UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	August 3, 2012
(Watts Bar Nuclear Plant Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF SPENT REACTOR FUEL AT WATTS BAR UNIT 2

I. INTRODUCTION

On July 9, 2012, Southern Alliance for Clean Energy, Inc. ("SACE") submitted "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" ("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 Watts Bar Nuclear Plant Unit 2 ("WBN-2") operating license ("OL") Draft Final Environmental Statement ("Draft SFES") 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] Other groups filed essentially-identical contentions on the same day in numerous other licensing proceedings.

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

2 Motion at 4.

Pursuant to 10 C.F.R. § 2.309(h) and the Board's May 26, 2010 Scheduling Order, the Tennessee Valley Authority ("TVA") files this Answer opposing the Proposed Contention. As demonstrated below, the Proposed Contention should be rejected as a threshold matter because SACE fails 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. Accordingly, SACE has not demonstrated that the information upon which the Proposed Contention is based is materially different than information previously available, nor has SACE demonstrated that the non-timely factors weigh in favor of considering the Proposed Contention at this time.

In addition, the Proposed Contention should be rejected because SACE fails 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). Additionally, even if the D.C. Circuit's mandate issues, the Proposed Contention should be rejected because longstanding Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes the admission of a contention that concerns 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 through rulemaking. Finally, to the extent any uncertainty exists on these issues, the Board can 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. WBN-2 OL Proceeding

TVA filed an updated WBN-2 OL application in 2009.[3] SACE is a party to that proceeding and one aquatic impacts contention remains subject to litigation.[4] The NRC is not expected to make a final decision on the WBN-2 OL for several years.[5] The NRC issued the Draft SFES in October 2011.[6]

B. Waste Confidence

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[7] the Commission issued its initial WCD and TSR.[8] 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.[9] The Commission has thus clearly and consistently chosen to address waste storage issues generically through the TSR instead of litigating issues in individual licensing proceedings.[10]

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3 *See Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939, 945 n.1 (2009).

4 *See id*. at 946, 988 (admitting aquatic impacts contention); *Tenn. Valley Auth.* (Watts Bar Unit 2), Licensing Board Memorandum and Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) at 2 (June 2, 2010) (unpublished) (holding contention regarding federal and state permits to be moot).

5 *See* NRC Staff's May 2012 Bimonthly Report Regarding the Schedule for Review of the Watts Bar Number 2 License Application at 2 (May 1, 2012), *available at* ADAMS Accession No. ML12122A962 (indicating that the NRC Staff expects to issue the Final Safety Evaluation Report in December 2013).

6 *See* NUREG-0498, Supp. 2, Draft Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Unit 2 (Oct. 2011).

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

8 *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).

9 *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).

10 *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,[11] SACE and several non-parties submitted comments on the proposed revisions.[12] After considering public comments, the Commission issued the WCD and TSR revisions in December 2010.[13]

Four states, an Indian community, and several environmental groups (including SACE) 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.[14]

Notwithstanding the still-evolving developments in *New York*, on June 18, 2012, SACE filed a petition with the Commission in response to that decision requesting suspension of final licensing decisions in pending proceedings and additional public participation opportunities.[15] Both TVA and the NRC Staff responded to the petition on June 25, 2012.[16]

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[11] 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).

[12] Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, Blue Ridge Environmental Defense League, C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by 2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, Southern Alliance for Clean Energy, and the Sustainable Energy and [Economic] Development Coalition 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.

[13] 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).

[14] *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).

[15] Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012). This petition was filed in numerous other proceedings as well. The petition remains pending before the Commission.

[16] Tennessee Valley Authority'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

III. LEGAL STANDARDS

As discussed below, SACE must satisfy the requirements in: (1) 10 C.F.R. §§ 2.309(f)(2) and (c), governing timeliness of late-filed contentions; and (2) 10 C.F.R. § 2.309(f)(1) to demonstrate contention admissibility. Failure to satisfy any of these requirements compels the rejection of the Proposed Contention.[17]

A. Timeliness Requirements

Pursuant to the Hearing Notice[18] and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired approximately 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), which govern nontimely requests and/or petitions and contentions.[19] SACE bears the burden of successfully addressing the "stringent" non-timely criteria.[20]

Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012).

[17] *See, e.g.*, *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, slip op. at 6-7 (June 7, 2012) (stating that contentions must meet the "strict contention standards under 10 C.F.R. § 2.309(f)," including the admissibility and timeliness standards); *see also* Scheduling Order, at 5 (May 26, 2010) ("Scheduling Order").

[18] 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).

[19] The Commission has indicated that for new contentions filed by an admitted party, the timeliness standard is 10 C.F.R. § 2.309(f)(2), not 10 C.F.R. § 2.309(c). *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 86 n.171 (2010) (discussing the applicability of Section 2.309(f)(2) versus Section 2.309(c), and stating: "To be clear, in the circumstances presented here, where [the intervenor] was admitted to this case as a party at the time it filed [the new contention], consideration of the contention's admissibility is governed by the provisions of § 2.309(f)(2), as well as the general contention admissibility requirements of § 2.309(f)(1)."). Therefore, because the Proposed Contention does not meet the timeliness requirements of Section 2.309(f)(2), the analysis should end. To be conservative and consistent with the Scheduling Order, however, TVA also evaluates the timeliness requirements of Section 2.309(c).

[20] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); *see also Pilgrim*, CLI-12-15, slip op. at 13 ("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).

