July 9, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
Tennessee Valley Authority	)	
	)	
(Watts Bar Unit 2)	)	

SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF SPENT REACTOR FUEL AT WATTS BAR UNIT 2

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), Southern Alliance for Clean Energy ("SACE") seeks leave to file a new contention which challenges the failure of the U.S. Nuclear Regulatory Commission's ("NRC's") draft environmental impact statement for the operation of Watts Bar Unit 2 (NUREG-04598, Supp. 2, Draft Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant (Oct. 2011) ("Draft SFES")) to address the environmental impacts of spent fuel pool leakage and fires as well as the environmental impacts that may occur if a spent fuel repository does not become available. The contention is based on the United States Court of Appeals for the District of Columbia Circuit's recent decision in *State of New York v. NRC*, No. 11-1045 (June 8, 2012), which invalidated the Nuclear Regulatory Commission's ("NRC") Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) ("WCD") and the NRC's final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)) ("Temporary Storage Rule" or "TSR"). *State of New York* vacated the generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage. As a

result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings.

SACE recognizes that because the mandate has not yet issued in *State of New York,* this contention may be premature. Nevertheless, SACE is submitting the contention within 30 days of becoming aware of the court's ruling, in light of Commission precedents judging the timeliness of motions and contentions according to when petitioners became aware of a decision's potential effect on their interests. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002). If the Atomic Safety and Licensing Board or Commission determines that this contention is premature, SACE requests that consideration of the contention be held in abeyance pending issuance of the mandate.

II. FACTUAL BACKGROUND

In 1984, the NRC issued its first WCD, making findings regarding the safety of spent fuel disposal and the safety and environmental impacts of spent fuel storage. Over the several decades that have passed since then, the NRC has updated the WCD. The latest update was issued in December 2010. On June 8, 2012, the U.S. Court of Appeals for the D.C. Circuit took review of the NRC's 2010 WCD Update and TSR and vacated those rules in their entirety. In the course of reviewing the WCD Update, the court found that the WCD is a "major federal action" under the National Environmental Policy Act ("NEPA"), therefore requiring either a finding of no significant impact ("FONSI") or an environmental impact statement ("EIS"). *Id.,* slip op. at 8. The court also found it was "eminently clear that the WCD will be used to enable licensing decisions based on its findings" because the WCD "renders uncontestable general

conclusions about the environmental effect of plant licensure that will apply in every licensing decision." *Id.,* slip op. at 9 (citing 10 C.F.R. § 51.23(b)).

With respect to the WCD's conclusions regarding spent fuel disposal, the court observed that the NRC has "no long-term plan other than hoping for a geologic repository" and that spent reactor fuel "will seemingly be stored on site at nuclear plants on a permanent basis" if the government "continues to fail in its quest" to site a permanent repository. *Id.,* slip op. at 13. Thus, the court concluded that the WCD "must be vacated" with respect to its conclusion in Finding 2 that a suitable spent fuel repository will be available "when necessary." *Id.,* slip op. at 11. In order to comply with NEPA, the court found that the NRC must "examine the environmental effects of failing to establish a repository." *Id.,* slip op. at 12.

With respect to the TSR's conclusions regarding the environmental impacts of temporary storage of spent reactor fuel at reactor sites, the court concluded that the NRC's environmental assessment ("EA") and FONSI issued as part of the TSR "are not supported by substantial evidence on the record" in two respects. First, the NRC had reached a conclusion that the environmental impacts of spent fuel pool leaks will be insignificant, based on an evaluation of past leakage. The court concluded that the past incidence of leaks was not an adequate predictor of leakage thirty years hence, and therefore ordered the NRC to examine the risks of spent fuel pool leaks "in a forward-looking fashion." *Id.,* slip op. at 14. In addition, the court found that the NRC's analysis of the environmental impacts of pool fires was deficient because it examined only the probability of spent fuel pool fires and not their consequences. *Id.,* slip op. at 18-19. "Depending on the weighing of the probability and the consequences," the court observed, "an EIS may or may not be required." *Id.,* slip op. at 19.

In remanding the WCD Update and the TSR to the NRC, the court purposely did not

express an opinion regarding whether an EIS would be required or an EA would be sufficient. Instead, it left that determination up to the discretion of the NRC. *Id.,* slip op. at 12, 20.

III. CONTENTION

A. Statement of the Contention

The Draft SFES for Watts Bar Unit 2 does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals for the D.C. Circuit in *State of New York v. NRC,* No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

B. The Contention Satisfies the NRC's Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

1. Brief Summary of the Basis for the Contention

The contention is based on the United States Court of Appeals for the District of Columbia Circuit's decision in *State of New York v. NRC*, which invalidated the NRC's generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage after cessation of reactor operation with respect to spent fuel pool leakage, pool fires, and the environmental impacts of failing to establish a repository. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual licensing proceedings. To the extent that the Draft FSES for Watts Bar Unit 2 addresses spent fuel storage impacts, it does not address the concerns raised by the Court in *State of New York.* Therefore, before Watts Bar Unit 2 can be licensed, those impacts must be addressed.

