August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
PROGRESS ENERGY CAROLINAS, INC.	)	Docket Nos. 52-022-COL and 52-023-COL
	)	
(Shearon Harris Nuclear Power Plant, Unit 2 and 3)	)	
	)	

NRC STAFF'S RESPONSE TO NC WARN'S PETITION TO REOPEN THE RECORD AND ADMIT CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to NC WARN's [North Carolina Waste Awareness and Reduction Network's] Motion to Reopen the Record and Admit Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at the Shearon Harris Nuclear Power Plant (July. 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A360) ("Motion"). The Motion raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the new contention would be admissible if the Commission rules on it after the D.C. Circuit issues the mandate for that decision. But, if the Commission rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Commission should dismiss it without prejudice to timely refiling upon issuance of the court's mandate. Further, in the event the Commission finds the contention admissible after the D.C. Circuit mandate issues, the Staff does not oppose NC WARN's motion to reopen the record to admit the contention.

BACKGROUND

A. Procedural History

This proceeding concerns the application submitted by Progress Energy Carolinas, Inc. ("PEC" or "Applicant") for combined licenses ("COLs") for two new reactor units at the Shearon Harris nuclear facility. *See* Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3, 73 Fed. Reg. 21,995 (Apr. 23, 2008). NC WARN timely filed a request for hearing and petition for leave to intervene, which the Board granted in October 2008, after finding a showing of representational standing and one admissible contention. LBP-08-21, 68 NRC 554, 559-64 (2008). However, the Commission held that the Board erred in doing so, and remanded the proceeding for a reassessment of the contention's admissibility. CLI-09-08, 69 NRC 317, 324-27, 330 (2009). The Board dismissed the original contention on remand from CLI-09-08 for failing to meet the 10 C.F.R. § 2.309(f)(1) admissibility requirements. LBP-09-08, 69 NRC 736, 745 (2009), *aff'd,* CLI-10-09, 71 NRC at 273-75, 278 (2010). With no pending contentions remaining, the Board terminated the proceeding. LBP-09-08, 69 NRC at 746, *aff'd,* CLI-10-09, 71 NRC at 278.

B. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement ("EIS") to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report ("ER") as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("Waste Confidence Decision") and a temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. *See* Motion at 4; 10 C.F.R. § 51.23(a). The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" from any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

On June 8, 2012, the United States Court of Appeals for the D.C. Circuit vacated the NRC's Waste Confidence Decision and Temporary Storage Rule and remanded those rulemakings back to the agency. *New York v. NRC*, 681 F.3d at 483. Shortly thereafter, NC WARN, together with various other organizations, submitted a petition requesting that the NRC "suspend its final licensing decisions in all pending NRC licensing proceedings pending

completion of the remanded proceedings[.]" *See* Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings, at 3 (June 18, 2012) (ADAMS Accession No. ML12170A983). These petitioners also requested that the Commission establish a 60-day timetable for submitting new site-specific contentions based on the D.C. Circuit's ruling. *Id.* at 12. As part of its response, NRC Staff averred that the Commission's normal adjudicatory procedures in 10 C.F.R. Part 2 provide "well-understood and appropriate means for raising contentions based on new information[.]" *See* NRC Staff's Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings, at 4-5 (June 25, 2012) ("Staff Answer"). NC WARN thereafter filed the present Motion, which the Staff now answers.

DISCUSSION

NC WARN based the proposed contention on the D.C. Circuit Court of Appeals' recent decision in *New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

> The Environmental Report for the Shearon Harris Nuclear Power Plants, Units 2 and 3, 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 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.

Motion at 3-4. At root, the Motion asserts that because the generic findings in the Commission's rulemaking have been vacated, "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." *Id.* at 4.

A. Contention Admissibility Standards

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, NC WARN asserts that it meets the standards of § 2.309(f)(2) for late-filed contentions. *Id.* at 14-15. Considering the holding of the D.C. Circuit and that the Motion was filed within 30 days of the ruling, the Staff agrees that, assuming the D.C. Circuit's mandate issues before the Commission rules on the contention's admissibility, NC WARN has sufficiently demonstrated the timeliness of its filing.[1]

