

August 3, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT’S RESPONSE TO PROPOSED NEW
CONTENTION ON SPENT FUEL STORAGE AND DISPOSAL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), The Detroit Edison Company (“Detroit Edison”) hereby responds to the “Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant,” dated July 9, 2012 (“Motion”). The proposed contention is based on the recent Court of Appeals decision in *New York v. NRC*, and seeks a discussion of the environmental impacts of spent fuel storage after cessation of operations.¹

As recognized by Intervenors, the “mandate” for the Court of Appeals decision has not yet issued. The proposed contention is therefore premature. But, in any event, the issues raised in the proposed contention are generic in nature and have historically and consistently been addressed through generic analysis and rulemaking. Long standing Commission precedent establishes that issues that are, or that are about to become, the subject of a rulemaking are not

¹ Docket No. 11-1045 (D.C. Cir. June 8, 2012). The Court of Appeals decision would vacate the NRC’s Waste Confidence Decision (“WCD”) and Temporary Storage Rule (“TSR”) and remand the matter to the NRC for further consideration. The WCD includes a finding that spent fuel can be safely stored onsite until a permanent repository is available. The TSR prohibits further consideration in individual licensing cases of the issue of interim spent fuel storage after permanent cessation of plant operation.

appropriate for litigation in individual licensing proceedings. Moreover, the proposed contention fails to demonstrate any material site-specific issue. The proposed contention therefore should not be accepted for a site-specific hearing for Fermi 3. In the event that the Licensing Board does find the proposed contention to be admissible, the Licensing Board should refer that determination to the Commission and hold the contention in abeyance pending action by the Commission.

DISCUSSION

A. The Proposed Contention Is Premature

As recognized by the Intervenors (Motion at 2), the “mandate” for the Court of Appeals decision in *New York v. NRC* has not yet issued. Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is, in effect, the order that makes the decision effective.² By rule, the mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying a petition for rehearing is issued, whichever is later.³ A timely rehearing petition by the NRC or other party in the case would automatically stay the issuance of the mandate.⁴ Until the mandate issues, the remand to the NRC is not effective and there is no need for the NRC to take any action in connection with pending license applications. The proposed contention is, therefore premature.

² Fed. R. App. P. 41(a).

³ Fed. R. App. P. 41(b). The present deadline for filing a petition for rehearing of the Court’s decision is August 22, 2012.

⁴ Fed. R. App. P. 41(d)(1). A circuit court can, upon a motion of a party, stay its mandate pending a petition for certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2).

B. The Proposed Contention Should Not Be Admitted

1. *The Proposed Contention Raises Generic Issues*

The Commission has previously determined that issues related to spent fuel storage lend themselves to generic resolution.⁵ The issue of spent fuel storage and disposal, the Commission has said, “is a national problem” that is of “essentially the same degree of complexity and uncertainty” at all sites.⁶ The Commission also concluded that “it would not be useful to have a repetitive reconsideration of the matter.”⁷ The Commission therefore has chosen to proceed through the general rulemaking process on issues related to interim (post-license) storage of spent fuel — that is, through the WCD/TSR — instead of litigating the same issues case-by-case in individual adjudicatory proceedings.⁸ If the WCD and TSR are vacated and remanded, the issues raised by the Court of Appeals, and indirectly in the proposed contention, presumptively will be addressed by the NRC through a revised rulemaking.⁹ The Intervenors

⁵ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999).

⁶ 61 Fed. Reg. 66537, 66538 (Dec. 11, 1996).

⁷ *Id.*

⁸ *See, e.g.*, “Waste Confidence Decision,” 49 Fed. Reg. 34658, 34659-60 (Aug. 31, 1984); “Waste Confidence Decision Review,” 55 Fed. Reg. 38474, 38505 (Sept. 18, 1990); “Waste Confidence Decision Review: Status,” 64 Fed. Reg. 68005, 68006-07 (Dec. 6, 1999). The Court in *New York v. NRC* also recognized that the issues involved may be appropriate for generic resolution, consistent with longstanding NRC precedent. *New York*, slip op. at 16. The Court specifically upheld the NRC’s authority to address NEPA issues by generic rulemaking. *Id.* at 20.

⁹ *See, e.g.*, SRM-SECY-09-0090, “Final Update of the Commission’s Waste Confidence Decision,” dated September 15, 2010 (directing NRC Staff to begin a rulemaking effort to update the WCD to account for storage at onsite storage facilities, offsite storage facilities, or both, that would address impacts of storage beyond a 120 year time frame with the ultimate timeframe, which could be two or three hundred years or more); SECY-11-0029, “Plan for the Long-Term Update to the Waste Confidence Rule and Integration with the Extended Storage and Transportation Initiative,” dated February 28, 2010

have presented no basis for supposing that the Commission will depart from its historic and consistent treatment of these issues through rulemaking.¹⁰ Under longstanding NRC policy 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.”¹¹ Consequently, the Intervenor’s proposed contention seeking to raise interim fuel storage issues in this proceeding should not be admitted for hearing.

