March 21, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

DTE RESPONSE TO PETITION TO SUSPEND LICENSING DECISION

INTRODUCTION

On February 27, 2014, several organizations ("Petitioners"), including Don't Waste Michigan and Beyond Nuclear in this proceeding, collectively filed with the Commission a petition to suspend final decisions in pending reactor licensing and license renewal proceedings.[1] The Petition is based upon a separate petition, characterized as a "Rulemaking Petition," that was filed with the Office of the Secretary on February 18, 2014 (and attached to the Petition) seeking essentially the same relief on the same grounds. DTE Electric Company ("DTE") opposes the Petition as it applies to the Fermi Nuclear Power Plant, Unit 3 ("Fermi 3")

[1] "Petition to Suspend Reactor Licensing Decisions and Reactor Re-Licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures," February 27, 2014 ("Petition"). When a proceeding is pending, motions should initially be addressed to the presiding officer. *See* 10 C.F.R. § 2.323(a); *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002). Here, the Petition is directed to the Commission (rather than to the presiding Licensing Board in this case). Nevertheless, given that the Petition has been filed on multiple dockets and is generic in nature, the Commission should address the Petition in the first instance.

combined license ("COL") application proceeding.[2] The Petition, and the relief that it seeks, is unnecessary, not in accord with established NRC processes, and not warranted on the merits.

BACKGROUND

Following the accident at the Fukushima Daichi station in Japan, the NRC Staff considered whether licensees should be required to expedite transfer of spent fuel from storage pools to dry cask storage systems.[3] COMSECY-13-0030, "Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel," dated November 12, 2013, presents the results of the NRC Staff's evaluation of an extensive spent fuel pool accident Consequence Study completed in October 2013,[4] and a substantial Regulatory Analysis.[5]

Following an opportunity for public input, the NRC Staff concluded that, "in light of the robust designs of [spent fuel pools], especially in more seismically active areas in the western United states, . . . public health and safety are adequately protected."[6] Further, the NRC Staff concluded that "the expedited transfer of spent fuel to dry storage would provide only a

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2 In an Order, dated March 4, 2014, the Commission directed that responses to the Petition be filed with the Commission on or before March 21, 2014.

3 Consideration of expedited transfer of spent fuel was adopted and prioritized as a Tier 3 Fukushima lessons-learned activity. Expedited transfer of spent fuel was not included as a recommendation of the NRC's post-Fukushima Near-Term Task Force.

4 "Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor," Office of Nuclear Regulatory Research, October 2013 ("Consequence Study").

5 "Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel," Office of Nuclear Regulatory Research, November 2013 ("Regulatory Analysis").

6 COMSECY-13-0030 at 7-8.

minor or limited safety benefit, and that its implementation costs would not be warranted."[7] The NRC Staff recommended that no further generic assessments be pursued.[8] COMSECY-13-0030 presently remains before the Commission for consideration and policy direction.

Notwithstanding the NRC Staff's detailed analysis, conclusions, and recommendation, the Petitioners argue that the generic evaluation developed in connection with COMSECY-13-0030 has "yielded new and significant information about the environmental impacts of high-density pool storage of spent fuel and the cost-beneficial nature of some increases for mitigation of spent fuel pool fires."[9] The Petitioners assert that this allegedly "new and significant" environmental information must be addressed prior to any final licensing decision in order for the NRC to comply with the National Environmental Policy Act ("NEPA"). Related to the Fermi 3 COL proceeding, the Petitioners ask the Commission to:

- Suspend the effectiveness, in any new reactor licensing proceeding for reactors that employ high-density pool storage of spent fuel, of all regulations approving the standardized designs for those new reactors and all Environmental Assessments ("EAs") approving Severe Accident Mitigation Design Alternatives ("SAMDAs");
- Re-publish for comment the EISs for all new reactors (including Fermi 3) and the EAs for all new certifications of standardized reactor designs (including the ESBWR design, which is incorporated by reference in the Fermi 3 COL application);
- Suspend a final decision on COL issuance until the requested actions are completed.[10]

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7 *Id.* at 10.

8 *Id.*

9 Petition at 5 (footnote omitted).

10 *Id*. at 8-9.

Petitioners argue that this relief is necessary in order for the NRC to meet its obligations under NEPA. DTE opposes the Petition for the reasons discussed below.