It is well established in NRC case law that petitioners may not challenge agency regulations in individual adjudications. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station) CLI-00-20, 52 NRC 151, 165-66 (2000) (*citing North Atlantic Energy Service Station* (Seabrook Station, Unit 1) CLI-99-06, 49 NRC 201, 217 n.8 (1999). NC WARN recognizes that "because the mandate has not yet issued in *New York*, this contention may be premature." Motion at 2. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . .." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id*. at 467. Moreover, licensing boards have typically found contentions premature, and therefore

[1] The Commission has indicated that where there is no proceeding in which to file a new or amended contention, the standards of § 2.309(f)(2) do not apply; under such circumstances, a pleading seeking to introduce a new contention is simply a new intervention petition and must meet the standards of § 2.309(c) (and the standards of § 2.326 for reopening a closed record, if applicable). *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 18 n.65) (Sept. 27, 2011). As explained below, assuming the D.C. Circuit's mandate issues before the Board rules on the contention's admissibility, the Staff does not oppose NC WARN's motion to reopen the record, including its assertion that it has met the standards of § 2.309(c) for untimely filings. The Staff notes that should the Commission determine that the § 2.309(f)(2) standards apply under the present circumstances (and again assuming the D.C. Circuit's mandate has issued by the time the Board rules on the Motion), the Staff would not oppose NC WARN's assertion regarding the timeliness of the contention under § 2.309(f)(2), considering the holding of the *State of New York* decision and that the Motion was filed within 30 days of the ruling.

inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g., Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[2] As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[3] *Id.*

Under the Federal Rules of Appellate Procedure, a "court's mandate must issue 7 days after the time to file a petition for rehearing expires or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later." Fed. R. App. P. 41(b). On July 6, 2012, at the Commission's request, the D.C. Circuit extended the period of time to file a petition for rehearing of *New York v. NRC* to August 22, 2012. *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate is not likely to issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the exclusion of NC WARN's contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when the Commission rules on the Motion.[4]

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[2] *But see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued. . . "we have deferred our rulings on these requests").

[3] The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.' " *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Commission cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

[4] *See* 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding").

If the D.C. Circuit's mandate issues before the Commission rules on the contention's admissibility, upon the mandate's issuance, the contention as pled would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission. *See* Motion at 4-5. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court's ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 345 (''Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

If the D.C. Circuit's mandate has not issued by the time the Commission rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Motion at 4, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Commission should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If NC WARN were to refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be otherwise admissible provided the claims it raises do not become the subject of a generic rulemaking. *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 342 n.43 (2011); *Oconee*, CLI-99-11, 49 NRC at 345.

B. Reopening Standards

i. Standing

NC WARN moves to reopen the record for the Shearon Harris Units 2 and 3 COL proceeding in order to allow for consideration of its proposed new contention. Where a petitioner seeks to reopen the record and file a new contention, the petitioner must submit a "'fresh intervention petition' that fulfills the applicable standards that govern such filings, presumably including an appropriate standing demonstration." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC 616, 640 (2010) (citing *U.S. Army Installation Command* (Schofield Barracks, Oahu, Haw. & Pohakuloa Training Area, Island of Haw., Haw.), CLI-10-20, 72 NRC 185, 195 & n.56 (2010)).

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

> (i) The name, address and telephone number of the requestor or petitioner;
>
> (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (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; and
>
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1).

An organization may establish its standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding) or representational standing (based on the standing of its members). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding and would have standing in his or her own right, it must identify that

member by name and address, and it must show that the member "has authorized the organization to represent him or her and to request a hearing on his or her behalf." *See e.g.*, *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted); *CPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Further, for the organization to establish representational standing, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (citing *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

A petitioner who is admitted as a party in one proceeding must re-establish standing once the original proceeding is dismissed – he may not simply rely on standing established in the prior proceeding. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993).[5] A prospective petitioner has an affirmative duty to demonstrate that it has standing in each proceeding in which it seeks to participate, since a petitioner's status can change over time and the bases for its standing in an earlier proceeding may no longer apply. *Id.* A petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are (1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing. *Id.*

NC WARN filed an intervention petition that was initially granted, but after an appeal, the licensing board dismissed its petition and closed the record. Motion at 3; 11; *Shearon Harris*,

