UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company Davis-Besse Nuclear Power Station, Unit 1	)	October 3, 2013
Regarding the Proposed Amendment to Facility Operating License	)	

INTERVENORS' MEMORANDUM IN OPPOSITION TO 'FENOC'S PETITION FOR CERTIFICATION OF WASTE CONFIDENCE-RELATED QUESTION TO THE COMMISSION PURSUANT TO 10 C.F.R. § 2.323(f)(2)'

Now come Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Ohio Sierra Club, hereafter referred to as the "Intervenors," and respond in opposition to "FENOC'S Petition for Certification of Waste Confidence-Related Question to the Commission Pursuant to 10 C.F.R. § 2.323(f)(2)" (hereinafter "FENOC Petition"). For reasons discussed herein, the Petition should be denied in all respects, because there is no justification for certification demonstrated by FENOC.

A. There Are No Significant and Novel Legal Or Policy Issues, And Certification Would Not Materially Advance The Orderly Disposition Of The Proceeding

By 10 C.F.R. § 2.323(f)(2), the presiding officer of the ASLB is instructed to apply the criteria of 10 C.F.R. § 2.341(f)(1), which states:

> A ruling referred or question certified to the Commission under §§ 2.319(l) or 2.323(f) may be reviewed if the certification or referral raises significant and novel legal or policy issues, or resolution of the issues would materially advance the orderly disposition of the proceeding.

While the remand for redetermination of the NRC's policy respecting the viability of high-level nuclear waste disposition was novel, the request to lift the stay raises no significant and novel legal

or policy issues, but instead, would create them. Rather than materially advancing a judicially-economic, orderly disposition of the Davis-Besse license renewal application, lifting the stay as to this single one of two dozen proceedings would create undue strain on NRC adjudicative resources and perhaps impel differential rulings among the various ASLB panels.

B. The Davis-Besse NEPA Process Is Not Completed

The Draft Environmental Impact Statement for the Davis-Besse license renewal application has not been completed and released to the public for review and comment. And the as-yet incomplete Waste Confidence rulemaking is one of the key reasons the DEIS has not been published. Subpart A, Appendix B of Title 10 of the U.S. Code of Federal Regulations comprises the master list of environmental impacts which may attach to license amendment proceedings. Within Appendix B is an impact entitled "Offsite radiological impacts of spent nuclear fuel and high-level waste disposal," which says:

> Uncertain impact. The generic conclusion on offsite radiological impacts of spent nuclear fuel and high-level waste *is not being finalized pending the completion of a generic environmental impact statement on waste confidence*.

(Emphasis supplied).

Further, footnote seven to this listed environmental impact states:

> As a result of the decision of United States Court of Appeals in *New York v. NRC,* 681 F.3d 471 (DC Cir. 2012), *the NRC cannot rely upon its Waste Confidence Decision and Rule until it has taken those actions that will address the deficiencies identified by the D.C. Circuit*. Although the Waste Confidence Decision and Rule did not assess the impacts associated with disposal of spent nuclear fuel and high-level waste in a repository, it did reflect the Commission's confidence, at the time, in the technical feasibility of a repository and when that repository could have been expected to become available. *Without the analysis in the Waste Confidence Decision and Rule regarding the technical feasibility and availability of a repository, the NRC cannot assess how long the spent fuel will need to be stored onsite.*

(Emphasis supplied). 10 C.F.R. Subpart A, App. B. As a practical and legal matter, the requisite

draft and final environmental impact statement documents cannot be completed, absent a finalized new Waste Confidence Rule that is compliant with Atomic Energy Act expectations and NEPA. Certification would be a useless act, because it would not accelerate finalization of the Waste Confidence rulemaking.

C. Procedural Irregularity at This Stage Invites Error

Even assuming this request for certification to the Commission is occurring at an advanced stage of its waste confidence rulemaking," an order by the Commission to adjudicate the remaining contention, if there is not a genuinely final new rule, invites several jurisdictional and justiciability errors which will give the party which petitions for a court review considerable grounds for reversal of the certification ruling. These include lack of subject matter jurisdiction, finality and ripeness, and failure to exhaust administrative remedies.

