August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CAROLINAS	)	Docket Nos. 52-018-COL and 52-019-COL
	)	
(William States Lee III, Units 1 and 2)	)	

NRC STAFF'S RESPONSE TO BREDL'S MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT WILLIAM STATES LEE III, UNITS 1 AND 2

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 Blue Ridge Environmental Defense League's ("BREDL's") Motion to Reopen the Record for William States Lee III Units 1 and 2 ("Motion") and Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at William States Lee III Units 1 and 2 ("Petition") (July 10, 2012[1]) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12192A000). 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 Motion should be denied because it fails to meet the standards for reopening a closed record in this proceeding, as required by 10 C.F.R. § 2.326.

[1] While BREDL's Motion and Petition are dated July 9, 2012, they were filed on the Electronic Information Exchange on July 10, 2012. As discussed below, this does not affect the Staff's determination that the Motion and Petition were timely filed.

BACKGROUND

A. Procedural History

This proceeding concerns the application submitted by Duke Energy Carolinas ("Duke" or "Applicant") for combined licenses ("COLs") for two reactor units at a site in Cherokee County, South Carolina. *See* Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 6,218 (Feb. 1, 2008). BREDL timely filed a joint hearing request and petition for intervention, proffering eleven contentions; the Board found that BREDL had standing to participate, but found none of the contentions admissible. *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 458 (2008). The Board referred one ruling on the inadmissibility of a contention to the Commission, which declined to review the decision. *Duke Energy Carolinas, LLC & Tennessee Valley Authority* (Williams States Lee III Nuclear Station Units 1 and 2 & Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-21, 70 NRC 927, 928 (Nov. 3, 2009). In April 2009, BREDL sought to file a new contention based on the NRC's Waste Confidence Decision and Proposed Spent Fuel Storage Rule. *See* New Contention Eleven (Mar. 9, 2009) (ADAMS Accession No. ML090690031). The Board dismissed the request for lack of jurisdiction, given that the proceeding before the Board terminated after the initial intervention petition was denied. Memorandum and Order (Regarding BREDL's New Contention Eleven) at 4-5 (Apr. 29, 2009) (unpublished) (ADAMS Accession No. ML091190338).

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, BREDL, 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 on the WCD Update and TSR." *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. ML12170B124). 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) ("Staff Answer"). BREDL thereafter filed its 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* Petition at 9; 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). Petition at 9.

DISCUSSION

BREDL 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 William States Lee III nuclear power plant 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 9. 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." Petition at 9.

As discussed further below, the Staff recognizes that, upon issuance of the D.C. Circuit's mandate, the underlying contention may meet the Commission's general contention admissibility requirements. However, the Staff concludes that, in this proceeding, BREDL's failure to meet the standards for reopening the record require that the Motion and Petition be denied.

I. Contention Admissibility Standards

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, BREDL asserts that it meets the standards of § 2.309(f)(2) for late-filed contentions. Petition at 11. Considering the holding of the D.C. Circuit and that the Petition was filed within 32 days[2] of the ruling, the Staff agrees that, were § 2.309(f)(2) standards the applicable criteria in this proceeding,[3] BREDL could have sufficiently demonstrated the timeliness of its filing under that regulation.

The Board that was previously constituted in this proceeding discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. *William States Lee III*, LBP-08-17, 68 NRC at 440. BREDL recognizes that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Petition at 7. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . . ." *Public*

[2] Mr. Louis Zeller submitted a letter to the NRC Secretary indicating that the cause for filing BREDL's Motion and Petition late, on July 10, 2012, was due to his spouse's medical issues. Letter of Mr. Louis Zeller to Commission Secretary (July 10, 2012) (ADAMS Accession No. ML12192A134).

[3] 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).

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.*

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

[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 cannot be admitted before a court of appeals issues its mandate striking down that regulation.

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 BREDL'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 9-10. 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, Petition at 9, 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,

[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").

and if, the mandate issues. If the Petitioners 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. However, as discussed further below, independent of whether the contention were to meet the standards of § 2.309(f)(1) upon issuance of the court's mandate, the Petitioners' present failure to meet the standards for reopening the record requires denial of the Motion and Petition.

