

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

In the Matter of:

FirstEnergy NUCLEAR OPERATING
COMPANY

(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-346-LR

ASLBP No. 11-907-01-LR-BD01

November 18, 2013

ORDER

(Denying FENOC's Petition for Certification of Waste Confidence-Related Question to the
Commission)

On September 23, 2013, FirstEnergy Nuclear Operating Company ("FENOC") filed a petition for certification to the Commission of a waste confidence-related question pursuant to 10 C.F.R. § 2.323(f)(2).¹ Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, "Intervenors") filed a joint answer on October 3, 2013.² The Nuclear Regulatory Commission Staff ("NRC Staff") did not file an answer to FENOC's petition.

¹ See FENOC's Petition for Certification of Waste Confidence-Related Question to the Commission Pursuant to 10 C.F.R. § 2.323(f)(2) (Sept. 23, 2013) [hereinafter FENOC's Petition].

² See 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) (Oct. 3, 2013) [hereinafter Intervenors' Answer].

As a note, Intervenors' Answer lists the "Ohio Sierra Club" as an Intervenor instead of the "Green Party of Ohio." See Intervenors' Answer at 1. The Board views this as a typographical error as the Ohio Sierra Club is not a party to this proceeding. See, e.g., 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). The Board has replaced "Ohio Sierra Club" with the "Green Party of Ohio" in this Order.

For the reasons discussed below, FENOC's petition for certification is denied.

I. PROCEDURAL BACKGROUND

The underlying proceeding in this matter concerns FENOC's application to renew its operating license for the Davis-Besse Nuclear Power Station, Unit 1 for an additional twenty years.³ On December 27, 2010, Intervenor petitioned to intervene in this proceeding, setting forth four contentions.⁴

On April 26, 2011, the Board admitted Contention One, a reformulated and consolidated version of Contentions One, Two, and Three, regarding renewable energy alternatives, and Contention Four, a narrowed version of a contention regarding severe accident mitigation alternatives ("SAMAs").⁵ FENOC appealed the Board's ruling admitting the two contentions; and on March 27, 2012, the Commission reversed the Board's admission of Contention One and reversed, in part, the Board's admission of Contention Four.⁶ FENOC eventually moved for summary disposition as to the remaining part of Contention Four.⁷

On January 10, 2012, Intervenor moved to admit proposed Contention Five concerning recently discovered concrete cracking at the Davis-Besse shield building.⁸ Subsequently,

³ [FENOC's] License Renewal Application is available on the NRC's public website at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-lra.pdf>.

⁴ See 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).

⁵ See LBP-11-13, 73 NRC 534, 588–89 (2011).

⁶ See generally CLI-12-8, 75 NRC 393 (2012).

⁷ See [FENOC's] Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (July 26, 2012).

⁸ See Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012).

Intervenors submitted five motions to amend and/or supplement the proposed cracking contention.⁹

On November 5 and 6, 2012, in Toledo, Ohio, this Board conducted an oral argument on FENOC's motion for summary disposition of Contention Four, the admissibility of proposed Contention Five, and the five motions to supplement or amend.¹⁰

On December 28, 2012, the Board granted FENOC's motion for summary disposition of Contention Four¹¹ and denied Intervenors' motion to admit proposed Contention Five and the five subsequent motions to amend and/or supplement Contention Five.¹² Both of the Board's December 28 orders contained footnotes specifically addressing Intervenors' sole remaining contention – the "Waste Confidence" contention being held in abeyance "pending further Commission directive."¹³

II. BRIEF BACKGROUND ON "WASTE CONFIDENCE" CONTENTION

On July 9, 2012, Intervenors moved to admit a new environmental contention that challenges the failure of FENOC's Environmental Report to address the environmental impacts of spent fuel pool leakage and fires, as well as the environmental impacts that may occur if a high-level waste spent fuel repository does not become available.¹⁴

⁹ See Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5' (Feb. 27, 2012); Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 4, 2012); Intervenors' Third Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 16, 2012); Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 23, 2012); Intervenors' Fifth Motion To Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012).

¹⁰ See Notice and Order (Scheduling Oral Argument) (Sept. 20, 2012); see also Tr. at 275–712.

