August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
	)	
(Watts Bar Nuclear Plant, Unit 2)	)	

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

INTRODUCTION

Pursuant to the Board's Order[1] and 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission (Staff) files its answer to Southern Alliance For Clean Energy's (SACE's) Motion For Leave To File A New Contention Concerning Temporary Storage And Ultimate Disposal Of Spent Reactor Fuel At Watts Bar Unit 2 (July 9, 2012) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12191A383) (Motion). The Motion raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below, the new contention would be admissible if the Atomic Safety and Licensing Board (Board) rules on it after the D.C. Circuit issues the mandate for that decision. 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.

[1] Order (Scheduling Order), at 5 ¶ G.1 (May 26, 2010) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML101460473) ("Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention.").

BACKGROUND

I. Procedural History

This proceeding involves an operating license application for Watts Bar Unit 2, a partially-complete reactor located near Spring City, Tennessee. On May 1, 2009, the NRC published a Notice of Opportunity for Hearing on the operating license application of Tennessee Valley Authority (TVA) for the Watts Bar Nuclear Plant, Unit 2.[2] On July 13, 2009, SACE, along with Tennessee Environmental Council, We the People, Sierra Club, and Blue Ridge Environmental Defense League (collectively, Petitioners) filed a single combined petition to intervene and request for hearing with seven contentions on the operating license application of Watts Bar Unit 2.[3]

In proposed Contention 5, Petitioners asserted that the Commission does not have a lawful basis to issue an OL for WBN Unit 2 because of deficiencies in the NRC's proposed Waste Confidence Decision and proposed Waste Confidence rule.[4] Petitioners conceded that the issues raised in Contention 5 were "generic in nature," but argued that the contention should be admitted and held in abeyance in order to avoid a premature judicial review.[5] The Staff, and separately TVA, filed answers which, *inter alia*, opposed the admission of Contention 5; Petitioners replied.[6]

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[2] Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350 (May 1, 2009) (Notice).

[3] Petition to Intervene and Request for Hearing (July 13, 2009) (Initial Petition) (ADAMS Accession No. ML091950686).

[4] Initial Petition at 23 (discussing Proposed WCD Update and Proposed TSR).

[5] *Id.*at 23-24.

[6] [TVA]'s Answer Opposing the [SACE] et al., Petition to Intervene and Request for Hearing (Aug. 7, 2009) (ADAMS Accession No. ML092190926); NRC Staff's Answer to Petition to Intervene and Request for Hearing (Aug. 7, 2009) (ADAMS Accession No. ML092190919); Petitioners' Reply To NRC Staff's And Tennessee Valley Authority's Answers To Petition To Intervene And Request For Hearing (Aug. 14, 2009) (Initial Reply) (ADAMS Accession No. ML092260788).

On November 19, 2009, the Board issued its ruling which, *inter alia*, admitted SACE as a party[7] but concluded that proffered Contention 5 was inadmissible because, as SACE acknowledged, Contention 5 was a challenge to an ongoing rulemaking, and Commission precedent holds that contentions challenging topics being addressed in rulemaking are inadmissible. *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939, 964 (2009) (ADAMS Accession No. ML093230679). The Board noted that SACE did not dispute TVA's and the Staff's arguments against the admissibility of Contention 5, but SACE stated that it was raising the issue to preserve it for appeal. *Id.* (citing Initial Reply at 22). The Board also denied SACE's request to hold Contention 5 in abeyance or to refer the contention to the Commission pursuant to 10 C.F.R. § 2.341(f)(1). *Id.* at 965 (finding that the Board's ruling on Contention 5 did not raise significant and novel legal or policy issues, and that referring Contention 5 to the Commission would not materially advance the orderly disposition of the proceeding).

In October 2011, Staff issued "NUREG-0498, Supplement 2, Draft Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant," (Oct. 2011) (Draft SFES) (ADAMS Package Accession No. ML112980199)). The Draft SFES documents the Staff's environmental review of TVA's operating license application for the Watts Bar Nuclear Plant, Unit 2.[8] On June 8, 2012, the D.C. Circuit issued *State of New York v. NRC*, 681 F.3d 471, 473

[7] The other Petitioners appealed the Board's ruling denying their party status and request for hearing, and the Commission affirmed the Board's decision denying Petitioners' motion to permit late intervention and their request for hearing. *Tennessee Valley Authority* (Watts Bar Nuclear Plant Unit 2), CLI-10-12, 71 NRC 319 (2010).

[8] The Draft SFES is a supplement to the FES issued in 1978 related to the operating license for Watts Bar North Units 1 and 2. *See* 10 C.F.R. § 51.92 (requiring the NRC to prepare a supplement to the final environmental statement if there are substantial new circumstances or information relevant to environemtnal concerns and bearing on the proposed action or its impacts).

which vacated the NRC's Waste Confidence Decision Update[9] and its Temporary Storage Rule.[10] On July 9, 2012, SACE filed the instant Motion before the Board.

II. 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. *State of 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").

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[9] *See* 75 Fed. Reg. 81, 037 (Dec. 23, 2010). *See also* Motion at 1.

[10] 75 Fed. Reg. 81, 032 (Dec. 23, 2010) (discussing final temporary storage rule regarding consideration of environmental impacts of spent fuel after cessation of reactor operation). *See also* Motion at 1.

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 1; 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

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

Motion at 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.*

Considering the holding of the D.C. Circuit and that the Motion was filed within 30 days of the ruling, the Staff agrees that SACE has sufficiently demonstrated the timeliness of its filing under that regulation and the Board's Scheduling Order.[11]

The Board has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. *Watts Bar Unit 2*, LPB-09-26, 70 NRC at 946 - 948. SACE recognizes 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).[12] 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.[13] *Id*. at 205.

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[11] *See* Scheduling Order at 5 ¶ G.2 ("A motion and proposed new contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available to the moving party through service, publication, or any other means."); Motion at 6-7.

[12] *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").

[13] 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

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 Board to exclude 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 this Board rules on the Petition.[14]

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

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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.

[14] *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").

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 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 5, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a); *Watts Bar Unit 2*, LPB-09-26, 70 NRC at 963-965. 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. *Id.* If SACE refiles 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 SACE that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *State of 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.

Signed (electronically) by

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Answer 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 have been unsuccessful. Staff did not oppose the filing of the motion but was unable to take a position on the addmisbility of the proposed contention pursuant to 10 C.F.R. § 2.309 at the time of consultation.

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TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF SPENT REACTOR FUEL AT WATTS BAR UNIT 2" dated August 2, 2012, have been served upon the following by the Electronic Information Exchange, this 2nd of August, 2012:

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