

May 2, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
THE DETROIT EDISON COMPANY) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))

OPPOSITION TO EMERGENCY PETITION
TO SUSPEND LICENSING DECISIONS AND PROCEEDINGS

INTRODUCTION

On April 14, 2011, Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Harold L. Stokes, Michael J. Keegan, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman, who are intervenors in this combined license ("COL") licensing proceeding, and other petitioners and stakeholders in various licensing and rulemaking matters (collectively "Petitioners"), filed an "Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident" ("Emergency Petition"). The Emergency Petition is directed to the Commission (rather than to the presiding Licensing Board in this case). The Emergency Petition requests, as relevant to this proceeding, that the Commission:

- "Suspend all decisions" regarding the issuance of COLs and promulgation of design certification rules, pending completion by the NRC's Task Force of its investigation of the near-term and long-term lessons of the Fukushima accident and any regulatory actions and/or environmental analyses of those issues. Emergency Petition at 1-2.

- “Suspend all proceedings with respect to hearings or opportunities for public comment” on any reactor-related or spent fuel pool-related issues that have been identified for investigation in the Task Force’s Charter, including external events (*i.e.*, seismic, flooding); station blackout; severe accident measures; implementation of 10 C.F.R. § 50.54(hh)(2) regarding responses to explosions or fire; and emergency preparedness. *Id.* at 2.
- Establish procedures for raising new issues relevant to the Fukushima accident in pending licensing proceedings, while suspending requirements to justify the late-filing of new issues if their relevance to the Fukushima accident can be demonstrated.¹ *Id.* at 3.

Because the Emergency Petition is not characterized as a petition for rulemaking, a request for enforcement, or other request for other action under NRC regulations, the Detroit Edison Company (“Detroit Edison”) is treating the Emergency Petition as a general motion under 10 C.F.R. § 2.323.² By Order, dated April 19, 2011, the Commission established a May 2, 2011, deadline for responding to the Emergency Petition.

Detroit Edison recognizes that the Commission has already directed the NRC Staff to create a Task Force to identify near-term and long-term lessons from the Fukushima accident.³ After a full review of technical information (once it becomes available), Detroit

¹ The Emergency Petition also requests that the Commission (1) conduct a safety analysis of the regulatory implications of the Tohoku-Chihou-Taiheiyo-Oki earthquake and publish the results for public comment and (2) request that the President establish an *independent* investigation of the Fukushima incident and its implications for nuclear safety in the United States. These requests are beyond the scope of this site-specific adjudication. Detroit Edison notes, however, that some of what the Petitioners seek already has taken place. For example, the NRC has established a Task Force to identify near-term and long-term lessons and to make recommendations for regulatory action.

² When a proceeding is pending, all motions should initially be addressed to the presiding officer. *See* 10 C.F.R. § 2.323(a); *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002). Nevertheless, given that the Emergency Petition has been filed on numerous dockets and is generic in nature, we agree that the Commission should address the Emergency Petition in the first instance.

³ *See* SRM-COMGBJ11-0002 (March 21, 2011) (ADAMS Accession No. ML110800456).

Edison expects that the NRC will apply the lessons-learned, as appropriate, to new reactors, including the proposed Fermi Unit 3 (“Fermi 3”). Detroit Edison is also supporting industry initiatives at operating plants to respond to the events in Japan and understands that the operating experience will ultimately enhance safety at Fermi 3.

However, as discussed below, Detroit Edison opposes the Emergency Petition to the extent that it requests that the Commission suspend ongoing licensing reviews, adjudicatory hearings, and licensing decisions. Commission precedent and public policy dictate that the NRC continue its ongoing reviews of the Fermi 3 COL application. Moreover, the Atomic Energy Act and NRC regulations provide for appropriate public participation in connection with agency actions such as any future rulemakings or licensing hearings. And, to the extent any petitioners believe new information emerges from the lessons-learned reviews that is relevant to the NRC findings required for issuance of a COL for Fermi 3, existing regulations also provide adequate processes for seeking relief.

