

July 9, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

In the Matter of:)
)
COMBINED OPERATING LICENSE)
APPLICATION OF THE) Docket No. 52-024-COLA
GRAND GULF NUCLEAR PLANT)
UNIT 3)

**BEYOND NUCLEAR MOTION FOR LEAVE TO FILE A NEW CONTENTION
CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF
NUCLEAR WASTE AT GRAND GULF UNIT 3**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), Beyond Nuclear (Intervenor) seeks leave to file a new contention which challenges the failure of the Grand Gulf Unit 3 Combined License (“COL”) Application, Environmental Report, Rev. 3 (the “ER”) to address the environmental impacts of spent fuel pool leakage and fires as well as the environmental impacts that may occur if a spent fuel repository does not become available.

In support of this Request for Hearing and Petition to Intervene, the Intervenor further states that Beyond Nuclear is a not-for-profit organization based in Takoma Park, Maryland with members of who reside, work and recreate within the fifty (50) mile Emergency Planning Zone of the Grand Nuclear Power Station Unit 3 site (hereinafter referred to as “Grand Gulf”). Beyond Nuclear is providing the NRC with declarations of its members who wish to have representational standing in this proceeding. The central office of Beyond Nuclear is located at 6930 Carroll Avenue, Suite 400, Takoma Park, Maryland, 20912, Tel 301-270-2209 and website www.beyondnuclear.org.

The contention is based on the United States Court of Appeals for the District of Columbia Circuit's recent decision in *State of New York v. NRC*, No. 11-1045 (June 8, 2012), which invalidated the Nuclear Regulatory Commission's ("NRC") Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23, 2010)) ("WCD") and the NRC's final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)) ("Temporary Storage Rule" or "TSR"). *State of New York* vacated the generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings.

The Intervenor recognizes that because the mandate has not yet issued in *State of New York*, this contention may be premature. Nevertheless, the Intervenor is submitting the contention within 30 days of becoming aware of the court's ruling, in light of Commission precedents judging the timeliness of motions and contentions according to when the petitioner became aware of a decision's potential effect on their interests. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002). If the Atomic Safety and Licensing Board determines that this contention is premature, Intervenor's request that consideration of the contention be held in abeyance pending issuance of the mandate.

II. FACTUAL BACKGROUND

In 1984, the NRC issued its first WCD, making findings regarding the safety of spent fuel disposal and the safety and environmental impacts of spent fuel storage. Over the several

decades that have passed since then, the NRC has updated the WCD. The latest update was issued in December 2010. On June 8, 2012, the U.S. Court of Appeals for the D.C. Circuit took review of the NRC's 2010 WCD Update and TSR and vacated those rules in their entirety. In the course of reviewing the WCD Update, the court found that the WCD is a "major federal action" under the National Environmental Policy Act ("NEPA"), therefore requiring either a finding of no significant impact ("FONSI") or an environmental impact statement ("EIS"). *Id.*, slip op. at 8. The court also found it was "eminently clear that the WCD will be used to enable licensing decisions based on its findings" because the WCD "renders uncontestable general conclusions about the environmental effect of plant licensure that will apply in every licensing decision." *Id.*, slip op. at 9 (citing 10 C.F.R. § 51.23(b)).

With respect to the WCD's conclusions regarding spent fuel disposal, the court observed that the NRC has "no long-term plan other than hoping for a geologic repository" and that spent reactor fuel "will seemingly be stored on site at nuclear plants on a permanent basis" if the government "continues to fail in its quest" to site a permanent repository. *Id.*, slip op. at 13. Thus, the court concluded that the WCD "must be vacated" with respect to its conclusion in Finding 2 that a suitable spent fuel repository will be available "when necessary." *Id.*, slip op. at 11. In order to comply with NEPA, the court found that the NRC must "examine the environmental effects of failing to establish a repository." *Id.*, slip op. at 12.

With respect to the TSR's conclusions regarding the environmental impacts of temporary storage of spent reactor fuel at reactor sites, the court concluded that the NRC's environmental assessment ("EA") and FONSI issued as part of the TSR "are not supported by substantial evidence on the record" in two respects. First, the NRC had reached a conclusion that the

environmental impacts of spent fuel pool leaks will be insignificant, based on an evaluation of past leakage. The court concluded that the past incidence of leaks was not an adequate predictor of leakage thirty years hence, and therefore ordered the NRC to examine the risks of spent fuel pool leaks “in a forward-looking fashion.” *Id.*, slip op. at 14. In addition, the court found that the NRC’s analysis of the environmental impacts of pool fires was deficient because it examined only the probability of spent fuel pool fires and not their consequences. *Id.*, slip op. at 18-19. “Depending on the weighing of the probability and the consequences,” the court observed, “an EIS may or may not be required.” *Id.*, slip op. at 19.

