

June 18, 2012

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of Calvert Cliffs 3 Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3)	) ) )	Docket No. 52-016-COL
In the Matter of Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)	) ) )	Docket No. 52-033-COL
In the Matter of Duke Energy Carolinas, L.L.C. (William States Lee III Nuclear Station, Units 1 and 2)	) ) ) )	Docket Nos. 52-018 and 52-019
In the Matter of Entergy Operations, Inc. (Grand Gulf Nuclear Station Unit 1)	) ) )	Docket No. 50-416-LR
In the Matter of Entergy Operations, Inc. (Grand Gulf Nuclear Station Unit 3)	) ) )	Docket No. 52-024-COL
In the Matter of FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1)	) ) ) )	Docket No. 50-346-LR
In the Matter of Florida Power & Light Co. (Turkey Point Units 6 and 7)	) ) )	Docket Nos. 52-040-COL and 52-041-COL
In the Matter of Luminant Generation, Co., L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4)	) ) ) )	Docket Nos. 52-034-COL and 52-035-COL
In the Matter of Nextera Energy Seabrook, L.L.C. (Seabrook Station, Unit 1)	) ) )	Docket No. 50-443-LR

In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	) ) ) ) )	Docket Nos. 50-275-LR and 50-323-LR
In the Matter of PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant)	) ) )	Docket No. 52-039-COL
In the Matter of Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3)	) ) ) )	Docket Nos. 52-022-COL and 52-023-COL
In the Matter of Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2)	) ) ) )	Docket Nos. 52-029-COL and 52-030-COL
In the Matter of South Texas Nuclear Operating Co. (South Texas Project, Units 1 and 2)	) ) ) )	Docket Nos. 50-498-LR and 50-499-LR
In the Matter of South Texas Nuclear Operating Co. (South Texas Project, Units 3 and 4)	) ) ) )	Docket Nos. 52-012-COL and 52-013-COL
In the Matter of Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4)	) ) ) )	Docket Nos. 52-014-COL and 52-015-COL
In the Matter of Tennessee Valley Authority (Watts Bar Unit 2)	) ) )	Docket No. 50-0391-OL
In the Matter of Union Electric Co. (Callaway Plant Unit 1)	) ) )	Docket No. 50-483-LR
In the Matter of Virginia Electric and Power Co. d/b/a/ Dominion Virginia Power and Old Dominion Electric Cooperative	) ) ) )	Docket No. 52-017-COL

**PETITION TO SUSPEND FINAL DECISIONS IN ALL PENDING
REACTOR LICENSING PROCEEDINGS PENDING COMPLETION OF
REMANDED WASTE CONFIDENCE PROCEEDINGS**

I. INTRODUCTION

On June 8, 2012, in *State of New York v. Nuclear Reg. Comm.*, No. 11-1045, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision vacating the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") Waste Confidence Decision Update ("WCD Update") (75 Fed. Reg. 81,037 (Dec. 23, 2010)) and its Temporary Storage Rule ("TSR") (75 Fed. Reg. 81,032 (Dec. 23, 2010)) and remanded them to the NRC. As a result, the findings of the WCD Update and the TSR regarding the safety and environmental impacts of spent reactor fuel storage and disposal no longer provide a legally valid basis for any NRC reactor licensing decision.

Therefore, pursuant to NRC regulation 10 C.F.R. § 2.323, the National Environmental Policy Act ("NEPA"), the Atomic Energy Act ("AEA"), and the court's decision in *State of New York*, Petitioners in the above-captioned licensing proceedings respectfully request the Commission to (1) suspend its final licensing decisions in all pending NRC licensing proceedings pending completion of the remanded proceedings on the WCD Update and TSR; and (2) establish a process for ensuring that the remanded proceeding complies with the public participation requirements of Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a). The Petitioners have submitted this request in virtually every NRC reactor licensing proceeding now

pending before the NRC, including twelve applications for combined licenses (“COLs”), six applications for license renewal (“LR”), and one application for an operating license (“OL”).¹

As discussed in Section II below, many of the Petitioners are currently participating as intervenors in NRC licensing cases for new or existing reactors. Other Petitioners are neighbors of existing or proposed reactors who would have participated in NRC licensing proceedings had they not been barred from raising their concerns about spent fuel storage and disposal by the Commission decisions that were struck down by the court. By joining together in this Petition, Petitioners seek to ensure that the environmental analyses ordered by the U.S. Court of Appeals in *State of New York* will be fully applied in each reactor licensing case before operation is permitted, and that they will be given a meaningful opportunity to participate in the decision-making process.

