August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| FIRSTENERGY NUCLEAR OPERATING CO. | ) | Docket No. 50-346-LRA |
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| (Davis-Besse Nuclear Power Station, Unit 1) | ) | |
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NRC STAFF'S ANSWER TO INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TERMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT DAVIS-BESSE NUCLEAR POWER STATION

## INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's ("Board") Initial Scheduling Order ("ISO"),[1] the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the "Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station," ("Motion") jointly filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and Green Party of Ohio (collectively "Intervenors")[2] regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").[3]

The Motion raises a new contention based on the D.C. Circuit Court of Appeal's June 8, 2012 opinion in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). As explained below,

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[1] Initial Scheduling Order at B.2.

[2] *See* Intervenors' Motion for Leave to File a New contention concerning Temporary Storage and ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station ("Motion") (July 9, 2012) (Agencywide Document Access and Management System ("ADAMS") Accession No. ML12191A421).

[3] Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse (ADAMS Accession No. ML1024505650).

the new contention is admissible, except for Intervenors' claim that the ER is deficient because it does not consider the environmental impacts of an offsite high-level waste repository, assuming the Board rules on it after the D.C. Circuit issues the mandate for that decision. But, if the Board rules before the issuance of the mandate, then the Commission's existing regulations bar admission of the contention, and the Board should dismiss it without prejudice to timely refiling upon issuance of the court's mandate.

## BACKGROUND

### A. Procedural History

This proceeding concerns FENOC's August 27, 2010 application to renew its operating license for Davis-Besse for an additional twenty years from the current expiration date of April 22, 2017.[4] The Staff accepted the LRA for review, and on October 25, 2010, published a *Federal Register* Notice providing a Notice of Opportunity for Hearing.[5] On December 27, 2010, Joint Petitioners filed a petition to intervene.[6] On April 26, 2011, the Board admitted in part two of four originally proffered contentions.[7] On March 27, 2012, the Commission affirmed in part,

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[4] LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

[5] 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 (Oct. 25, 2010).

[6] Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010).

[7] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC__ (Apr. 26, 2011) (slip op.). Intervenors also filed several motions following the March 11, 2011 accident at the Fukushima Dai-ichi site in Japan, which are not discussed in this pleading. *See, e.g.*, 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 (Apr. 14, 2011) (ADAMS Accession No. ML111040355). *See Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2) *et al.*, CLI-11-05, 74 NRC __ (Sept. 9, 2011) (slip op. at 3) (ADAMS Accession No. ML11252A535) (denying request to stay licensing decisions). Additionally, Intervenors have filed several motions regarding recently discovered cracking in the shield building. *See, e.g.*, Motion for Admission of Contention No. 5 on Shield Building Cracking ("Intervenors' Motion") (Jan. 10, 2012) ADAMS Accession No. ML12010A172). The Board has not yet ruled on these motions.

and reversed in part, the Board's decision.[8] Specifically, the Commission held that the Board erred in admitting the energy alternatives contention[9] and parts of the severe accident mitigation alternatives ("SAMA") contention.[10] Therefore, only part of Intervenors' Contention 4 regarding SAMAs is currently an admitted contention pending in this proceeding.[11]

On June 8, 2012, the D.C. Circuit issued *State of New York v. NRC*, 681 F.3d 471, 473, which vacated the NRC's Waste Confidence Decision Update[12] and its Temporary Storage Rule.[13] On July 9, 2012, Intervenors filed the present contention in the *Davis-Besse* license renewal proceeding.

B. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an

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[8] *See* FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08 (Mar. 27, 2012) (slip op. at 1).

[9] *Id*. at 10. As initially admitted by the Board, the energy alternatives contention read:

> [FirstEnergy's] Environmental Report fails to adequately evaluate the full potential for renewable energy sources, specifically wind power in the form of interconnected wind farms and/or solar photovoltaic power, in combination with compressed air energy storage, to offset the loss of energy production from Davis-Besse, and to make the requested license renewal action unnecessary. [FirstEnergy's] Environmental Report (§ 7.2) treats all of the alternatives to license renewal except for natural gas and coal plants as unreasonable and does not provide a substantial analysis of the potential for significant alternatives in the Region of Interest.

*Id*. at 8.

[10] *See id*. at 20 ("We agree that the Board erred in admitting portions of the SAMA contention.").

[11] *Id*. at 21 (deferring to the Board regarding the admission of Intervenors' MAAP code claims). FENOC filed a motion for summary disposition of Contention 4 on July 26, 2012. FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (July 26, 2012). The Board has not yet ruled on the motion for summary disposition, or on the proposed new contention regarding shield building cracking. *See infra* at n. 7.

[12] *See* 75 Fed. Reg. 81, 037 (Dec. 23, 2010). *See also* Motion at 1.

