May 4, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF ANSWER TO SEED COALITION'S
MOTION TO REOPEN THE RECORD AND PETITION TO INTERVENE

INTRODUCTION

In accordance with U.S. Nuclear Regulatory Commission (NRC) regulations set forth in 10 C.F.R. §§ 2.309(i) and 2.323(c), the staff of the U.S. Nuclear Regulatory Commission (Staff) respectfully submits its combined answer to the SEED Coalition's (SEED's) Hearing Request and Petition to Intervene[1] and Motion to Reopen the Record[2] filed in the South Texas Project, Units 3 and 4 (STP 3 and 4) combined license (COL) proceeding on April 24 and 27, 2015.

The Petition and Motion are substantively identical to a petition and motion to reopen filed previously in the *Fermi 3* COL proceeding.[3] In its ruling on those filings in CLI-15-12, the

[1] SEED Coalition's Hearing Request and Petition to Intervene in Combined License Proceeding for South Texas Units 3 and 4 Nuclear Power Plant (Apr. 24, 2015) (ADAMS Accession No. ML15117A405) (Petition).

[2] SEED Coalition's Motion to Reopen the Record of Combined License Proceeding for South Texas Units 3 and 4 Nuclear Power Plant (Apr. 24, 2015) (ADAMS Accession No. ML15114A464) (Motion).

[3] *Compare* Petition and Motion *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). The Petition and Motion are also substantively identical in their bases to a petition and motion to reopen filed in the *Callaway* license renewal proceeding. Missouri Coaltion [sic] 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 Coaltion [sic]

Commission denied the petition because "a contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver."[4] The Commission also ruled that because the proposed contention does not engage the COL application, it does not demonstrate "a genuine dispute with the applicant on a material issue."[5] Regarding the Motion, the Commission also held that "the lack of an admissible contention necessarily precludes reopening the proceeding."[6]

Just as it did in *Fermi 3* and *Callaway*, the Commission should (1) deny the 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 proceeding and (2) deny the Motion 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 find that the unsupported timeliness arguments in the Motion and Petition are insufficient under both the Commission's standards at 10 C.F.R. § 2.309 and 10 C.F.R. § 2.326.

BACKGROUND

The Federal Register notice of hearing and opportunity to petition for leave to intervene for this proceeding was issued on February 20, 2009.[7] SEED (along with other groups) timely filed a hearing request and petition for intervention, which was granted by the Atomic Safety and

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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).

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

[5] *Id*.

[6] *Id*. at n.17.

[7] 74 Fed. Reg. 7934. An earlier notice was published on December 19, 2007, but this earlier notice was withdrawn by an Order from the Commission dated February 13, 2008.

Licensing Board (Board).[8] On July 9, 2012, following the D.C. Circuit's Decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), the Intervenors filed a proposed new contention concerning temporary storage and ultimate disposal of nuclear waste.[9] Pursuant to the Commission's direction, that proposed new contention was held in abeyance pending further order from the Commission.[10]

On August 26, 2014, the Commission approved a final rule and a generic environmental impact statement (GEIS) regarding the environmental impacts of continued storage of spent fuel (Continued Storage Rule and Continued Storage GEIS, respectively).[11] At the same time, the Commission issued its decision in 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. The Commission explained that, because the generic impacts of continued storage had been the subject of extensive public participation in the Continued Storage rulemaking, those generic

[8] *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-09-21, 70 NRC 581 (2009); *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-09-25, 70 NRC 867 (2009). All previously admitted contentions in this proceeding have been dismissed with the exception of three contentions on which evidentiary hearings were held. In each of these evidentiary hearings, the Board issued initial decisions finding against the intervenors. The intervenors filed a petition to review the Board's initial decision on one of the contentions, but this petition was denied by the Commission. The Board terminated the proceeding on September 19, 2014. *Nuclear Innovation North America LLC* (South Texas Project Units 3 & 4), LBP-14-14, 80 NRC 144.

[9] Intervenors' Motion for leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012) (ADAMS Accession No. ML12191A394). Similar contentions were filed in multiple reactor licensing proceedings. *See Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 n.10 (2012).

