

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of ) FIRSTENERGY NUCLEAR OPERATING COMPANY ) (Davis-Besse Nuclear Power Station, Unit 1) )	)	Docket No. 50-346-LR  September 23, 2013
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**FENOC’S PETITION FOR CERTIFICATION OF WASTE CONFIDENCE-RELATED  
QUESTION TO THE COMMISSION PURSUANT TO 10 C.F.R. § 2.323(f)(2)**

**I. INTRODUCTION**

On September 13, 2013, the Nuclear Regulatory Commission (“NRC” or “Commission”) published its proposed “waste confidence” rule and related draft generic environmental impact statement (“DGEIS”) in the *Federal Register*.<sup>1</sup> In view of this milestone, and pursuant to 10 C.F.R. § 2.323(f)(2),<sup>2</sup> FirstEnergy Nuclear Operating Company (“FENOC”) petitions the Atomic Safety and Licensing Board (“Board”) to certify the following question to the Commission:

Given the advanced stage of its waste confidence rulemaking (*i.e.*, issuance of the Proposed Rule and supporting DGEIS), does the Commission intend to promptly authorize the Board to lift the abeyance on Intervenor’s Proposed Contention related to waste confidence issues,<sup>3</sup> such that the Board may disposition the only

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<sup>1</sup> See Waste Confidence—Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013) (“Proposed Rule”); Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg. 56,621 (Sept. 13, 2013); NUREG-2157, Waste Confidence Generic Environmental Impact Statement, Draft Report for Comment (Aug. 2013) (“DGEIS”), available at ADAMS Accession No. ML13224A106.

<sup>2</sup> In accordance with 10 C.F.R. § 2.323(b), counsel for FENOC certifies that he made a sincere effort to contact the other parties in this proceeding on September 19, 2013, to explain to them the factual and legal issues raised in this Petition, and to resolve those issues to the extent practicable, and certifies that his efforts to avoid the need for this Petition have been unsuccessful. During the parties’ consultations, Intervenor’s stated that they oppose this Petition, and that they “intend to participate in the rulemaking and NEPA process respecting the waste confidence determination, and will continue the timely pursuit of our contention.” E-mail from Terry Lodge, Counsel for Intervenor, to Timothy Matthews, Counsel for FENOC (Sept. 20, 2013). The NRC Staff stated that it does not oppose FENOC’s request for certification to the Commission.

<sup>3</sup> See Intervenor’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station (July 9, 2012) (“Proposed Contention”). The Intervenor’s include Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio.

remaining contention in the adjudicatory proceeding on FENOC’s license renewal application for Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”)?<sup>4</sup>

FENOC respectfully submits that certification is warranted in these circumstances. The Board has held Intervenor’s Proposed Contention in abeyance for more than one year pursuant to the Commission’s directive in CLI-12-16.<sup>5</sup> As a threshold policy matter, this situation is contrary to the Commission’s previously-stated “general reluctance” to “hold adjudications in abeyance pending the results of an ongoing reexamination of [its] rules.”<sup>6</sup>

Furthermore, the Commission and other licensing boards routinely have ruled that a facially-inadmissible contention should not be held in abeyance pending further developments, such as the conclusion of a generic rulemaking.<sup>7</sup> As explained below, Intervenor’s Proposed Contention is, without question, inadmissible as a matter of law, because it raises *only* issues that fall squarely within the scope of the NRC’s Proposed Rule and its supporting DGEIS.

Specifically, the Proposed Contention alleges that FENOC’s environmental report (“ER”) omits a

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<sup>4</sup> The Board has stated that all motions in this proceeding are subject to the promptness deadline specified in 10 C.F.R. § 2.323(a) and must be filed no later than ten (10) days after the occurrence or circumstance from which the motion arises. *See* Licensing Board Order (Denying Motion for Leave to File a Motion for Reconsideration), slip op. at 5 (Jan. 30, 2012) (unpublished). This Petition has been timely filed within 10 days of the NRC’s publication of its Proposed Rule and DGEIS in the *Federal Register* on September 13, 2013. The Commission directed the NRC Staff to proceed with a generic environmental evaluation and rulemaking in September 2012. However, as stated in the September 13, 2013 *Federal Register* notice, the DGEIS and the Proposed Rule—not some earlier Staff action—“implement the Commission’s direction” and reflect the results of the Staff’s further technical evaluations of continued spent fuel storage impacts. Proposed Rule, 78 Fed. Reg. at 56,780. Accordingly, FENOC submits that this Petition is timely submitted based on the NRC’s formal issuance of the DGEIS and Proposed Rule.

