

February 12, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY OF THE COMMISSION

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

**BEYOND NUCLEAR'S
MOTION TO REOPEN THE RECORD OF
COMBINED LICENSE PROCEEDING FOR
FERMI UNIT 3 NUCLEAR POWER PLANT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.326, Beyond Nuclear hereby moves to reopen the record in this proceeding to admit a new contention challenging the legal adequacy of NRC's Final Environmental Impact Statement for Combined License (COL) for Fermi Unit 3 (NUREG-2105, Jan. 2013) ("Fermi 3 FEIS") to comply with the National Environmental Policy Act ("NEPA"). Beyond Nuclear's Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant (Feb. 12, 2015) ("Hearing Request/Petition to Intervene"). Beyond Nuclear contends that under NEPA, the Fermi 3 FEIS does not provide the NRC with an adequate legal basis for licensing Fermi 3 because it relies for its evaluation of the environmental impacts of spent fuel storage and disposal on the Continued Storage of Spent Nuclear Fuel Rule (79 Fed. Reg. 56,238 (Sept. 19, 2014) ("Continued Spent Fuel Storage Rule")) and the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157, September 2014) ("Continued Spent Fuel Storage GEIS").

As discussed in Beyond Nuclear's Hearing Request/Petition to Intervene, while Beyond Nuclear seeks admission of its contention, Beyond Nuclear does not seek to litigate the substantive content of its contention in an adjudicatory hearing. Instead, Beyond Nuclear has

already raised its concerns about the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS in comments on draft versions of those documents, and the NRC has already either rejected or disregarded Beyond Nuclear's comments in the final versions of the Rule and GEIS. Beyond Nuclear also has appealed the final versions to the U.S. Court of Appeals for the District of Columbia Circuit. *See Beyond Nuclear v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).¹ The sole purpose of Beyond Nuclear's Contention is to lodge a formal challenge to the NRC's reliance, in the Fermi 3 FEIS, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS for purposes of licensing Fermi 3. This motion is necessary because the hearing record is closed.

Several overlapping factors, set forth in three regulations, govern motions to reopen and admit new contentions. This motion and the accompanying contention satisfy each of these factors. *See* 10 C.F.R. §§ 2.309(c), 2.309(f), and 2.326.

II. JURISDICTION

Until issuance of its initial final decision, a Licensing Board has jurisdiction to reopen a proceeding. *See* 10 C.F.R. §§ 2.318(a), 2.713(a), 2.319(m), and 2.341; Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982). After that, jurisdiction lies with the Commission. Therefore, Beyond Nuclear has filed this Motion before the Secretary of the Commission.

III. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(a).

10 C.F.R. § 2.236(a) provides three criteria which must be satisfied for this motion to be granted:

¹ As discussed below in Section II.A, *Beyond Nuclear v. NRC* was consolidated with four other cases and is now captioned *New York v. NRC*, Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated).

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Id. This motion and the accompanying contention satisfy all three criteria, as discussed below.

A. This Motion is Timely.

Pursuant to 10 C.F.R. § 2.326, motions to re-open the record must be “timely.” The NRC judges timeliness of motions to reopen the record by the same standards as for contentions. 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012).² This motion to reopen and the attached contention are timely because they do not depend at all on past information. Instead, they are “placeholders” that depend on an event that will occur in the future: the U.S. Court of Appeals’ decision in *New York II*. Beyond Nuclear’s contention seeks the denial (or revocation) of a COL for Fermi Unit 3 in the event that the Court of Appeals reverses the Continued Spent Fuel Storage Rule and/or GEIS.

If the COL proceeding for Fermi Unit 3 were at an earlier stage, or if the NRC had decided to suspend the Fermi 3 COL decision until the outcome of *New York II* in response to the Petition to Suspend submitted by Beyond Nuclear and other organizations (*see* Hearing Request/Petition to Intervene at 7), Beyond Nuclear could have waited until after the Court’s

² NRC regulations 10 C.F.R. § 2.309(c) and § 2.309(f)(2) call for a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

decision to file its contention. Because the NRC appears to be poised to issue a COL for Fermi 3 in the near future, however, this contention must be filed now to ensure that the Court's decision in *New York II* will be applied to the NRC's COL decision for Fermi Unit 3.

B. This Motion and the Accompanying Contention Address a Significant Environmental Issue.

This motion and the accompanying contention raise the significant environmental issue that the Fermi 3 FEIS is not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal. The analysis referenced by the Fermi 3 FEIS (at pages 6-16 through 6-18) was vacated by the D.C. Circuit Court of Appeals for its insufficiency to satisfy NEPA with respect to the risk of pool fires, spent fuel pool leaks, and long-term impacts of spent fuel storage. *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012). While the NRC has now issued a new analysis of these impacts (through the Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS), that analysis is also seriously deficient to satisfy NEPA. *See* Hearing Request/Petition to Intervene at 9-10.

C. This Motion and the Accompanying Contention Would Likely Produce a Materially Different Result in this Proceeding.

The purpose of Beyond Nuclear's contention is to ensure that in the reasonably likely event that the U.S. Court of Appeals grants Beyond Nuclear's petition for review of the Continued Spent Fuel Storage Rule and GEIS and vacates them for failure to comply with NEPA, the NRC will withdraw the Fermi 3 EIS as a basis for licensing Fermi 3, and therefore withdraw the Fermi 3 COL. Thus, admission of this contention would likely produce a materially different result in this proceeding.

IV. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(b).

10 C.F.R. § 2.326(b) requires that a motion to reopen the record must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of Section 2.326(a) have been satisfied. Beyond Nuclear has not submitted affidavits, because the bases for this motion are purely legal: As discussed in Beyond Nuclear's Contention, the sole purpose of Beyond Nuclear's Contention – and therefore of this motion – is to ensure that any court decision resulting from Beyond Nuclear's appeal of the generic Continued Spent Fuel Storage Rule and GEIS will also be applied to the individual Fermi 3 COL proceeding, which relies on the Continued Spent Fuel Storage Rule and GEIS.

V. THIS MOTION AND THE ACCOMPANYING CONTENTION SATISFY THE STANDARDS FOR CONTENTIONS FILED AFTER THE DEADLINE SET FORTH IN 10 C.F.R. §§ 2.326(d) AND 2.309(c).

10 C.F.R. § 2.326(d) provides that “[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).”³ As discussed above in Section III.A, this Motion and Beyond Nuclear's placeholder Contention are timely because they are based on information that does not yet exist: the U.S. Court of Appeals' decision in *New York II*. If the U.S. Court of Appeals reverses the Continued Spent Fuel Storage Rule and GEIS, then the filing of this contention will have ensured that the Fermi 3 COL decision is also reversed, because the Fermi 3 FEIS relies on the Continued Spent Fuel Storage Rule and GEIS.

³ See note 2 above for the requirements of 10 C.F.R. § 2.309(c).

VI. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(B)

Undersigned counsel Terry Lodge certifies that on February 10, 2015, he contacted counsel for DTE Electric Co. and the NRC staff in an attempt to obtain their consent to this motion. Counsel for both parties stated that they would oppose it.

VII. CONCLUSION

For the foregoing reasons, Beyond Nuclear's Motion to Reopen the Record should be granted.

Respectfully submitted,

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