UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	August 3, 2012

NUCLEAR INNOVATION NORTH AMERICA LLC'S ANSWER OPPOSING NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT SOUTH TEXAS UNITS 3 & 4

I. INTRODUCTION

On July 9, 2012, Sustainable Energy and Economic Development ("SEED") Coalition ("Intervenors") submitted "Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4" ("Motion" or "Proposed Contention"). Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC's Waste Confidence Decision ("WCD") and Temporary Storage Rule ("TSR") update,[1] the Proposed Contention claims that the Environmental Impact Statement ("EIS") for the STP Units 3 and 4 combined licenses ("COLs") omits 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."[2]

Pursuant to 10 C.F.R. § 2.309(h) and the Board's October 20, 2009 Initial Scheduling Order ("ISO"), Nuclear Innovation North America LLC ("NINA") files this Answer opposing

[1] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[2] Motion at 4. Other groups filed essentially-identical contentions on the same day in numerous other licensing proceedings.

the Proposed Contention. As demonstrated below, the Proposed Contention should be rejected because the Intervenors failed to submit the required 10 C.F.R. § 2.326 motion to reopen the closed environmental record in this proceeding, and such a motion is without any basis.

Additionally, Intervenors fail to satisfy the Commission's 10 C.F.R. §§ 2.309(f)(2) and (c)(1) timeliness requirements. The D.C. Circuit has not issued a mandate in *New York* and, therefore, the *New York* decision has no legal effect in this proceeding. The information upon which the Proposed Contention is based is not materially different than information previously available, and the non-timely factors weigh against admitting the Proposed Contention.

The Intervenors also fail to satisfy the Commission's 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. Specifically, because the D.C. Circuit has not issued a mandate in *New York*, the Proposed Contention lacks legal basis and constitutes an impermissible challenge to the TSR, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a). Even if the mandate issues, the Proposed Contention should be rejected because longstanding Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes admission of a contention on an issue that is, *or is about to become*, the subject of a rulemaking. The Commission's longstanding practice is to address long-term waste storage issues generically. Finally, to the extent any uncertainty exists, the Board should certify an appropriate question to the Commission pursuant to 10 C.F.R. § 2.319(l), rather than admit the Proposed Contention or hold it in abeyance.

II. BACKGROUND

A. STP Units 3 and 4 Proceeding

On September 20, 2007, STP Nuclear Operating Company ("STPNOC")[3] submitted an Application to the NRC for COLs for STP Units 3 and 4.[4] Public Citizen, the SEED Coalition,

[3] NINA became the lead applicant in early 2011. *See* Licensing Board Order (Revising Case Caption) (Feb. 7, 2011) (unpublished). The Proposed Contention incorrectly includes the earlier case caption.

and several other individuals and organizations filed a joint Petition to Intervene, which proposed a number of contentions.[5] The only remaining issue in this proceeding relates to foreign ownership, control, or domination of STP Units 3 and 4.[6] The evidentiary record for environmental matters in this proceeding is closed.[7]

B. Waste Confidence

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[8] the Commission issued its initial WCD and TSR.[9] Since that time, the TSR has made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in any reactor licensing proceeding.[10] The Commission has thus clearly and consistently chosen to address waste storage issues generically instead of litigating issues in individual proceedings.[11]

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4 South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934, 7934 (Feb. 20, 2009) ("Hearing Notice").

5 Petition for Intervention and Request for Hearing (Apr. 21, 2009).

6 *See Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-25, 74 NRC __, slip op. (Sept. 30, 2011).

7 The Board has held evidentiary hearings on two environmental contentions in this proceeding, and has concluded them both in favor of NINA and the NRC Staff. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-11-38, 74 NRC __, slip op. at 55-56 (Dec. 29, 2011); *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-12-05, 75 NRC __, slip op. at 33-34 (Feb. 29, 2012). Following approval of transcript corrections on the second of these evidentiary hearings, the Board concluded: "As the hearing on Contention DEIS-1-G is the second and final hearing on environmental matters in this proceeding, this memorandum and order closes the evidentiary record for environmental matters." Memorandum and Order (Adopting Transcript Corrections and Closing Evidentiary Record), at 2 (Nov. 29, 2011) (unpublished).