<sup>5</sup> *See Calvert Cliffs Nuclear Project, LLC, et al.* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012) (“In view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that these [Waste Confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order.”); Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Decision) at 1 (Aug. 8, 2012) (unpublished) (holding Intervenor’s Proposed Contention on waste confidence issues in abeyance pending further Commission order).

<sup>6</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390 (2001). Although the Commission stated in CLI-12-16 that licensing reviews and proceedings should “continue to move forward” (*Calvert Cliffs*, CLI-12-16, 76 NRC at 67), as discussed below, Intervenor’s Proposed Contention is the *sole* contention remaining before the Board. Thus, the Board’s disposition of the Proposed Contention and termination of the contested adjudication presently is contingent upon Commission authorization to lift the longstanding abeyance on the Proposed Contention.

<sup>7</sup> *See, e.g., Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-09-08, 69 NRC 317 (2009); *South Carolina Elec. & Gas* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 10 (2010); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 186 (2008).

discussion of the environmental impacts of spent fuel pool leakage, spent fuel pool fires, and failure to establish a spent fuel repository after cessation of licensed plant operation.<sup>8</sup> All three of these issues are directly addressed by the Commission’s Proposed Rule and DGEIS, both of which have been made available to the public—including Intervenors—for review and comment.

Finally, granting certification would materially advance the disposition of this adjudication.<sup>9</sup> The Board dismissed Intervenors’ two other pending contentions nearly nine months ago.<sup>10</sup> However, it did not close the proceeding due solely to the pendency of the Proposed Contention, which has been held in abeyance pending further Commission directive.<sup>11</sup> For the reasons stated below, FENOC respectfully submits that the time for that directive—or least further Commission guidance—is now.

## **II. BACKGROUND**

The Board’s December 28, 2012 decisions (LBP-12-26 and LBP-12-27) fully describe the procedural history of this adjudication. As a result of those decisions, Intervenors’ Proposed Contention on waste confidence issues is the only contention pending before the Board. To assist the Board, FENOC briefly summarizes the history of the Proposed Contention and, in a related vein, the NRC’s present rulemaking on continued storage of spent nuclear fuel.

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<sup>8</sup> Proposed Contention at 4.

<sup>9</sup> FENOC fully recognizes that significant milestones in this proceeding—including publication of the NRC Staff’s draft and supplemental environmental impact statements—await completion. That fact, however, does not negate the fundamental policy and legal considerations raised in this Petition. Specifically, as discussed below, the Commission historically has disfavored holding adjudicatory issues in abeyance pending the results of an ongoing generic rulemaking. Further, it has been the Commission’s longstanding practice to address long-term waste storage issues generically by rulemaking rather than on a case-by-case adjudicatory basis.

<sup>10</sup> See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-26, 76 NRC \_\_\_, slip op. (Dec. 28, 2012) (granting FENOC’s motion for summary disposition of Contention 4 and dismissing the contention as a matter of law); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-12-27, 76 NRC \_\_\_, slip op. (Dec. 28, 2012) (dismissing proposed Contention 5 as moot). In accordance with 10 C.F.R. § 2.341(b)(1), the deadline for appeals of the Board’s rulings in LBP-12-26 and LBP-12-27 (the latter being interlocutory) was January 22, 2013. Intervenors did not seek review of either Board decision on that date.

<sup>11</sup> See *Davis Besse*, LBP-12-27, slip op. at 35-36 n.176 (“Although our summary disposition decision this date regarding Intervenors’ Contention 4 resolves all admitted contentions in this proceeding, and this ruling is dispositive of the proposed Contention 5 and the subsequent five motions to amend and/or supplement Contention 5 this proceeding remains unconcluded at this juncture because another matter is still pending before the Board.”) (citation omitted).

**A. Intervenors’ Proposed Contention on Waste Confidence Issues**

On July 9, 2012, Intervenors filed with the Board a motion to admit a new environmental contention that challenges the alleged failure of FENOC’s ER to address the environmental impacts of spent fuel pool leakage and fires, as well as the environmental impacts that may occur if a spent fuel repository does not become available.<sup>12</sup> The Proposed Contention—by Intervenors own admission—is based on the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *State of New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012),<sup>13</sup> which invalidated and remanded the NRC’s Waste Confidence Decision Update<sup>14</sup> and related final rule.<sup>15</sup>

On August 7, 2012, the Commission issued CLI-12-16, wherein it found, “[i]n view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that [numerous pending waste confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order.”<sup>16</sup> The Commission noted that “should we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply.”<sup>17</sup> Consequently, in an August 8, 2012 Order, the Board held any participant or Board activity concerning Intervenors’ Proposed Contention in abeyance pending further Commission direction.<sup>18</sup>

**B. NRC’s Generic Rulemaking Activities Related to Waste Confidence Decision**

On September 6, 2012, the Commission issued a Staff Requirements Memorandum (“SRM”) that directed the NRC Staff to proceed directly with the development of a generic

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<sup>12</sup> See Proposed Contention at 1, 4.