In remanding the WCD Update and the TSR to the NRC, the court purposely did not express an opinion regarding whether an EIS would be required or an EA would be sufficient. Instead, it left that determination up to the discretion of the NRC. *Id.*, slip op. at 12, 20.

III. CONTENTION

A. Statement of the Contention

The Environmental Report for Grand Gulf Unit 3 does not satisfy NEPA because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v. NRC*, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

B. The New Contention Satisfies the Standards For Non-Timely Contentions Set Forth in 10 C.F.R. § 2.309(c).

Under § 2.309(c), determination on any "nontimely" filing of a contention must be based on a balancing of eight factors, the most important of which is "good cause, if any, for the failure to file on time." *Crow Butte Res., Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008). As set forth below, each of the factors favors admission of the accompanying contention.

1. Good Cause.

Good cause for the late filing is the first, and most important element of 10 C.F.R. § 2.309(c)(1). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). Newly arising information has long been recognized as providing the requisite "good cause." See *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 577 (1982), citing *Indiana & Michigan Elec. Co.* (Donald C. Cook Nuclear Plant, Units 1 & 2), CLI-72-75, 5 AEC 13, 14 (1972). Thus, the NRC has previously found good cause where (1) a contention is based on new information and, therefore, could not have been presented earlier, and (2) the intervenor acted promptly after learning of the new information. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

As noted above, the information on which this Motion and accompanying contention are based primarily on law rather than facts. The Intervenor has adequately supported their contention by citing *State of New York* and discussing its legal effect on this proceeding. The intervenor also relies on the undisputed fact that the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a) that the Court identified in *State of New York*. This Motion and accompanying contention are being submitted less than thirty (30) days after

issuance of the Court's decision. Accordingly, Beyond Nuclear has good cause to submit this petition and the accompanying contention now.

2. Nature of the Intervenor's Right to be a Party to the Proceeding.

In support of this petition, Beyond Nuclear through its pro se representative is submitting declarations for representational standing of individual members who work, reside and recreate within fifty (50) miles to the Grand Gulf reactor site.

3. Nature of Beyond Nuclear's Interest in the Proceeding.

Beyond Nuclear seeks to protect its members' health, safety, and lives, as well as the health and safety of the general public and the environment by ensuring that the NRC fulfills its non-discretionary duty under NEPA safely manage and store spent fuel. Moreover, as each of the members represented by the Intervenor in this proceeding live within fifty (50) miles of Grand Gulf, Beyond Nuclear has an interest in this proceeding because of the "obvious potential for offsite consequences" to those members' health and safety. *Diablo Canyon*, 56 NRC at 426-27, citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

4. Possible Effect of an Order on Beyond Nuclear's Interest in the Proceeding.

As noted above, Beyond Nuclear's interest in a safe, clean, and healthful environment would be served by the issuance of an order requiring the NRC to fulfill its non-discretionary duty under NEPA to consider new and significant information before making a licensing decision. See *Silva v. Romney*, 473 F.2d at 292. Compliance with NEPA ensures that environmental issues are given full consideration in "the ongoing programs and actions of the Federal Government." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 n. 14 (1989).

As noted above, the Court in *State of New York* held that the WCD was "predicate" to every licensing decision.

5. Availability of Other Means to Protect the Intervenor's Interests.

With regard to this factor, the question is not whether other parties may protect Beyond Nuclear's interests, but rather whether there are other means by which an intervenor may protect its own interests. *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975). Quite simply, no other means exist. Only through this hearing does the Intervenor have a right that is judicially enforceable to seek compliance by NRC with NEPA before the COL for Grand Gulf is issued, permitting these new reactors to operate and impose severe accident risks on the individuals represented by the Intervenor.

6. Extent the Beyond Nuclear's Interests are Represented by Other Parties.

No other party can represent the Intervenor's interests in protecting the health, safety, and environment of their members. Indeed, there are no parties currently admitted in the contested proceeding. As such, Beyond Nuclear's interests cannot be represented by any other party.

7. Extent That Participation Will Broaden the Issues.

While Beyond Nuclear's participation may broaden or delay the proceeding, this factor may not be relied upon to deny this Motion or exclude the contention because the NRC has a non-discretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision. *Marsh*, 490 U.S. at 373-4. Moreover, any resulting delay from granting Intervenor's participation in this proceeding would not prohibit other licensing activities by the operator or the NRC staff. Review of the COL application by the NRC staff will remain unaffected by this Motion and accompanying contention. See *Florida Power & Light*

Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-420, 6 NRC 8, 23 (1977) (holding that, in deciding whether petitioners' participation would broaden the issues or delay the proceeding, it is proper for the Licensing Board to consider that the petitioner agreed to allow issuance of the construction permit before their antitrust contentions were heard, thereby eliminating any need to hold up plant construction pending resolution of those contentions.)