The doctrine of ripeness serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). "A further objective [of the ripeness doctrine] is to avoid piecemeal, duplicative, tactical and unnecessary appeals which are costly to the parties and consume limited judicial resources." *Mount Wilson FM Broadcasters, Inc. v. F.C.C.,* 884 F.2d 1462, 1466 (D.C. Cir.1989). Those objectives would be advanced by continuing to hold licensing proceedings in abeyance here, not by selectively opening them up for adjudication. FENOC has not demonstrated how judicial economy will be achieved by certifying only a single one of dozens of cases for special consideration for disposition. Correspondingly FENOC can demonstrate no harm or delay in these

proceedings if it is denied the *ad hoc* certification of this license renewal case to the Commission.

D. The Commission's Ostensible Reluctance To Hold Adjudications In Abeyance Does Not Extend To Court-Ordered Proceedings To Correct Violations of NEPA

FENOC maintains (p. 2, fn. 6 of Petition) that "As a threshold policy matter, this situation [*viz*., the stay on all COLA and LRA proceedings imposed by the Commission pending restructuring of the "waste confidence" decision] 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,'" *citing Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390 (2001).

The asserted reluctance of the Commission to suspend proceedings is belied by a reading of FENOC's precedent. In the wake of the 9/11 attacks, the NRC on its own motion, and at the urging of the public and other agencies, undertook a generic review of terrorism-resistance capability at nuclear installations. In CLI-01-27, the Commission considered a motion brought by Blue Ridge Environmental Defense League ("BREDL") to dismiss, as legally invalid, Duke Energy's application to renew four power reactor operating licenses, or alternatively to hold the license renewal proceeding in abeyance to await the conclusion of the NRC's review of the terrorism-related rules and policies. The Commission declined to postpone the license renewal process because that procedure would "address many issues entirely unconnected to terrorism, will result in no immediate licensing action, and will cause BREDL no injury other than litigation costs." CLI-01-27 p. 1. That holding is quite similar to what has been put in place here by the Commission, *see Calvert Cliffs Nuclear Project, LLC, et al.* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 (2012). Here, the U.S. Court of Appeals for the District of Columbia Circuit found that the NRC

had violated the National Environmental Policy Act (NEPA) in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule. The court vacated both the Decision and the Rule, and remanded the case to the Commission for further proceedings consistent with the court's opinion. The Commission decided not to appeal that ruling to the U.S. Supreme Court, but instead, to reconsider the matter under the National Environmental Policy Act, holding as follows:

> Because of the recent court ruling striking down our current waste confidence provisions, we are now considering all available options for resolving the waste confidence issue, which could include generic or site-specific NRC actions, or some combination of both. We have not yet determined a course of action But, in recognition of our duties under the law, we will not issue licenses dependent upon the Waste Confidence Decision or the Temporary Storage Rule until the court's remand is appropriately addressed. This determination extends just to *final* license issuance; all licensing reviews and proceedings should continue to move forward.

See Calvert Cliffs Nuclear Project, LLC, et al., supra, CLI-12-16, 76 NRC 63, 67. In the 2012 decision to impose the stay, the Commission further observed that "*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." *Id.* at 68-69. The "special circumstances" certainly included the option for nuclear licensing case intervenors to petition the Court of Appeals for a stay, had the Commission itself refused such an order. While there are special circumstances present warranting the stay, there are not special or novel legal or other issues raised by a request to lift it, other than perhaps the chance of extraordinary inconsistency of adjudication and waste of ASLB and Commission resources.

It bears noting that when in 2012 the Commission took up the stay question, the NRC Staff concurred that "no final decision to grant a combined license ('COL'), operating license, or renewed

operating license should be made in the captioned proceedings *until the NRC has appropriately dispositioned the issues remanded by the court*." (Emphasis supplied). "NRC Staff Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings," ADAMS No. ML12177A139 p. 4 (June 25, 2012).[1] The "dispositioning" of the issues remanded by the court remains incomplete.