¹¹ See LBP-12-26, 76 NRC 559 (2012).

¹² See LBP-12-27, 76 NRC 583 (2012).

¹³ Id. at 611–12, n.176; see also LBP-12-26, 76 NRC at 581 n.124.

¹⁴ 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 (July 9, 2012).

The proposed contention, known as the “Waste Confidence” contention, is largely based on the United States 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), which invalidated the NRC’s Waste Confidence Decision Update¹⁵ and the NRC’s final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation.¹⁶

On August 7, 2012, the Commission issued CLI-12-16, finding that “[i]n 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.”¹⁷ The Commission noted that “[s]hould we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply.”¹⁸

Following the Commission’s directive in CLI-12-16, on August 8, 2012, this Board suspended activity related to Intevernors’ Waste Confidence contention, holding it in abeyance pending further Commission direction.¹⁹

On September 6, 2012, the Commission issued a Staff Requirements Memorandum directing the NRC Staff to develop a generic environmental impact statement (EIS) to support an updated Waste Confidence decision and temporary storage rule by September 2014.²⁰

¹⁵ 75 Fed. Reg. 81,037 (Dec. 23, 2010).

¹⁶ 75 Fed. Reg. 81,032 (Dec. 23, 2010).

¹⁷ CLI-12-16, 76 NRC 63, 68–69 (2012).

¹⁸ Id. at 69 n.11.

¹⁹ See Licensing Board Order (Suspending Procedural Date Related to Proposed Waste Confidence Contention) (Aug. 8, 2012) (unpublished).

²⁰ See Staff Requirements – COMSECY-12-0016 – Approach for Addressing Policy Issues Resulting for Court Decision to Vacate Waste Confidence Decision and Rule at 1 (Sept. 6, 2012) (ADAMS Accession No. ML12250A032).

The NRC began the environmental review process by publishing a Notice of Intent to prepare an EIS and to conduct scoping.²¹ After holding several public meetings and webinars, the scoping period ended on January 2, 2013 and the NRC Staff issued the “Waste Confidence Generic Environmental Impact Statement Scoping Process Summary Report” on March 4, 2013.²²

On June 7, 2013, the NRC Staff issued SECY-13-0061, which requested Commission approval to publish a proposed rule in the Federal Register that would revise the generic determination of the environmental impacts associated with continued storage of spent nuclear fuel.²³

On August 5, 2013, the Commission approved issuance of the Proposed Rule in the Federal Register, subject to the Commission’s comments and changes.²⁴

On September 13, 2013, the NRC published in the Federal Register, and requested, public comment on, the draft generic environmental impact statement of the environmental impacts associated with continued storage of spent nuclear fuel.²⁵

III. LEGAL STANDARD

10 C.F.R. § 2.341(f)(1) provides that a ruling referred or question certified to the

²¹ See 77 Fed. Reg. 65,137 (Oct. 25, 2012).

²² See generally Waste Confidence Generic Environmental Impact Statement Scoping Process Summary Report (March 2013) (ADAMS Accession No. ML13060A128).

²³ SECY-13-0061, Proposed Rule: Waste Confidence – Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (June 7, 2013) (ADAMS Accession No. ML13143A374).

²⁴ See Staff Requirements – SECY-13-0061 – Proposed Rule: Waste Confidence – Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 5, 2013) (ADAMS Accession No. ML13217A358).

²⁵ 78 Fed. Reg. 56,621 (Sept. 13, 2013).

Commission under 10 C.F.R §§ 2.319(1) 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.”²⁶

Under 2.323(f)(2), a party may petition the presiding officer to certify a question to the Commission for early review. “The presiding officer shall apply the criteria in § 2.341(f)(1) in determining whether to grant the petition for certification. No motion for reconsideration of the presiding officer’s ruling on a petition for certification will be entertained.”²⁷

IV. ANALYSIS AND RULING

In its September 23 filing, FENOC petitions this 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, such that the Board may disposition the only remaining contention in the adjudicatory proceeding on FENOC’s license renewal application for Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”)?²⁸

FENOC contends that its petition should be granted and its Waste Confidence-based question should be certified to the Commission for three reasons: (1) the prolonged abeyance of Intervenor’s Waste Confidence contention is a significant departure from longstanding adjudicatory precedent because the Commission has historically promoted “expeditious decision-making and regulatory certainty”;²⁹ (2) Intervenor’s Waste Confidence contention is inadmissible as a matter of law because it only raises issues that are the subject of

²⁶ 10 C.F.R. § 2.341(f)(1).

