

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)

FIRSTENERGY NUCLEAR OPERATING COMPANY)

(Davis-Besse Nuclear Power Station, Unit 1))

Docket No. 50-346-LR

June 25, 2012

**FENOC’S ANSWER OPPOSING PETITION TO SUSPEND FINAL LICENSING
DECISIONS PENDING COMPLETION OF REMANDED WASTE CONFIDENCE
PROCEEDINGS**

I. INTRODUCTION

On June 18, 2012, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, the Green Party of Ohio, and various other organizations (collectively, “Petitioners”) submitted a “Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings” (“Petition”) to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”).¹ Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC’s Waste Confidence Decision (“WCD”) Update and Temporary Storage Rule (“TSR”),² Petitioners request that the Commission: (1) suspend all final reactor licensing decisions pending conclusion of the *New York* remand proceeding; (2) allow public comment on

¹ FENOC addresses only Petitioners’ request to suspend the above-captioned proceeding because Petitioners’ request to suspend other proceedings is not cognizable in this individual adjudicatory proceeding. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 n.9 (2001). Furthermore, most of the organizations joining the Petition have never filed a hearing request or sought permission to participate in this proceeding on any other basis. Therefore, any request by the other organizations has “no legitimate place” in this proceeding and hereafter this Answer refers only to Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio as Petitioners. *See, e.g., id.* at 398.

² *New York v. NRC*, No. 11-1045, 2012 WL 2053581 (D.C. Cir. June 8, 2012); *see also* Clerk’s Order, *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012) (unpublished) (withholding mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc).

any Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) prepared by NRC on remand; and (3) provide at least 60 days for raising site-specific contentions in individual licensing proceedings.³

Pursuant to 10 C.F.R. § 2.323(c) and the Commission’s June 19, 2012 Order, FirstEnergy Nuclear Operating Company (“FENOC”) files this Answer opposing the Petition filed in the Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”) license renewal proceeding. As discussed below, the Petition is premature because *New York* is not yet final, and Petitioners fail to satisfy the relevant standard set forth in the Commission’s recent *Callaway* decision for the drastic action of suspending final licensing decisions. Regardless of how the Commission proceeds to address *New York*—through either a rulemaking or case-by-case path—continuing final licensing decisions will not prevent appropriate implementation of any pertinent rule or policy changes regarding long-term spent fuel storage environmental impacts. Furthermore, whether long-term spent fuel storage issues are addressed generically or in individual licensing proceedings, NRC’s established processes allow for fair and efficient resolution of such issues without the need to suspend final licensing decisions. Moreover, no basis exists to conclude that a final decision in the Davis-Besse license renewal proceeding would present any immediate threat to public health and safety. Finally, special procedures for public participation in the environmental review process or for filing contentions are unnecessary because existing NRC regulations sufficiently address such issues.

II. BACKGROUND

The current operating license (“OL”) for Davis-Besse expires on April 22, 2017.⁴ On August 27, 2010, FENOC submitted its License Renewal Application, requesting that the NRC

³ Petition at 12.

renew the Davis-Besse OL for an additional 20 years (*i.e.*, until April 22, 2037).⁵ The NRC accepted the Application for docketing and published a Hearing Notice in the *Federal Register* on October 25, 2010.⁶ Following a Petition for Leave to Intervene and subsequent litigation, one contention regarding Severe Accident Mitigation Alternatives remains admitted in this proceeding.⁷

III. LEGAL STANDARDS

As an initial matter, the Petition does not comport with any pleading form contemplated or authorized by the NRC Rules of Practice.⁸ Commission precedent, however, makes clear that suspension of licensing decisions is not warranted absent compelling circumstances.⁹ In considering requests to, among other things, suspend licensing decisions following the Fukushima accident, the Commission in *Callaway* considered whether denying such requests would prevent appropriate implementation of any pertinent rule or policy changes, prove an obstacle to fair and efficient decisionmaking, or jeopardize public health and safety.¹⁰

IV. ARGUMENT

A. The Petition Should Be Denied as Premature

Based on the D.C. Circuit's recent *New York* decision, Petitioners argue that NRC no longer has a "valid basis for any NRC reactor licensing decision."¹¹ The D.C. Circuit, however,

⁴ Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License No. NPF-003 for an Additional 20-Year Period; FirstEnergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, Unit 1, 75 Fed. Reg. 65,528, 65,528 (Oct. 25, 2010).

