UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014-COL & 52-015-COL
TENNESSEE VALLEY AUTHORITY	)	
	)	August 3, 2012
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT BELLEFONTE UNITS 3 AND 4

I. INTRODUCTION

On July 9, 2012, Blue Ridge Environmental Defense League ("BREDL") and the Southern Alliance for Clean Energy ("SACE") (collectively, "Intervenors") submitted "Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Bellefonte" ("Motion" or "Proposed Contention").[1] 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,[2] the Proposed Contention claims that the Bellefonte Units 3 and 4 combined license ("COL") application Environmental Report ("ER") omits a discussion of "the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage,

[1] In addition to BREDL and SACE, the Motion lists Bellefonte Efficiency and Sustainability Team ("BEST") as a movant. *See* Motion at 1. The Atomic Safety and Licensing Board ("Board"), however, already has rejected BEST as a party to this proceeding. *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 373, 379-80, 428 (2008), *rev'd in part on other grounds*, CLI-09-3, 69 NRC 68 (2009). Because BEST makes no attempt to meet the Commission's standing or non-timely petition requirements, the Board's earlier conclusion still stands. Therefore, because BEST is not a party, it cannot participate in any adjudication of the Proposed Contention.

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

spent fuel pool fires, and failing to establish a spent fuel repository."[3] Other groups filed essentially identical contentions on the same day in numerous other licensing proceedings.

Pursuant to 10 C.F.R. § 2.309(h) and the Board's July 17, 2012 Order, Tennessee Valley Authority ("TVA") files this Answer opposing the Proposed Contention. As demonstrated below, the Proposed Contention should be denied as premature because the D.C. Circuit has not issued a mandate in *New York*. As such, 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 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

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[4] the Commission issued its initial WCD and TSR.[5] 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 ER or environmental impact statement ("EIS").[6] The Commission has thus

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3 Motion at 4.

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

5 *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).

6 *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).

clearly and consistently chosen to address waste storage issues generically through the TSR instead of litigating issues in individual licensing proceedings.[7]

TVA submitted a COL application for Bellefonte 3 and 4 in 2007.[8] BREDL and SACE are parties to that proceeding and two contentions remain, one related to aquatic impacts and the other construction costs.[9] The Board, however, rejected Intervenors' proposed Contention NEPA-L, which claimed that TVA's ER was deficient because it omitted discussion of the environmental implications of the lack of options for permanent disposal of Bellefonte Units 3 and 4 spent fuel, as an impermissible TSR challenge.[10]

In response to an October 2008 proposed revision to the WCD and TSR,[11] Intervenors and several non-parties submitted comments on the proposed revisions.[12] Intervenors also proposed Contention NEPA-S, which was "based on" these comments, but stated that Intervenors "do not seek to litigate" those comments in this individual proceeding, but nonetheless argued that Contention NEPA-S should be admitted and held in abeyance to avoid a premature judicial appeal if the Bellefonte COL proceeding concluded before the rulemaking.[13]

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7 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (July 8, 2010) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

8 *Bellefonte*, LBP-08-16, 68 NRC at 374.

9 *See id.* at 373-75, 430, *rev'd in part*, CLI-09-3, 69 NRC at 78.

10 *See id.* at 416.

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 Joint Intervenors' New Contention NEPA-S at 1, 3 (Mar. 9, 2009), Ex. A, Comments by [BREDL, SACE, 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).

13 *Id.* at 1, 3.

The Board rejected Contention NEPA-S as untimely and as an impermissible attack on a proposed Commission rule.[14]

After considering public comments, the Commission issued the WCD and TSR revisions in December 2010.[15] Four states, an Indian community, and several environmental groups (including 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.

Notwithstanding the still evolving developments in *New York*, on June 18, 2012, Intervenors 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.[16] Both TVA and the NRC Staff responded to the petition on June 25, 2012.[17] That petition remains pending before the Commission.

III. LEGAL STANDARDS

Any new contention must meet all of the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[18] The Commission has recently reiterated that its rules on

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[14] *See* Memorandum and Order (Ruling on Request to Admit New Contention) at 11-14 (Apr. 29, 2009) (unpublished).

