UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'S HEARING REQUEST AND PETITION TO INTERVENE AND MOTION TO REOPEN THE RECORD IN THE OPERATING LICENSE PROCEEDING FOR WATTS BAR UNIT 2

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INTRODUCTION

In accordance with 10 C.F.R. §§ 2.309(i) and 2.323(c), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) respectfully submits its combined answer to the Petition to Intervene[1] and Motion to Reopen the Record[2] filed by the Southern Alliance for Clean Energy (SACE) on April 21, 2015 in the Watts Bar Nuclear Plant (WBN), Unit 2 (WBN2) operating license (OL) proceeding. SACE asserts that the WBN2 Final Environmental Statement is inadequate because its evaluation of the environmental impacts of spent fuel storage and disposal relies on the NRC's Continued Storage Rule and Continued Storage generic environmental impact statement (GEIS).[3]

SACE's Petition and Motion to Reopen are substantively similar to petitions and motions to reopen filed previously in the Callaway Nuclear Power Plant, Unit 1 (Callaway) license

[1] Southern Alliance for Clean Energy's Hearing Request and Petition to Intervene in Operating License Proceeding for Watts Bar Unit 2 Nuclear Power Plant (filed Apr. 21, 2015; dated Apr. 22, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15111A356) (Petition).

[2] Southern Alliance for Clean Energy's Motion to Reopen the Record of Operating License Proceeding for Watts Bar Unit 2 Nuclear Power Plant (filed Apr. 21, 2015; dated Apr. 15, 2015) (ADAMS Accession No. ML15111A356) (Motion to Reopen).

[3] *Id*. at 1.

renewal proceeding and the Fermi Nuclear Power Plant, Unit 3 (Fermi 3) combined license proceeding, which also argued that the NRC's environmental documents in those proceedings were inadequate due to their reliance on the NRC's Continued Storage Rule and Continued Storage GEIS.[4] In its rulings on those filings, CLI-15-11 and CLI-15-12, the Commission denied the petitions to intervene because they impermissibly challenged an agency regulation without a waiver of that regulation and were therefore outside the scope of their individual licensing proceedings and because, by challenging a regulation instead of the associated application, they did not provide sufficient information to demonstrate a genuine dispute with the applicant on a material issue.[5] The Commission also held that, because the petitions to intervene had not included an admissible contention, the accompanying motions to reopen necessarily did not satisfy the Commission's reopening standards because they did not raise a significant environmental issue and did not demonstrate that a materially different result would be likely if the contentions had been considered initially.[6]

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[4] *Compare* Petition and Motion to Reopen *with* Missouri [Coalition] for the Environment's Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Dec. 8, 2014) (ADAMS Accession No. ML14342B010) and Missouri [Coalition] for the Environment's Motion to Reopen the Record of License Renewal Proceeding for Callaway Unit 1 Nuclear Power Plant (Dec. 8, 2014) (ADAMS Accession No. ML14342B011) (the only substantive difference between these pleadings is that the Missouri Coalition for the Environment's pleadings include timeliness arguments based on the alleged availability of the final NUREG-1437, Supplement 51, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Callaway Plant, Unit 1" whereas SACE's pleadings state, without legal support, that they are timely because they depend on a future ruling on a case pending before the U.S. Court of Appeals for the District of Columbia Circuit); *compare* Petition and Motion to Reopen *with* Beyond Nuclear's Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant (Feb. 12, 2015) (ADAMS Accession No. ML15043A567) and Beyond Nuclear's Motion to Reopen the Record of Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant (Feb. 12, 2015) (ADAMS Accession No. ML15043A566).

[5] *Union Elec. Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC __, __ (Apr. 23, 2015) (slip op. at 4); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC __, __ (Apr. 23, 2015) (slip op. at 4).

[6] *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 4 n.17); *Fermi*, CLI-15-12, 81 NRC at __ (slip op. at 4 n.17).

Just as it did in *Callaway* and *Fermi 3*, the Commission should (1) deny SACE's Petition because it challenges a Commission rule without requesting a waiver and because it fails to raise a genuine issue of fact or law material to the WBN2 OL proceeding and (2) deny SACE's Motion to Reopen because it does not address a significant environmental issue and because it does not demonstrate that a materially different result would be likely if the proposed new contention had been raised at the beginning of the proceeding. Moreover, the Commission should also deny the Petition and Motion because they are untimely.