⁵ *Id.* at 65,529.

⁶ *See id.*

⁷ *See generally FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC ___, slip op. (Mar. 27, 2012).

⁸ The Petition in fact states that it is *not* a request for a stay pursuant to 10 C.F.R. § 2.342 or a request for any other form of equitable relief recognized by the Commission. *See* Petition at 4.

⁹ *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___, slip op. at 19 (Sept. 9, 2011).

¹⁰ *Id.* at 19-21.

¹¹ Petition at 3.

has not yet issued its “mandate” formally returning the proceeding to the Commission. In fact, in accordance with Federal Rule of Appellate Procedure 41(b), the mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate.¹² As such, the mandate will not issue, at the earliest, until late July 2012.¹³ Because the mandate is the certified copy of the final judgment and the order that makes the decision effective, the *New York* decision establishes no binding legal “requirements” at this time, contrary to Petitioners’ assertion.¹⁴ As such, the Petition is premature and should be denied.

Recognizing that their request is premature, Petitioners ask the Commission to hold the Petition in abeyance pending the mandate’s issuance.¹⁵ Such a request, however, is inconsistent with Commission precedent. Specifically, in *Diablo Canyon*, the Commission denied a similarly premature motion seeking relief in advance of an appellate court’s mandate.¹⁶ As the Commission recognized, a premature relief request should be denied because the facts relevant to the request may change before the mandate issues.¹⁷ So too here, where further judicial review, administrative action, or both, may well obviate the need for Petitioners’ requested relief.¹⁸

¹² In addition, upon motion, the court’s mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

¹³ *See* Fed. R. App. P. 40(a)(1) (indicating that in cases where a federal agency is a party, the time seeking rehearing is 45 days after entry of judgment, unless an order shortens or extends the time).

¹⁴ *See* Petition at 4.

¹⁵ *Id.* at 4 n.1.

¹⁶ *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation)*, CLI-06-23, 64 NRC 107, 109 (2006).

¹⁷ *See id.* at 108-09.

¹⁸ Moreover, the NRC will not make any licensing decision concerning Davis-Besse license renewal in the immediate future. Given this fact and the numerous potential intervening events that may take place before any licensing decision, the requested relief is premature for this additional reason.

B. The Petition Fails to Demonstrate Compelling Circumstances to Suspend Final Licensing Decisions

Even had the mandate already issued, the Commission should deny the Petition for failing to demonstrate compelling circumstances justifying suspending final licensing decisions. Petitioners ignore the leading and most recent Commission precedent that establishes the framework within which requests for suspension of licensing decisions must be evaluated. In *Callaway*, the Commission considered petitions that requested, among other things, suspending licensing decisions pending a Commission National Environmental Policy Act (“NEPA”) review following the Fukushima accident.¹⁹ As discussed below, none of the three criteria in *Callaway* justifies suspending final licensing decisions.

1. Continuing Final Licensing Decisions Will Not Prevent Appropriate Rule or Policy Change Implementation

Petitioners argue that, absent final action by the NRC on remand, the NRC no longer has a valid NEPA basis to issue any reactor licenses.²⁰ If and when the mandate issues, however, the Commission has broad discretion as to how it responds to the remand, whether through rulemaking or case-by-case.²¹ Suspending licensing is not necessary in either case.