<sup>13</sup> See *id.*

<sup>14</sup> Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

<sup>15</sup> Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

<sup>16</sup> *Calvert Cliffs*, CLI-12-16, 76 NRC at 68-69.

<sup>17</sup> *Id.* at 69 n.11.

<sup>18</sup> See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Decision) at 1 (Aug. 8, 2012) (unpublished).

environmental impact statement (“GEIS”) to support an updated waste confidence decision and rule.<sup>19</sup> The Commission further directed the Staff to develop and publish a final rule and GEIS within 24 months of the date of the SRM (by September 2014).<sup>20</sup> It also recommended that the Staff draw from and build upon its prior Waste Confidence determinations, and focus on addressing the three deficiencies identified in the D.C. Circuit’s *New York v. NRC* decision, as discussed further below.<sup>21</sup>

In October 2012, the NRC Staff issued SECY-12-0132, in which it stated that the NRC long has considered the environmental effects of spent nuclear fuel storage and disposal following the licensed lifetime of reactor operations “to be a *generic issue* that is best addressed through rulemaking,” and that it “will address its obligations under [NEPA] for this issue through rulemaking rather than in individual license proceedings.”<sup>22</sup> Therefore, for plant-specific, licensing-related environmental impact statements (“EISs”) now under development, the Staff stated its intent to develop appropriate explanatory text for those EISs that identifies long-term storage and disposal of spent nuclear fuel as a *generic issue that is being addressed through rulemaking*.<sup>23</sup> The Staff further explained that the NRC rulemaking process provides an appropriate forum for public review and comment on both the draft GEIS and the proposed Waste Confidence Decision and related rule.<sup>24</sup>

On October 25, 2012, the NRC published a notice in the *Federal Register* announcing its intent to conduct a NEPA “scoping process” in support of the planned GEIS that would

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<sup>19</sup> See Staff Requirements – COMSECY-12-0016 – Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule at 1 (Sept. 6, 2012).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> SECY-12-0132, Implementation of Commission Memorandum and Order CLI-12-16 Regarding Waste Confidence Decision and Rule at 2 (Oct. 3, 2012) (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> *Id.*

accompany its updated Waste Confidence Rule.<sup>25</sup> The NRC held public meetings and webinars in late 2012 as part of the scoping process. The notice established a January 2, 2013 deadline for the submittal of public comments on the scope of the waste confidence environmental review.<sup>26</sup> The NRC Staff issued its GEIS Scoping Summary Report on March 5, 2013.<sup>27</sup>

On June 7, 2013, the Staff issued SECY-13-0061, in which it requested Commission approval of a proposed rule that would revise the generic determination on the environmental impacts of continued storage of spent nuclear fuel.<sup>28</sup> In SRM-SECY-13-0061, issued on August 5, 2013, the Commission approved issuance of the Proposed Rule in the *Federal Register*, subject to the Staff's inclusion of certain modifications to the Proposed Rule, as specified in the SRM.<sup>29</sup>

The NRC published the Proposed Rule in the *Federal Register* on September 13, 2013. The Proposed Rule concludes that the analysis provided in the DGEIS generically addresses the environmental impacts of continued storage of spent nuclear fuel; and supports determinations that it is feasible to safely store such fuel beyond the licensed life for operation of a reactor, and to have a mined geologic repository within 60 years following the licensed life for operation of a reactor.<sup>30</sup> As discussed below, the Proposed Rule and the supporting DGEIS directly address the three issues identified by the D.C. Circuit in its remand order: (1) the impacts of failing to establish a permanent repository, (2) the probability and consequences of future spent fuel pool

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<sup>25</sup> Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 77 Fed. Reg. 65,137 (Oct. 25, 2012).

<sup>26</sup> *Id.*

<sup>27</sup> Waste Confidence Generic Environmental Impact Statement Scoping Process Summary Report (Mar. 5, 2013), available at ADAMS Accession No. ML13060A128.

<sup>28</sup> SECY-13-0061, Proposed Rule, Waste Confidence: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (June 7, 2013).

<sup>29</sup> Staff Requirements – SRM-SECY-13-061, Proposed Rule, Waste Confidence: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) at 1-2 (Aug. 5, 2013).