Under the Board's Scheduling Order,[21] a new or amended contention must meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) through (iii), which provide 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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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

The Board specified a definitive period for determining timeliness. The Scheduling Order provides that a "motion and proposed new contention specified in the preceding paragraph 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*."[22] The Scheduling Order further states that if a motion and proposed contention are not filed within this time period, then they "shall be deemed nontimely under 10 C.F.R. § 2.309(c)."[23]

Section 2.309(c) sets forth an eight-factor balancing test for nontimely filings.[24] The burden is on SACE to demonstrate "that a balancing of these factors weighs in favor of granting

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21 *See* Scheduling Order at 5.

22 *Id.* (emphasis added).

23 *Id.*

24 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.

the petition."[25] The eight factors in Section 2.309(c)(1) are not of equal importance. The first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[26]

B. 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).[27] These requirements are discussed in detail in TVA's August 7, 2009 Answer opposing the initial Petition to Intervene[28] and a brief discussion of the key contention admissibility requirements is set forth below.

The Commission has recently reiterated that its rules on contention admissibility are "strict."[29] "[T]he NRC in 1989 revised its rules to prevent the 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."[30] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from another proceeding involving another reactor,' even

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

26 *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."); *see also Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009).

27 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. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

28 Tennessee Valley Authority's Answer Opposing the Southern Alliance for Clean Energy, Et Al. Petition to Intervene and Request for Hearing, at 8-16 (Aug. 7, 2009); *see also Watts Bar*, LBP-09-26, 70 NRC 939.

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

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

though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[31]

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.[32] 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.[33] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[34] 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."[35]

IV. THE PROPOSED CONTENTION SHOULD BE REJECTED

A. 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.[36] Because it is the mandate that makes the decision effective, the *New York* decision has no legal

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

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

33 *Id.*

34 *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).

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

36 *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).

effect on this proceeding.[37] Accordingly, the Proposed Contention has not raised any materially different information, and therefore fails to satisfy 10 C.F.R. § 2.309(f)(2)(ii). Similarly, the Scheduling Order 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."[38] Because no material information has become available, the Proposed Contention fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii) as well. For these reasons, the Proposed Contention is premature and does not satisfy the Section 2.309(f)(2) requirements.

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).[39] SACE entirely ignores 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.[40]

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

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37 *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).

38 Scheduling Order at 5.

39 *See id.*; 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.").

40 *See, e.g.*, *Millstone*, CLI-09-5, 69 NRC at 126 ("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 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.").

and *procedurally ripe* to permit the filing of a contention."[41] SACE fails 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. As discussed above, the mandate will not issue, at the earliest, until late August 2012, if at all. Therefore, the *New York* decision has no legal effect on this proceeding. Accordingly, because the issues raised in the Proposed Contention are not ripe, SACE has not demonstrated good cause supporting the submission of the Motion.

Because SACE fails to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors would have to weigh heavily in its favor for the Proposed Contention to be admitted.[42] 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 SACE.[43]

Furthermore, SACE provides no indication that its 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

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41 *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).

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

43 *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").

prospective witnesses, and summarize their proposed testimony.[44] SACE has failed to satisfy any of those requirements. Thus, SACE provides no basis to suggest it is 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 SACE with adequate means to protect its interests (factor five). As such, that factor also weighs in favor of denying the Proposed Contention.[45]

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 SACE. Therefore, the Proposed Contention should be denied.

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

In addition to the non-timely filing requirements, SACE also must demonstrate that the Proposed Contention is admissible under 10 C.F.R. § 2.309(f)(1). As discussed below, SACE fails to satisfy the Commission's substantive admissibility requirements.

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, SACE claims that the WBN-2 Draft SFES improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.[46] However, as discussed above, the D.C. Circuit

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

45 *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).

46 Motion at 4.

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 SACE's assertion.[47] 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.[48]

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.[49] 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 operating license . . . for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis."[50] Unless and until the mandate issues, the updated TSR remains in effect.[51] Accordingly, as long as that regulation is effective,

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47 *See id.*

48 *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).

49 *See* Motion at 4.

50 10 C.F.R. § 51.23(b).

51 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 certify such a question to the Commission for its determination.

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, "SACE requests that consideration of the contention be held in abeyance pending issuance of the mandate."[52] An abeyance, 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.[53] Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.[54] Likewise, SACE's abeyance request should be rejected.

SACE also fails 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 speculative guesswork. As discussed above, the Commission refuses to admit contentions "based on little more than speculation."[55] 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

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52 Motion at 2.

53 *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.

54 *See, e.g.*, *Watts Bar*, LBP-09-26, 70 NRC at 977; *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).

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

rulemaking.[56] 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 issues case-by-case in individual adjudicatory proceedings.[57] The Commission does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[58] Thus, if the mandate issues, the contention would still be inadmissible because it may reasonably be expected that the Commission will continue this practice and institute a rulemaking addressing the issues on remand.

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.[59] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. SACE presents no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about WBN-2. To the contrary, SACE expressly declines to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.[60] 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).

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

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

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

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

60 *See* Motion at 5.

TVA recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision.[61] Therefore, to the extent the Board has any uncertainty concerning whether the Commission will proceed with a generic rulemaking, the Board can certify a question pursuant to 10 C.F.R. § 2.319(l) to the Commission for its determination.[62] 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, SACE fails 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 both of these reasons, the Proposed Contention should be denied in its entirety.

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[61] SACE itself placed this issue before the Commission for decision in its 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.

[62] *See* 10 C.F.R. §§ 2.319(l), 2.341(f)(1).

Respectfully submitted,

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

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Dated in Washington, DC
this 3rd day of August 2012

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 No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	August 3, 2012
(Watts Bar Nuclear Plant Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Tennessee Valley Authority's Answer Opposing New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2" was served by the Electronic Information Exchange on the following recipients:

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