8 *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

9 *See Rulemaking on the Storage and Disposal of Nuclear Waste* (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).

10 *Compare* Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. at 34,694, *with* 10 C.F.R. § 51.23(b).

11 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (2010) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

In response to an October 2008 proposed revision to the WCD and TSR,[12] SEED Coalition, Public Citizen, and several non-parties submitted comments on the proposed revisions.[13] After considering public comments, the Commission issued the WCD and TSR revisions in December 2010.[14] Four states, an Indian community, and several environmental groups (but not Intervenors) challenged that rulemaking in the D.C. Circuit. On June 8, 2012, the D.C. Circuit issued a decision in *New York v. NRC*, vacating and remanding the WCD and TSR update. No mandate, however, has issued and parties are still evaluating their options, including potentially seeking rehearing or rehearing en banc.[15]

Notwithstanding the still-evolving developments in *New York*, on June 18, 2012, the Intervenors filed a petition with the Commission in response to that decision requesting suspension of final licensing decisions in many pending proceedings and additional public participation opportunities.[16] Both NINA and the NRC Staff responded to the petition on June 25, 2012.[17] That petition remains pending before the Commission.

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12 Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008).

13 Comments by [SEED Coalition, Public Citizen, and Others] Regarding NRC's Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations (Feb. 6, 2009), *available at* ADAMS Accession No. ML09068091.

14 Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

15 *See New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc).

16 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012).

17 Nuclear Innovation North America LLC's Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012); NRC Staff's Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012).

III. LEGAL STANDARDS

A. Reopening the Record

Given the closed environmental record, if Intervenors seek a new contention on environmental matters, such as the Proposed Contention, they must submit a motion to reopen. The requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

> (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
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> (2) The motion must address a significant safety or environmental issue; and
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> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.[18]

B. Timeliness Requirements

Pursuant to the Hearing Notice and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired over three years ago. Therefore, the Proposed Contention must satisfy 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c). The Intervenors bear the burden of successfully addressing the "stringent" non-timely criteria.[19]

Section 2.309(f)(2) provides that a petitioner may submit a new or amended contention only with leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;

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[18] 10 C.F.R. § 2.326(a). In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent." Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986). As part of this burden, the request to reopen must be accompanied by an affidavit that separately and specifically supports each of the applicable criteria in Section 2.326(a). 10 C.F.R. § 2.326(b).

[19] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Plant, Units 2 & 3), CLI-12-15, 75 NRC __, slip op. at 13 (June 7, 2012) ("At the threshold contention admission stage, the burden for providing support for a contention is on the petitioner."); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 5 & n.19 (Mar. 10, 2011).

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Section 2.309(c) sets forth an eight-factor balancing test for nontimely filings,[20] but they are not of equal importance. Whether "good cause" exists for the failure to file on time, is entitled to the most weight.[21] The burden is on the Intervenors to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[22]

C. Contention Admissibility Standards

Any new contention also must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[23] The Commission has recently reiterated that its rules on contention admissibility are "strict."[24] "[T]he NRC in 1989 revised its rules to prevent the

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

[21] *Pilgrim*, CLI-12-15, slip op. at 25 n.96 ("The standard for new or amended contentions involves a balancing of eight factors set forth in 10 C.F.R. § 2.309. The factor given the most weight is whether there is 'good cause' for the failure to file on time.").

[22] *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

[23] That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (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 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, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. These requirements are discussed in detail in the Applicant's May 18, 2009 Answer opposing the initial Petition to Intervene and a brief discussion of the key contention admissibility requirements is set forth below.