<sup>30</sup> See Proposed Rule, 78 Fed. Reg. at 56,766, 56,787, 56,799.

leaks, and (3) the probability and consequences of spent fuel pool fires. These are the *same* issues that Intervenors seek to litigate via their Proposed Contention.

### III. LEGAL STANDARD

10 C.F.R. § 2.341(f)(1) provides for early review of questions certified to the Commission under 10 C.F.R. § 2.319(l),<sup>31</sup> or of rulings referred or issues certified to the Commission under 10 C.F.R. § 2.323(f).<sup>32</sup> These questions or rulings may be certified to the Commission by the presiding officer in his or her discretion, *or on the motion of a party requesting that the presiding officer exercise this discretion.*<sup>33</sup> When determining whether to certify such a question or refer a ruling, the presiding officer must find, as a threshold matter, that it (1) raises significant and novel legal or policy issues, or (2) the resolution of the issues would materially advance the orderly disposition of the proceeding.<sup>34</sup> Party motions initiating this process must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.<sup>35</sup>

The Commission recently stated that it “encourages” licensing boards to refer rulings that raise “significant and novel legal or policy issues,” the resolution of which “would materially

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<sup>31</sup> Section 2.319(l) states that a licensing board may “[r]efer rulings to the Commission under § 2.323(f)(1), or certify questions to the Commission for its determination, either in the presiding officer’s discretion, or on petition of a party under § 2.323(f)(2), or on direction of the Commission.”

<sup>32</sup> Section 2.323(f)(2) states that a party may petition the presiding officer to certify a question to the Commission for early review, and that the presiding officer shall apply the criteria in Section 2.341(f)(1) in determining whether to grant the petition for certification. Section 2.341(f)(1) states that, if in the judgment of the presiding officer the petition for certification raises significant and novel legal or policy issues, or prompt decision by the Commission is necessary to materially advance the orderly disposition of the proceeding, then the presiding officer may promptly refer the ruling to the Commission.

<sup>33</sup> 10 C.F.R. § 2.323(f)(1)-(2).

<sup>34</sup> *Id.* §§ 2.323(f)(1), 2.341(f)(1); *see also* Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 46,576 (Aug. 3, 2012) (“Final § 2.341(f) provides the Commission with maximum flexibility by allowing, but not requiring, the Commission to review an issue if it raises significant legal or policy issues, or if resolution of the issue would materially advance the orderly disposition of the proceeding.”).

<sup>35</sup> 10 C.F.R. § 2.323(a)(2). As noted above, this Petition is timely because it was filed within 10 days of the NRC’s publication of its proposed waste confidence rule and DGEIS in the *Federal Register* on September 13, 2013.

advance the orderly disposition of the proceeding.”<sup>36</sup> It also has stated that, “[t]raditionally, we have accepted Board certifications or referrals.”<sup>37</sup>

#### IV. ARGUMENT

##### A. This Petition Raises Novel Policy and Legal Issues Because the Prolonged Abeyance Resulting from CLI-12-16 Represents a Significant Departure from Longstanding Commission Policy and Adjudicatory Precedent

###### 1. **The Commission Historically Has Disfavored Holding Adjudicatory Issues in Abeyance Pending the Results of an Ongoing Generic Rulemaking**

When viewed against the backdrop of Commission practice and precedent, the extended abeyance resulting from CLI-12-16 appears to be an anomaly. Specifically, the Commission has long stated its desire to promote expeditious decision-making and regulatory certainty:<sup>38</sup>

[T]he Commission historically has been reluctant to suspend pending adjudications to await developments in other ... proceedings. For example, we did not hold adjudications in abeyance pending the results of an ongoing reexamination of our rules in the aftermath of the Three Mile Island accident. ... This general reluctance is firmly grounded in our longstanding commitment to efficient and expeditious decisionmaking, as reiterated in our 1998 Adjudicatory Policy Statement (balancing the applicants’ and licensees’ interest in a prompt decision on their applications with the intervenors’ and petitioners’ interest in an opportunity for a hearing).<sup>39</sup>

The Commission further stated that “postponement of license renewal adjudications contravenes the Commission’s interest in ‘regulatory finality’ and ‘sound case management,’” and emphasized

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<sup>36</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 685 (2012) (citing *Union Electric Co. d/b/a Ameren Mo.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 170 (2011)) (advising that “should a licensing board decision raise novel legal or policy questions, we encourage the boards to certify to us, in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f), those questions that would benefit from our consideration”); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-3, 69 NRC 68, 72 (2009)).