BACKGROUND

This proceeding concerns an application pursuant to 10 C.F.R. Part 50 by the Tennessee Valley Authority (TVA) for an OL for a second nuclear reactor at the WBN site in Rhea County, Tennessee, referred to as WBN2.[7] The Staff published a *Federal Register* Notice on May 1, 2009, providing a 60-day Notice of Opportunity for Hearing.[8]

On July 13, 2009,[9] SACE, Tennessee Environmental Council, We the People, the Sierra Club, and Blue Ridge Environmental Defense League, jointly filed a petition to intervene and request for a hearing.[10] The petition included seven proposed contentions.[11] On July 28, 2009,

[7] TVA originally filed an OL application for WBN2 on June 30, 1976; however, construction of the unit was never completed. TVA filed an update to the OL application on March 4, 2009. *See* Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009).

[8] 74 Fed. Reg. at 20,351.

[9] Before the filing deadline, SACE requested and was granted an extension of the deadline to July 14, 2009. *See* Order (June 24, 2009) (unpublished Commission order) (ADAMS Accession No. ML091750643).

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

[11] The seven proposed contentions were: (1) "Failure to List and Discuss Compliance With Required Federal Permits, Approvals and Regulations"; (2) "Inadequate SAMA Uncertainty Analysis"; (3) "Inadequate Consideration of Severe Accident Mitigation Alternatives With Respect to AC Backup for Diesel Generators"; (4) "Inadequate Discussion of Need for Power and Energy Alternatives"; (5) "Inadequate Basis for Confidence in Availability of Spent Fuel Repository and Safe Means of Interim

an Atomic Safety and Licensing Board (Board) was established to preside over this petition.[12] In LBP-09-26, the Board granted the petition with respect to SACE only, which the Board determined had standing and had submitted two admissible contentions with proposed contentions 1 and 7.[13] Subsequently, on June 2, 2010, the Board granted TVA's unopposed motion to dismiss SACE's Contention 1 as moot.[14]

On July 9, 2012, following the D.C. Circuit's Decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), SACE filed a motion for leave to file a new contention concerning the temporary storage and ultimate disposal of spent reactor fuel at WBN2.[15] The Commission exercised its inherent supervisory authority and held the contention in abeyance.[16]

In May 2013, the Staff published NUREG-0498, Supplement 2, "Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Unit 2" (FES).[17] On July 17, 2013, the Board granted SACE's unopposed motion to withdraw Contention 7.[18]

Spent Fuel Storage"; (6) "TVA's EIS Fails To Satisfy The Requirements Of NEPA Because It Does Not Contain An Adequate Analysis Of The Environmental Effects Of The Impact Of A Large, Commercial Aircraft Into The Watts Bar Nuclear Plant"; and (7) "Inadequate Consideration of Aquatic Impacts." *Id*. at 6-36.

[12] Establishment of Atomic Safety and Licensing Board (July 28, 2009) (ADAMS Accession No. ML092090724).

[13] *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 946 (2009).

[14] Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1), at 2 (June 2, 2010) (ADAMS Accession No. ML101530188).

[15] 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 (July 9, 2012) (ADAMS Accession No. ML12191A383).

[16] *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012) ("In view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that these contentions – and any related contentions that may be filed in the near term – be held in abeyance pending our further order.").

[17] NUREG-0498, *Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Unit 2, Supplement 2*, Vols. 1-2 (May 2013) (ADAMS Accession Nos. ML13144A092 and ML13144A093). *See also* Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 2, 78 Fed. Reg. 35,989 (June 14, 2013).

On August 26, 2014, the Commission approved a final rule and GEIS regarding the environmental impacts of the continued storage of spent fuel (the Continued Storage Rule and Continued Storage GEIS, respectively).[19] At the same time, the Commission issued CLI-14-08. In CLI-14-08, the Commission stated that in the Continued Storage GEIS, it had determined that the environmental impacts of continued storage would not vary significantly from site to site and could, therefore, be analyzed generically.[20] The Commission explained that, because the generic impacts of continued storage had been the subject of extensive public participation in the Continued Storage rulemaking process, those generic determinations "are excluded from litigation in individual proceedings."[21] Citing longstanding precedent, the Commission reiterated that "[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings."[22] The Commission observed that the Staff could make decisions on the issuance of final licenses once it has "completed its review of the affected applications and has implemented the Continued Storage Rule . . . ."[23] The Commission then directed the WBN2 OL Board, among others, to dismiss the spent fuel contention before it consistent with the Commission's reasoning.[24] Accordingly, on September

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[18] Order (Granting Motion to Withdraw Contention 7), at 1 (July 17, 2013) (ADAMS Accession No. ML13198A195).