[5] In *Comanche Peak*, the Petitioner had been admitted as a party to the Comanche Peak Unit 2 operating license proceeding, and was later withdrawn from the proceeding by request. CLI-93-4, 37 NRC at 158-59. The proceeding then continued until the parties reached a settlement agreement dismissing the operating license proceeding. *Id.* at 159. The Petitioner filed a petition for late intervention in the same proceeding, and subsequently filed a petition asking the Commission for the opportunity for a new hearing, both of which were denied. *Id.* Afterward, the Petitioner filed yet another petition for late intervention. *Id.* The Commission determined that the Petitioner had not demonstrated that it had standing based on the documents filed in its previous attempt to re-intervene, and that the petition was thus deficient. *Id.* at 163. However, the Commission declined to rely on that flaw to dismiss the petition, instead relying on the Petitioner's failure to meet other requirements. *Id.*

LBP-08-21, 68 NRC at 588; *Shearon Harris*, LBP-09-08, 69 NRC at 746.[6] To demonstrate standing, NC WARN submitted a declaration from its principal officer that (1) NC WARN continues to represent the interest of the members who previously filed standing declarations in the proceeding, (2) there has been no substantial change in the organization's status or standing regarding its participation in the proceeding, and (3) there has been no material change in the factual bases upon which the members' standing declarations were based. Motion at 11-12; Standing Declaration in Support of Motion to Reopen the Record and Admit Contention. Accordingly, the Staff does not oppose the representational standing of NC WARN.

ii. § 2.326 Reopening Standards

In addition to the threshold requirement that NC WARN demonstrate its standing, NC WARN must meet the reopening standards in 10 C.F.R. § 2.326 because the record in the proceeding has closed. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009); *Shearon Harris*, LBP-09-08, 69 NRC at 746, *aff'd*, CLI-10-9, 71 NRC 245, 278 (2010). Pursuant to 10 C.F.R. § 2.326, a motion to reopen a closed record must (1) be timely, (2) "address a significant safety or environmental issue," and (3) "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a). Section 2.326(b) further requires the motion to be accompanied by supporting affidavits that "set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) be satisfied. 10 C.F.R. § 2.326(b). "Each of the criteria must be separately addressed, with a specific explanation as to why it has been met." *Id.* In addition, a motion to reopen relating to a contention not previously in controversy must satisfy the requirements for nontimely contentions in § 2.309(c).

[6] NC WARN notes that it initially submitted a contention challenging the environmental report's failure to discuss the environmental impacts of the lack of options for permanent disposal of spent fuel generated at the Shearon Harris site, but it was dismissed as an impermissible challenge to the Waste Confidence Decision. Motion at 3. NC WARN requests that, if the Commission deems it necessary, its Motion be treated a request for reconsideration of the dismissal of this previous contention. *Id.* The Staff answers the Motion as a request for consideration of the new contention in light of new information.

NC WARN characterizes its contention as "based primarily on law rather than facts," cites *New York* as the basis for the contention, and alleges that the NRC has no valid environmental analysis on which to base the issuance of a COL. Motion at 4-5, 10. As such, the Staff views the contention as a legal contention, which does not rely on facts or technical analysis for its support.[7]

The Motion addresses each of the § 2.326(a) criteria separately and specifically. First, the Motion states the proposed contention is timely because it is based on and was filed within 30 days of the D.C. Circuit Court of Appeals' decision in *New York v. NRC*. Motion at 8. Second, the Motion asserts that the contention presents a significant environmental issue because the environmental impacts of spent fuel storage must be addressed in all reactor licensing decisions as the Waste Confidence Decision is a "predicate" to every licensing decision. Motion at 9 (citations omitted). Third, the Motion addresses the materially different criterion because it claims the NRC no longer has a legal basis for § 51.23(b); therefore, before the NRC can issue a COL to Shearon Harris, it must address the environmental impacts of

[7] Although the Commission has recently emphasized the importance of the affidavit requirement under § 2.326(b), the Staff does not consider the lack of a supporting affidavit addressing the § 2.326(a) criteria fatal to the Motion because, in the context of legal contentions, the Commission has also stated that "requiring a petitioner to allege 'facts' under section 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' under section 51.109(a)(2) in support of a *legal* contention –as opposed to a *factual* contention—is not necessary." *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 590 (2009) (Section 51.109(a)(2) links the procedural standards for admission of environmental contentions in the High-Level Waste Repository proceeding to those for reopening under § 2.326, and therefore, the Commission's holding in CLI-09-14 supports the conclusion that affidavits are likewise unnecessary for reopening a record on a legal contention pursuant to § 2.326.); *cf. Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation),* LBP-99-07, 49 NRC 124, 128-29 (1999) (In discussing the petitioner's ability to contribute to the development of a sound record under § 2.309(c)(viii), the board indicated that, where legal issues are the focal point of a late-filed contention, "the need for an extensive showing regarding witnesses and testimony may be less compelling."); *but see Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-03, 75 NRC __, ___ (Feb. 22, 2012) (slip op. at 18 n.86) ("Litigants seeking to reopen a record must comply fully with section 2.326(b)"); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 9) (Sept. 27, 2011) (stating that Appellants' motion to reopen and proposed new contention pleading "could have been rejected solely on the basis of the Appellants' failure to comply fully with § 2.326(b)).