[10] *See Calvert Cliffs*, CLI-12-16, 76 NRC at 68–69.

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

determinations "are excluded from litigation in individual proceedings."[12] 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."[13] The Commission observed that the Staff could make decisions on the issuance of final licenses once it "completed its review of the affected applications and has implemented the Continued Storage Rule[.]"[14] The Commission then directed the Board to dismiss the continued storage contention in STP 3 and 4 consistent with the Commission's decision.[15]

On September 19, 2014, the Continued Storage Rule was published in the *Federal Register* with an effective date of October 20, 2014.[16] On April 24 and 27, 2015, SEED filed the Motion and Petition. On April 23, 2015, the Commission denied substantively identical motions to reopen the record and admit new contentions in the *Fermi 3* COL and *Callaway* license renewal proceedings.[17]

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)[18] and must submit that

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

[13] *Id*. at 9 n.27.

[14] *Id*. at 7.

[15] *Id*. at 10.

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

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

[18] 10 C.F.R. § 2.309(a).

contention in a timely filing.[19] The Commission's contention admissibility requirements are set forth in 10 C.F.R. § 2.309(f)(1). In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) Demonstrate 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 a concise statement of the alleged facts or expert opinions… [including] references to specific sources and documents [that support the petitioner's position]on which the requestor/petitioner intends to rely to support its position on the issue;
> (vi) …provide sufficient information to show that a genuine dispute with the Applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief….

10 C.F.R. § 2.309(f)(1).

The Commission has emphasized that the rules on contention admissibility are "strict by design."[20] Failure to comply with any of these requirements is grounds for the dismissal of a contention.[21]

Challenges to Commission's regulations and generic determinations are beyond the scope of NRC adjudications.[22] A proposed contention otherwise inadmissible as an out-of-scope collateral attack on a Commission rule may, however, be entertained if (1) the proponent

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[19] 10 C.F.R. § 2.309(b).

[20] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

[21] *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).

[22] *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.").

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.[23] 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."[24] Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.[25]

Contentions must also raise a genuine material issue of law or fact with the specific application.[26] In other words, the proponent of the contention must show how resolution of the dispute would make a difference in the outcome of the licensing proceeding.[27] 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.[28] While a disagreement as to the interpretation of the language of a rule may raise a genuine issue of law, a challenge

[23] 10 C.F.R. § 2.335(b) and (d).

[24] 10 C.F.R. § 2.335(c).

[25] 10 C.F.R. § 2.335(e).

[26] 10 C.F.R. § 2.309(f)(1)(vi).

[27] *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).

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

to the rule itself does not.[29] Such a challenge fails because it does not raise a material issue of law as contemplated by the regulation.

Where the original date for filing of contentions has passed, the provisions of 10 C.F.R. § 2.309(c) apply. Section 2.309(c) provides that a contention may be filed after the original deadline provided 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 information.

B. Legal Standards for Reopening

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."[30] Section 2.326(a) of the Commission's regulations sets forth the reopening standards:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

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[29] *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).

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

(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.[31]

Additionally, one or more affidavits showing that the motion to reopen meets the above criteria must accompany the motion under 10 C.F.R. § 2.326(b). Each affidavit must contain statements from competent individuals with knowledge of the facts alleged or experts in disciplines appropriate to the issues raised.[32] Moreover, the motion and its supporting documentation must be strong enough, in the light of any opposing filings, to avoid summary disposition.[33] The Commission has held that "[t]he burden of satisfying the reopening requirements is a heavy one [and] proponents of a reopening motion bear the burden of meeting all of [these] requirements."[34] 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.[35]

II. The Petition Fails to Proffer an Admissible Contention

In its Petition, SEED seeks admission of a single "place-holder" contention challenging the NRC's reliance, in proposing to license STP 3 and 4, on the Continued Storage Rule.[36] The

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[31] 10 C.F.R. § 2.326(a). *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008).

[32] 10 C.F.R. § 2.326(b). *See also Oyster Creek*, CLI-09-7, 69 NRC at 291-93.

[33] *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).