[19] *See* SRM-SECY-14-0072, *Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20)* at 2, Attachment 5 (Aug. 26, 2014) (ADAMS Accession No. ML14237A092); SECY-14-0072, *Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20)* (July 21, 2014) (attaching the GEIS and the draft Continued Storage Rule). The Commission paper and its attachments may be found at ADAMS Accession No. ML14177A482 (package).

[20] *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC 71, 78-79 (2014) (CLI-14-08).

[21] *Id*. at 79.

[22] *Id*. at n.27, *citing Duke Energy Corp.* (Oconee Nuclear Power Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

[23] *Id*. at 77.

[24] *Id*. at 79.

9, 2014, the Board denied SACE's motion for leave to file a new contention concerning the temporary storage and ultimate disposal of spent reactor fuel at WBN2 and, since no further contentions were pending, terminated the WBN2 OL adjudicatory proceeding.[25]

On September 19, 2014, the Commission published its new Continued Storage Rule in the *Federal Register* with an effective date of October 20, 2014.[26]

On September 29, 2014, SACE submitted a motion for leave to file a new contention with the Commission in which it asserted that the NRC had failed to make safety findings regarding the feasibility and capacity for spent fuel disposal in connection with the WBN2 OL proceeding.[27] This motion was accompanied by a petition to suspend licensing actions and a motion to reopen the record.[28] On February 26, 2015, the Commission denied the suspension petition and denied the associated motions for leave to file a new contention and to reopen the record.[29]

On January 28, 2015, SACE, along with various other groups in other proceedings, filed with the Commission a "Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage" with respect to the WBN2 OL application, as well as various

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[25] *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-14-13, 80 NRC 142, 143 (Sept. 9, 2014).

[26] *See* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,238 (Sept. 19, 2014) (Final Rule).

[27] *See* Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings (Sept. 29, 2014) (ADAMS Accession No. ML14272A577).

[28] *See* Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014) (ADAMS Accession No. ML14272A573); Southern Alliance for Clean Energy's Motion to Reopen the Record (Sept. 29, 2014) (ADAMS Accession No. ML14272A579).

[29] *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC __ (slip op.) (Feb. 26, 2015) (ADAMS Accession No. ML15057A279).

other combined license and license renewal applications.[30] The Commission denied this petition, finding it to be without merit.[31]

On February 6, 2015, SACE filed a second motion for leave to file a new contention and to reopen the record in this proceeding alleging that TVA's final safety analysis report in support of its WBN2 OL application was insufficient because it did not include information that TVA had since separately provided to the NRC in response to the NRC's post-Fukushima 10 C.F.R. § 50.54(f) request for information.[32] The Commission referred this matter to a Board, which found that SACE had failed to satisfy the Commission's stringent reopening requirements and, therefore, denied SACE's motion to reopen and ruled that it did not need to reach the related motion for leave to file a new contention.[33]

On April 21, 2015, SACE filed the instant Petition to Intervene and Motion to Reopen the Record alleging that the WBN2 FES is inadequate because its evaluation of the environmental impacts of spent fuel storage and disposal relies on the Continued Storage Rule and Continued Storage GEIS.[34] SACE does not seek to litigate the substantive content of this filing in an adjudicatory hearing.[35] At its core, SACE's contention challenges 10 C.F.R. § 51.23(b).[36]

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[30] Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage (Jan. 28, 2015) (ADAMS Accession No. ML15028A113).

[31] *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC __, __ (slip op. at 4) (Apr. 23, 2015) (ADAMS Accession No. ML15113A276).

[32] Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4), at 1-2 (dated Feb. 5, 2015, filed via the NRC's E-Filing System Feb. 6, 2015) (available at ADAMS Accession No. ML15037A318 as a single document along with Southern Alliance for Clean Energy's Motion to Reopen the Record).

[33] *Tennessee Valley Auth.* (Watts Bar Unit 2), LBP-15-14, 81 NRC __, __ (slip op. at 1) (Apr. 22, 2015) (ADAMS Accession No. ML15112A814).