At the outset, the Petitioners wish to establish with clarity what this Petition is *not*. This is *not* a motion for a stay of the effectiveness of a decision pursuant to 10 C.F.R. § 2.342 or any other kind of request for equitable relief. Instead, the Petition is a demand for non-discretionary compliance with the requirements of NEPA, the AEA, and the court’s decision in *State of New York*. In addition, this Petition is *not* a request to suspend all or any licensing *proceedings*. Petitioners do not demand any change in the schedules for the NRC Staff’s review of reactor license applications or adjudications in pending reactor licensing cases. This Petition seeks the suspension of final licensing *decisions* only, pending the NRC’s completion of the NEPA

¹ Petitioners recognize that until the mandate issues in *State of New York*, the WCD and TSR remain effective. Nevertheless, Petitioners have submitted this Petition within ten 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 Petition is premature, Petitioners request that the Petition be held in abeyance pending issuance of the mandate.

proceedings remanded by the U.S. Court of Appeals. In addition, Petitioners seek a ruling ensuring that they will be given an adequate opportunity for public participation in the remanded proceeding. The requested relief is fully consistent with the Commission's holding in *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), 72 NRC 98, 100 (2010) ("*Indian Point*") that it will not conclude action on the Indian Point license renewal application "until the [waste confidence] rulemaking is resolved." Petitioners seek a ruling by the Commission that it will apply the *Indian Point* precedent to all pending reactor licensing cases.

II. DESCRIPTION OF PETITIONERS

Petitioners are individuals and organizations dedicated to the protection of the environment. These individuals and the members of these organizations live or work near operating or proposed nuclear reactors. Some organizations and individuals have been admitted as intervenors in the above-captioned pending NRC proceedings for the review of applications for COLs, license renewals, and an operating license. Other Petitioners are neighbors of proposed reactors or existing reactors whose license applications are under review by the NRC.

All of the Petitioners are concerned about the environmental and public health risks posed by the storage and ultimate disposal of spent fuel. Many of them have tried, without success, to raise their concerns about spent fuel in NRC licensing proceedings and rulemakings. They now seek to protect their health, the health of their families, and the health of the environment, by ensuring that the NRC does not take any licensing action for a given reactor unless and until it has completed the environmental review of spent fuel storage and disposal mandated by the U.S. Court of Appeals in *State of New York*. The Petitioners also seek to ensure that they are given an opportunity to participate in the NRC's decision-making process, as required by Section 189a of the AEA, 42 U.S.C. § 2239(a).

Many of the Petitioners have already established their standing to bring this Petition by gaining admission as intervenors in some of the above-captioned NRC licensing proceedings. Other Petitioners are organizations whose members live within 50 miles of a nuclear reactor and who would have successfully petitioned to intervene regarding the issues remanded by the court in *State of New York* had they not been precluded from intervening by the very rules that the court struck down. They intend to submit hearing requests regarding the effect of *State of New York* on the licensing proceedings in which they are interested, and will submit standing declarations at that time. In the interim, they join the admitted intervenors in seeking the suspension of all licensing decisions pending compliance by the NRC with *State of New York*.

A list of the Petitioners follows:

- Beyond Nuclear, Inc. (Intervenor in Fermi COL proceeding, Calvert Cliffs COL proceeding, and Davis-Besse license renewal proceeding; potential intervenor in Grand Gulf COL and Grand Gulf license renewal proceedings)
- Blue Ridge Environmental Defense League, Inc. and chapters (“BREDL”) (Intervenor in Bellefonte COL proceeding and North Anna COL proceeding; previously sought intervention in W.S. Lee COL proceeding and Bellefonte OL proceeding)
- Citizens Allied for Safe Energy, Inc. (Former intervenor in Turkey Point COL proceeding)
- Citizens Environmental Alliance of Southwestern Ontario, Inc. (Intervenor in Fermi COL proceeding and Davis-Besse license renewal proceeding)
- Citizens for Alternatives to Chemical Contamination (Intervenor in Fermi COL proceeding)

- Don't Waste Michigan, Inc. (Intervenor in Fermi COL proceeding and Davis-Besse license renewal proceeding)
- Ecology Party of Florida (Intervenor in Levy COL proceeding)
- Eric Epstein (potential intervenor in Bell Bend COL proceeding)
- Friends of the Earth, Inc. (Potential intervenor in reactor licensing proceedings throughout U.S.)
- Friends of the Coast, Inc. (Intervenor in Seabrook license renewal proceeding)
- Green Party of Ohio (Intervenor in Davis-Besse license renewal proceeding)
- Dan Kipnis (Intervenor in Turkey Point proceeding)
- National Parks Conservation Association, Inc. (Intervenor in Turkey Point COL proceeding)
- Mark Oncavage (Intervenor in Turkey Point COL proceeding)
- Missouri Coalition for the Environment, Inc. (Petitioner in Callaway license renewal proceeding; Intervenor in suspended Callaway COL proceeding)
- New England Coalition, Inc. (Intervenor in Seabrook license renewal proceeding)
- North Carolina Waste Reduction and Awareness Network, Inc. (Admitted as an Intervenor in now-closed Shearon Harris COL proceeding)
- Nuclear Information and Resource Service, Inc. (Intervenor in Calvert Cliffs COL proceeding and Levy COL proceeding)
- Public Citizen, Inc. (Intervenor in South Texas COL proceeding; admitted as Intervenor in now-closed Comanche Peak COL proceeding; potential intervenor in South Texas license renewal proceeding)