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

[35] The original deadline for filing contentions in this proceeding was April 21, 2009. *See* 10 C.F.R. § 2.309(b); 74 Fed Reg. 7934, 7935 (Feb. 20, 2009).

[36] *See* Petition at 1. As previously noted, *see supra* at 1, SEED's proposed contention is essentially identical to the proposed contentions dismissed by the Commission on April 23, 2015. The

Petition states that "[t]he sole purpose of this contention is to lodge a formal challenge to the NRC's complete and unqualified reliance, in the separate license proceeding for South Texas Units 3 and 4, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS."[37] SEED's Petition acknowledged that it "has already raised its concerns about the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS in comments on draft versions of those documents, and the NRC has already either rejected or disregarded SEED Coalition's comments in the final versions of the Rule and GEIS. SEED Coalition also has appealed the final versions to the U.S. Court of Appeals for the District of Columbia Circuit."[38] The Petition goes on to identify seven specific alleged failures in the Continued Storage Rule and GEIS.[39]

Simply stated, SEED's proposed contention is an impermissible challenge to the Commission's Continued Storage Rule and GEIS. As the Commission recently held 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.[40] SEED also raises no site-specific environmental issue with respect to the STP 3 and 4 COL application and thus does not raise a genuine issue of material fact or law. Moreover, its petition was untimely filed.

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present Petition and Motion to Reopen should be dismissed for all of the reasons discussed in those Orders.

[37] *Id*. at 2.

[38] *Id*.

[39] Petition at 7-8.

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

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

SEED's proposed contention is a challenge to the Continued Storage Final Rule and Continued Storage GEIS and, as a challenge to a Commission rule, is a challenge that is beyond the scope of this proceeding.[41] Every alleged failure and violation of NEPA that SEED asserts is an alleged failure or violation by virtue of the Continued Storage Rule or the Continued Storage GEIS.[42] Its only complaint with the Staff's environmental impact statement for the STP 3 and 4 COL application is the fact that the Continued Storage Rule adopted the environmental impacts described in the Continued Storage GEIS and deemed it incorporated into the Staff's environmental impact statement.[43]

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.[44] Most recently and to the point, in ruling on an essentially identical contention, the Commission held that such contention was not admissible because it impermissibly challenges an agency

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[41] 10 C.F.R. § 2.309(f)(1)(iii).

[42] Petition at 7-8.

[43] SEED implies that it "is not able to challenge the South Texas Units 3 and 4 FEIS with the accuracy and specificity required by 10 C.F.R. §§ 2.309(f)(1)(vi) and (f)(2)" because "the NRC Staff has not yet updated the South Texas Units 3 and 4 FEIS to incorporate the Continued Spent Fuel Storage GEIS by reference," as requested in SEED's recent related petition. Petition at 8-9 n.5. As the Commission recently held, because findings from the GEIS are deemed incorporated into the STP 3 and 4 COL FEIS by rule, the STP 3 and 4 FEIS does not need to be supplemented to reflect that information. *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC __, __ (slip op. at 5-7) (Apr. 23, 2015).

[44] *See e.g., Fermi 3,* CLI-15-12, 81 NRC __ (slip op.); *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.").

regulation and is therefore outside the scope of individual licensing proceedings.[45] Similarly, 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."[46] Consistent with this case law, SEED's challenge to the Continued Storage GEIS should be rejected.

In accordance with the provisions of 10 C.F.R. § 2.335(b), SEED could challenge the rule in an adjudicatory proceeding if it sought and obtained a waiver of the prohibition against such challenges. But SEED explains that it does not seek a waiver because "[n]o purpose would be served by such a waiver, because SEED Coalition does not seek an adjudicatory hearing on the NRC's generic environmental findings."[47] Given that SEED's proposed contention challenges the NRC's Continued Storage Rule and GEIS, SEED's affirmative decision to forego a waiver petition compels rejection of the contention.[48]

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

As explained above, the contention is inadmissible as an impermissible attack on the Commission's Continued Storage Rule and GEIS. As the contention constitutes an impermissible attack on an agency regulation 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.[49] All SEED disputes is the incorporation of the Continued Storage Rule and GEIS into the STP 3 and 4 COL FEIS. The incorporation was, however, mandated by the Commission.[50] As the *Limerick* board

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

[46] *Calvert Cliffs,* CLI-14-08, 80 NRC at __ (slip op. at 9).