[15] 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).

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

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

[18] *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). 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

contention admissibility are "strict."[19] "[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."[20] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from another proceeding involving another reactor,' even though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[21]

The purpose of the six admissibility criteria is to focus litigation on concrete issues and result in a clearer and more focused record for decision.[22] 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.[23] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[24] Similarly, the Commission will "not accept in

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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). These requirements are discussed in detail in TVA's July 1, 2008 Answer opposing the initial Petition to Intervene.

19 *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").

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

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

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

23 *Id.*

24 *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).

individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[25]

IV. THE PROPOSED CONTENTION DOES NOT SATISFY THE NRC'S CONTENTION ADMISSIBILITY REQUIREMENTS

A. The Proposed Contention Should Be Denied as Premature

Based on the D.C. Circuit's recent *New York* decision, Intervenors claim that the Bellefonte ER improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.[26] The D.C. Circuit, however, 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.[27] 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 Intervenors' assertion.[28] 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.[29]

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

26 Motion at 4.

27 *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).

28 *See* Motion at 4. *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).

29 *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). For this same reason, the Proposed Contention has not raised any materially different information, and therefore is untimely under 10 C.F.R. § 2.309(f)(2)(ii). Similarly, Intervenors do not have good cause under 10 C.F.R. § 2.309(c)(1) for their untimely filing, because good cause requires a "judgment about when the matter is sufficiently factually concrete and *procedurally ripe* to permit the filing of a contention." *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). The other Section 2.309(c) factors also weigh against Intervenors, because

Furthermore, because the mandate has not yet issued, the contention constitutes an impermissible TSR challenge. The contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.[30] The TSR, 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."[31] Unless and until the mandate issues, the updated TSR remains in effect.[32] Accordingly, 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 is premature, "Intervenors request that consideration of the contention be held in abeyance pending issuance of the mandate."[33] 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

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the Proposed Contention would broaden the current issues in this proceeding, Intervenors have not indicated that their participation would contribute to the development of a sound record, and, if the Commission proceeds with rulemaking, that generic proceeding would provide Intervenors with adequate means to protect their interests. These reasons provide an additional, independent basis for rejecting the Proposed Contention.

30 *See* Motion at 4.

31 10 C.F.R. § 51.23(b).

32 The mandate would invalidate the 2010 WCD and TSR update. In doing so, 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.

33 Motion at 2.

by an intervenor to hold the contentions in abeyance pending future potential action.[34] Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.[35] Likewise, this Board should deny the Proposed Contention notwithstanding Intervenors' abeyance request.

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."[36] This speculation provides an additional basis for rejecting the Proposed Contention and not holding it in abeyance.

B. Should the Mandate Issue, the Issues Raised in the Proposed Contention Would Likely Be the Subject of Rulemaking, Making the Contention Inadmissible

Even if the mandate were to issue, Commission precedent clearly dictates the Board cannot admit a contention that raises an issue that is, or is about to become, the subject of a rulemaking.[37] 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.[38] The Commission does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[39] Thus, if the mandate issues, the contention would still be inadmissible because it may reasonably

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34 *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.

35 *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).

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

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

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

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

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.[40] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has done in the past. 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 Bellefonte Units 3 and 4. To the contrary, Intervenors expressly decline to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.[41] Thus, unless and until the Commission directs otherwise, *Indian Point* is governing, 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).

TVA recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision. 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. Such certification also would avoid the potential for inconsistent treatment in the various other proceedings in which similar contentions have been filed.[42]

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

41 *See* Motion at 5.

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

V. CONCLUSION

The Proposed Contention should be denied as premature because the D.C. Circuit has not issued a mandate for *New York*. Additionally, even if a mandate issues, the Proposed Contention is inadmissible because Commission precedent holds that the Board cannot litigate an issue that is, or is about to become, the subject of a rulemaking. For these reasons, the Proposed Contention should be dismissed. To the extent any uncertainty exists on these issues, the Board can certify an appropriate question to the Commission.

Respectfully submitted,

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

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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 Nuclear Waste at Bellefonte Units 3 and 4" was served by the Electronic Information Exchange on the following recipients:

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