[13] 75 Fed. Reg. 81, 032 (Dec. 23, 2010) (discussing final temporary storage rule regarding consideration of environmental impacts of spent fuel after cessation of reactor operation). *See also* Motion at 1.

environmental impact statement ("EIS") to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an environmental report ("ER") as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *State of Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010) ("Waste Confidence Decision") and a temporary storage rulemaking, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation," Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("Temporary Storage Rule").

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a), regarding the impacts of spent fuel storage after the licensed period of operation. *See* Motion at 4; 10 C.F.R. § 51.23(a). The Commission rendered several findings in § 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" from any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

DISCUSSION

Intervenors based their new contention on the D.C. Circuit Court of Appeals' recent decision in *State of New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention states as follows:

> The ER for the Davis-Besse license renewal application ("LRA") 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 FENOC produces new and additional information within the ER, it must be deemed legally incomplete and insufficient for the NRC Staff to review as the basis for the Staff's Draft Supplemental Environmental Impact Statement ("DSEIS").Consequently, no license may be issued.

Motion at 4. At root, Intervenors' Motion asserts that because the generic findings in the Commission's rulemaking have been vacated, "the NRC no longer has any legal basis for § 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." *Id*. at 2.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, Intervenors assert that they meet the standards of § 2.309(f)(2) for late-filed contentions. *Id*. at 7-8. Considering the holding of the D.C. Circuit and that the Motion was filed within 60 days of the ruling,[14] the Staff agrees that Intervenors have sufficiently demonstrated the timeliness of their filing under § 2.309(f)(2) and the Board's ISO.

The Board has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. *Davis-Besse*, LBP-

[14] Board's ISO at B.1 (noting that new or amended contention is "deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when the material information on which it is based first becomes available to the moving party through service, publication, or any other means.").

11-13, 73 NRC__ (Apr. 26, 2011) (slip op. at 15-16). Intervenors recognize that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Motion at 2. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect…." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (*citing Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id*. at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g., Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).[15] As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.[16] *Id*. at 205.

Under the Federal Rules of Appellate Procedure, a "court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate,

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[15] *But see Louisiana Power and Light Co*, (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued…we have deferred our rulings on these requests").

[16] The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.' " *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

whichever is later." Fed. R. App. P. 41(b). On July 6, 2012, at the Commission's request, the D.C. Circuit extended the period of time to file a petition for rehearing of *New York v. NRC* to August 22, 2012. *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate is not likely to issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the Board to exclude the Intervenors' contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when this Board rules on the Motion.[17]

If the D.C. Circuit's mandate issues before the Board rules on the contention's admissibility, upon the mandate's issuance, the contention as pled would satisfy each of the § 2.309(f)(1) criteria and would be admissible as a contention of omission,[18] except Intervenors' claim that the ER is legally deficient because it does not consider the environmental effects of a high-level waste repository.[19] This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit's ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how

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[17] *See* 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, "no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding").

[18] Motion at 4-7.

[19] Specifically, Intervenors assert that "environmental impacts of post-operational spent fuel storage, including onsite use of pools, casks or other methods, *and offsite repository or other storage*" must be considered in the environmental analyses for individual reactor license applications. Motion at 8 (emphasis added). However, clear NEPA principles bar consideration of the environmental impacts of an offsite high level waste repository in individual licensing actions: Building a repository is a separate federal action that will require its own NEPA analysis. Jackson Cnty., N.C. v. F.E.R.C., 589 F.3d 1284, 1290 (D.C. Cir. 2009) (setting forth the standard for when two federal projects are so intertwined they must be considered in the same EIS). Intervenors provide no basis for their claim that the applicant and the NRC should nonetheless speculate in a current ER and EIS, respectively, on the possible environmental impacts of a repository of unknown location, design, and completion date. Hence, this claim is inadmissible. 10 C.F.R. § 2.309(f)(v), (vi).

contentions based on the court's ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 345 (''Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.' ").

If the D.C. Circuit's mandate has not issued by the time the Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Motion at 4, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If Intervenors refile the contention after the court issues the mandate, it would be timely if filed within 60 days of the mandate's issuance and would be admissible, except to the extent Intervenors claim the ER is legally deficient because it does not consider the environmental effects of a high level waste repository,[20] provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345.

## CONCLUSION

For the foregoing reasons, the Staff agrees with Intervenors that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *State of New York v. NRC,* except to the extent Intervenors argue that the environmental analysis for Davis-Besse must consider the environmental effects of an offsite high level waste repository. However, if the Board rules

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[20] Motion at 8. As discussed above, this claim is inadmissible.

before that time, the contention must be rejected as an impermissible challenge to NRC regulations. Finally, the admission of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

***Signed (electronically) by***

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT DAVIS-BESSE NUCLEAR POWER STATION)" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 2nd day of August, 2012.

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