If the Commission continues its long-standing practice of addressing NEPA-based waste issues generically through rulemaking, then, consistent with federal case law, licensing suspension is unnecessary to implement any rule changes.²² In *Minnesota v. NRC*, based upon an apparent NEPA violation, the D.C. Circuit ordered the NRC to consider long-term spent fuel

¹⁹ See *Callaway*, CLI-11-05, slip op. at 19-21.

²⁰ Petition at 3.

²¹ See, e.g., *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100-01 (1983) (finding that rulemaking is an appropriate method for complying with NEPA); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

²² See *Potomac Alliance v. NRC*, 682 F.2d 1030, 1031 (D.C. Cir. 1982) (affirming *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451 (1980)); Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. 61,372, 61,373 (Oct. 25, 1979).

storage issues.²³ On remand, the Commission instituted the first WCD rulemaking and issued a Notice of Proposed Rulemaking establishing that “licensing practices need not be altered” during the rulemaking because all licensing proceedings then underway would be subject to the final rulemaking determination.²⁴ Thus, the Commission allowed licensing to continue, because once the rulemaking eventually concluded, the WCD could be applied retroactively.²⁵ Between the Notice of Proposed Rulemaking and conclusion of the WCD proceeding, the NRC issued 17 reactor OLs.²⁶

Moreover, this practice passed the test of judicial scrutiny. Following the direction in the Notice of Proposed Rulemaking, the Atomic Safety and Licensing Appeal Board rejected a request to delay a spent fuel-related OL amendment pending the completion of the WCD proceeding.²⁷ The D.C. Circuit upheld the decision to proceed with licensing absent a final WCD in *Potomac Alliance v. NRC*, declining to stay challenged licensing actions.²⁸ Accordingly, this precedent demonstrates that licensing suspension is not required pending completion of rule changes.²⁹

²³ See *Minnesota*, 602 F.2d at 418-19.

²⁴ Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁵ See *North Anna*, ALAB-584, 11 NRC at 464-66; Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. at 61,373.

²⁶ See NUREG-1350, Vol. 23, Information Digest, 2011-2012, App. A at 102-13 (Aug. 2011).

²⁷ See *North Anna*, ALAB-584, 11 NRC at 464-66.

²⁸ See *Potomac Alliance*, 682 F.2d at 1031.

²⁹ Contrary to Petitioners’ claim, the Commission’s *Indian Point* decision does not support the conclusion that the NRC committed to suspend licensing in that (or any other) proceeding until the WCD Update rulemaking was completed. See Petition at 10 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC ___, slip op. (July 8, 2010)). Instead, after directing the Board to deny two proposed contentions concerning potential impacts of long-term spent fuel storage, the Commission simply observed that the *Indian Point* license renewal proceeding would not be completed before the then-pending WCD Update. See *Indian Point*, CLI-10-19, slip op. at 3. This prediction proved accurate, as the WCD Update was issued in December 2010 and the *Indian Point* proceeding continues. See Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Atomic Safety and Licensing Board; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3); Notice of Hearing (Application for License Renewal), 77 Fed. Reg. 36,015, 36,016 (June 15, 2012). Further, this Commission observation did not establish a “precedent” that all licenses must be withheld until the WCD Update was completed. In fact, the

Furthermore, should the Commission elect to address the *New York* decision on a case-by-case basis, the issues raised by *New York* will be resolved prior to any licensing action in the above proceeding. NRC regulations and case law establish procedures allowing participation in such proceedings.³⁰ Therefore, granting of the Petition is unnecessary even if the Commission elects to proceed on a case-by-case basis.

