

Pursuant to 10 C.F.R. § 2.309(h), Entergy Operations, Inc. (“Entergy”) files this Answer opposing the Proposed Contention. As demonstrated below, the Proposed Contention should be rejected as a threshold matter because Beyond Nuclear fails to satisfy the Commission’s 10 C.F.R. § 2.309(c)(1) non-timely filing 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, Beyond Nuclear has not demonstrated good cause for filing the Proposed Contention under 10 C.F.R. § 2.309(c)(1)(i). Nor has Beyond Nuclear made the required compelling showing on the remaining factors, 10 C.F.R. § 2.309(c)(1)(ii) to (viii).

In addition, the Proposed Contention should be rejected because Beyond Nuclear 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) to (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 Atomic Safety and Licensing Board (“Board”)⁴ 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.

⁴ This Answer assumes that the Secretary will refer the Petition to the Atomic Safety and Licensing Board Panel in accordance with 10 C.F.R. § 2.346(i).

II. BACKGROUND

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,⁵ the Commission issued its initial WCD and TSR.⁶ Since that time, the TSR has made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in reactor licensing proceeding ERs or environmental impact statements ("EISs").⁷ 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.⁸

Following notice and comment on an October 2008 proposed revision to the WCD and TSR,⁹ the Commission revised the WCD and TSR in December 2010.¹⁰ Four states, an Indian community, and several environmental groups challenged that rulemaking in the D.C. Circuit.

Meanwhile, Entergy filed the Grand Gulf Unit 1 license renewal application in November 2011. After the NRC published a notice of opportunity for hearing,¹¹ no party requested a hearing or proposed contentions relating to spent fuel storage or otherwise.

⁵ *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

⁶ 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) ("Spent Fuel Requirements").

⁷ *Compare* Spent Fuel Requirements, 49 Fed. Reg. at 34,694, *with* 10 C.F.R. § 51.23(b).

⁸ *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)).

⁹ 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).

¹⁰ Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

¹¹ Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing, Regarding Renewal of Facility Operating License No. NPF-29 for an Additional 20-Year Period; Entergy Operations, Inc.; Grand Gulf Nuclear Station, Unit 1, 76 Fed. Reg. 80,980 (Dec. 27, 2011).

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, Beyond Nuclear and various other organizations 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.¹² Both Entergy and the NRC Staff responded to the petition on June 25, 2012.¹³ That petition remains pending before the Commission.

III. LEGAL STANDARDS

Given the timing of the Petition—more than four months after the deadline for hearing requests—Beyond Nuclear must satisfy the requirements for non-timely filings in 10 C.F.R. § 2.309(c)(1), as well as the contention admissibility in 10 C.F.R. § 2.309(f)(1).

A. Non-timely Filing Standards

After the deadline for hearing requests, NRC regulations provide that a petitioner may submit a new contention only upon a favorable balancing of the eight factors in 10 C.F.R. § 2.309(c)(1). Those factors are: (1) good cause, if any, for the failure to file on time; (2) the nature of the petitioner's right to be made a party; (3) the nature and extent of the petitioner's interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the petitioner's interest; (5) the availability of other means whereby the petitioner's interest will be protected; (6) the extent to which the petitioner's interests will be

¹² Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012).

¹³ Entergy Operations, Inc.'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).

represented by existing parties; (7) the extent to which the petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.¹⁴

The burden is on the petitioner to demonstrate “that a balancing of these factors weighs in favor of granting the petition.”¹⁵ The eight factors in Section 2.309(c)(1) are not of equal importance—factor one, whether “good cause” exists for the failure to file on time, is entitled to the most weight.¹⁶ If good cause is lacking, then a “compelling showing” must be made as to the remaining factors to outweigh the lack of good cause.¹⁷ After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is the most significant factor.¹⁸

B. Contention Admissibility Standards

Under 10 C.F.R. § 2.309(f)(1), a contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) 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 (6) provide

¹⁴ 10 C.F.R. § 2.309(c)(1)(i)-(viii).

¹⁵ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

¹⁶ *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-126 (2009) (“[Section 2.309(c)(1)] sets forth eight factors, the most important of which is ‘good cause’ for the failure to file on time.”).

¹⁷ *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

¹⁸ *See, e.g., Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.¹⁹ Any new contention must meet all of these requirements.²⁰

The Commission's rules on contention admissibility are "strict by design."²¹ The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"²² 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.'"²³

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 more focused record for decision.²⁴ 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.²⁵ Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.²⁶ Similarly, the

¹⁹ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

²⁰ 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).

²¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

²² *Id.* (citing *Oconee*, CLI-99-11, 49 NRC at 334).

²³ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC ___, slip op. at 4 (Mar. 27, 2012) (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

²⁴ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²⁵ *Id.*

²⁶ 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).

Commission will “not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.”²⁷

IV. ARGUMENT

A. The Petition Does Not Satisfy the Requirements for Non-timely Filings Under 10 C.F.R. § 2.309(c)(1)

As demonstrated below, Beyond Nuclear has not demonstrated the necessary “good cause” under 10 C.F.R. § 2.309(c)(1)(i). Nor has it made a “compelling showing” as to the remaining factors to outweigh the lack of good cause.²⁸ Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) warrants denial of the Proposed Contention.

1. **Beyond Nuclear Has Not Shown Good Cause for Failing to File on Time**

Beyond Nuclear claims to have “good cause” for failing to file on time because the Proposed Contention is based on a new legal development, the D.C. Circuit’s *New York* decision, which was not available when the hearing request deadline passed.²⁹ Good cause, however, requires a “judgment about when the matter is sufficiently factually concrete and *procedurally ripe* to permit the filing of a contention.”³⁰

Beyond Nuclear fails to demonstrate the necessary good cause because 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.³¹ Because the mandate is the

²⁷ *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

²⁸ *See Braidwood*, CLI-86-8, 23 NRC at 244.