<sup>37</sup> *Bellefonte*, CLI-09-3, 69 NRC at 72. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 75 NRC 98, 100 (2010) (directing Board to deny proposed contentions raising issues involving potential impacts of long-term spent fuel storage at reactor sites in response to Board certification); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-11, 59, NRC 203, 209 (2004) (accepting Board certification of questions regarding a security contention).

<sup>38</sup> *See McGuire/Catawba*, CLI-01-27, 54 NRC at 391.

<sup>39</sup> *See id.* at 390-91 (internal quotation marks omitted) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998)); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001)).

its “commitment to expeditious consideration of license renewal applications.”<sup>40</sup> But the effect of the Commission’s directive in CLI-12-16 has been to hold the contested adjudication—which otherwise could be terminated—in indefinite abeyance. This result is at odds with established Commission principles and precedent. Therefore, FENOC asks the Board to exercise its discretion to grant this petition and seek further action, or least direction, from the Commission.

**2. The Proposed Contention Is Inadmissible As a Matter of Law, and Holding It in Abeyance Contravenes Established Commission Policy and Precedent**

**a. *Intervenors’ Proposed Contention Is Facially Inadmissible Because It Raises Only Issues That Are the Subject of a Generic Rulemaking***

Given the NRC’s proposed generic rulemaking on continued storage of spent fuel, Intervenors’ Proposed Contention is not admissible in this proceeding. “It has long been agency policy that 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.’”<sup>41</sup> Here, Intervenors’ Proposed Contention solely raises issues that are the subject of the Proposed Rule. Indeed, Intervenors explicitly stated that the Proposed Contention is “based on” the U.S. Court of Appeals for the District of Columbia Circuit’s recent decision in *State of New York v. NRC*, and that insofar as the FENOC ER addresses spent fuel storage impacts, it does not address the concerns raised by the Court in that decision.<sup>42</sup> Intervenors further contended that “the NRC has taken no steps to cure the deficiencies in the basis for 10 C.F.R. § 51.23(a),” as identified by the D.C. Circuit; *i.e.*, the lack of discussion of the environmental impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository.<sup>43</sup>

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<sup>40</sup> *Id.* at 391 (quoting *Hydro Res.*, CLI-01-4, 53 NRC at 40).

<sup>41</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 343 (1999) (citing *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 86 (1985); *Private Fuel Storage, L.L.C.* (ISFSI), LBP-98-7, 47 NRC 142, 179 (1998)).

<sup>42</sup> Proposed Contention at 1, 4-5.

<sup>43</sup> *Id.* at 7.

The Proposed Rule, with its supporting DGEIS,<sup>44</sup> specifically addresses the three issues Intervenor proposed to litigate in this plant-specific adjudication, and does so in a manner that generically addresses the environmental impacts of continued storage of spent nuclear fuel for all operating reactors—including Davis-Besse.<sup>45</sup> Notably, the Proposed Rule states:

On September 6, 2012, the Commission instructed NRC staff to proceed with a generic EIS to analyze the environmental impacts of continued storage and *address the issues raised in the Court's decision* and to update the Waste Confidence rule in accordance with the analysis in the EIS. *The DGEIS and the proposed rule implement the Commission's direction.*<sup>46</sup>

With regard to the first issue identified by the court (failure to secure permanent disposal), the DGEIS analyzed the impacts of three time frames that represent various scenarios for the length of time for which continued spent fuel storage may be required.<sup>47</sup> Relevant here, the “indefinite” time frame assumes, for analysis purposes, that a repository never becomes available, and that spent fuel must be stored indefinitely in either at-reactor or away-from reactor storage facilities.<sup>48</sup> The NRC Staff evaluated the indefinite storage scenario to “fully cover any likely environmental impacts associated with continued storage” and in direct response to the D.C. Circuit’s recent ruling.<sup>49</sup> As stated in the DGEIS, “[f]or most of the resource areas, the impact determinations for all three timeframes are SMALL.”<sup>50</sup>

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<sup>44</sup> See Proposed Rule 78 Fed. Reg. at 56,784 (“The analysis in the GEIS constitutes a regulatory basis for the proposed rule at 10 CFR 51.23, which codifies the NRC’s conclusions in the GEIS on the environmental impacts of continued storage, including the Commission’s expectations on the availability of a geologic repository.”).

<sup>45</sup> See *id.* (“A generic environmental analysis, such as the one conducted in the DGEIS, would apply to the issuance of a license, amendment, or license renewal of any power reactor or of any ISFSI.”) (emphasis added).

