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Ms. Annette L. Vietti-Cook  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16G4  
Washington, DC 20555-0001

*Hand-delivered to Monroe, MI scoping meeting NRC staff and sent via email to NRCExecSec@nrc.gov*

RE: Request to suspend adjudication of Fermi 3 COLA pending completion of ESBWR design certification process

To the Members of the Commission:

The Michigan Chapter of the Sierra Club, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Resistance at Fermi 2, Coalition for a Nuclear-Free Great Lakes, Don't Waste Michigan, and Toledo Coalition for Safe Energy, along with several individual residents in the Monroe, Michigan area respectfully request that the the U.S. Nuclear Regulatory Commission immediately suspend the current proceedings aimed and review and ultimately, approval of DTE Energy Company's combined construction and operating license application ("COLA") for Fermi 3, a proposed new nuclear power plant near Monroe, Michigan.

These public organizations and citizens make this request to suspend the COLA adjudication for Fermi 3 pending the commencement and completion of the design certification rulemaking proceeding for the proposed Economically Simplified Boiling Water Reactor ("ESBWR") design on which DTE's COLA depends. We ask that the Commission repudiate a recent policy statement that would unlawfully remove the COLA's design-related contents from the scope of issues that may be challenged in the COLA adjudication and refer those issues to be resolved in a separate, parallel rulemaking proceeding to our knowledge has not been scheduled or commenced, the Policy Statement on the Conduct of New Reactor Licensing Proceedings, 72 Fed. Reg. 20,963 (April 17, 2008) ("2008 Policy Statement"). The 2008 Policy Statement - which is not enforceable law or regulation - should be ignored because it violates Section 189a of the Atomic Energy Act ("AEA"), as well as judicial precedents interpreting the AEA, and the NRC's Part 52 regulations for the conduct of licensing proceedings on COLAs. *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (when an agency applies a policy in a particular situation, "it must be prepared to support the policy just as if the policy statement had never been issued").

The Commission should further reconsider and revoke a recent

decision that affirms and applies the unlawful policy, *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15 (July 23, 2008) ("CLI-08-15"). The Sierra Club and other public organizations and individuals further suggest that the manner in which the NRC is poised to conduct the licensing proceeding would deprive these groups and individuals and the general public a fair and meaningful opportunity for a hearing on the Fermi COLA, in violation of the AEA, the Administrative Procedure Act ("APA") and the NRC's own regulations. As a matter of law, the COLA is incapable of meeting the APA's requirement for an adequate hearing notice, because one of the chief "issues of . . . law" that must be included in the hearing notice - the content of the ESBWR standard design certification rule - has not been established. The legal circumstance here is that the application cannot be considered "complete" for purposes of satisfying the docketing standard in 10 C.F.R. § 2.101(a)(2) or § 2.104(b)'s requirement to provide notice of the factual issues subject to a hearing, because the underlying design is not even finished, let alone certified.

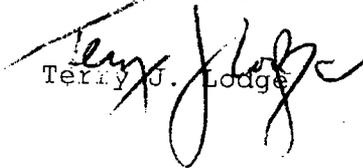
Without a fixed, certified ESBWR design, public commenters in the ongoing NEPA proceeding cannot meaningfully comment concerning operational prospects and associated environmental effects; accident scenarios and such effects; nor can they be afforded an understanding of the ongoing radiation emissions that come from all operating nuclear power plants. Furthermore, the public faces a March 9, 2009 deadline to raise trial contentions in the coming adjudication of the license. The absence of certainty about whether the ESBWR design will even be the ultimate reactor constructed by DTE (assuming that somehow nuclear is the preferred alternative against far safer and cheaper options) is a denial of due process to the public. Consequently, any licensing efforts conducted by the NRC will be riddled with doubts and conditions which will, of course, heighten the growing perception that the fix is in and that this process is merely bread and circuses.

The regulatory scheme embodied in 10 CFR Part 52 regulatory scheme leaves the Commission only two choices with respect to the conduct of a licensing proceeding for the proposed Fermi 3: either to hold an adjudication on the entire COLA, including the ESBWR design certification application that is incorporated by reference into the COLA; or to complete the ESBWR design certification rulemaking before holding an adjudicatory hearing on the Fermi 3 COLA. The Part 52 regulations do not give the NRC the option of removing the COLA's design-related contents from the scope of the adjudication on the COLA and referring them to a separate rulemaking for resolution.

The NRC has apparently committed to conduct a rulemaking on the ESBWR standard design certification application. The Sierra Club and other public groups and individuals respectfully suggest that the Commission must complete the ESBWR design certification rulemaking before commencing the Fermi 3 COLA adjudication and therefore, they request to suspend all further steps toward that adjudication immediately, pending completion of the ESBWR design certification rulemaking.

Thank you.

Very truly yours,

  
Terry J. Lodge