²⁹ Petition at 5.

³⁰ *Private Fuel Storage, L.L.C.* (Indep. 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).

³¹ *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 v. NRC*, No. 11-1045, Clerk’s Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition

certified copy of the final judgment and the order that makes the decision effective, the *New York* decision has no “legal effect on this proceeding.”³² Accordingly, Beyond Nuclear has not demonstrated good cause supporting the submission of the Petition.

2. Beyond Nuclear Has Not Made a Compelling Showing on the Remaining Factors

Because Beyond Nuclear 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.³³ They do not. The Proposed Contention, if admitted, would require initiation of an entirely new contested hearing, with mandatory disclosures and the involvement of new experts and personnel, on an issue that affects numerous other proceedings. 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 Beyond Nuclear.³⁴

Furthermore, Beyond Nuclear 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 prospective witnesses, and summarize their proposed testimony.³⁵ Beyond Nuclear has failed to satisfy any of those requirements. Thus, Beyond Nuclear provides no basis to

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).

³² *See* Petition at 5.

³³ *Braidwood*, CLI-86-8, 23 NRC at 244.

³⁴ *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”).

³⁵ *See Braidwood*, CLI-86-8, 23 NRC at 246.

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 Beyond Nuclear with adequate means to protect its interests (factor five). As such, that factor also weighs against admitting the Proposed Contention.³⁶

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 Beyond Nuclear.

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, Beyond Nuclear also must demonstrate that the Proposed Contention is admissible under 10 C.F.R. § 2.309(f)(1). As discussed below, Beyond Nuclear 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) to (iii) and 2.335(a)

Based on the D.C. Circuit's recent *New York* decision, Beyond Nuclear claims that the Grand Gulf ER improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.³⁷ However, as discussed above, the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Because the mandate is the certified copy of the final judgment and the order that makes the decision

³⁶ 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).

³⁷ Petition at 4.

effective, no evaluation or other action is “required” by the *New York* decision at this time.³⁸

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.³⁹

Furthermore, because the mandate has not yet issued, the Proposed Contention is contrary to the TSR. The contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.⁴⁰ The current 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.”⁴¹ Unless and until the mandate issues, the current TSR remains in effect. Accordingly, the Proposed Contention is contrary 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 Petition lacks a legal basis, Beyond Nuclear asks the Board to hold consideration of the Proposed Contention in abeyance pending the mandate’s issuance.⁴² However, placing a currently inadmissible contention in abeyance 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

³⁸ See *id.*

³⁹ *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).

⁴⁰ See Petition at 4.

⁴¹ 10 C.F.R. § 51.23(b).

⁴² Petition at 2.

contention admissibility ruling in abeyance pending future potential action.⁴³ Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.⁴⁴ Likewise, Beyond Nuclear's abeyance request should be rejected.

Beyond Nuclear also fails to address the considerable uncertainty underlying the Petition's central assumptions, including when (and whether) the mandate will issue, whether the prior TSR or an interim TSR will take the place of the current TSR, and whether the NRC will initiate a generic rulemaking. 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."⁴⁵ 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 raising an issue that is, or is about to become, the subject of a rulemaking.⁴⁶ 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.⁴⁷ The Commission does so for the

⁴³ See *Indian Point*, CLI-10-19, 72 NRC at 100; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), 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.

⁴⁴ 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).

⁴⁵ *Davis-Besse*, CLI-12-8, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

⁴⁶ See *Indian Point*, CLI-10-19, 72 NRC at 100; *Oconee*, CLI-99-11, 49 NRC at 345.

⁴⁷ See *Indian Point*, CLI-10-19, 72 NRC at 99 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.⁴⁸

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.⁴⁹ Moreover, the long-term spent fuel storage issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. Beyond Nuclear presents no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about Grand Gulf Unit 1. To the contrary, Beyond Nuclear expressly declines to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.⁵⁰ Thus, unless and until the Commission directs otherwise, *Indian Point* governs 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).

Entergy recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision.⁵¹ 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

⁴⁸ See *id.* at 100.

⁴⁹ *New York*, 681 F.3d at 483.

⁵⁰ See Petition at 8.

⁵¹ Beyond Nuclear has 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.

determination.⁵² 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, Beyond Nuclear fails to satisfy the standards for non-timely petitions in 10 C.F.R. § 2.309(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 Petition and the Proposed Contention should be denied in its entirety.

Respectfully submitted,

Signed (electronically) by Jonathan M. Rund

Paul M. Bessette

Kathryn M. Sutton

Jonathan M. Rund

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Phone: 202-739-3000

Fax: 202-739-3001

E-mail: pbessette@morganlewis.com

E-mail: ksutton@morganlewis.com

E-mail: jrund@morganlewis.com

COUNSEL FOR ENTERGY OPERATIONS, INC.

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

⁵² 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 prior WCD and TSR may remain effective because the D.C. Circuit has not undertaken review or issued a decision vacating the prior 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.

BEFORE THE SECRETARY

August 3, 2012

Signed (electronically) by Jonathan M. Rund

Jonathan M. Rund

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Phone: 202-739-5061

Fax: 202-739-3001

E-mail: jrund@morganlewis.com

COUNSEL FOR ENTERGY OPERATIONS, INC.

DB1/ 70478803