spent fuel storage raised by the D.C. Circuit in *New York* in an individual EIS or environmental assessment for Shearon Harris or a generic EIS or environmental assessment.[8] Motion at 4.

If the Commission rules on the Motion after the D.C. Circuit issues the mandate in *New York*, then the Staff does not oppose NC WARN's claim that it has satisfied the § 2.326(a) criteria. However, if the Commission rules on the Motion before the mandate is issued, then the § 2.326(a)(2) and (a)(3) criteria are not satisfied, and the Commission should deny the Motion without prejudice to timely refilling upon issuance of the court's mandate. To satisfy § 2.326(a)(2) and (a)(3), NC WARN relies on the Waste Confidence Decision rule being vacated by the D.C. Circuit. *See* Motion at 4, 9. If the Waste Confidence Decision rule remains in effect, then the environmental impacts of spent fuel storage have been addressed, and the NRC need not revisit its environmental analysis of those impacts before issuing reactor licenses. In that case, NC WARN would not have presented a significant environmental issue, nor shown that a materially different result would have been likely had its contention been considered initially.

iii. § 2.309(c) Late Filing Standards

The reopening rule also explicitly requires petitioners to satisfy the requirements for nontimely contentions in § 2.309(c) when the motion relates to a contention not previously in controversy. 10 C.F.R. § 2.326(d); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, __ (slip op. at 15-16) (Sept. 27, 2011). Section

[8] NC WARN also argues that a materially different result would be likely because, "if severe accident mitigation alternatives ("SAMAs") were imposed as mandatory measures to manage and store the spent fuel at the Shearon Harris site, the outcome of the Environmental Report could be affected in three major respects." Motion at 9. The Staff notes that this discussion relating to SAMAs does not meet the materially different result criterion of § 2.326(a)(3). NC WARN asserts that the environmental analysis "could be affected," but that is not the standard a motion to reopen must meet. Petitioners must show that "a materially different result *would be or would have been likely* had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a)(3) (emphasis added). In addition, the Motion does not provide any basis to support the assumption that SAMAs would be imposed as mandatory measures. Such an assertion is not a legal argument and, therefore, would need to be supported by factual or technical bases supported by an expert affidavit. *See* 10 C.F.R. § 2.326(b); *Pilgrim*, CLI-12-03, 75 NRC at __ (slip op. at 22-23) (Intervenor did not demonstrate the likelihood of a material change to the SAMA analysis where Intervenor did not support its generalized claims that the SAMA analysis underestimates consequences of a severe accident and an unspecified increase in consequences would lead to the identification of additional cost-beneficial mitigating measures.).

2.309(c) requires a balancing of eight factors, the most important of which is "good cause, if any, for the failure to file on time." 10 C.F.R. § 2.309(c)(i)-(viii); *Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 17) (citing *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 322-23 (2010)). The Motion addresses the § 2.309(c) criteria, and the Staff does not dispute NC WARN's conclusion that, on balance, the factors favor allowing the nontimely filing. *See* Motion at 10-14. Accordingly, assuming the D.C. Circuit's mandate issues before the Commission finds the contention admissible, the Staff does not oppose NC WARN's motion to reopen the record.

CONCLUSION

For the foregoing reasons, the Staff agrees with NC WARN that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *New York*. In that event, the Staff does not oppose NC WARN's motion to reopen the record and admit the new contention. However, if the Commission rules before the mandate issues, the contention must be rejected as an impermissible challenge to NRC regulations and the motion to reopen the record must be denied. Finally, the admission of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 2nd day of August, 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC Staff's Response to NC WARN's Motion to Reopen the Record and Admit Contention" have been served upon the following persons by Electronic Information Exchange this 2nd day of August, 2012.

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