Thus, these procedures demonstrate that, regardless of how the Commission elects to proceed, no compelling reason warrants suspending final licensing decisions.³¹

2. Continuing Final Licensing Decisions Will Not Prevent Fair and Efficient Decisionmaking Concerning the *New York* Remand Issues

Regardless of how the Commission proceeds, the NRC's established processes provide proven, fair, and efficient means to resolve long-term spent fuel storage environmental impact issues in response to the *New York* remand without the need to suspend final licensing decisions. For example, NRC's Rules of Practice provide for public comment on any generic rulemaking proceedings.³² Should the Commission decide on a case-by-case approach, NRC regulations, case law, and case-specific scheduling orders provide for ample public participation.³³ In addition, whether a rulemaking or case-specific approach is taken, NRC's NEPA regulations provide public comment opportunities.³⁴ Thus, suspension of final licensing decisions is

NRC issued two renewed licenses (Cooper and Duane Arnold) after the *Indian Point* decision and before the final WCD Update. See NUREG-1350, Vol. 23, App. A at 103-04.

³⁰ See, e.g., 10 C.F.R. § 2.309(f)(2).

³¹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399-400 (2008) (finding no reason to stay licensing decision where issuance of the license is not imminent and proposed contention pending before Board).

³² See 10 C.F.R. § 2.805(a).

³³ See *id.* § 2.309(f)(2); *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC ___, slip op. at 10 n.43 (Mar. 10, 2011) (indicating that the Commission and its Boards generally consider approximately 30 to 60 days as the limit for timely filings based on new information); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Initial Scheduling Order (June 15, 2011) (unpublished).

³⁴ See, e.g., 10 C.F.R. §§ 51.33(a)-(e), 51.73.

unnecessary for fair and efficient decisionmaking. Just as the NRC continued to issue licenses during the first WCD proceeding and during the recent WCD Update, the Commission can continue to issue licenses during any *New York* remand proceeding. The Commission's policy of providing prompt, efficient, and fair resolution of adjudications demands as much.³⁵

3. Continuing Final Licensing Decisions Poses No Immediate Public Health and Safety Threat

The Petition provides no basis upon which to conclude that a final decision in the Davis-Besse license renewal proceeding would present any public health and safety threat, much less an immediate threat. Nor could the Petition so provide, because, as a general matter, the WCD does not address "immediate" risks but instead concerns the long-term storage of spent nuclear fuel. Moreover, to the extent that any rule changes are implemented following any generic proceedings, as discussed above, those rules can then be applied retroactively. Accordingly, there simply is no risk of any immediate threat to public health and safety.

C. Petitioners Fail to Establish the Need for Special Procedures

Aside from suspending final licensing decisions, Petitioners also ask the Commission for an opportunity to comment on any EA or EIS issued by the NRC, and establish deadlines for contentions raising site-specific concerns that are not sufficiently addressed in any generic rulemaking.³⁶ This request is unnecessary and should be denied. As discussed above, NRC regulations already establish ample and appropriate public participation opportunities.

Furthermore, to the extent Petitioners seek an additional opportunity to raise contentions in individual licensing proceedings even if the NRC proceeds with a generic rulemaking, Commission precedent bars such contentions. As the Commission explained in *Indian Point*,

³⁵ See *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)).

³⁶ Petition at 11-12.

when the Commission elects to proceed with WCD issues through rulemaking, it does so for the specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.³⁷

Thus, a contention that raises a matter that is, or is about to become, the subject of a rulemaking cannot be litigated in an individual licensing proceeding.³⁸

V. CONCLUSION

Suspending final licensing decisions is an extraordinary remedy that is not warranted and should not be granted. Not only is the Petition premature, it fails to demonstrate compelling circumstances justifying the requested action. Furthermore, NRC rules already provide appropriate public participation opportunities. Accordingly, for all of these reasons, the Petition should be denied in its entirety.

³⁷ See *Indian Point*, CLI-10-19, slip op. at 2.

³⁸ See *id.* at 2-3.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 25th day of June 2012

**UNITED STATES OF AMERICA
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In the Matter of)

FIRSTENERGY NUCLEAR OPERATING COMPANY)

(Davis-Besse Nuclear Power Station, Unit 1))

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FENOC’s Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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