[47] Petition at 3 n.3.

[48] *Limerick*, CLI-12-19, 76 NRC at 386-87.

[49] *Limerick*, LBP-12-8, 75 NRC at 566, *rev'd on other grounds*, CLI-12-16, 76 NRC 377 (2012).

[50] 10 C.F.R. § 51.23 (revised); *see* Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,260 (Sept. 19, 2014) (Final Rule).

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 Statement of Considerations fails "to present a genuine dispute of fact or law . . . as required by NRC regulations."[51] SEED's 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).[52]

C. The Proposed Contention is Untimely

SEED's Petition makes it clear that SEED's dissatisfaction is with the Continued Storage Rule and GEIS; its only criticism of the STP 3 and 4 COL FEIS is that it incorporates the Continued Storage Rule and GEIS.[53] Since SEED's Petition is actually a challenge to the Continued Storage Rule and GEIS, the timely filing requirements should be determined based on the effective date of the rule and no later. While the Continued Storage Rule went into effect on October 20, 2014, the language of the rule and the analysis behind it were available to the public months in advance of the effective date. The Continued Storage Rule and GEIS were available as early as September 19, 2014, when the Continued Storage Rule and GEIS were published in the *Federal Register*.[54] SEED had an obligation to raise its contention in a timely

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

[52] The Indian Point licensing board dismissed a site-specific environmental contention challenging the Continued Storage GEIS, noting that the Commission has "determined that site-specific environmental aspects of continued storage should not be considered in individual licensing proceedings." *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Dismissing Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4), at 3 (Nov. 10, 2014) (unpublished Licensing Board Order) (ADAMS Accession No. ML14314A350). *See also Fermi 3*, CLI-15-12, 81 NRC at __ (slip op. at 4) (holding that an essentially identical contention was not admissible because it impermissibly challenged an agency regulation and was therefore outside the scope of the individual licensing proceeding).

[53] Petition at 2.

[54] 79 Fed. Reg. at 56,260.

manner based on the effective date of the rule, at the latest.[55] The Petition should therefore be dismissed as untimely.

III. The Motion Should Be Denied

The Motion should be denied as it is untimely, does not address a significant environmental issue, and does not demonstrate that a materially different result would be likely if the new contention had been raised at the beginning of the proceeding. A motion to reopen will not be granted unless the criteria set forth in 10 C.F.R. § 2.326(a) 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.

10 C.F.R. § 2.326(a).

A. The Motion is Untimely and Does Not Raise A Significant Safety or Environmental Issue, Let Alone An Exceptionally Grave One

Under 10 C.F.R. § 2.326(a)(1), a motion to reopen a closed record "must be timely." As discussed above, the issues raised in SEED's contention are not timely because they are based on the analysis contained in the Continued Storage Rule and GEIS, not the STP 3 and 4 COL FEIS. The final version of the Continued Storage Rule was published on September 19, 2014, and became effective on October 20, 2014.[56] To the extent that the Motion to Reopen asserts that the STP 3 and 4 COL FEIS is inadequate because of its reliance on the Continued Storage

[55] SEED admits that the "sole purpose" of the contention is to challenge the NRC's reliance in the STP 3 and 4 COL proceeding on the GEIS and Continued Storage rule. Petition at 2. Because the rule itself makes clear that the findings in the GEIS are incorporated into individual licensing proceedings, the Petition fails to demonstrate why the contention could not have been filed at least at the time the rule became effective, if not even earlier. In its Petition, SEED notes that its contention is similar to one filed in the Callaway license renewal proceeding on December 8, 2014. Petition at 1 n.1. That SEED subsequently took more than four months to file a substantively identical contention only reinforces its untimeliness.

[56] *See* Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014) (GEIS); 79 Fed. Reg. at 52,238.

Rule and GEIS, SEED does not point to any new information, nor does it justify the safety or environmental significance of the issue it raises.

