August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY OPERATIONS, INC.	)	Docket No. 52-024-COL
	)	
(Grand Gulf Nuclear Station, Unit 3)	)	
	)	

NRC STAFF'S RESPONSE TO PETITIONER'S
MOTION FOR LEAVE TO FILE A NEW 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 the Beyond Nuclear's ("Petitioner") Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Grand Gulf Unit 3 (July 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A425) ("Petition").[1] The Petition 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 Petition demonstrates Beyond Nuclear's standing, and a balancing of the late-filing factors specified in 10 C.F.R. § 2.309(c) weighs in its favor. In addition, the new contention would be admissible if the Commission rules on it after the D.C. Circuit issues the mandate for that decision. However, because NRC regulations bar admission of the contention prior to the issuance of the mandate, if the Commission rules before that occurs it should dismiss the Petition without prejudice to timely refiling upon issuance of the court's mandate.

[1] Although Beyond Nuclear characterizes its filing as a "motion," it is apparent from the substance of the pleading that it is a petition for leave to intervene in accordance with 10 C.F.R. § 2.309, and the Staff therefore refers to it as such throughout this answer.

BACKGROUND

A. Procedural History

This proceeding concerns the application submitted by Entergy Operations, Inc. ("Entergy") for a combined license ("COL") for Grand Gulf Nuclear Plant, Unit 3. *See* Acceptance for Docketing of an Application for Combined License for Grand Gulf Unit 3, 73 Fed. Reg. 22,180 (Apr. 24, 2008). Shortly thereafter, NRC Staff published a notice of hearing on the application and provided a sixty (60) day window for persons to petition for leave to intervene in the proceeding. *See* Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Grand Gulf Unit 3, 73 Fed. Reg. 37,511 (July 1, 2008). The notice specified that "[n]on-timely filings will not be entertained absent a determination by the Commission or presiding officer designated to rule on the petition, pursuant to the requirements of 10 CFR 2.309(c)(1)(i)-(viii)." *Id.* No petitions to intervene were filed during this 60-day period. Several months later, in January 2009, NRC staff suspended its review of the Grand Gulf COL application until further notice after receiving a request from Entergy to do so. Letter from David B. Matthews, NRC Director of Division of New Reactor Licensing, to William K. Hughey, Entergy Director of New Plant Licensing (Jan. 12, 2009) (ADAMS Accession No. ML090080523). The application review currently remains suspended.

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* Petition 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 to the agency. *New York v. NRC*, 681 F.3d at 483. Shortly thereafter, Beyond Nuclear, together with various other organizations, submitted a petition requesting the NRC to "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. ML12170B111). 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, the 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). Beyond Nuclear thereafter filed its present Petition, which the Staff now answers.[2]

DISCUSSION

A. Legal Standards

For a petitioner to be admitted as an intervenor in a licensing proceeding, NRC regulations require the petitioner to demonstrate standing and to submit at least one admissible contention. 10 C.F.R. § 2.309(a), (d), & (f)(1). Regarding standing, pursuant to Section 189a. of the Atomic Energy Act ("AEA"), only persons "whose interest may be affected" by a licensing proceeding are entitled to a hearing; the Commission typically uses contemporaneous Article III standing requirements to determine whether a party's "interest" is sufficient. *See EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-03, 72 NRC __, __

[2] Beyond Nuclear asserts that on July 6, 2012, it contacted counsel for the NRC staff in an attempt to obtain consent to the Petition. Petition at 12. It is unclear from this statement which Staff counsel Beyond Nuclear attempted to contact; however, the only Staff counsel with a notice of appearance in this proceeding did not receive such a request from the petitioners.