II. Reopening Standards

Because the record in this proceeding has closed, for its proposed new contention to be considered, BREDL must satisfy the motion to reopen criteria in § 2.326 in addition to the contention admissibility criteria. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 NRC 115, 124 (2009) (applying reopening standards where petitioner's initial hearing request was denied and petitioner subsequently sought to file a 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)). As explained below, BREDL's failure to demonstrate standing and to address the factors of § 2.309(c) as required by § 2.326 are both fatal to its Motion.

A. Failure to Demonstrate Standing

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. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-99-10, 49 NRC 318, 323 (1999) (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. Electric Co.* (Comanche Peak Steam Electric Station, Unit 2),

CLI-93-4, 37 NRC 156, 162-63 (1993).[7] 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*.

BREDL filed an intervention petition, and while the licensing board previously found BREDL had standing to intervene, it ruled BREDL failed to submit an admissible contention. *William States Lee III*, LBP-08-17, 68 NRC at 436.[8] To demonstrate standing to support the instant Motion, BREDL submitted standing declarations from 43 residents of South Carolina and North Carolina, who live between 8 and 180 miles from the proposed William States Lee site. Motion at 4.[9] The standing declarations assert that BREDL has members who live within 50 miles of the proposed reactor site and who authorize BREDL to represent their interests in the proceeding. *See, e.g.,* Standing Declaration in Support of Motion to Suspend Licensing Decisions by Steve Breckheimer. BREDL has not, however, addressed whether the interests it seeks to protect continue to be germane to its own purpose. *Private Fuel* Storage, CLI-99-10, 49 NRC at 323 (citation omitted); *Comanche Peak*, CLI-93-4, 37 NRC at 162-63 (to rely on prior

[7] 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.*

[8] BREDL notes that it initially submitted a waste confidence contention, but it was dismissed as an impermissible challenge to the Waste Confidence Rule. Motion at 3 (citing *Lee*, LBP-08-17, 68 NRC at 457).

[9] BREDL filed the standing declarations separately from its Motion. The declarations were submitted on July 11, 2012.

demonstrations of standing, petitioners must show that the prior demonstrations correctly reflect the current status of petitioners' standing). Accordingly, BREDL has not demonstrated it has representational standing.

B. Failure to Comply with Section 2.326(d)

In addition to the threshold requirement that BREDL demonstrate its standing, BREDL must meet the reopening standards in 10 C.F.R. § 2.326. *Millstone*, CLI-09-05, 69 NRC at 124. 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).

BREDL characterizes its contention as "based primarily on law rather than facts," cites *New York* as the basis for the contention, and asserts that the NRC has no valid environmental analysis on which to base the issuance of a COL.[10] Petition at 11-12. As such, the Staff views the contention as a legal contention, which does not rely on facts or technical analysis for its support.[11] The Motion addresses each of the § 2.326(a) criteria separately and specifically.

[10] Because a Draft Supplemental Environmental Impact Statement (DSEIS) has already been issued for the William States Lee III Nuclear Station Units 1 and 2 COL, NUREG-2111, the Staff understands the Petition's references to the applicant's environmental analysis or the Environmental Report (Petition at 9, 11) to be a challenge to the approach used in the DSEIS, which also relies on 10 C.F.R. § 51.23(b) for resolution of spent fuel storage impacts.

[11] 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

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 1. Second, the Motion asserts that the contention presents a significant environmental issue because the D.C. Circuit vacated the 2010 Waste Confidence Decision Update, which it found be "a major federal action because it is a logical predicate to every decision to license a nuclear plant.[12] Motion at 1-2. Third, the Motion asserts a materially different result is likely because there is no longer a legal basis for § 51.23(b), which exempts environmental analyses prepared in connection with COLs from addressing the environmental impacts of spent fuel storage in reactor facility storage pools, so the Commission or licensing board will have to examine the environmental consequences of long-term storage of spent fuel at reactor sites. Motion at 3-4.

If the Commission rules on the Motion after the D.C. Circuit issues the mandate in *New York*, then the Staff would not oppose BREDL's claim that it has satisfied the § 2.326(a) criteria.

---

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)).