DISCUSSION

A. The Petition Fails To Comply With NRC Regulations For Raising NEPA Issues

The Petition raises NEPA issues that, under NRC regulations, properly should be addressed in a proposed contention, rather than in a petition to suspend a final licensing decision. Here, the Petition specifically seeks supplementation of the Fermi 3 Final Environmental Impact Statement ("FEIS"), which was issued in January 2013, to consider allegedly new and significant information developed during consideration of expedited spent fuel transfer. According to 10 C.F.R. § 2.309(f)(2), Petitioners may file new environmental contentions based on the Fermi 3 FEIS only if the information on which the contention is based was not previously available, the information is materially different from that previously available, and the contention has been submitted in a timely fashion based on the availability of subsequent information.[11] Moreover, the record in the Fermi 3 COL proceeding closed on February 4, 2014.[12] Any request to raise a new issue therefore also must satisfy the reopening criteria in 10 C.F.R. § 2.326. The Petition, however, does not address either the contention admissibility standard or the reopening standard. Petitioners cannot circumvent the NRC's procedural requirements for raising application-specific issues by styling their request as a generic one.

The Petition is also untimely. Although the Petition was filed within 10 days of the Rulemaking Petition, the factual basis for the Petition is the allegedly new and significant information developed during the NRC Staff's evaluation of expedited spent fuel transfer. That

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[11] 10 C.F.R. § 2.309(c).

[12] Order (Adopting Transcript Corrections, Denying Intervenors' Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record), dated February 4, 2014.

information was available in COMSECY-13-0030, dated November 12, 2013. Rather than raising their concerns at that time, the Petitioners waited more than three months before submitting the Rulemaking Petition. The Petition now comes too late. The Rulemaking Petition did not "reset" the time period for raising NEPA issues with respect to the Fermi 3 COL application. Holding otherwise would allow the Petitioners to subvert the NRC's timeliness requirements and transform an untimely contention into a timely one simply by submitting a rulemaking petition at any point in the licensing process.

The Petition also raises issues that are not specifically directed to the Fermi 3 COL. The Fermi 3 COL application incorporates the ESBWR design, which is the subject of an ongoing design certification rulemaking in accordance with 10 C.F.R. Part 52.[13] The issues raised in the Petition, including the environmental impacts of spent fuel pool accidents, are within the scope of the proposed ESBWR design certification rule and should be addressed in the rulemaking process. The rulemaking process provides for public comment on NEPA issues. Suspending a final licensing decision on the Fermi 3 COL application is unnecessary since the COL cannot be issued until the ESBWR design certification rulemaking is complete (including compliance with NEPA).

B. Suspension of a Final Licensing Decision Is Not Warranted

In a decision on similar suspension petitions filed after the Fukushima event, the Commission reiterated that suspension of licensing proceedings (including suspensions of final decisions) is a "drastic" action that is not warranted absent immediate threats to public health and

[13] "ESBWR Design Certification; Proposed Rule," 76 Fed. Reg. 16549 (Mar. 24, 2011). The NRC Staff issued the Final Design Approval and Final Safety Evaluation Report ("FSER") for the ESBWR on March 9, 2011.

safety, or other compelling reason.[14] In deciding whether to postpone a final licensing decision while awaiting the results of an ongoing regulatory review, the Commission considers whether moving forward with the licensing process will (1) jeopardize the public health and safety; (2) prove an obstacle to fair and efficient decisionmaking; or (3) prevent appropriate implementation of any pertinent rule or policy changes that might emerge from its ongoing evaluations.[15] The Petition does not meet any of these criteria.

In the present case the Petitioners are raising a NEPA compliance issue. Therefore, under the first criterion, no public health and safety issue is involved. And none could be involved, given that operation under a COL would not begin for many years. There is no reason to believe that any danger to public health and safety would result from completion of the licensing process and issuance of a COL.[16] NEPA issues should be raised and addressed in accordance with other processes, as discussed above.

With respect to the second criterion, the Commission's consideration of COMSECY-13-0030 is moving forward in parallel with the NRC Staff review of the Fermi 3 COL application.[17] To the extent that the Petition (and the underlying Rulemaking Petition) seek

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14 *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2) *et al.*, CLI-11-05, 74 NRC 141, 158 (September 9, 2011).

15 *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001).

16 In CLI-11-05 (74 NRC at 161), addressing a request to suspend COL proceeding pending completion of the NRC's post-Fukushima reviews, the Commission noted that the lack of a specific link between the relief requested and the particulars of the individual applications made it difficult to conclude that moving forward with any individual licensing decision would have a negative impact on public health and safety. The same is true here, where the Petition makes no effort to link the Fermi 3 COL application or the ESBWR design to the issues raised in its Petition.