[24] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 31 (Mar. 27, 2012); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 &

admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.' The agency deliberately raised the contention-admissibility standards to relieve the hearing delays that such contentions had caused in the past."[25] The purpose of the six 10 C.F.R. § 2.309(f)(1) admissibility criteria is to focus litigation on concrete issues and thereby ensure a clear and focused record for decision.[26] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[27] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[28] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[29]

IV. THE PROPOSED CONTENTION SHOULD BE REJECTED

A. Intervenors Have Not Met the Standards to Reopen the Environmental Record Under 10 C.F.R. § 2.326

The Proposed Contention should be denied for failing to even address—much less meet—the requirements set forth in 10 C.F.R. § 2.326 to reopen a closed record. As discussed above, the Board has closed the evidentiary record for environmental matters in this proceeding, and therefore a new contention on environmental matters, such as the Proposed Contention, must address the motion to reopen standards. The Intervenors have not addressed any of the factors in 10 C.F.R. § 2.326(a) and have not included an affidavit addressing why the three

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3), CLI-01-24, 54 NRC 349, 358 (2001) (characterizing the contention admissibility rules as "strict by design").

25 *Davis-Besse*, CLI-12-08, slip op. at 3-4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

26 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

27 *Id.*

28 *See, e.g.*, *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

29 *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

reopening criteria have been met. For these reasons alone, the Board should reject the Proposed Contention. Even if the Intervenors had attempted to address the reopening standards, they plainly do not meet them.

First, as discussed in the next section, the Proposed Contention is premature because the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Accordingly, any motion to reopen is not timely, contrary to 10 C.F.R. § 2.326(a)(1).[30]

Second, the Intervenors do not identify a significant safety or environmental issue in this proceeding, contrary to 10 C.F.R. § 2.326(a)(2). To raise a significant environmental issue, "new information must paint a '*seriously* different picture of the environmental landscape.'"[31] Nothing in the Proposed Contention identifies any seriously different picture of the environmental landscape. Indeed, the Proposed Contention does not even discuss actual environmental impacts at STP Units 3 and 4, but instead focuses on legal requirements.

Third, the Intervenors fail to demonstrate that a materially different result would be likely, contrary to 10 C.F.R. § 2.326(a)(3). As noted above, the D.C. Circuit has not yet issued its mandate, and therefore a materially different result is not possible at this time. Moreover, the Intervenors do not address any specific environmental impacts for STP Units 3 and 4, much less how those impacts would require a materially different result in this proceeding.

For these reasons, the Intervenors have not submitted the required motion to reopen the closed record in this proceeding, and one should not be granted even if it had been submitted. Therefore, the Proposed Contention is deficient and should be rejected.

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[30] Because the Intervenors did not address the nontimely contention standards in 10 C.F.R. § 2.309(c), they also fail to meet the requirement in 10 C.F.R. § 2.326(d) to address these standards in a motion to reopen. This provides an independent basis for rejecting the Proposed Contention.

[31] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

B. The Proposed Contention Is Untimely

1. The Proposed Contention Fails to Satisfy the 10 C.F.R. § 2.309(f)(2) Timeliness Requirements

The D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. In fact, the mandate will not issue, at the earliest, until late August 2012, if at all.[32] Because it is the mandate that makes the decision effective, the *New York* decision has no legal effect on this proceeding.[33] Accordingly, the Proposed Contention has not raised any materially different information, and therefore is premature and fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii).[34]

2. The Proposed Contention Fails to Satisfy the 10 C.F.R. § 2.309(c)(1) Timeliness Requirements

Because the Proposed Contention is untimely under 10 C.F.R. § 2.309(f)(2), it must satisfy the non-timely criteria in 10 C.F.R. § 2.309(c)(1)(i)-(viii).[35] The Intervenors entirely ignore the requirements of Section 2.309(c). This failure to address the requirements of Section 2.309(c) is alone a sufficient basis to reject the untimely arguments, as the Commission has affirmed rejection of late-filed contentions for failure to address the non-timely criteria.[36]

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[32] *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); *New York*, 681 F.3d 471 (No. 11-1045), Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

[33] *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 466 (1976) (explaining that "[a] court acts only through its mandate" and that "[w]hen a mandate is stayed, a decision has no binding effect") (citation omitted).

[34] Similarly, the ISO specifies that a new contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if filed within a certain period of "when the new and material information on which it is based first becomes available." ISO at 8. Because no material information has become available, the Proposed Contention fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii) as well.

[35] *See* ISO at 8-9; 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.").