²⁷ Id. § 2.323(f)(2).

²⁸ FENOC’s Petition at 1–2.

²⁹ See id. at 8–9.

a generic rulemaking;³⁰ and (3) Commission resolution of Applicant's petition would materially advance the disposition of the contested adjudication.³¹

Intervenors argue that FENOC's petition should be denied for several reasons including, (1) FENOC's petition does not raise significant and novel legal or policy issues as required under 10 C.F.R. § 2.323(f)(2); and (2) the draft supplemental environmental impact statement (DSEIS) for Davis-Besse has not been completed, and the Waste Confidence rulemaking is one of the reasons the DSEIS has not been published.³²

The Board declines to certify FENOC's Waste Confidence-based question to the Commission.

FENOC's petition does not raise "significant and novel legal or policy issues" as required under 10 C.F.R. § 2.341(f)(1) and § 2.323(f)(2).³³ While FENOC is correct that the NRC has published its proposed Waste Confidence rule and related draft GEIS in the Federal Register, the rulemaking on this matter is not complete.³⁴ If the Commission had intended for the proposed rule and related draft GEIS to be used by Licensing Boards to determine the admissibility of Waste Confidence-based contentions, it would have said so. In fact, Intervenors' Waste Confidence contention, along with a number of Waste Confidence-based contentions and filings in more than a dozen proceedings,³⁵ is being held in abeyance at the explicit direction of the Commission.³⁶

³⁰ Id. at 9–15.

³¹ Id. at 15.

³² See Intervenors' Answer at 1–3.

³³ See FENOC's Petition at 1–2.

³⁴ See 78 Fed. Reg. 56,621 (Sept. 13, 2013).

³⁵ See CLI-12-16, 76 NRC at 67–68 n.10.

³⁶ Id. at 68–69.

Additionally, as Intervenor's have argued, the draft supplemental EIS in this proceeding has not been issued, in part, because the Waste Confidence rulemaking has not been completed.³⁷ The final supplemental EIS is not scheduled to be released until June 2014.³⁸ Using NRC's proposed generic rulemaking to determine that Intervenor's' Waste Confidence contention is inadmissible at this stage appears to be premature, as there is no indication that the current form of the proposed Waste Confidence rule will be its final form.

In making its ruling in CLI-12-16, the Commission acknowledged the precept that "licensing boards should not accept in individual license proceedings contentions which are (or about to become) the subject of general rulemaking by the Commission."³⁹ We thus feel fully justified in presuming that the Commission has knowledge of both this tenet as well as the Waste Confidence rulemaking process as outlined in section II above. Nonetheless, it has not given any subsequent instruction to Licensing Boards beyond its initial direction "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."⁴⁰ Thus, until receiving further instruction from the Commission, Intervenor's' Waste Confidence contention will remain in abeyance in accordance with the Commission directive set forth in CLI-12-16.

V. CONCLUSION

For the foregoing reasons, FENOC's Petition for Certification of Waste Confidence-

³⁷ See Intervenor's' Answer at 2.

³⁸ Letter from Brian Harris, Counsel for the NRC Staff, to Davis-Besse Licensing Board, September 2013 Status Update Letter at 1 (Sept. 30, 2013).

³⁹ See CLI-12-16, 76 NRC at 67 n.9 (quoting Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)); see also FENOC's Petition at 13–15.

⁴⁰ CLI-12-16, 76 NRC at 68–69.

Related Question to the Commission is DENIED.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. William E. Kastenbergl
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 18, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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FIRST ENERGY NUCLEAR OPERATING)	
COMPANY)	Docket No. 50-346-LR
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(Davis-Besse Nuclear Power Station, Unit 1))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying FENOC's Petition for Certification of Waste Confidence-Related Question to the Commission)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell _____]
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Dated at Rockville, Maryland
this 18th day of November, 2013