August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT SOUTH TEXAS UNITS 3 & 4

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's ("Board's") Initial Scheduling Order dated October 20, 2009, the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer to the "Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4" (July 9, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12191A394) ("Motion").[1] 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

[1] Intervenors include the Sustainable Energy and Economic Development (SEED) Coalition, the South Texas Association for Responsible Energy (STARE), and Public Citizen. While the Motion otherwise consistently uses the term "Intervenors" (plural), the first sentence of the Motion states that it is the "SEED Coalition ('Intervenor')" that seeks leave to file a new contention and does not mention STARE or Public Citizen. *Id.* at 1. It is unclear, therefore, whether the Motion is also being filed on behalf of STARE and Public Citizen or whether the Motion is being filed only on behalf of the SEED Coalition.

admissible if the Board rules on it after the D.C. Circuit issues the mandate for that decision.[2] But, if the Board rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Board should dismiss it without prejudice to timely refiling upon issuance of the court's mandate.

BACKGROUND

A. Procedural History

The complex and lengthy history of this proceeding has been discussed in numerous filings and Board orders and will not be repeated it here. Briefly, this proceeding concerns the application of Nuclear Innovation North America LLC ("Applicant")[3] for combined licenses ("COLs") for two new nuclear reactor units at the South Texas Project Electrical Generating Station in Matagorda County, Texas. The only admitted contention remaining in this proceeding is Contention FC-1 regarding the statutory and regulatory prohibition on foreign ownership, control, or domination. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC __, __ (Sept. 30, 2011) (slip op. at 1-2) (admitting Contention FC-1). The Intervenors filed a motion for summary disposition of Contention FC-1, but this was denied by the Board. *See* Memorandum and Order, Ruling on Intervenors' Motion for Summary Disposition of Contention FC-1, at 13 (Feb. 7, 2012) (unpublished) (ADAMS Accession No. ML12038A169). Evidentiary hearings on two other contentions were held in August 2011 and

[2] When closing the evidentiary record for Contention DEIS-1-G, the Board stated that, because the hearing on Contention DEIS-1-G was "the second and final hearing on environmental matters in this proceeding," the environmental record was closed. Memorandum and Order (Adopting Transcript Corrections and Closing Evidentiary Record), at 2 (Nov. 29, 2011) (unpublished) (ADAMS Accession No. ML11333A292). At the time of the Board's order, there were no pending environmental contentions. As such, the Staff interprets the Board's closure of the environmental record as simply meaning that there was no environmental matter pending before the Board for which the record remained open. Consequently, the Staff does not believe the Board intended to require the Intervenors to file a motion to reopen the record pursuant to 10 C.F.R. § 2.326 under the present circumstances, where there is an ongoing contested proceeding.

[3] South Texas Project Nuclear Operating Company initially submitted the application in dispute, but was replaced by NINA as the lead applicant in January 2011. *See* Notification of Letter Regarding Change in Lead Application for STP Units 3 and 4, at 1 (Jan. 21, 2011) (ADAMS Accession No. ML110210980).

October 2011, and the Board issued a pair of partial initial decisions ruling in favor of the Applicant and Staff on both contentions. *See Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-38, 74 NRC __, __ (Dec. 29, 2011) (slip op. at 2) (Contention CL-2); *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-12-05, 75 NRC __, __ (Feb. 29, 2012) (slip op. at 2) (Contention DEIS-1). All other previously admitted contentions in this proceeding have been dismissed.

On June 8, 2012, the United States Court of Appeals for the D.C. Circuit vacated the NRC's Waste Confidence Decision Update and Temporary Storage Rule and remanded those rulemakings back to the agency. *New York*, 681 F.3d at 483. Shortly thereafter, the Intervenors, 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. ML12170B113). 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). Intervenors thereafter filed the present Motion, which the Staff now answers.

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).

DISCUSSION

The Intervenors 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 EIS for STP 3 & 4 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 4 (internal footnote omitted). 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." Motion at 4.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, the Intervenors assert that they meet the standards of § 2.309(f)(2) for late-filed contentions. Motion at 6-7. Considering the holding of the D.C. Circuit and that the Motion was filed within the 30 day deadline established by the Initial Scheduling Order, the Staff agrees that the Intervenors have sufficiently demonstrated the timeliness of their filing under that regulation. *See* Initial Scheduling Order at 3, 8 (regarding computation of time and contention filing deadlines).

The Staff has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. NRC Staff Answer to Intervenors' Motion to Admit New Contention Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-Ichi Accident, at 3-5, 7

(Sept. 6, 2012) (ADAMS Accession No. ML11249A159). The Intervenors recognize that "because the mandate has not yet issued in *State of 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 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*. at 205.

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

[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, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

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 to seek rehearing). As a result, under Rule 41(b), the mandate will not likely 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 Board to exclude the Intervenors' 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 this Board rules on the Motion.[6]

If the D.C. Circuit's mandate issues before the Board 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 4-6. 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 Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC

[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").

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 Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If the Intervenors 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. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345.

CONCLUSION

For the foregoing reasons, the Staff agrees with the Intervenors that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *New York v. NRC*. However, if the Board 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

REQUIRED 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 motion, and that my efforts to resolve the issues were unsuccessful.

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NUCLEAR INNOVATION NORTH	)	
AMERICA LLC	)	Docket Nos. 52-012 & 52-013
	)	
(South Texas Project, Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Response to Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4," have been served upon the following persons by Electronic Information Exchange this 2nd day of August 2012:

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