[34] Motion to Reopen at 1.

[35] Motion to Reopen at 1-2; Petition at 1-2.

[36] *See* Petition at 7-8.

DISCUSSION

I. Legal Standards

A. Legal Standards for Admission of Contentions

For a hearing request to be granted, the requestor must propose at least one admissible contention that meets all of the requirements of 10 C.F.R. § 2.309(f)[37] and must submit that contention in a timely filing.[38] The requirements for an admissible contention are set out in 10 C.F.R. § 2.309(f)(1), which provides that a contention is admissible if it:

> (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . .;
>
> (ii) Provide[s] a brief explanation of the basis for the contention;
>
> (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .

The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements are "strict by design."[39] Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissing the proposed contention.[40]

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[37] 10 C.F.R. § 2.309(a).

[38] 10 C.F.R. § 2.309(b).

[39] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsid'n denied*, CLI-02-01, 55 NRC 1 (2002).

Subsection (iii) of 10 C.F.R. § 2.309(f)(1) explicitly provides that a contention must raise an issue that is within the scope of the proceeding. Challenges to the Commission's regulations and generic determinations are beyond the scope of NRC adjudications.[41] A proposed contention otherwise inadmissible as an out-of-scope collateral attack on a Commission rule may, however, be entertained if (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.[42] If the presiding officer determines that the petitioner has not made the required *prima facie* showing, "no evidence may be received on [the] matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter."[43] Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.[44]

Contentions must also raise a genuine material issue of law or fact with the specific application at bar.[45] In other words, the proponent on the contention must show how resolution

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[40] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999), *citing Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

[41] *See Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Units No. 1, 2, and 3), LBP-91-19, 33 NRC 397, 410 (1991), *appeal granted in part,* CLI-91-12, 34 NRC 149 (1991); *Philadelphia Elec. Co*. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974), *citing Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972) ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.").

[42] 10 C.F.R. §§ 2.335(b) and (d).

[43] 10 C.F.R. § 2.335(c).

[44] 10 C.F.R. § 2.335(e).

[45] 10 C.F.R. § 2.309(f)(1)(vi).

of the dispute would make a difference in the outcome of the licensing proceeding.[46] A contention that raises only a generic issue and fails to link that issue to any specific aspect of the pertinent application is inadmissible for failure to raise a genuine material issue.[47] While a disagreement as to the interpretation of the language of a rule may raise a genuine issue of law, a challenge to the rule itself does not.[48] Such a challenge fails because it does not raise a material issue of law as contemplated by the regulation.

Where the original date for the filing of contentions has passed, the provisions of 10 C.F.R. § 2.309(c) apply. Section 2.309(c) provides that contentions filed after the deadline will not be entertained absent a determination by the presiding officer that the proponent of the contentions has demonstrated good cause by showing that:

> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii)The filing has been submitted in a timely fashion based on the availability of the subsequent information.

Whether a contention is timely filed depends in large part on when the new information became available. The Commission generally considers a contention based on new information to be filed in a timely fashion if the contention is filed within 30 days of the availability of the new information. When information is later repeated in a Staff document, however, the date that controls for timeliness purposes is the date that the information first became available, not the

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[46] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 354 (2006), *citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (Final Rule).

[47] *See Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-28, 74 NRC 604, 609 (2011).

[48] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 NRC 539, 566 (2012), *rev'd in part*, CLI-12-19, 76 NRC 377 (2012), *remanding* LBP-13-1, 77 NRC 57 (2013), *aff'd on other grounds,* CLI-13-7, 78 NRC 199 (2013).

later date when the Staff "collect[ed], summarize[d] and place[d] into context the facts supporting the contention."[49]

B. Legal Standards for Reopening of the Record

The Commission has stated that a petitioner seeking to introduce a new contention after the record has been closed should "address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing."[50] Section 2.326(a) of the Commission's regulations states that a motion to reopen will not be granted unless the following criteria are satisfied:

> (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;
>
> (2) The motion must address a significant safety or environmental issue; and
>
> (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.

Additionally, one or more affidavits showing that the motion to reopen meets the above three criteria must accompany the motion.[51] Each affidavit must contain statements from competent individuals with knowledge of the facts alleged or experts in disciplines appropriate to the issues raised.[52] Moreover, the motion to reopen and its supporting documentation must be strong

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[49] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010). *See also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 224-225 (2011).