2. *The Proposed Contention Fails to Establish Any Genuine Site-Specific Dispute*

The sole basis for Intervenor’s proposed contention is the decision in *New York v. NRC*. According to the Intervenor, that decision invalidates 10 C.F.R. § 51.23(a) and undermines the legal basis for 10 C.F.R. § 51.23(b).¹² The latter regulation relieves the NRC Staff and the applicant from addressing the environmental impacts of spent fuel storage for the period following cessation of reactor operation until permanent disposal by the federal government. However, the environmental impacts of onsite spent fuel storage are addressed in

(proposing a plan for a long-term waste confidence rule, including an environmental impact statement and updated WCD, for extended storage of spent nuclear fuel for more than 60 years after a reactor’s licensed life); Speech by Chairman Jazcko, “A Retrospective: A Decisive Regulator Built on a Firm Foundation,” No. S-12-010, dated July 5, 2012 (explaining that the Commission was already on its way to addressing the issues raised by the D.C. Circuit, noting that the Court decision “may just change the timeframe and the timing, and accelerate some of that work,” and concluding that “this is an issue that the Commission will have little difficulty addressing”).

¹⁰ The Intervenor has also presented no reason to litigate generic fuel storage issues in this site-specific proceeding.

¹¹ See *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, CLI-10-19, __ NRC __ (slip op. July 8, 2010) at 2-3, citing *Oconee*, CLI-99-11, 49 NRC at 345 and *Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2)*, ALAB-218, 8 AEC 79, 85 (1974).

¹² Motion at 4.

the DEIS.¹³ The Intervenor has offered nothing to link the substantive aspects of the decision in *New York v. NRC* to the specific discussion of environmental impacts in the DEIS or to operation of Fermi 3. The Intervenor does not challenge the DEIS conclusions on the environmental impacts of spent fuel pool leaks and fires specifically as they apply to Fermi 3, nor do they allege that the DEIS overlooks any site-specific considerations related to fuel storage. Consequently, the proposed contention fails to demonstrate a genuine dispute with the Fermi 3 DEIS on a material issue and does not establish any issue for a site-specific hearing.

To the extent that the proposed contention seeks to assure that the NRC Staff will address the remanded issue prior to issuing a combined license (“COL”) for Fermi 3, the proposed contention is no more than a truism. The Intervenor has provided no basis for supposing that the Commission will fail to comply with a Court of Appeals remand.

C. If the Board Admits a Contention, it Should Refer its Decision to the Commission and Hold the Contention in Abeyance

Given the Commission’s historical treatment of interim spent fuel storage issues generically, a decision by the Licensing Board to admit the proposed contention and permit litigation of a generic issue in this proceeding would certainly present novel legal and policy questions that would merit immediate Commission review under 10 C.F.R. § 2.323(f).

¹³ See, e.g., DEIS at 6-15 to 6-17; D-114 to D-115. The DEIS also incorporates the conclusions of NUREG-1437, “Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants.” *Id.* at 6-17. The GEIS concludes spent fuel can be safely stored on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available. 10 C.F.R. Part 51, Appendix B, Table B-1. And, with respect to fires, the GEIS concludes that, even under the worst probable cause of a loss of spent-fuel pool coolant (a severe seismic-generated accident causing a catastrophic failure of the pool), the likelihood of a fuel-cladding fire is highly remote. GEIS at 6-75, *citing* 55 Fed. Reg. 38474 (September 18, 1990). Impacts or events that are “remote and speculative” need not be considered under NEPA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002).

Intervenors themselves recognize that the question of whether the issues raised by the Court of Appeals should be addressed in a site specific analysis or generic analysis “must be decided by the NRC in the first instance.”¹⁴ By expanding the scope of issues to be considered on a plant-specific basis, a decision to admit a fuel storage contention could have significant practical consequences for the Fermi 3 COL review and the NRC’s overall new reactor licensing program. Consequently, a decision to admit the proposed contention would warrant referral by the Licensing Board to the Commission.

Any admitted contention also should be held in abeyance pending further direction from the Commission. This would include suspension of any disclosure obligations. Given the current schedule in this matter, there is ample time for the Commission to consider a referred question and for the agency to complete necessary evaluations of the remanded issues through a generic rulemaking process prior to issuance of the COL.¹⁵ The Fermi 3 COL will not be granted without the Commission’s resolution of the issues identified by the Court of Appeals. Accordingly, there would be no prejudice to the Intervenors in holding a contention in abeyance.

CONCLUSION

For the foregoing reasons, the Licensing Board should deny the proposed contention. Alternatively, if the Licensing Board admits the proposed contention, it should refer its decision to the Commission and hold the contention in abeyance pending direction from the Commission.

¹⁴ Motion at 7.

¹⁵ Holding a contention in abeyance is appropriate where NRC Staff action may obviate the need for litigation. *CBS Corporation* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 235 (2007); *U.S. Dept. of Energy* (High Level Waste Repository), CLI-04-32, 60 NRC 469, 473 (2004).

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PROPOSED NEW CONTENTION ON TEMPORARY STORAGE AND WASTE DISPOSAL” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 3rd day of August 2012, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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