BACKGROUND

On September 18, 2008, Detroit Edison filed its application for a COL for Fermi 3, to be located in Monroe County, Michigan. The COL application references the application for certification of the ESBWR design, which was initially submitted on August 24, 2005. The NRC Staff issued the Final Design Approval and Final Safety Evaluation Report (“FSER”) for the ESBWR on March 9, 2011. The ESBWR design is the subject of an ongoing design certification review rulemaking in accordance with 10 C.F.R. Part 52. “ESBWR Design Certification; Proposed Rule,” 76 Fed. Reg. 16549 (Mar. 24, 2011).

In LBP-09-16, dated July 31, 2009, the Licensing Board admitted four contentions for hearing (Contentions 3, 5, 6, and 8). Later, in LBP-10-09, dated June 15, 2010,

the Licensing Board admitted another contention for hearing (Contention 15). Subsequently, two contentions were resolved through motions for summary disposition. *See* Order (Granting Motion for Summary Disposition for Contention 3), dated July 9, 2010 (unpublished); Order (Granting Motion for Summary Disposition of Contention 5), dated March 1, 2011 (unpublished). Motions for summary disposition are pending before the Licensing Board on two of the remaining three contentions (Contentions 6 and 8).

Separately, the Licensing Board has issued a scheduling order establishing certain milestones for hearings on the remaining admitted contentions in this matter. *See* Order (Establishing schedule and procedures to govern further proceedings), dated September 11, 2009 (unpublished). The hearings on the admitted contentions are linked to the issuance of the NRC Staff review documents — in particular, the Final Environmental Impact Statement (“FEIS”), which is currently scheduled for completion in November 2012, and the FSER for Fermi 3, which is currently scheduled for completion in September 2012.⁴

DISCUSSION

The Commission has previously addressed the criteria that it applies in circumstances such as those raised in the Emergency Petition — that is, in deciding whether to postpone licensing decisions and proceedings while awaiting the results of ongoing reviews of Commission regulations and policies. The Commission considers whether moving forward with the licensing review and hearing will (1) jeopardize the public health and safety; (2) prove an obstacle to fair and efficient decisionmaking; or (3) prevent appropriate implementation of any pertinent rule or policy changes that might emerge from its ongoing evaluation of the events at

⁴ Under the Licensing Board’s current schedule, the hearing on Contention 15, which is the only contention that is not the subject of a pending summary disposition motion, is linked to issuance of the FSER.

Fukushima Daiichi. *See Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 (2001). The Emergency Petition does not demonstrate circumstances that meet any of these criteria. Continuation of ongoing safety and environmental reviews, and hearings on admitted issues, would neither present a threat to public health and safety nor interfere with implementation of any changes that could result from ongoing regulatory reviews. Conversely, halting the licensing process would be inefficient.

First, the Emergency Petition seeks generic relief (*e.g.*, suspend all decisions on COL applications and design certification rulemakings). The Commission has already implicitly addressed the generic issue. The Commission to date has not seen fit to suspend licensing reviews or decisions, recognizing that lessons learned from the Fukushima events can be addressed in the future, as those lessons and the appropriate regulatory response are identified. The Commission has stated in various forums that it is confident in the safety of U.S. nuclear plants based on current regulations, that it will evaluate the lessons learned from Japan deliberately and in a comprehensive fashion, and will apply those lessons, as needed, to U.S. reactors.⁵ The Commission intends to follow the same lessons-learned approach that it took after the accident at Three Mile Island, Unit 2, and after the terrorist attacks of September 11, 2001.

With respect to Fermi 3 specifically, the NRC Staff review of the COL application is moving forward in parallel with the Task Force's examination of the Fukushima events. Hearings on the currently-admitted COL issues are not imminent. Nonetheless, upon achieving the milestones in the NRC Staff's reviews, any necessary hearings on issues currently

⁵ *See, e.g.*, Commission Briefing Transcript, dated March 21, 2011, at 5, 9-10 (ADAMS Accession No. ML110810254).

before the Licensing Board can continue without jeopardizing public health and safety.⁶ Indeed, it would not be sensible to postpone consideration and resolution of safety and environmental issues within the scope of NRC’s COL review that are unrelated to the Commission’s ongoing review of Fukushima events. Given the current status of the safety and technical reviews of the COL application, there is no reason to believe that any danger to public health and safety would result from mere continuation of the licensing review or adjudicatory proceeding on previously-admitted issues.