(June 6, 2011) (slip op. at 8) (*citing* 42 U.S.C. § 2239(a)(1)(A)). When determining standing in new reactor proceedings, NRC traditionally employs a fifty (50) mile "proximity presumption" of standing, based on the "realistic threat of harm" that persons living within such a radius of a proposed new reactor face if a release of radioactive material from the facility were to occur. *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009). An organization may demonstrate "representational standing" by showing that (1) the organization's members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the lawsuit. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). The organization must also demonstrate that at least one of its members has authorized it to represent the member's interests. *Id*.

With respect to demonstrating an admissible contention, all contentions—timely or not—must meet the admissibility standards of 10 C.F.R. § 2.309(f)(1), which require that a petition must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . .;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised . . . is within the scope of the proceeding;
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . . . [I]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, [the petition must include] the identification of each failure and the supporting reasons for the petitioner's belief[.]

10 C.F.R. § 2.309(f)(1)(i)-(vi). However, petitioners who seek to intervene after the initial

deadline for filing petitions are also subject to the requirements of 10 C.F.R. § 2.309(c). *See 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).

10 C.F.R. § 2.309(c) requires a non-timely petitioner to demonstrate that its request should be granted based upon a balancing of eight factors:

> (i) Good cause, if any, for the failure to file on time;
> (ii) The nature of the petitioner's right under the [AEA] to be made a party to the proceeding;
> (iii) The nature and extent of the petitioner's property, financial or other interest in the proceeding;
> (iv) The possible effect of any order that may be entered in the proceeding on the petitioner's interest;
> (v) The availability of other means whereby the petitioner's interest will be protected;
> (vi) The extent to which the petitioner's interests will be represented by existing parties;
> (vii) The extent to which the petitioner's participation will broaden the issues or delay the proceeding; and
> (viii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. §§ 2.309(c)(1)(i)-(viii). The petitioner bears the burden of showing that a balancing of these eight factors weighs in favor of admittance of its late petition. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998).[3]

B. Beyond Nuclear Has Demonstrated Representational Standing

The affidavits submitted with the Petition demonstrate that, pursuant to the "proximity presumption" described above, two members of Beyond Nuclear would have standing in their

[3] The Staff also notes that the Grand Gulf COL application references an early site permit (ESP) that was previously issued for the Grand Gulf site; the ESP is generally referenced throughout the Environmental Report in the COL application. *See generally* Notice of Issuance of Early Site Permit (ESP) for Grand Gulf ESP Site, 72 Fed. Reg.19,217 (Apr. 17, 2007); Entergy Grand Gulf Unit 3 COL Application (Environmental Report) Rev. 0 (Feb. 27, 2008) (ADAMS Accession No. ML080640404). With respect to an application for a combined license that references an ESP, any environmental issues resolved in the ESP proceeding are considered to have finality at the combined license stage unless information that is both "new and significant" has been identified. *See* 10 C.F.R. § 52.39(c)(1)(v). Waste Confidence contentions were contemplated and denied in the ESP proceeding, and thus have finality absent "new and significant" information. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004). While Beyond Nuclear does not specifically address this issue, numerous portions of the Petition assert that NRC has a nondiscretionary duty to consider "new and significant" information in the context of the *New York v. NRC* decision. *See* Petition at 6-8.

own right in this proceeding because they live within thirty (30) miles of the proposed Unit 3 at the Grand Gulf nuclear site. *See* Standing Declaration of Kos Kostmayer in Support of Beyond Nuclear Request for Public Hearing and Leave to Intervene (July 7, 2012) (ADAMS Accession No. ML12191A427); Standing Declaration of Martha Ferris in Support of Beyond Nuclear Request for Public Hearing and Leave to Intervene (July 7, 2012) (ADAMS Accession No. ML12191A426). The affidavits also explicitly authorize Beyond Nuclear to represent the interests of these individual members. *Id.* These interests are "germane" to Beyond Nuclear's stated organizational purpose of protecting the health, safety, and lives of its members and the general public. *See* Petition at 6. Lastly, the claim and the relief requested—not issuing a license for Grand Gulf Unit 3 until NRC addresses the environmental impacts of spent fuel storage after cessation of operation consistent with the *New York v. NRC* decision—does not require the addition of these members individually to the proceeding.