17 Contrary to the Petition (at 10), the Commission is not "ignoring" the potential significance of post-Fukushima efforts. The Commission has stated in various forums it

expedited spent fuel transfer to dry storage systems and elimination of high-density spent fuel pool storage, there is no need to suspend final licensing decisions before the NRC has even completed its assessment of the need for regulatory action. If the NRC decides that additional requirements are necessary, it can impose those requirements at that time. Regarding NEPA compliance, the NRC Staff has not identified new and significant information to date.[18] The Commission may yet decide to supplement NEPA documents with data from the Consequence Study. But, new environmental information is always being developed and more data can always be gathered. This does not mean that licensing decisions must be suspended in the interim. Agencies have discretion under NEPA to draw the line and move forward with decisionmaking.[19]

Under the third criterion, the results of the NRC's ongoing evaluation of expedited spent fuel transfer can be applied at whatever time the NRC deems appropriate, regardless of the status of the COL. The Commission can modify license requirements by rule, regulation, or order, and the changes — whether related to spent fuel pool inventories and storage configurations or additional mitigative measures — can be made applicable to licensees. Issuance of a COL therefore will not prevent appropriate implementation of any rule or policy changes arising from the Commission's ongoing evaluation of expedited spent fuel transfer.

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will evaluate the lessons learned from Japan deliberately and in a comprehensive fashion, and will apply those lessons, as needed, to U.S. reactors. *See, e.g.*, Commission Briefing Transcript, dated March 21, 2011, at 5, 9-10 (ADAMS Accession No. ML110810254).

[18] As discussed below, the Petition also does not identify any "new and significant" environmental information that would require supplementing the Fermi 3 FEIS.

[19] *Town of Winthrop v. FAA*, 535 F.3d 1, 11 (1st Cir. 2008). This is especially true where, as discussed below, the supposedly new and significant environmental information in the Petition relates only to a very low probability event and does not present a "seriously different" picture of the risks of a spent fuel pool accident.

C. The Petition Fails to Identify New and Significant Environmental Information

Under 10 C.F.R. § 51.92, if a proposed action has not yet been taken, the NRC Staff will prepare a supplement to a final environmental impact statement if there is new and significant environmental information relevant to the proposed action or its impacts. Not every change requires a supplement — only those changes that cause effects that are significantly different from those already studied. The new circumstance must reveal a "seriously different" picture of the environmental impact of the proposed project.[20] A supplemental EIS is necessary only where new information "raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary."[21] Here, the Petition fails to identify any new and significant information that would warrant supplementation of the Fermi 3 FEIS.

1. The Consequence Study Does Not Contain New and Significant Information Regarding Land Contamination

Citing the October 2013 Consequence Study, the Petition asserts that there is new information specifying "the size of the area that could be contaminated" and "the number of people who could be displaced for an extended period of time by a high-density spent fuel pool fire."[22] The Petition goes on to claim that this information is significant because it undermines the NRC's conclusion in environmental studies for reactor licensing that the impacts of spent fuel storage during reactor operation are small. But, the Consequence Study does not support the Petition's claim. As the D.C. Circuit pointed out in *New York v. NRC*, under NEPA an agency

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20 *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001).

21 *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

22 Petition at 5.

must look at both the *probabilities* of potentially harmful events and the *consequences* if those events come to pass in evaluating risk.[23] The NRC may find no significant impact if the probability is so low as to be "remote and speculative," or if the combination of probability and harm (*i.e.*, the risk) is sufficiently minimal.[24] Here, the Petition fails to show that there is new and significant information with respect to the probability of a spent fuel pool accident or the overall risk of spent fuel pool release.

With respect to probability, nothing in the Petition purports to show that the likelihood of a spent fool pool accident is any greater than previously acknowledged. In fact, the Consequence Study explains (at viii) that it considered a liner failure likelihood of about two times in a million years, which is comparable to previous NRC studies.[25] And, the Consequence Study concludes that a release from a spent fuel pool accident after the hypothetical severe earthquake at the reference plant could only occur about one time in 10 million years or lower.[26] In the case of the Fermi 3 COL application, the Petition says nothing about the ESBWR spent fuel pool design or how the Consequence Study applies to that design, further undermining any claim of "new" information with respect to the Fermi 3 COL application.

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23 681 F.3d 471, 478 (D.C. Cir. 2012), *citing Carolina Envtl. Study Grp. v. U.S.*, 510 F.2d 796, 799 (D.C. Cir. 1975).

24 *Id*. at 478-479.

25 NUREG-1353, "Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools," predicted the likelihood of liner failure from all potential earthquakes to be between about two and six times in a million years. NUREG-1738, "Technical Study of Spent Nuclear Fuel Pool Accident Risk at Decommissioning Nuclear Plants," predicted the likelihood of liner failure from all potential earthquakes to be between about two times in a million years and two times in 10 million years.