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 EIS.[57] 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."[58] Any "new information must paint a '*seriously* different picture of the environmental landscape.'"[59]

SEED does not explain how the analysis in the Continued Storage GEIS is new and significant or how the GEIS paints a seriously different picture of the environmental landscape for STP 3 and 4. Accordingly, SEED's claims do not constitute a significant environmental issue under 10 C.F.R. § 2.326(a)(2), let alone an "exceptionally grave" matter that would justify an untimely motion to reopen under 2.326(a)(1), a standard which the Commission "anticipates…will be granted rarely and only in truly extraordinary circumstances."[60]

B. SEED Has Not Shown That a Materially Different Result Would Be Likely

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen a closed record "must *demonstrate* that a materially different result would be or would have been *likely* had the newly proffered evidence been considered initially." 10 C.F.R. § 2.326(a)(3) (emphasis added). One Board has explained that under this standard "[t]he movant must show that it is *likely* that the result would

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

[58] 10 C.F.R. § 51.92(a)(1)-(2).

[59] *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)).

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

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."[61] While the quality of evidence presented for reopening must be at least of a level sufficient to withstand a motion for summary disposition, the Commission has made clear that the reopening standard requires more.[62] The evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding.[63]

SEED has not demonstrated that a materially different result would be likely in this proceeding. In its motion, SEED claims that the purpose of its new contention is to ensure that in the event the U.S. Court of Appeals grants SEED's petition for review of the Continued Storage Rule and GEIS and reverses the NRC for failure to comply with NEPA, the NRC would withdraw the STP 3 and 4 FEIS as a basis for licensing STP 3 and 4.[64] SEED therefore asserts that "admission of this contention would likely produce a materially different result in this proceeding."[65] SEED's logic is flawed. If the contention is admitted and SEED were to prevail on the merits of its contention, SEED would not have an appealable issue for federal court review, which is SEED's stated purpose for filing this new contention. Moreover, SEED 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 generic."[66] Further, SEED provides no evidence to establish the likelihood that, should it prevail,

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[61] *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).

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

[63] *Id.*

[64] Motion at 4.

[65] *Id.*

[66] Petition at 2.

the STP 3 and 4 FEIS will be withdrawn as a basis for licensing; SEED simply speculates that it is "reasonably likely" that the U.S. Court of Appeals will reverse the NRC for failure to comply with NEPA, which it asserts will result in the withdrawal of the STP 3 and 4 FEIS.[67]

Finally, SEED has not shown that a materially different result would be likely because, as explained above, SEED has failed to proffer an admissible contention under 10 C.F.R. §§ 2.309(f)(1) and 2.309(c). For the reasons previously described, because SEED's proposed new contention challenges a Commission regulation, it raises issues beyond the scope of this proceeding and does not raise a genuine dispute with the STP 3 and 4 application as required by 10 C.F.R. § 2.309(f)(1)(vi).

CONCLUSION

For the reasons set forth above, and consistent with the Commission's dismissal of substantively identical petitions and motions in CLI-15-11 and CLI-15-12, the Petition and Motion should be denied and dismissed. The Petition impermissibly challenges a Commission rule and thus raises an issue that is beyond the scope of this proceeding; it should have been accompanied by a request for waiver of the regulation at 10 C.F.R. § 2.335(a) that prohibits challenges to regulations in licensing adjudications, but no waiver request was submitted; it fails to raise a genuine issue of material fact or law; and it was filed late without good cause. The Motion, should be denied because it is untimely, does not address a significant environmental issue, and does not demonstrate that a materially different result would be likely if the new

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[67] Motion at 4. In CLI-15-11, the Commission noted that should the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS, it would take appropriate action consistent with the court's direction. *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 5).

contention had been raised at the beginning of the proceeding.

Respectfully submitted,

/signed (electronically) by/
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Dated at Rockville, MD,
this 4th day of May 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NRC Staff Answer to SEED Coalition's Motion to Reopen the Record and Petition to Intervene" dated May 4, 2015, has been filed through the E-Filing system this 4th day of May 2015.

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Dated at Rockville, MD,
this 4th day of May 2015