<sup>46</sup> *Id.* at 56,780 (emphasis added).

<sup>47</sup> See *id.* at 56,784, 56,789.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 56,785; see also *id.* at 56,779 (“[T]he Court held that the Commission needed to include an evaluation of the environmental effects of failing to secure permanent disposal since there was a degree of uncertainty regarding whether a repository would be built.”).

<sup>50</sup> DGEIS at 4-90.

With regard to the second issue cited by the court, Appendix E of the DGEIS analyzes the potential offsite impacts of spent fuel pool leaks to groundwater, surface water, soils, and public health. That analysis concludes that the impacts are small.<sup>51</sup>

Finally, to address the third area of concern raised by the court, the DGEIS contains a detailed analysis of spent fuel pool fires, and concludes that the probability-weighted impacts (*i.e.*, risk) of spent fuel pool fires during the short-term storage time frame is small for all plants.<sup>52</sup> Thus, the Staff clearly has taken actions, in the form of the DGEIS and a proposed generically-applicable rule, to address the deficiencies in 10 C.F.R. § 51.23 identified by the D.C. Circuit.

Importantly, the Proposed Rule states that “[t]he DGEIS and this rulemaking are intended to generically resolve the NRC’s NEPA obligations with respect to the continued storage of spent nuclear fuel.”<sup>53</sup> The advantage of a generic rulemaking in these circumstances is not only clear and well-established, it is expressly stated in the proposed rule: to enhance efficiency in individual licensing reviews by comprehensively analyzing environmental impacts that are the same or largely similar for each nuclear power reactor or storage site, thereby avoiding the need to “repeat the identical or substantially similar analysis in individual licensing actions.”<sup>54</sup>

In view of the above, Intervenor’s Proposed Contention is plainly inadmissible as a matter of law. The Commission’s longstanding practice has been to address long-term waste storage issues generically by rulemaking rather than on a case-by-case adjudicatory basis.<sup>55</sup> This practice

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<sup>51</sup> See Proposed Rule, 78 Fed. Reg. at 56,797; DGEIS, App. E at E-19.

<sup>52</sup> See Proposed Rule, 78 Fed. Reg. at 56,783, 56,797; DGEIS, App. F at F-12. As discussed in DGEIS Section 1.8, the NRC assumes that all spent fuel is removed from the pools and placed in dry-cask storage by the end of the short-term storage timeframe. Appendix F, therefore, does not analyze the impacts of a spent fuel pool fires after the short-term storage timeframe because a spent fuel pool will not be used to store spent fuel after that time.

<sup>53</sup> Proposed Rule, 78 Fed. Reg. at 56,789.

<sup>54</sup> *Id.* at 56,784.

<sup>55</sup> See *Indian Point*, CLI-10-19, 72 NRC at, 99-100 (citing *Oconee*, CLI-99-11, 49 NRC at 343; *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995)) (directing denial of the admission of waste confidence contentions that were the subject of general rulemaking).

has been sanctioned by the federal courts, including the D.C. Circuit in *New York v. NRC*,<sup>56</sup> and avoids the obvious inefficiencies attendant to case-by-case adjudication of generic environmental issues.<sup>57</sup> As the Commission explained in *Oconee*:

The Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications. High-level waste storage and disposal, we have said, “is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter.” 61 Fed. Reg. 66,537, 66,538 (Dec. 11, 1996). *The petitioners have presented no reason for the Commission to depart from its generic waste storage determinations in this proceeding and instead litigate the question in an individual case.* If petitioners are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication.<sup>58</sup>

As explained above, Intervenor’s Proposed Contention raises only issues that fall squarely within the scope of the NRC’s general rulemaking. Moreover, as in *Oconee*, the Intervenor has presented no reason for the Commission to depart from its use of the generic rulemaking process, and no basis for the Board to adjudicate waste confidence issues as part of this plant-specific proceeding.<sup>59</sup> In these circumstances, Intervenor’s Proposed Contention plainly is inadmissible, and the appropriate, *alternative* remedy “lies in the rulemaking process.”

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<sup>56</sup> See *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 101 (1983) (“The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.”); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979); *New York v. NRC*, 681 F.3d at 480 (“[W]e see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants.”).

<sup>57</sup> See *Indian Point*, CLI-10-19, 72 NRC at 100 (quoting *Oconee*, CLI-99-11, 49 NRC at 346) (“The Commission has stated that ‘it would be counterproductive (and contrary to longstanding agency policy) to initiate litigation on an issue that by all accounts very soon will be resolved generically.’”); *Natural Res. Def. Council v. NRC*, 547 F.2d 633 (D.C. Cir. 1976), *rev’d and remanded*, 435 U.S. 519 (1978), *on remand*, 685 F.2d 459 (D.C. Cir. 1982), *rev’d*, 462 U.S. 87 (1983) (stating that generic proceedings “are a more efficient forum in which to develop issues without needless repetition and potential for delay”).