[50] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

[51] 10 C.F.R. § 2.326(b).

[52] *Id*. *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 291-93 (2009).

enough, in the light of any opposing filings, to avoid summary disposition.[53] The Commission has held that "[t]he burden of satisfying the reopening requirements is a heavy one [and that] proponents of a reopening motion bear the burden of meeting all of [these] requirements."[54] Section 2.326(d) further provides that a motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the requirements in 10 C.F.R. § 2.309(c) (discussed above) for contentions submitted after the original deadline for filing.

II. The Petition Should Be Denied for Failing to Timely Proffer an Admissible Contention

SACE's proposed contention asserts that, "the Continued . . . Storage Rule and GEIS fail to provide the NRC with a lawful basis under [the National Environmental Policy Act of 1969, as amended, (NEPA)] for issuing an operating license for [WBN2]."[55] The Petition goes on to identify seven specific alleged failures in the Continued Storage Rule and GEIS.[56]

Simply stated, SACE's proposed contention is an impermissible challenge to the Commission's Continued Storage Rule and GEIS. As the Commission just recently held in *Callaway* and *Fermi 3* with respect to a substantively identical proposed contention, a "placeholder" contention such as the instant contention is not admissible under the Commission's rules of practice because it impermissibly challenges an agency regulation and is therefore outside the scope of an individual licensing proceeding.[57] Additionally, SACE does not raise any site-specific environmental issues with respect to the WBN2 OL application and, thus, does not show that a genuine dispute exists with the applicant on a material issue of law or fact.

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[53] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (PFS), *citing Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-4 (1973).

[54] *Oyster Creek*, CLI-09-7, 69 NRC at 287 (internal quotations omitted, alteration in original).

[55] Petition at 7.

[56] *Id.* at 7-8.

[57] *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-4); *Fermi*, CLI-15-12, 81 NRC at __ (slip op. at 4).

Finally, SACE's Petition is untimely. For all of these reasons, SACE's Petition should be denied.

A. The Proposed Contention Challenges a Rulemaking that Is Beyond the Scope of this Proceeding

SACE's proposed contention is a challenge to the Continued Storage Rule and GEIS and, as a challenge to a Commission rule, it is a challenge that is beyond the scope of this proceeding.[58] Every alleged failure and violation of NEPA that SACE asserts is an alleged failure or violation by virtue of the Continued Storage Rule or GEIS.[59] SACE's only complaint with the Staff's FES for the WBN2 OL is the fact that the Continued Storage Rule adopted the environmental impacts described in the Continued Storage GEIS and deemed them incorporated into the Staff's FES.[60]

Commission regulations bar such challenges to its rules: 10 C.F.R. § 2.335(a) provides that "no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part." Contentions that challenge Commission regulations or its regulatory processes are beyond the scope of adjudicatory proceedings and have been regularly dismissed as such.[61] Most recently and to the point, in ruling on a substantively identical proposed contention in *Callaway* and *Fermi 3*, the Commission held that such a contention was not admissible because it impermissibly challenges an agency regulation and is therefore outside the scope of an

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[58] *See* 10 C.F.R. § 2.309(f)(1)(iii).

[59] *See* Petition at 7-8.

[60] *Id.* at 7.

[61] *See, e.g., Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-4); *Fermi*, CLI-15-12, 81 NRC at __ (slip op. at 4); *Palo Verde*, LBP-91-19, 33 NRC at 400, 410, *appeal granted in part*, CLI-91-12, 34 NRC 149 (1991); *Peach Bottom*, ALAB-216, 8 AEC at 20, *citing Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972) ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.").

individual licensing proceeding.[62] Further, in its Continued Storage decision in CLI-14-08, the Commission also wrote: "Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings."[63] For this same reason, contentions that challenge the NRC's generic environmental impact statement for license renewal have been rejected in case after case.[64] In CLI-14-08, the Commission explained, "[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings."[65] Consistent with the recent *Callaway* and *Fermi 3* decisions, as well as CLI-14-08 and longstanding case law, the Commission should deny SACE's challenge to the Continued Storage Rule and GEIS.

