkwood
Michael Spencer
Anthony Wilson
Jody Martin
Andrea Silvia
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
E-mail: Sara.Kirkwood@nrc.gov
Michael.Spencer@nrc.gov
Anthony.Wilson@nrc.gov
Jody.Martin@nrc.gov
Andrea.Silvia@nrc.gov

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

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

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5059
E-mail: sburdick@morganlewis.com

Counsel for Nuclear Innovation North America LLC