[12] The Petitioner also cites the comments of Dr. Arjun Makhijani that were filed in 2009 on the Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage. Motion at 2 & n.1 (citing Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission's Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage, Arjun Makhijani, Ph.D. President, Institute for Energy and Environmental Research, 6 February 2009 (ADAMS Accession No. ML090680888). The Staff notes that these comments do not form a sufficient basis for finding that the § 2.326 criteria have been met. The comments relate to the proposed rule, rather than the stated basis of the contention, which is the D.C. Circuit's decision in *New York v. NRC*. As the comments were filed in 2009, they do not, and could not, address the three criteria in § 2.326(a). Additionally, there is no indication that Dr. Makhijani supports the use of his remarks in the context of the court decision and Petitioner's Motion.

However, if the Commission rules on the Motion before the mandate is issued, then the § 2.326(a)(2) and (a)(3) criteria would not be satisfied. To satisfy § 2.326(a)(2) and (a)(3), BREDL relies on the WCD rule being vacated by the D.C. Circuit. *See* Motion at 1-4. If the WCD 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, BREDL 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.

In any event, however, 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 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)(1)(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)). These eight criteria must be addressed with specificity. *Vogtle*, CLI-11-08, 74 NRC at __ (slip op. at 16) (citing 10 C.F.R. § 2.309(c)(2)).

Although BREDL makes a single reference to § 2.309(c) and states that it has "good cause for the filing at the present time based on new information; i.e, the US Court of Appeals order on June 8, 2012," BREDL does not address the remaining seven criteria of § 2.309(c)(1). Motion at 4. Consequently, BREDL does not demonstrate that a balancing of the § 2.309(c)(1) factors weighs in favor of allowing the nontimely filing; this failure to address the § 2.309(c)(1) factors, in turn, fails to satisfy § 2.326(d). While BREDL addressed the three § 2.309(f)(2) criteria for new or amended contentions (Petition at 11-12), the Commission has stated that the failure to address the eight criteria in § 2.309(c)(1) for nontimely filings is a potentially fatal omission even where the movant has addressed the § 2.309(f)(2) factors. *Vogtle*, CLI-11-08, 74

NRC at __ (slip op. at 16-17 & n.59, 18 n.65). The Commission has noted that its "rules place a heavy burden on petitioners who ask to have a record reopened," and that the failure to address the § 2.309(c) factors is "reason enough to reject the proposed new contentions." *Id*. at __ (slip op. at 8) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-69 (2008)); *Millstone*, CLI-09-05, 69 NRC at 125-26. As BREDL's Motion does not fully comply with § 2.326 because it does not address all of the § 2.309(c) criteria, it should be rejected.

CONCLUSION

For the foregoing reasons, the Motion and Petition should be denied because the Motion fails to meet the standards for reopening a closed record in this proceeding, as required by 10 C.F.R. § 2.326. If the Commission nevertheless determines that the reopening standards have been met, the Staff considers the new contention to be admissible assuming the Commission issues its ruling after the D.C. Circuit issues the mandate in *New York*. However, if the Commission rules before the mandate issues, 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. 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,

Kevin C. Roach
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
301-415-2779
Kevin.Roach@nrc.gov

Executed in Rockville, MD
this 2nd Day of August 2012.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018 and 52-019
	)	
(William States Lee III Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's Answer to Petition to Suspend Final Decisions in all Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings dated August 2, 2012, have been served upon the following persons by Electronic Information Exchange this 2nd day of August 2012:

E. Roy Hawkens, Chief Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Roy.Hawkens@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

David R. Lewis
Pillsbury Winthrop Shaw Pittman LLP
2300 N. Street, NW
Washington, DC 20037-1122
E-mail: david.lewis@pillsburylaw.com

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

Louis S. Watson, Jr.
Kimberly Jones
North Carolina Utilities Commission
435 Mail Service Center
Raleigh, NC 27699-4325
E-mail: swatson@ncuc.net
kjones@ncuc.net

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: bredl@skybest.com

Florence P. Belser
South Carolina Office of
Regulatory Staff
1441 Main Street, Suite #300
Columbia, SC 29201
E-mail: fbelser@regstaff,sc,gov

/signed (electronically) by/
Kevin C. Roach
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2779
Kevin.Roach@nrc.gov

Executed in Rockville, Maryland
this 2nd day of August 2012