[36] *See, e.g.*, *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) ("The Board correctly found that failure to address the requirements [of 10 C.F.R. §§ 2.309(c) and (f)(2)] was reason enough to reject the proposed new contentions."); *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear

Nonetheless, even if the Section 2.309(c)(1) factors are considered, the Proposed Contention should be dismissed as untimely. The most important of the Section 2.309(c)(1) factors, good cause, requires a "judgment about when the matter is sufficiently factually concrete and *procedurally ripe* to permit the filing of a contention."[37] The Intervenors fail to demonstrate that the Proposed Contention is procedurally ripe because the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Accordingly, because the issues raised in the Proposed Contention are not ripe, the Intervenors have not demonstrated good cause supporting the submission of the Motion.

Because the Intervenors fail to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors would have to weigh heavily in their favor for the Proposed Contention to be admitted.[38] They do not. The Proposed Contention, if admitted, would require initiation of a contested hearing on an entirely new subject matter, with mandatory disclosures and the involvement of new experts and personnel, on an issue that impacts the nuclear industry as a whole. Accordingly, admission of the Proposed Contention could significantly and unnecessarily delay this proceeding. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor seven), weighs heavily against the Intervenors.[39]

Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.10 (1998) ("Indeed, the Commission has itself summarily dismissed petitioners who failed to address the . . . factors for a late-filed petition.").

[37] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 437 (1999) (emphasis added) (denying as premature a motion to amend a contention to contest an applicant exemption request that had yet to be granted).

[38] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

[39] *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993) (holding that "the potential for delay if the petition is granted, weighs heavily against" petitioners because "[g]ranting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule").

Furthermore, the Intervenors provide no indication that their participation would contribute to the development of a sound record (factor eight). The Commission has stated that to make a showing on this factor, a petitioner should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[40] The Intervenors have failed to satisfy any of those requirements. Thus, the Intervenors provide no basis to suggest they are capable of assisting in the development of a sound record concerning the long-term spent fuel storage issues raised in the Proposed Contention.

In addition, should the Commission proceed with a rulemaking, as it has consistently done in the past on this issue, that generic proceeding would provide the Intervenors with adequate means to protect their interests (factor five). As such, that factor also weighs in favor of denying the Proposed Contention.[41]

In summary, having failed to establish good cause and make a compelling showing on the remaining factors, the balance of the untimely factors weighs against the Intervenors. Therefore, the Proposed Contention should be denied.

C. The Proposed Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

1. The Proposed Contention Lacks Legal Basis and Challenges the TSR, Contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a)

Based on the D.C. Circuit's recent *New York* decision, the Intervenors claim that the EIS for STP Units 3 and 4 improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.[42] However, as discussed above, the

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40 *See Braidwood*, CLI-86-8, 23 NRC at 246.

41 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

42 Motion at 4.

D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Because it is the mandate that makes the decision legally effective, no evaluation or other action is "required" by the *New York* decision at this time, contrary to the Intervenors' assertion.[43] Accordingly, the contention lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii). Indeed, the Commission has specifically held that it is premature for a party to request relief based upon a court decision before the mandate issues.[44]

Furthermore, because the mandate has not yet issued, the Proposed Contention constitutes an impermissible challenge to the TSR. The contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.[45] The currently effective regulation, however, makes clear that "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the . . . reactor combined license . . . for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis."[46] Unless and until the mandate issues, the current TSR remains in effect. Accordingly, as long as that regulation is effective, the Proposed Contention constitutes an impermissible challenge to that regulation and should be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

Recognizing that the Motion lacks a legal basis, "Intervenors request that consideration of the contention be held in abeyance pending issuance of the mandate."[47] An abeyance,

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43 *See id.*

44 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006) (denying premature motion seeking procedural relief in advance of an appellate court's mandate).

45 *See* Motion at 4.

46 10 C.F.R. § 51.23(b).

47 Motion at 2.

however, would be inconsistent with NRC case law. In the *Indian Point* proceeding, the Commission directed the Board to deny two waste confidence contentions notwithstanding a similar request by an intervenor to hold the contention admissibility ruling in abeyance pending future potential action.[48] Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.[49] Likewise, the Intervenors' abeyance request should be rejected.