8. Extent to which the Intervenor Will Assist in the Development of a Sound Record.

Beyond Nuclear will assist in the development of a sound record, as its contention is supported by findings and conclusions in the Court's decision in *State of New York*, and further described in this motion. Furthermore, as a matter of law, NEPA requires consideration of the new and significant information in matters requiring an environmental impact statement. See 10 C.F.R. § 51.92(a)(2). A sound record cannot be developed without such consideration.

C. The Contention Satisfies the NRC's Admissibility Requirements in

10 C.F.R. § 2.309(f)(1)

1. Brief Summary of the Basis for the Contention

The contention is based on the United States Court of Appeals for the District of Columbia Circuit's decision in *State of New York v. NRC*, which invalidated the NRC's generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage after cessation of reactor operation with respect to spent fuel pool leakage, pool fires, and the environmental impacts of failing to establish a repository. As a result, the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing spent fuel storage impacts in individual

licensing proceedings. To the extent that the ER addresses spent fuel storage impacts, it does not address the concerns raised by the Court in *State of New York*. Therefore, before Grand Gulf Unit 3 can be licensed, those impacts must be addressed.

The Intervenor does not currently take a position on the question of whether the environmental impacts of post-operational spent fuel storage should be discussed in an individual EIS or environmental assessment for this facility or a generic EIS or environmental assessment. That question must be decided by the NRC in the first instance. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 (1983). The Intervenor reserves the right to challenge the adequacy of any generic analysis the NRC may prepare in the future to address the site-specific environmental conditions at Grand Gulf Unit 3. The current circumstances, however, are such that the NRC has no valid environmental analysis, either generic or site-specific, on which to base the issuance of a license for this facility.

2. The Contention is Within the Scope of the Proceeding

The contention is within the scope of this licensing proceeding because it seeks to ensure that the NRC complies with the NEPA before issuing a COL for Grand Gulf Unit 3. There is no doubt that the environmental impacts of spent fuel storage must be addressed in all NRC reactor licensing decisions. *State of New York*, slip op. at 8 (holding that the WCD is a “predicate” to every licensing decision); *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

3. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issues raised in this contention are material to the findings the NRC must make to support the action that is involved in this proceeding, in that the NRC must render findings pursuant to NEPA covering all potentially significant environmental impacts. *See* discussion above in subsection (2). As such, in the absence of 10 C.F.R. § 51.23(a), it is clear that this contention addresses a material omission in the NRC staff's environmental review pursuant to NEPA.

4. Concise Statement of Facts of Expert Opinion Support the Contention

This contention is based primarily on law rather than facts. The Intervenor has adequately supported their contention by citing *State of New York* and discussing its legal effect on this proceeding. The Intervenor also relies on the undisputed fact that the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a) that the Court identified in *State of New York*.

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact

The Intervenor has a genuine dispute with the applicant regarding the legal adequacy of the environmental analysis on which the applicant relies in seeking a COL in this proceeding. Unless or until the NRC cures the deficiencies identified in *State of New York* or the applicant withdraws its application, this dispute will remain alive.

IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. § 2.309(f)(2)

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(f)(2), which call for a showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information. *Id.*

The Intervenor satisfies all three prongs of this test. First, the information on which the contention is based -- *i.e.*, the invalidity of 10 C.F.R. § 51.23(b) and the findings on which it is based -- is new and materially different from previously available information. Prior to June 8, 2012, 10 C.F.R. § 51.23 was presumptively valid. Subsequent to the issuance of *State of New York* by the U.S. Court of Appeals, the NRC no longer has a lawful basis for relying on that regulation to exempt itself or license applicants from considering the environmental impacts of post-operational spent fuel storage in the environmental analyses for individual reactor license applications. By the same token, the generic analyses in the WCD and the TSR, on which the NRC relied for all of its reactor licensing decisions, are no longer sufficient to support the issuance of a license. Therefore the NRC lacks an adequate legal or factual basis to issue a COL for Grand Gulf Unit 3.

Finally, the contention is timely because it has been submitted within 30 days of June 8, 2012, the date the U.S. Court of Appeals issued *State of New York*.

V. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)

The Intervenor certifies that on July 6, 2012, Beyond Nuclear contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this petition. To the best of our knowledge, counsel for the applicant and NRC staff did not respond to the attempt.

VI. CONCLUSION

For the reasons stated, the Intervenor respectfully requests that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted this 9th day of July, 2012.

 /signed electronically through digital certificate/

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