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

Beyond Nuclear bases its 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 Grand Gulf Unit 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.

Petition at 4. At root, the Petition 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 8-9.

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)). Beyond Nuclear recognizes that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Petition 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 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).[4] As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[5] *Id.*

[4] *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").

[5] 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, a contention that challenges an NRC regulation is not admissible before a court of appeals issues its mandate striking down that regulation.

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 exclusion of the Petitioner'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 Petition.[6]

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* Petition 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 (''[L]icensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

[6] *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 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, Petition 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 contention should be rejected, subject to refiling without prejudice when, and if, the mandate issues. If the Petitioners 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 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.

D. The Petition Meets the § 2.309(c) Standards Governing Untimely Filings

As previously stated, the period for timely filing in this licensing proceeding has long expired; Beyond Nuclear must demonstrate via the eight factor balancing test codified in 10 C.F.R. § 2.309(c) that its Petition should be granted. For the following reasons, six of the eight factors weigh in favor of granting the Petition, including the weightiest "good cause" factor. On balance, therefore, the Staff agrees that Beyond Nuclear has supported its claim that the Petition should be granted notwithstanding its late filing.

1. Factor (i): Good Cause

The "good cause" factor is accorded the greatest weight in the balancing analysis. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 323 (2010). "Newly available information has long been held to provide good cause to file a new contention." *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 NRC 749, 754 (2004). In addition, the

good cause factor particularly favors petitioners who file "within 30 days of the availability of the document they contend contains" the new information forming the basis of the late-filed contention. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-01, 71 NRC 165, 181-82 (2010).

As noted above, the admissibility of the underlying contention depends on whether the mandate has issued when the Commission rules on the Petition. Assuming the D.C. Circuit's mandate has issued by the time the Commission rules on the Petition, the Staff agrees that Beyond Nuclear has satisfied the "good cause" factor. Petition at 5.[7] Beyond Nuclear's contention asserts that the recently issued decision in *New York v. NRC* invalidated NRC's legal basis for exempting the review of the safety and environmental impacts of spent fuel storage in individual licensing proceedings. Petition at 5, 8-9. The contention was then filed on July 9, 2012, thirty (30) days following that June 8 decision—a timeframe the Commission has previously accepted "as timely and presumptively meeting the good cause requirement of section 2.309(c)(1)(i)[.]" *Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC at 87 (2010) (quoting standard established by Licensing Board and finding it to be reasonable).

2. Factors (ii) – (iv): Standing

Beyond Nuclear claims it has met factors (ii)-(iv) by submitting declarations for representational standing of individual members, by proclaiming its interest in protecting the "health, safety and lives" of its members and the general public, and asserting these interests would be served by an issuance in its favor, respectively. Petition at 6. Factors (ii)-(iv) closely mirror the requirements for demonstrating standing in an NRC adjudication. *Compare* 10 C.F.R. § 2.309(c)(1)(ii)-(iv), *with* 10 C.F.R. § 2.309(d)(1)(ii)-(iv). Thus, if the Petition demonstrates that Beyond Nuclear has standing in this proceeding, factors (ii)-(iv) should weigh in its favor. *Vogtle*, LBP-10-01, 71 NRC at 182. As discussed above, the Staff agrees that Beyond Nuclear has

[7] By contrast, if the D.C. Circuit's mandate has not issued by the time the Commission rules on the contention, then for the reasons previously explained the court's decision would not provide a basis for an admissible contention and accordingly could not constitute good cause for a late-filed contention,

demonstrated representational standing to participate in this proceeding, and thus factors (ii)-(iv) weigh in Beyond Nuclear's favor.