26 Consequence Study at x.

Additionally, the hypothetical release scenario cited in the Petition (at 5) assumed that preplanned and improvised mitigative actions were either not successful or not implemented before three days, at which time the analysis was terminated. For example, the scenario did not include mitigation measures required by 10 C.F.R. § 50.54(hh)(2) or address the possibility that the site emergency response organization would request support from offsite response organizations to implement additional mitigative measures, such as using a fire truck to pump water into the spent fuel pool. As the NRC Staff explained in COMSECY-13-0030 (at 5), a more reliable and robust mitigation capability is — or in the case of a future plant, such as Fermi 3, will be — in place to address degraded spent fuel pool conditions than was assumed in the study. Indeed, according to the Consequence Study, if section 50.54(hh)(2) measures are taken into account, the probability of a release from a spent fuel pool accident after the hypothetical severe earthquake at the reference plant is 5.5×10^{-9}.[27] Because the Consequence Study, which provides the only factual support for the Petition,[28] itself shows that the probability of a spent fuel pool accident and release is so low as to be remote and speculative, there is no basis for revisiting the NRC's prior NEPA determinations regarding spent fuel pool storage impacts.[29] And, in any event, the Petition fails to provide any information to extend the hypothetical scenario in the Consequence Study to the spent fuel pool design proposed for Fermi 3.

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27 *Id*. (Figure ES-2).

28 Petition at 9.

29 *See New York v. NRC*, 681 F.3d at 478-479 (explaining that an agency may find no significant impact if the probability is so low as to be "remote and speculative," or if the combination of probability and harm is sufficiently minimal); *see also City of New York v. Dep't of Transp.*, 715 F.2d 732, 738 (2d Cir. 1983) ("The concept of overall risk incorporates the significance of possible adverse consequences discounted by the improbability of their occurrence.").

2. The Consequence Study Does Not Show That Additional Mitigation Is Cost Beneficial

Citing the sensitivity studies in the Regulatory Analysis (at 46-51), the Petition also claims (at 5-6) that the Consequence Study shows "for the first time" that a "combination of reduced-density pool storage and dry storage constitutes a reasonable alternative for mitigating the risks of high-density pool storage of spent fuel." But, the Petition again fails to recognize the overall very low risk of a spent fuel pool accident. As noted above, the probability of a release from a spent fuel pool accident after the hypothetical severe earthquake at the reference plant considered in the Consequence Study is 5.5×10^{-9}.[30] NEPA does not demand consideration of alternatives to address environmental impacts of accidents that, like a spent fuel pool accident, are remote and speculative.[31] Further, with respect to the Fermi 3 COL application and the ESBWR design in particular, the Petition provides no information to suggest that additional mitigation would be cost-beneficial. In the absence of any information showing a "seriously different" picture of the risk of a spent fuel pool accident generally, much less for Fermi 3 or the ESBWR, supplementation of the Fermi 3 FEIS is not warranted.

3. The Petition Does Not Identify New and Significant Information Regarding the Effect of Reactor Accidents on Spent Fuel Pool Risks

The Petition argues (at 6) that the NRC Staff must consider the possibility that spent fuel pool fires could be affected by reactor accidents, but then goes on to acknowledge that the NRC Staff is doing just that in the context of a Level 3 probabilistic risk assessment ("PRA")

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30 Consequence Study at x (Figure ES-2).

31 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978)*; Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837-838 (D.C.Cir. 1972). NEPA is subject to a rule of reason and as such need not include all theoretically possible environmental effects arising out of an action, but may be limited to effects that have some likelihood of occurring. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48, 49 (1978).

for Vogtle Electric Generating Plant Units 1 and 2. To the extent that the Petition requests supplementation of the Fermi 3 FEIS based on the NRC Staff's ongoing analysis, the Petition is premature. If in the course of evaluating the interaction between spent fuel pool accidents and reactor accidents the NRC Staff identifies new and significant environmental information applicable to the ESBWR design certification or the Fermi 3 COL, the NRC can incorporate that information into its NEPA evaluations in due course consistent with the agency's NEPA regulations. This could include, if necessary, preparation of a supplemental FEIS. But, it is unnecessary to suspend final licensing decisions based on the possibility that new and significant information may be identified *in the future*.[32]

CONCLUSION

For the foregoing reasons, the Commission should deny the request to suspend the final licensing decision in the Fermi 3 proceeding. The Petition does not properly raise a NEPA compliance issue and, in any event, does not identify any new and significant environmental information that would warrant supplementation of the Fermi 3 FEIS. The Commission can complete its consideration of the issues in COMSECY-13-0030 in due course.

Respectfully submitted,

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[32] *See Winthrop*, 535 F.3d at 11 (noting there will always be more environmental data that could be gathered, but recognizing that agencies have discretion to draw the line and move forward with decisionmaking).

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Dated at Washington, District of Columbia
this 21st day of March 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "DTE RESPONSE TO PETITION TO SUSPEND LICENSING DECISION" in the above captioned proceeding have been served via the Electronic Information Exchange this 21st day of March 2014.

Respectfully submitted,

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