Nevertheless, in accordance with the provisions of 10 C.F.R. § 2.335, SACE could still have challenged the Continued Storage Rule and GEIS in this adjudicatory proceeding had it sought and obtained a waiver of the prohibition against such challenges. In order to obtain such a waiver, 10 C.F.R. § 2.335(b) requires that a petitioner provide an affidavit demonstrating that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the regulation would not serve the purposes for which the regulation was adopted. But SACE has not done this; instead, SACE states that "its contention is not accompanied by a petition for a waiver" and explains that this is because "[n]o purpose would

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[62] *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-4); *Fermi*, CLI-15-12, 81 NRC at __ (slip op. at 4).

[63] *Calvert Cliffs,* CLI-14-08, 80 NRC at 79 n.27, *citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

[64] *See, e.g., Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 386 (2012), *remanding*, LBP-13-1, 77 NRC 57 (2013), *aff'g on other grounds*, CLI-13-7, 78 NRC 199 (2013); *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 20 (2007); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-12 (2001).

[65] *Calvert Cliffs,* CLI-14-08, 80 NRC at 79.

be served by such a waiver, because SACE does not seek an adjudicatory hearing on the NRC's generic environmental findings."[66] Given that SACE's proposed contention challenges the NRC's Continued Storage Rule and GEIS and that SACE has affirmatively decided to forego petitioning for a waiver, the Commission should deny SACE's Petition.[67]

B. The Proposed Contention Fails to Raise a Genuine Material Issue

SACE asserts, without referencing to any specific portions of the WBN2 OL application, that its contention "raises a genuine dispute with both the applicant and the NRC regarding whether the NRC has satisfied NEPA for the purpose of issuing an operating license for Watts Bar Unit 2."[68] As explained above, SACE's contention is an inadmissible attack on the Commission's Continued Storage Rule and GEIS and, as such, it cannot raise a genuine issue for dispute as required by 10 C.F.R. § 2.309(f)(1)(vi); the dispute is, *per se*, not a genuine one.[69]

Additionally, it is well established that an admissible contention "must raise a genuine dispute with the license application" in order to demonstrate that a material issue for hearing exists.[70] All SACE disputes is the incorporation of the Continued Storage Rule and GEIS into the WBN2 FES. This incorporation was, however, mandated by the Commission. The Continued Storage Rule itself provides that:

> The environmental reports described in . . . [§] 51.53 [Postconstruction environmental reports] . . . are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an [Independent Spent Fuel Storage Installation (ISFSI)] for the period following the term of the reactor operating license . . . . The impact determinations in [the Continued Storage GEIS] regarding continued

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[66] Petition at 2 n.3.

[67] *See Limerick*, CLI-12-19, 76 NRC at 386-87; *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-4).

[68] Petition at 9.

[69] *See Limerick*, LBP-12-8, 75 NRC at 566, 566 n.188, *rev'd on other grounds*, CLI-12-16, 76 NRC 377 (2012); *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-4).

[70] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 709 (2012).

> storage shall be deemed incorporated into the environmental impact statements described in . . . [§] 51.95 [Postconstruction environmental impact statements] . . . .[71]

As the *Limerick* board observed, "while a disagreement over the proper interpretation of NRC regulations may give rise to an admissible contention," an interpretation that is in direct conflict with the plain meaning of a regulation and the agency's Statements of Consideration fails "to present a genuine dispute of fact or law . . . as required by NRC regulations."[72] SACE's proposed contention, which is in direct conflict with the Continued Storage Rule, thus fails to present a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.

C. The Proposed Contention Is Untimely

The initial deadline for filing contentions in the WBN2 OL proceeding was June 30, 2009.[73] A petition to intervene filed after this deadline will not be entertained absent a determination that the petition was timely filed based on the availability of previously unavailable and materially different information.[74] However, instead of identifying previously unavailable and materially different information as providing good cause for its late filing of its Petition, SACE states that the Petition "does not depend at all on past information."[75] This assertion, though, is incorrect. The entirety of SACE's statement of its proposed new contention is an argument against the Continued Storage Rule and GEIS[76] and this argument does indeed depend on past information, that is, on the Continued Storage Rule and GEIS themselves,

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[71] 10 C.F.R. § 51.23(b) (emphasis added). *See Fermi 3*, CLI-15-10, 81 NRC at __ (slip op. at 5) (holding that, by the terms of the plain language of 10 C.F.R. § 51.23(b), the environmental impacts in the Continued Storage GEIS have already been incorporated into the NRC's environmental evaluations in individual licensing proceedings "by operation of law").