3. Factors (v)-(vi): Interests Protected by Other Means or Existing Parties

With respect to factors (v) and (vi), Beyond Nuclear claims that in this proceeding it has no other means to protect its organizational interests other than through the hearing it requests. Petition at 7. Assuming a petitioner has standing to participate, these two factors are generally satisfied in situations where there is currently no other proceeding or active party. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC 156, 165 (1993); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-05, 55 NRC 131, 141 (2002). The Staff agrees that as there is presently no contested proceeding on this application for a new license, such that Beyond Nuclear would be the sole intervening party if its petition were to be granted, these factors likewise weigh in Beyond Nuclear's favor.[8]

4. Factors (vii)-(viii): Implications of Petitioner's Participation

Factor (vii) requires a determination of whether the petitioner's participation will broaden the issues or delay the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 29-30 (1996). In the present situation, where there have been no contentions admitted, the admission of any contention will inherently broaden the issues by requiring the establishment of a new proceeding. *See Comanche Peak*, CLI-93-04, 37 NRC at 167; *Washington Public Power Supply System, et al.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1178 (1983). This factor thus weighs against Beyond Nuclear, although less significantly given that the review of the application is itself suspended and thus any contested proceeding would likely not yet have commenced. *Accord Philadelphia Electric*

[8] Other possible means the Commission has previously identified by which petitioners might protect the interests identified in a proffered contention, such as filing a § 2.206 petition or participating as *amici curiae*, are likewise unavailable with respect to the subject of the proposed contention. *See Watts Bar*, CLI-10-12, 71 NRC at 327 n.50.

Co. (Limerick Generating Station, Units 1 & 2), ALAB-828, 23 NRC 13, 23 (1986) (determination is whether the lateness of the filing will delay the proceeding, not whether it will delay the issuance of a license).

With regard to factor (viii), a petitioner generally must "provide more than vague assertions" that it will be able to assist in developing a sound record, and "should set out with as much particularity as possible the precise issues it plans to cover," including identifying prospective witnesses and summarizing proposed testimony. *Watts Bar*, CLI-10-12, 71 NRC at 326. This factor assumes greater importance in cases where the grant or denial of the petition will simultaneously decide whether there is to be any adjudicatory hearing at all. *WPPSS*, ALAB-747, 18 NRC at 1180-81.

The Petition is lacking in this regard, as Beyond Nuclear simply asserts it will "assist in the development of a sound record" because the Petition is "supported by [the] findings and conclusions" of the D.C. Circuit in *New York v. NRC*. Petition at 8. It further adds that NRC Staff must, as a matter of law, consider "new and significant information in matters requiring an environmental impact statement," and that a "sound record cannot be developed without such consideration." *Id*. As these claims simply assert an omission in the environmental review, and acknowledge that the NRC would be required to resolve the issues raised by the court's decision regardless of Beyond Nuclear's participation in this proceeding, these statements do not explain why admitting Beyond Nuclear to this proceeding will assist in the development of a sound record.

However, as Beyond Nuclear explains, the Petition is "based primarily on law rather than facts," in that the contention concerns the legal effect of *New York v. NRC* on NRC licensing actions. Petition at 5, 10. In situations 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." *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-99-07, 49 NRC 124, 128-29 (1999). Thus, although Beyond Nuclear provides little detail

as to why its participation would assist in the development of a sound record, this limited showing does not weigh strongly against its Petition, considering six of the seven other factors (including "good cause") weigh in favor of granting it.[9]

CONCLUSION

For the foregoing reasons, the Staff agrees with Beyond Nuclear that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *New York v. NRC*. However, if the Commission rules before that time, the contention must be rejected as an impermissible challenge to NRC regulations. 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

[9] In addition to asserting how it meets the § 2.309(c) factors, Beyond Nuclear also asserts that it meets the standards of § 2.309(f)(2), which establish criteria for certain new or amended contentions. *See* Petition at 11-12. 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).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC Staff's Response to Petitioner's Motion for Leave to File a New Contention" have been served upon the following persons by Electronic Information Exchange this 2nd day of August, 2012.

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