

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY

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| _____) | |
| In the Matter of) | |
| Duke Energy Carolinas) | Dockets No. 52-018, 52-019 |
| Combined License Application) | |
| For William States Lee III Units 1 and 2) | July 9, 2012 |
|) | |
| _____) | |

MOTION TO REOPEN THE RECORD FOR WILLIAM STATES LEE III UNITS 1 AND 2

Pursuant to 10 CFR § 2.326, the Blue Ridge Environmental Defense League and its chapter SAFE Carolinas (δBREDLδ) hereby move that the record in this proceeding be reopened to allow consideration of a new contention. The United States Court of Appeals has now nullified the Nuclear Regulatory Commission's 2010 Waste Confidence Decision Update (δWCDδ). This motion to reopen is based on the three criteria following.

Timeliness

On June 8, 2012 the United States Court of Appeals for the District of Columbia Circuit invalidated the Nuclear Regulatory Commission's basis for generic findings safety and environmental impacts of high-level nuclear waste storage after cessation of commercial power reactor operations. *State of New York v. NRC*, USCA Case No. 11-1045. This motion to reopen is filed within the 30 day time-frame of that decision.

Significant Environmental Issue

So-called waste confidence is all about high-level nuclear waste, produced by nuclear reactors, with fission products and transuranic elements generated in the reactor core, highly radioactive and often thermally hot. The disposition of used, irradiated nuclear fuel is by

definition a significant environmental issue. In comments to the NRC filed in 2009, Dr. Arjun Makhijani apparently was reading the tea leaves correctly when he observed:¹

“After repeatedly incorrect Waste Confidence Decisions regarding reasonable assurance of repository availability, the reasonable thing now is to do an Environmental Impact Statement that properly considers all the alternatives. This is necessary in any case, since a large part of the environmental impact evaluation done in the reactor licensing process is either obsolete or wrong or both.” *Id* at 28.

“10 CFR 51 therefore is no longer valid and as the basis for determining the environmental performance of nuclear power plants so far as releases from spent fuel are concerned. As a result it does not provide a satisfactory basis for licensing new nuclear power plants or relicensing existing ones. It also does not provide the basis for confidence that a suitable repository will be available that will keep the environmental impacts within the limits assumed by Table S-3.” *Id* page 35.

“The NRC must conduct a new environmental analysis that examines the impacts of onsite spent fuel storage for a much longer period than 50 to 60 years after the cessation of reactor operations. This must include considerations relating to the potential deterioration of onsite storage canisters and the potential for transfers to new onsite storage canisters.” *Id* at 2.

Finally, the US Court of Appeals agreed with petitioners that the WCD is a major federal action because it is a logical predicate to every decision to license a nuclear plant. As they are both archived in the public records of the NRC, The USCA order and Dr. Makhijani’s comments are included by reference in support of this motion to reopen.

1. Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission’s Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage, Arjun Makhijani, Ph.D. President, Institute for Energy and Environmental Research, 6 February 2009

A Materially Different Result Would Obtain

The United States Court of Appeals has now nullified the Nuclear Regulatory Commission's 2010 Waste Confidence Decision Update and with it the generic finding in 10 C.F.R. § 51.23(a). *State of New York v. NRC*, USCA Case No. 11-1045. Therefore, there is no longer any legal basis for § 51.23(b) which states *inter alia*: "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools...for the period following the term of the...reactor combined license...is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with the issuance... of a combined license for a nuclear power reactor under parts 52 and 54 of this chapter." Of course, the COL for William States Lee III Units 1 and 2 is a Part 52 proceeding.

Under NEPA, high-level nuclear waste disposition is a major federal action "because it is used to allow the licensing of nuclear plants." *Id* at 12. Further, "The Commission apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then SNF will seemingly be stored on site at nuclear plants on a permanent basis." *Id* at 13.

BREDL submitted a contention which raised this issue in its original petition to intervene. *See* Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League, June 27, 2008. In refusing to admit BREDL's original waste confidence contention, the Board concluded, "In light of the plain language of the rule and its regulatory history, the Waste Confidence Rule applies to this proceeding." LBP-08-17 at 30 (September 22, 2008). That conclusion is no longer justified. Under NEPA, an agency must look at both the probabilities of potentially harmful events and the consequences if those events come to pass. *See, e.g., Carolina Env'tl. Study Grp. v. U.S.*, 510 F.2d 796, 799 (D.C. Cir. 1975).

Parting ways with the Commission's assertion that the agency merits deference surrounding its field of expertise in this matter, the Court of Appeals held that after decades of failure to site a repository, the NRC "has no long-term plan other than hoping for a geologic repository." Therefore it is possible that spent fuel will be stored at reactor sites "on a permanent basis." *Id* p. 13. Under the circumstances, the Commission or the Atomic Safety and License Board must examine the environmental consequences of long-term storage on reactor sites.

Non-timely Filing and Standing

As provided in the accompanying Motion for Leave to File a New Contention, the requirements set forth in 10 C.F.R. § 2.309(f)(1) and (f)(2) are satisfied. Pursuant to 10 C.F.R. § 2.326(d) and 2.309(c), BREDL maintains that; 1) as indicated *supra*, our waste confidence contention was raised previously but not properly considered and 2) there is good cause for the filing at the present time based on new information; i.e., the US Court of Appeals order on June 8, 2012. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). Also, 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)

Standing Declarations from 43 residents of South Carolina and North Carolina are attached to this motion, signed by persons living from 8 to 180 miles from the proposed William States Lee III power plant site.

Conclusion

The issues BREDL seeks to raise in reopening this matter are material to the findings the NRC must make pursuant to NEPA before a license is issued and we ask that the record be reopened and the contention be admitted.

Respectfully submitted,

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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**INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION
CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF
NUCLEAR WASTE AT WILLIAM STATES LEE III UNITS 1 AND 2**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(f)(1) and 2.309(f)(2), Blue Ridge Environmental Defense League and its chapter SAFE Carolinas (Intervenors) seek leave to file a new contention which challenges the failure of the Environmental Report for William States Lee III (WSL) nuclear power plant combined license (COL) 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. 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.

Intervenors recognize that because the mandate has not yet issued in *State of New York*, this contention may be premature. Nevertheless, Intervenors are 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 petitioners 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 Commission determines that this contention is premature, Intervenors 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.ö *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 William States Lee III nuclear power plant 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 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 Environmental Report for WSL addresses spent fuel storage impacts, it does not address the concerns raised by the Court in *State of New York*. Therefore, before the WSL power plant can be licensed, those impacts must be addressed.

Intervenors do 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). Intervenors reserve 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 WSL. 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 WSL nuclear power plant. 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. Intervenors have adequately supported their contention by citing *State of New York* and discussing its legal effect on this proceeding. Intervenors also rely 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 Intervenors have a genuine dispute with the applicant regarding the legal adequacy of the environmental analysis on which the applicant relies in seeking [a COL or license renewal] 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.

Intervenors satisfy 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 the WSL nuclear power plant.

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)

Intervenors certify that on July 6, 2012, we contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this Motion.

VI. CONCLUSION

For the reasons stated, Intervenors respectfully requests that the Secretary grant leave to file their contention.

Respectfully submitted this 9th day of July, 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the
MOTION TO REOPEN THE RECORD FOR WILLIAM STATES LEE III UNITS 1 AND 2
And
**INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION
CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF
NUCLEAR WASTE AT WILLIAM STATES LEE III UNITS 1 AND 2**
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