Further, moving forward with the licensing reviews and this adjudication (consistent with the current schedule) will not prevent appropriate implementation of any rule or policy changes arising from the Commission’s ongoing evaluation of the Fukushima accident. There are no issues currently admitted in the Fermi 3 hearing process that involve issues identified in the Emergency Petition or that are reasonably linked to the events in Japan. The topics mentioned in the Emergency Petition — external events, station blackout, severe accidents, 10 C.F.R. § 50.54(hh)(2), and emergency preparedness — can all be addressed through existing regulatory processes. The Commission can modify license requirements by rule, regulation, or order; and changes can be applicable to both applicants and licensees. The regulations provide for public participation in these matters.⁷

⁶ As a general matter, the Commission has frequently reiterated its commitment to “the expeditious completion of adjudicatory proceedings.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998). Moreover, it is well settled that the pendency of parallel proceedings before other forums (*e.g.*, the NRC’s Fukushima Task Force) is not adequate grounds to stay an NRC adjudication. *See e.g.*, *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-08, 53 NRC 225, 228-30 (2001) (denying request to suspend proceeding pending completion of license transfers and a decision on a 10 C.F.R. § 2.206 enforcement petition).

⁷ *See* 10 C.F.R. § 2.802 (permitting “any interested person” to file a petition for rulemaking); 10 C.F.R. § 2.206 (affording “any person” the opportunity to file a request to modify, suspend, or revoke a license).

In addition, under the NRC's rules of practice, intervenors in ongoing hearings always retain the ability to file new or amended contentions, including contentions on lessons learned from Fukushima, if the contentions are based on new information within the scope of a COL proceeding. Indeed, many of the issues raised by the Petitioners are within the scope of the ESBWR design certification rulemaking. Issues that are, or that are about to become, the subject of a design certification rulemaking are outside the scope of an adjudicatory proceeding. *See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)*. Thus, suspending the NRC Staff's COL review or the adjudicatory proceeding is not necessary to ensure that the public will realize the full benefit of the ongoing regulatory reviews at Fermi 3.

The Emergency Petition also requests that the Commission conduct an analysis of whether the Fukushima events pose new and significant information that must be considered under the National Environmental Policy Act ("NEPA"). Emergency Petition at 2. It is axiomatic that the NRC must comply with its NEPA obligations. However, the Emergency Petition does not provide a basis for suspending ongoing license reviews or adjudicatory proceedings while the NRC decides whether there is new and significant information, or whether any supplemental NEPA evaluations are necessary, prior to issuance of the COL. Chapter 7 of the Fermi 3 Environmental Report ("ER") already addresses design basis accidents (Section 7.1), severe accidents (Section 7.2), and severe accident mitigation alternatives (Section 7.3). And, Chapter 19 of the Final Safety Analysis Report ("FSAR") incorporates the severe accident discussion from the ESBWR Design Control Document. Neither the Emergency Petition nor the declaration of Dr. Makhijani provides any basis to conclude that the COL application is

inadequate in light of events in Japan. Any evaluations ultimately identified to comply with NEPA can be completed in due course prior to issuance of the COL.

CONCLUSION

Detroit Edison recognizes and supports the NRC Task Force's efforts to identify the near-term and long-term lessons from the Fukushima accident and to apply those lessons, as appropriate, to new reactors, including Fermi 3 — following established regulatory processes. However, for the foregoing reasons, the Commission should deny the requests to suspend the ongoing licensing reviews, adjudicatory hearings, and licensing decisions. The NRC should continue its review of the Fermi 3 COL application, and the current hearing milestones set by the Licensing Board should remain in place. Any regulatory action or environmental analyses necessitated by the Fukushima accident can be addressed in due course prior to the eventual operation of Fermi 3.

Respectfully submitted,

/s/ signed electronically by

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Dated at Washington, District of Columbia
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CERTIFICATE OF SERVICE

I hereby certify that copies of “OPPOSITION TO EMERGENCY PETITION TO SUSPEND LICENSING DECISIONS AND PROCEEDINGS” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 2nd day of May 2011, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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