<sup>58</sup> *Oconee*, CLI-99-11, 49 NRC at 345 (emphasis added); see also *Indian Point*, CLI-10-19, 72 NRC at 100 (same).

<sup>59</sup> Aside from its filing on the Davis-Besse docket, there is nothing site-specific about the Proposed Contention. Intervenor has furnished no basis to conclude that spent fuel storage risks differ significantly from site to site, or that Davis-Besse presents unique considerations with respect to the environmental impacts of continued spent fuel storage. Further, Intervenor stated that they “do not currently take a position on the question of whether the environmental impacts of post-operational spent fuel storage should be discussed in an individual EIS or environmental assessment for this facility or a generic EIS or environmental assessment,” and acknowledged that “[t]hat question must be decided by the NRC in the first instance.” Proposed Contention at 5. As discussed herein, the Commission has made

***b. NRC Adjudicatory Precedent Dictates That an Inadmissible Contention Be Dismissed and Not Be Held in Abeyance***

Both the Commission and other licensing boards have ruled that an inadmissible contention should not be held in abeyance pending further developments, such as the conclusion of a generic rulemaking. For example, in the *Shearon Harris* proceeding, the Commission remanded a board decision admitting a contention that (1) raised a design-related issue addressed in a design certification application and (2) challenged the completeness of a combined operating license (“COL”) application.<sup>60</sup> In doing so, the Commission directed the Board to determine whether the contention was “otherwise admissible” under 10 C.F.R. § 2.309(f)(1), in which case it might be held in abeyance.<sup>61</sup> On remand, the Board reassessed the contention and found it to be inadmissible and terminated that proceeding.<sup>62</sup> The Commission later applied its *Shearon Harris* ruling in the *V.C. Summer* COL proceeding, stating that “[b]efore a Board may refer such a contention to the Staff and hold it in abeyance, *the contention must first be admissible.*”<sup>63</sup>

Importantly, licensing boards have applied this same principle in the context of prior contentions related to the onsite storage and disposal of spent fuel. For example, in the *Indian Point* license renewal proceeding, the board rejected such a proposed contention and refused to hold the contention in abeyance pending resolution of multiple petitions for rulemaking that addressed spent fuel pool fires.<sup>64</sup> The board stated that if the NRC denied the rulemaking

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that determination and, as evidenced by the Proposed Rule and DGEIS, has committed to a generic EIS and rulemaking, thereby rendering the Proposed Contention inadmissible as a matter of law.

<sup>60</sup> See *Shearon Harris*, CLI-09-08, 69 NRC at 317.

<sup>61</sup> *Id.* at 327.

<sup>62</sup> See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-09-8, 69 NRC 736, 745 (2009).

<sup>63</sup> *South Carolina Elec. & Gas* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 10 (2010) (emphasis added).

<sup>64</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 186 (2008) (citing *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17 (2007)) (“As the Commission noted in *Vermont Yankee/Pilgrim*, a petition for rulemaking that addresses issues related

petitions, then the current rule would remain in force, rendering any adjudicatory challenge to the validity of the rule impermissible as a matter of law.<sup>65</sup> It further noted that if the Commission modified the rule, then petitioners would have the opportunity to file new contentions at that time.<sup>66</sup> This same logic and reasoning applies to the Davis-Besse license renewal proceeding.

In the *Fermi* COL proceeding, the board denied admission of a proposed contention because it challenged a pending NRC policy review and rulemaking and, therefore, did not present a matter appropriate for adjudication before the board.<sup>67</sup> Specifically, the board cited the Commission's then-proposed updates to the NRC's Waste Confidence Decision and associated rule.<sup>68</sup> The board rejected the petitioners' request to admit the contention and hold it in abeyance, finding "no legal basis upon which to admit an otherwise inadmissible contention."<sup>69</sup>

In the *Comanche Peak* COL proceeding, another board rejected a proposed waste confidence contention, noting that "it is clear that the Commission is currently assessing the applicability of the Waste Confidence Rule to 'all reactors'—both current and anticipated."<sup>70</sup> Citing the Commission's *Oconee* ruling, the board found that the petitioners' contention could not be admitted, and that it could not abide by petitioners' suggestion to admit the contention and then hold it in abeyance pending issuance of the NRC's 2010 updated Waste Confidence Rule.<sup>71</sup>

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to spent fuel pool fires would be a more appropriate venue to seek relief 'for resolving . . . generic concerns about spent fuel fires than a site-specific contention in an adjudication.'").