SACE does not currently take a position on the question of whether the environmental impacts of post-operational spent fuel storage should be discussed in an individual EIS or environmental assessment for this facility or a generic EIS or environmental assessment. That question must be decided by the NRC in the first instance. *Baltimore Gas and Electric Co. v. NRDC,* 462 U.S. 87 (1983). SACE reserves the right to challenge the adequacy of any generic analysis the NRC may prepare in the future to address the site-specific environmental conditions at Watts Bar Unit 2. The current circumstances, however, are such that the NRC has no valid environmental analysis, either generic or site-specific, on which to base the issuance of a license for this facility.

2. The Contention is Within the Scope of the Proceeding

The contention is within the scope of this licensing proceeding because it seeks to ensure that the NRC complies with the NEPA before issuing an operating license for Watts Bar Unit 2. There is no doubt that the environmental impacts of spent fuel storage must be addressed in all NRC reactor licensing decisions. *State of New York,* slip op. at 8 (holding that the WCD is a "predicate" to every licensing decision); *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

3. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. *See* discussion above in subsection (2). As such, in the absence of 10 C.F.R. § 51.23(a), it is clear that this contention addresses a material omission in the Staff's environmental review pursuant to NEPA.

4. Concise Statement of Facts of Expert Opinion Support the Contention

This contention is based primarily on law rather than facts. SACE has adequately supported the contention by citing *State of New York* and discussing its legal effect on this proceeding. SACE also relies on the undisputed fact that the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a) that the Court identified in *State of New York.*

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact.

SACE has a genuine dispute with the applicant regarding the legal adequacy of the environmental analysis on which the applicant relies in seeking an operating license in this proceeding. Unless or until the NRC cures the deficiencies identified in *State of New York* or the applicant withdraws its application, this dispute will remain alive.

IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. § 2.309(f)(2).

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(f)(2), which 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.

Id.

SACE satisfies all three prongs of this test. First, the information on which the contention is based -- *i.e.,* the invalidity of 10 C.F.R. § 51.23(b) and the findings on which it is based -- is new and materially different from previously available information. Prior to June 8, 2012, 10 C.F.R. § 51.23 was presumptively valid. Subsequent to the issuance of *State of New*

York by the U.S. Court of Appeals, the NRC no longer has a lawful basis for relying on that regulation to exempt itself or license applicants from considering the environmental impacts of post-operational spent fuel storage in the environmental analyses for individual reactor license applications. By the same token, the generic analyses in the WCD and the TSR, on which the NRC relied for all of its reactor licensing decisions, are no longer sufficient to support the issuance of a license. Therefore the NRC lacks an adequate legal or factual basis to issue an operating license for Watts Bar Unit 2.

Finally, the contention is timely because it has been submitted within 30 days of June 8, 2012, the date the U.S. Court of Appeals issued *State of New York.*

V. CONCLUSION

For the reasons stated, SACE respectfully requests that the Atomic Safety and Licensing Board grant leave to file its contention.

Respectfully submitted,

Electronically signed by
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July 9, 2012

CERTIFICATION REGARDING
CONSULTATION PURSUANT TO 10 C.F.R. § 2.323

I certify that on July 7, 2012, I contacted counsel for the Tennessee Valley Authority ("TVA") and the NRC Staff to seek their consent to this motion. Counsel for TVA stated that TVA would oppose the motion. Counsel for the NRC Staff stated that the Staff does not oppose the filing of the motion, but that based on the representations in SACE's counsel's e-mail, the Staff does not have enough information to take a position on the admissibility of the contention. The Staff will respond to the contention when it is filed.

Electronically signed by
Diane Curran

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CERTIFICATE OF SERVICE

I certify that on July 9, 2012, I posted on the NRC's Electronic Information Exchange System copies of the foregoing Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2. It is my understanding that as a result, the following parties were served:

Lawrence G. McDade, Chair Paul B. Abramson Gary S. Arnold Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Mail Stop T-3F23 Lgm1@nrc.gov, pba@nrc.gov, wxb3@nrc.gov	Kathryn M. Sutton, Esq. Paul M. Bessette, Esq. Morgan, Lewis & Bockius, L.L.P. 1111 Pennsylvania Avenue N.W. Washington, D.C. 20004 ksutton@morganlewis.com pbessette@morganlewis.com
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(*signed electronically by*)
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