[72] *Limerick,* LBP-12-8, 75 NRC at 566.

[73] *See* 74 Fed. Reg. at 20,351.

[74] 10 C.F.R. § 2.309(c)(1).

[75] Petition at 10.

[76] *Id*. at 7-8.

which were published in the *Federal Register* on September 19, 2014.[77] The Continued Storage Rule went into effect on October 20, 2014, and SACE had an obligation to raise its contention in a timely manner based on the effective date of the rule, at the latest.[78] The Petition should therefore be denied as untimely.

SACE attempts to cure this pleading deficiency by asserting that its Petition is timely because it "depends on an event that will occur in the future . . . ."[79] However, SACE cites no authority supporting this assertion that filing timeliness before the Commission can be measured from an event that has not yet occurred, and the Staff has not identified any cases that support such a theory. Moreover, such a theory could be used to support the endless filing of late contentions based on claims that some event in the future may eventually provide a basis for the filings.

By filing a petition based on documents published many months earlier and by not identifying any other potentially new and materially different documents, but instead relying on an unsupported theory of future new and materially different information, SACE has not filed its Petition in a timely fashion and, thus, the Petition should be denied.

III. The Motion to Reopen Should Be Denied for Failing to Meet the Reopening Standards

SACE does not meet the Commission's reopening standards provided in 10 C.F.R. § 2.326(a)(1)-(3) because its Motion to Reopen is untimely without raising an exceptionally grave issue, it does not address a significant environmental issue, and it does not demonstrate that a materially different result would be likely if the proposed new contention had been raised at the beginning of the proceeding. Accordingly, SACE's Motion to Reopen should be denied.

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[77] *See* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (Final Rule).

[78] Additionally, SACE notes that its contention is similar to one filed in *Callaway* in December 2014. Petition at 1 n.1. The fact that SACE subsequently took more than four months to file a substantively identical contention only reinforces its untimeliness.

[79] Petition at 10.

A. SACE's Motion Is Untimely and Does Not Raise an Exceptionally Grave Issue

Under 10 C.F.R. § 2.326(a)(1), a motion to reopen "must be timely." As discussed above, the issues raised in SACE's Motion to Reopen are not timely because they are based on the analyses contained in the Continued Storage Rule and GEIS that were published on September 19, 2014.[80] Nonetheless, 10 C.F.R. § 2.326(a)(1) provides an exception to its timeliness requirement for when the motion to reopen raises "an exceptionally grave issue." The Commission "anticipates that this exception will be granted rarely and only in truly extraordinary circumstances."[81] The Commission has stated that "an untimely raised environmental issue could be 'exceptionally grave,' depending on the circumstances of the case and the facts presented."[82] However, SACE has not made any arguments or presented any facts in support of the existence of an exceptionally grave issue. Therefore, SACE's Motion to Reopen is untimely and this untimeliness cannot be excused.

B. SACE's Motion Does Not Address a Significant Environmental Issue

Under 10 C.F.R. § 2.326(a)(2), a motion to reopen must address a significant safety or environmental issue. When a motion to reopen is untimely, the 10 C.F.R. § 2.326(a)(1) "exceptionally grave issue" test supplants the 10 C.F.R. § 2.326(a)(2) "significant safety or environmental issue" test.[83] As discussed above, the claims in SACE's Motion to Reopen are untimely and do not raise an "exceptionally grave" issue; therefore, SACE's Motion to Reopen also does not meet the requirements of 10 C.F.R. § 2.326(a)(2).

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[80] *See* Motion to Reopen at 1-2.

[81] Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986) (Final Rule).

[82] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-501 (2012).

[83] *Vogtle*, CLI-11-8, 74 NRC at 225 n.44 (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988)).