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 249-51 (2009).

<sup>68</sup> *See id.* at 250-51.

<sup>69</sup> *Id.* at 251.

<sup>70</sup> *Luminant Generation Co.* (Comanche Peak Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 340-41 (2009) (quoting *Oconee*, CLI-99-11, 49 NRC at 345) ("It has long been agency policy that 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."). The *Comanche Peak* board also cited the petitioners' right "to petition the Commission to go in a different direction in its rulemaking approach to high-level waste management by plants."

<sup>71</sup> *Comanche Peak*, LBP-09-17, 70 NRC at 341.

In summary, in view of the Commission law and policy discussed above, Intervenor's Proposed Contention should no longer be held in abeyance. The NRC Staff's Proposed Rule and supporting DGEIS fully encompass the issues raised by Intervenor, such that their Proposed Contention raises issues that are the subject of a general rulemaking and, therefore, is inadmissible as a matter of law. For the above-stated reasons, the Board should certify the question raised in this Petition to the Commission.

**B. Commission Resolution of the Issue Raised in this Petition Would Materially Advance the Disposition of the Contested Adjudication**

Certifying the issue raised in this Petition also would advance the timely disposition of this contested adjudication. As noted above, the Board dismissed Contention 4 and proposed Contention 5 in LBP-12-26 and LBP-12-27, respectively. The only impediment to the Board's closure of the adjudicatory record at that time was the Proposed Contention on waste confidence issues, which was being held in abeyance "pending further Commission directive."<sup>72</sup> That remains the case today. The Commission's prompt consideration of this matter, via this certification request, could remove that impediment to the closure of the adjudicatory record.<sup>73</sup>

**IV. CONCLUSION**

For the foregoing reasons, the Board should grant FENOC's Petition and promptly certify the question raised therein to the Commission for resolution.

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<sup>72</sup> See LBP-12-27, slip op. at 35-36 n.176.

<sup>73</sup> Importantly, if the Commission authorizes the Board to lift the abeyance and dismiss the proposed contention, Intervenor's would not be prejudiced or without procedural recourse. Intervenor, like other stakeholders, have been given the opportunity to comment on the proposed rule and DGEIS (and, during the parties' consultations, Intervenor stated their intention to participate in the rulemaking process). Further, in CLI-12-16, the Commission stated that if it later determines that case-specific challenges are appropriate for consideration, then its normal procedural rules would apply. *Calvert Cliffs*, CLI-12-16, 76 NRC at 67-68. Those rules "contain ample provisions through which litigants may seek admission of new or amended contentions, seek stays of licensing board decisions, appeal adverse decisions, and file motions to reopen the record, as appropriate." *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC at 145(2011).

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

David W. Jenkins  
Senior Corporate Counsel  
FirstEnergy Service Company  
Mailstop: A-GO-15  
76 South Main Street  
Akron, OH 44308  
Phone: 330-384-5037  
E-mail: [djenkins@firstenergycorp.com](mailto:djenkins@firstenergycorp.com)

*Signed (electronically) by Martin J. O'Neill*

Kathryn M. Sutton  
Timothy P. Matthews  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Phone: 202-739-3000  
Fax: 202-739-3001  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)  
E-mail: [tmatthews@morganlewis.com](mailto:tmatthews@morganlewis.com)

Martin J. O'Neill  
MORGAN, LEWIS & BOCKIUS LLP  
1000 Louisiana Street, Suite 4000  
Houston, TX 77002  
Phone: 713-890-5710  
Fax: 713-890-5001  
E-mail: [martin.oneill@morganlewis.com](mailto:martin.oneill@morganlewis.com)

*COUNSEL FOR FIRSTENERGY*

Dated in Washington, DC  
this 23rd day of September 2013

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	Docket No. 50-346-LR
(Davis-Besse Nuclear Power Station, Unit 1)	)	September 23, 2013
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, a copy of “FENOC’s Petition for Certification of Waste Confidence-Related Question to the Commission Pursuant to 10 C.F.R. § 2.323(f)(2)” was filed through the Nuclear Regulatory Commission’s E-Filing system.

*Signed (electronically) by Stephen J. Burdick*

Stephen J. Burdick  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Phone: 202-739-5059  
Fax: 202-739-3001  
E-mail: sburdick@morganlewis.com

*COUNSEL FOR FIRSTENERGY*