- San Luis Obispo Mothers for Peace, Inc. (Intervenor in Diablo Canyon license renewal proceeding)
- Sierra Club, Inc. (Michigan Chapter) (Intervenor in Fermi COL proceeding)
- Southern Alliance for Clean Energy, Inc. (Intervenor in Watts Bar Unit 2 OL proceeding, Turkey Point COL proceeding, Bellefonte COL proceeding)
- Southern Maryland CARES, Inc. (Citizens Alliance for Renewable Energy Solutions) (Intervenor in Calvert Cliffs COL proceeding)
- Sustainable Energy and Economic Development (“SEED”) Coalition, Inc. (Intervenor in South Texas COL proceeding; admitted as Intervenor in now-closed Comanche Peak COL proceeding; potential intervenor in South Texas license renewal proceeding)

III. 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 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.

IV. ARGUMENT

A. The Commission Must Suspend All Licensing Decisions Pending Completion Of the Remanded Waste Confidence Proceedings.

As the court concluded in *State of New York*, the NRC considers the WCD and its Update to constitute essential findings regarding the feasibility and likelihood of spent fuel disposal that are prerequisites to the licensing of any reactor. Similarly, the conclusions of the TSR regarding the environmental impacts of spent fuel that will be generated by a reactor's operation are prerequisites to reactor licensing. The effect of the court's vacatur of the WCD Update and the TSR is to render these essential findings regarding spent fuel storage and disposal "null and void." See Black's Law Dictionary 1388 (5th ed. 1979) (to vacate is "[t]o render an act void; as, to vacate an entry or record, or a judgment.") Thus, unless and until the NRC completes the proceedings remanded by the court in *State of New York*, the NRC has no legal basis for licensing or re-licensing any nuclear reactor. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (agency must consider environmental impacts of a proposed action *before* taking the action).

The Commission has previously addressed the legal effect of an incomplete waste confidence proceeding. In *Indian Point*, the Commission refused to consider an intervenor's contention regarding spent fuel storage impacts in an individual licensing proceeding, but instead suggested that the intervenor could participate in the waste confidence rulemaking. 72 NRC at 100. The Commission also declared, however, that it would not "conclude action on the Indian Point license renewal application until the rulemaking is resolved." *Id.* Petitioners respectfully submit that the precedent set by the Commission in *Indian Point* continues to require suspension of the Indian Point license renewal decision in that case, and also applies to all other pending reactor licensing cases. Because NEPA requires that environmental impacts must be taken into

account *before* the NRC takes a licensing decision, *see Robertson*, the NRC must hold all reactor licensing decisions in abeyance until it has completed its remanded proceedings for consideration of spent fuel storage and disposal impacts.

B. The AEA and NEPA Require the NRC to Offer an Opportunity to Participate in the Remanded Proceedings.

Section 189a of the AEA requires that in any proceeding for the issuance or amendment of a license, the NRC must offer interested persons the right to participate. 42 U.S.C. § 2239(a). With respect to the WCD Update and the TSR, as the court has concluded and as NEPA requires, those decisions “apply in every licensing decision,” *State of New York*, slip op. at 9, and therefore are governed by the procedural requirements of Section 189a. In addition, NRC regulations require the NRC to offer an opportunity for public comment on any EIS that it prepares. 10 C.F.R. §51.73. While NRC regulations do not specifically require the provision of an opportunity for comment on an EA, the Supreme Court has found that NEPA favors broad participation in environmental decisions. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989).

Petitioners seek to ensure that the NRC will fully comply with the public participation requirements of the AEA and NEPA in the remanded waste confidence proceedings, by allowing them to (1) comment on any generic determinations that NRC may make and (2) raise contentions in individual licensing proceedings where they believe that generic rulemaking is insufficient to address their site-specific concerns. Therefore Petitioners request that the Commission issue any EAs it may prepare in proposed form for comment before making them final. In addition, Petitioners should be provided with at least 60 days – the standard time period for requesting a hearing – to seek consideration, in individual licensing cases, of site-specific safety or environmental concerns raised by the remanded proceeding. A 60-day time period is

essential, given that some petitioners may be required to submit hearing requests, petitions to intervene, standing declarations, and motions to re-open the record in proceedings that have been closed or in which no hearing has been held.

IV. CONCLUSION

For the foregoing reasons, the Petition should be granted. The Commission should issue an order that:

- Suspends all final decisions in pending reactor licensing proceedings pending conclusion of the remanded proceeding to evaluate the environmental impacts of spent fuel storage and disposal;
- Declares that any EAs or EISs issued by the NRC will be published in proposed form with a reasonable opportunity for public comment; and
- Provides a period of at least 60 days for raising site-specific concerns relating to the remanded proceedings in individual licensing proceedings.

Respectfully submitted,

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June 18, 2012

**CERTIFICATE REGARDING CONSULTATION
PURSUANT TO 10 C.F.R. § 2.323(b)**

I certify that on the beginning of the business day of June 18, 2012, I contacted counsel for the applicant and the NRC Staff regarding this petition. Counsel for the applicant did not respond before the filing at the end of the business day. Counsel for the Staff did not respond before the filing at the end of business day.

Respectfully submitted,

-----/s/-----

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June 18, 2012