The Intervenors also fail to address the considerable uncertainty underlying the Motion's central assumptions, including when (and whether) the mandate will issue. An admissible contention cannot be based on such guesswork. As discussed above, the Commission refuses to admit contentions "based on little more than speculation."[50] This speculation provides an additional basis for rejecting the Proposed Contention and not holding it in abeyance.

2. The Proposed Contention Raises Issues that Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

Even if the mandate were to issue, Commission precedent clearly dictates that the Board cannot admit a contention that raises an issue that is, or is about to become, the subject of a rulemaking.[51] As the Commission made clear in *Indian Point*, its longstanding practice has been to address long-term waste storage issues generically through rulemaking rather than litigating

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48 *See Indian Point*, CLI-10-19, 72 NRC at 100; Answer of the State of New York to Hudson River Sloop Clearwater, Inc.'s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point at 16 (Nov. 19, 2009), *available at* ADAMS Accession No. ML100820028.

49 *See, e.g.*, *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 977 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 251 (2009); *Luminant Generation Co.* (Comanche Peak Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 341 (2009).

50 *Davis-Besse*, CLI-12-08, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

51 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Oconee*, CLI-99-11, 49 NRC at 345.

issues case-by-case in individual adjudicatory proceedings.[52] The Commission does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[53]

The *New York* decision rejected the notion that the Commission must examine each site individually and allows the Commission to continue its traditional generic approach.[54] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. The Intervenors present no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about STP Units 3 and 4. To the contrary, the Intervenors expressly decline to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.[55] Thus, unless and until the Commission directs otherwise, *Indian Point* governs the Board and the Board should presume the Commission will proceed generically through rulemaking. Accordingly, the Board should deny the Proposed Contention pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

NINA recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision.[56] Therefore, to the extent the Board has any uncertainty concerning whether the Commission will proceed with a generic rulemaking, the Board should certify a question pursuant to 10 C.F.R. § 2.319(l) to the Commission for its

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52 *See Indian Point*, CLI-10-19, 72 NRC at 99 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

53 *See Indian Point*, CLI-10-19, 72 NRC at 100.

54 *New York*, 681 F.3d at 483.

55 *See* Motion at 5.

56 The Intervenors themselves placed this issue before the Commission for decision in their June 18, 2012 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings. The Board should defer to Commission direction on this issue.

determination.[57] Such certification also would avoid the potential for inconsistent treatment with the various other proceedings in which similar contentions have been filed.

V. CONCLUSION

As discussed above, the Intervenors fail to submit a motion to reopen the closed environmental record in this proceeding, as required by 10 C.F.R. § 2.326, and fail to satisfy the standards for non-timely contentions in 10 C.F.R. §§ 2.309(f)(2) and (c)(1). The Proposed Contention also fails to meet the Commission's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). For all of these reasons, the Proposed Contention should be denied in its entirety.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 3rd day of August 2012

[57] *See* 10 C.F.R. §§ 2.319(l), 2.341(f)(1). The mandate would invalidate the 2010 WCD and TSR update. According to precedent, the old WCD and TSR may remain effective because the D.C. Circuit has not undertaken review or issued a decision vacating the old TSR. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757-58 (D.C. Cir. 1987) (holding that a decision vacating an agency rule "necessarily reinstated" the previous rule); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacating an agency rule has the "effect of reinstating the rules previously in force"); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 238-39 (D.D.C. 2011) (holding that once the court vacated an agency rule for failing to conduct a NEPA review prior to finalizing the rule, the prior rule would be reinstated despite the argument that the prior rule suffered from the same legal flaws because the prior rule was not before the reviewing court). To the extent any uncertainty exists concerning this issue, the Board can likewise certify such a question to the Commission for its determination.

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.

Executed in Accord with 10 C.F.R. § 2.304(d)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 52-012-COL
	)	52-013-COL
NUCLEAR INNOVATION NORTH AMERICA LLC	)	
	)	
(South Texas Project Units 3 and 4)	)	August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Nuclear Innovation North America LLC's Answer Opposing New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4" was served electronically with the Electronic Information Exchange on the following recipients:

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