E. FENOC's Claim That The Commission Routinely Refuses A Stay When There Is Facial Inadmissibility Is Incongruent With Its Citations

Two of the three cases cited by FENOC in support of the premise that the Commission routinely refuses to impose a stay when a contention is facially inadmissible are distinguishable, and one case is inappropriately cited. The wrongly-cited case is *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-09-08, 69 NRC 317 (2009) (at FENOC's Petition, page 2, fn. 7). There, the Commission turned back a request by NC WARN that sought to hold the COLA proceeding for the proposed Shearon Harris Nuclear Power Plant, Units 2 and 3 in abeyance pending the completion by the NRC of a rulemaking on the standard design certification for the AP1000 reactor design. The Commission held that:

> [O]ur rules permit the filing of combined license applications in advance of design certifications. The design certification rulemaking and individual COL adjudicatory proceedings may proceed simultaneously, and issues raised in an adjudicatory proceeding that are appropriately addressed in the generic design certification rulemaking are to be referred to the rulemaking for resolution.

CLI-09-08 at 15. This was not, as FENOC would have the ASLB believe, a circumstance where (FENOC Petition p. 2) "a facially-inadmissible contention should not be held in abeyance pending

[1]The precise statement made by the NRC staff was: "While the Staff agrees that no final decision to grant a combined license ("COL"), operating license, or renewed operating license should be made in the captioned proceedings until the NRC has appropriately dispositioned the issues remanded by the court, there are no imminent final initial or renewed reactor licensing decisions." *Id.*

further developments, such as the conclusion of a generic rulemaking." Contention TC-1 in the Shearon Harris COLA, which was a contention of omission which claimed there had not yet been NRC certification of the adequacy of the AP-1000 design, was remanded by the Commission to the ASLB for a determination of admissibility. It was not "facially inadmissible." Following the remand, the Board reassessed the contention and found it to be inadmissible for the reason that the ASLB found present within the COL application evidence which countered the petitioner's asserted omissions. *See Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-8, 69 NRC __ (June 30, 2009) (slip op.). The contention was not ruled facially inadmissible in the CLI-09-08 holding. Too, there was no "special circumstance" of court-ordered NRC rulemaking at stake, which further differentiates *Progress Energy* from the instant situation.

FENOC's also erroneously relies on *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 186 (2008) to support this point. In *Entergy*, Riverkeeper, petitioning to intervene, filed a contention concerning the potential for spent fuel fires at Indian Point, and asked that it be held in abeyance pending resolution of multiple pending petitions for rulemaking that addressed spent fuel pool fires. The ASLB declined, saying "[i]n the event that the petitions are denied, the current rule will remain in force, and any attack on the validity of that rule will be impermissible in this proceeding as a matter of law." *Id.* Contrastingly, here, the former Waste Confidence rule has been stricken; there is no remaining underlying rule in place. Any attack on waste confidence can only be prospective, and would require challenging a rule that is far from finalization and which only exists in a draft form. There is an active dispute of the draft rule from some quarters, including by Intervenors.

F. Once the Waste Confidence Rulemaking Is Resolved, Intervenors Will Be Free To Amend Or Supplement Their Contention To Cure The

Claimed Facial Inadmissability

Because the Waste Confidence rulemaking is not yet complete, there is no established fact to trigger the 30-day requirement for Intervenors to file or amend their contention. Intervenors filed the existing contention during the 60-day window for appeal to the courts in 2012, days before the Commission decided not to appeal the Circuit Court decision to the Supreme Court. Intervenors had no idea which way the Commission would go, whether it would appeal to the Supreme Court, or to comply with the Circuit decision. Intervenors filed a "spaceholder" contention that was rendered gratuitous when the Commission determined to comply with the Circuit Court ruling. It became gratuitous because, as the ASLB in *Entergy* noted, "In the event that the Commission changes the rule, *petitioners will have the opportunity to file new contentions at that time*." (Emphasis supplied). *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 186 (2008).