Moreover, even if SACE had filed its Motion to Reopen in a timely fashion, the motion still does not raise a significant environmental issue under 10 C.F.R. § 2.326(a)(2). For environmental issues, the Commission has found that the standard for showing significance to reopen a closed record is analogous to the standard for supplementing an environmental impact statement.[84] This standard is that the Staff must prepare a supplement to a final environmental impact statement if: "(1) [t]here are substantial changes in the proposed action that are relevant to environmental concerns; or (2) [t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[85] Any such new information must "paint a '*seriously* different picture of the environmental landscape.'"[86]

SACE asserts that its Motion to Reopen raises the significant environmental issue that the WBN2 FES, because of its dependence on the Continued Storage Rule and GEIS, lacks an adequate analysis of the environmental impacts of spent fuel storage and disposal such that it fails to provide sufficient support for the proposed licensing action.[87] SACE does not explain how there is new and significant information relevant to its environmental concerns and how that information bears on the WBN2 OL application such that it paints a seriously different picture of the environmental landscape. Instead, SACE relies solely on its comments on the draft Continued Storage Rule and GEIS,[88] but fails to explain how these comments paint a new and seriously different picture of the environment. Accordingly, SACE's claims do not constitute a

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[84] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 28-29 (2006).

[85] 10 C.F.R. § 51.92(a).

[86] *PFS*, CLI-06-3, 63 NRC at 28 (quoting *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original)).

[87] Motion to Reopen at 4.

[88] *See id*.

significant environmental issue under 10 C.F.R. § 2.326(a)(2) and its Motion to Reopen should be denied.

C. SACE's Motion Does Not Show that a Materially Different Result Would Be Likely

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen "must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." One Board has explained that, under this standard, "[t]he movant must show that it is *likely* that the result would have been materially different, i.e., that it is more probable than not that [the movant] would have prevailed on the merits of the proposed new contention."[89] The Commission has made clear that the evidence provided in support of a motion to reopen must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding.[90]

SACE has not demonstrated that a materially different result would be likely in this proceeding had its proposed new contention been considered initially. In its Motion to Reopen, SACE claims that the purpose of its new contention is to ensure that the NRC will withdraw the WBN2 FES as a basis for licensing WBN2 and, therefore, withdraw the WBN2 OL, if the U.S. Court of Appeals for the District of Columbia Circuit vacates the Continued Storage Rule and GEIS.[91] Although SACE does assert that the admission of its proposed new contention would likely produce a materially different result in this proceeding, SACE's logic is flawed. First, SACE appears to contradict itself in asserting that *admission* of its contention would produce a materially different result because it also concedes that it is submitting its new contention with the reasonable expectation that it will be *denied*, because the subject matter of the contention is

[89] *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC 529, 549 (2010) (emphasis in original).

[90] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 498 (2012).

[91] Motion to Reopen at 4.

generic.[92] Second, SACE provides no evidence to establish the likelihood that its challenge to the Continued Storage Rule and GEIS would prevail especially given the fact that the very same comments on which it is based were available to the Commission at the time of its approval of the Continued Storage Rule and GEIS. Finally, SACE has not shown that a materially different result would be likely because, as explained above, SACE has failed to proffer an admissible contention under 10 C.F.R. §§ 2.309(f)(1) and 2.309(c). SACE also describes its contention as a "placeholder" that it does not intend to litigate before the NRC but, instead, only intends to appeal upon its denial.[93] However, as the Commission held in *Callaway* and *Fermi 3*, such "placeholder" contentions are not necessary to ensure that a petitioner's challenge to a Commission rule receives a full and fair airing.[94]

CONCLUSION

SACE's Petition to Intervene is inadmissible because it raises an issue that is beyond the scope of this proceeding by challenging a Commission rule without requesting a waiver of the rule, it fails to raise a genuine issue of material fact or law, and it was filed late without good cause. SACE's Motion to Reopen is inadmissible because it is untimely without addressing an extremely grave issue, it does not address a significant environmental issue, and it does not demonstrate that a materially different result would be likely if its proposed new contention had been raised at the beginning of the proceeding. Accordingly, consistent with the Commission's denial of a substantively identical proposed contention in *Callaway* and *Fermi 3*, the Commission should deny both SACE's Petition to Intervene and Motion to Reopen.

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[92] Petition at 2.

[93] Motion to Reopen at 1-2.

[94] *See Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 5); *Fermi*, CLI-15-12, 81 NRC at __ (slip op. at 5). Instead, the Commission stated that, "[s]hould the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS, we would take appropriate action consistent with the court's direction." *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 5).

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 1st day of May, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'S HEARING REQUEST AND PETITION TO INTERVENE AND MOTION TO REOPEN THE RECORD IN THE OPERATING LICENSE PROCEEDING FOR WATTS BAR UNIT 2," dated May 1, 2015 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 1st day of May, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 1st day of May, 2015