New or amended contention filing is triggered by timely discovery of a newly-released, such as a formal or final act. In the present case, the Commission's decision to accept the Circuit decision set into motion a complex process of reconsiderng the Waste Confidence Rule; it did not produce the Rule itself. Issuance of a final rule is the new administrative act-fact which will prompt the opportunity for amendment of the pending contention. *See Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-10-9, 71 NRC 493, 510-11 (2010). In the Fermi 3 case, the applicant, Detroit Edison ("DTE"), objected to a late-filed contention, arguing that it had been filed outside the 30-day period when the intervenors knew or should have known of the factual basis for it. The Fermi intervenors had filed a new contention alleging quality assurance program defects within thirty days after the NRC Staff issued a formal Notice of Violation (NOV). DTE urged that the

information contained within the NOV was not materially different from that which was previously available to the intervenors. The ASLB disagreed, stating:

> The NOV is not simply a reiteration of information and NRC Staff conclusions contained in the various documents cited by DTE. On the contrary, the NOV Letter explains that the NOV is based on the results of an inspection conducted on August 18-21, 2009, during which an "NRC inspection team reviewed certain portions of [DTE's] quality assurance (QA) program implementation to ensure that they were effectively implemented with respect to the Fermi Unit 3 combined license . . . application."The NOV Letter and its attachments announced the results of the August 18-21 inspection and NRC Staff's finding of three specific violations of Appendix B requirements based on those results. Both the Inspection Report and the three specific violations listed in the NOV constitute new information that was materially different from that previously available to Intervenors.

By analogy, the new rule which becomes the end result of the Waste Confidence rulemaking, even if it does not substantially change the current rule, will not be a simple reiteration of information. It will have been predicated on staff investigation, public comments, public hearings, promulgation, possible additional changes, and at the end, formalization by act of the Commission. As of this writing, none of these phases of rulemaking have been completed.

Once the Waste Confidence Rule is formalized, Intervenors will have two different opportunities to raise a new contention or amend the existing one. One involves the alleging of differences induced by the new Rule between the facts or conclusions rendered by FENOC in its Environmental Report, and those appearing in the DEIS, which is written by the NRC Staff. According to 10 C.F.R. § 2.309(f)(2), "[p]articipants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (*e.g.*, based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section."

The second avenue for amendment was set by the ASLB's prehearing order in this case. The Intervenors may raise a new or amended contention addressing site-specific concerns which fall

under the penumbra of the new Rule if they do so within the 30-day period after the Rule has been formally promulgated. Intervenors have had no obligation up to this time to try to amend their contention to add site-specific allegations, because there is only a proposed, nonfinal, rule. Intervenors are not required to file contention amendments with each new shard of information that appears in the ADAMS library or the NRC Docket. As the ASLB in the Yucca Mountain case observed:

> The Board is not impressed with arguments suggesting that, in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance. As Nevada points out, 'the significance of technical information or raw data in an LSN document is often not clear until a later time when DOE uses it for a particular purpose.' We do not expect parties to demonstrate clairvoyance or an 'encyclopedic knowledge' of the LSN, and our rulings will reflect this view.

U.S. Department of Energy (High-Level Waste Repository), LBP-09-29 at 12 (December 9, 2009).

. It remains at least theoretically possible that site-specific impact considerations might be written by the NRC Staff into the final Waste Confidence Rule, perhaps as a result of the public comment period, or from additional scrutiny by the NRC Staff. Regardless, it remains that the 30-day clock to amend the existing Waste Confidence contention in the Davis-Besse LRA has not begun to toll.

G. Conclusion

There are no "significant and novel legal or policy issues" in FENOC's petition. Resolution of the issue raised by FENOC's proposed question would not "materially advance the orderly disposition of the proceeding." There is no final Waste Confidence Rule which may be applied anytime soon. Intervenors continue to have legitimate options available to seek amendment of their placeholder contention. The Commission does not "routinely" have to lift its stay, and in fact, the same prudent reasons on which it based the order imposing the stay remain today. There is no

justification for certification of a question to the Commission from this case.

WHEREFORE, Intervenors pray the ASLB to deny FENOC's Petition in its entirety.

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Intervenors' Memorandum in Opposition to 'FENOC'S Petition for Certification of Waste Confidence-Related Question to the Commission Pursuant to 10 C.F.R. § 2.323(f)(2)'" was deposited in the NRC's Electronic Information Exchange by me this 3rd day of October, 2013.

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