

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) )

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APPLICANT'S OPPOSITION TO PETITION TO SUPPLEMENT FERMI 3  
FINAL ENVIRONMENTAL IMPACT STATEMENT TO REFERENCE  
CONTINUED STORAGE GENERIC ENVIRONMENTAL IMPACT STATEMENT

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INTRODUCTION

In accordance with the Commission’s Order, dated January 29, 2015, DTE Electric Company (“DTE”) responds to the Petition to Supplement filed in the Fermi 3 combined license (“COL”) proceeding.<sup>1</sup> The Petition to Supplement requests that the Commission “order the supplementation” of the Fermi 3 Final Environmental Impact Statement (“FEIS”) (NUREG-2105) to “incorporate by reference” the Generic Environmental Impact Statement for Continued Spent Fuel Storage (“Continued Storage GEIS”).<sup>2</sup> The Petitioners claim that supplementation is required by the National Environmental Policy Act (“NEPA”) and the Commission’s regulations. Petitioners also claim that supplementation is necessary “to allow members of the public to lodge, with the requisite level of specificity, ‘placeholder’ contentions challenging the NRC’s

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<sup>1</sup> “Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage,” dated January 28, 2015 (“Petition to Supplement”). The Petition to Supplement was filed in substantially similar form in connection with other ongoing proceedings.

<sup>2</sup> “Continued Storage of Spent Nuclear Fuel,” Final Rule, 79 Fed. Reg. 56238 (Sept. 19, 2014); “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” NUREG-2157 (Aug. 2014) (ADAMS Accession No. ML14188B749) (“GEIS”); 79 Fed. Reg. 56262 (Sept. 19, 2014).

reliance, in individual licensing proceedings, on the GEIS and [Continued Spent Fuel Storage] Rule.”<sup>3</sup>

The Commission should expeditiously deny the Petition to Supplement.<sup>4</sup> The Petition to Supplement is unnecessary with respect to Fermi 3 and, in any event, is not in accord with established NRC processes. By rule, the Continued Storage GEIS is incorporated by reference in site-specific licensing decisions. The NRC Staff also has specifically considered the potential for new and significant information in the GEIS relative to the Fermi 3 FEIS and found that supplementation is not warranted — including with respect to the Continued Storage issue. The Petitioners do not acknowledge, much less challenge the substantive adequacy of, that evaluation. The Petition to Supplement also fails to address the standards for reopening the closed Fermi 3 record to file “placeholder” contentions. In any event, there is no procedural basis for “placeholder” contentions under the Atomic Energy Act, NEPA, or the NRC’s Rules of Practice. Any one of these reasons is sufficient to deny the Petition to Supplement with respect to Fermi 3.

### BACKGROUND

After an extensive review and numerous opportunities for public comment, the NRC promulgated a final rule on Continued Storage of Spent Nuclear Fuel adopting the generic

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<sup>3</sup> *Id.* at 2-3.

<sup>4</sup> The Fermi 3 licensing proceeding is nearing completion. The FEIS and Final Safety Evaluation Report (“FSER”) have both been issued. The contested hearing is complete, and the oral portion of the hearing on uncontested issues was held on February 4, 2015. According to the Commission’s internal procedures, the Commission intends to issue adjudicatory decisions in uncontested hearings no later than 4 months after the FSER and FEIS are both publicly issued. For Fermi 3, a decision on the uncontested hearing is therefore anticipated to be about March 18, 2015. Prompt resolution of the issues raised in the Petition to Supplement is therefore critical to avoid undue delay in the licensing process.

environmental review in the GEIS. In the GEIS, the NRC comprehensively addressed the environmental impacts of continued storage of spent nuclear fuel.<sup>5</sup> Under the rule, the environmental impacts described in the GEIS “shall be deemed incorporated into environmental impact statements” for individual licensing decisions.<sup>6</sup> However, in issuing the rule, the NRC Staff explained that “[f]or applications where the final EIS has been published but the action has not yet been taken, the staff will determine whether it must supplement the site-specific EIS.”<sup>7</sup> The Commission agreed and directed the NRC Staff to utilize approaches that are transparent when “implementing the published GEIS findings into site-specific environmental analyses.”<sup>8</sup>

At the time the Continued Storage rule was issued, the NRC Staff had completed the Fermi 3 FEIS. Consistent with its commitment, the NRC Staff evaluated whether any new information in the Continued Storage GEIS was significant enough to warrant supplementation of the Fermi 3 FEIS.<sup>9</sup> And, consistent with Commission direction, the NRC Staff made its evaluation available to the public on December 1, 2014.<sup>10</sup> In its evaluation, the NRC Staff explained that, “[t]o merit a supplement, information must be both new and significant and it

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<sup>5</sup> 79 Fed. Reg. at 56241.

<sup>6</sup> 10 C.F.R. § 51.23(b).

<sup>7</sup> SECY-14-0072, “Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20),” dated July 21, 2014, at 5 (ADAMS Accession No. ML14177A474).

<sup>8</sup> Staff Requirements Memorandum for SECY-14-0072, dated August 26, 2014.

<sup>9</sup> “Consideration of New Information Regarding the Impacts of the Continued Storage of Spent Fuel for the Fermi Nuclear Power Plant, Unit 3, Combined License Application,” dated November 20, 2014 (ADAMS Accession No. ML14318A477).

<sup>10</sup> According to the “document properties” information in ADAMS, the NRC Staff evaluation was publicly released on December 1, 2014.

must bear on the proposed action or its impacts.”<sup>11</sup> The NRC Staff noted that new information would be considered significant under NEPA if it presents “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”<sup>12</sup> Applying that standard, the NRC Staff concluded that supplementation was not warranted.

The NRC Staff compared the GEIS conclusions to those in Section 6.1.6, *Radiological Wastes*, of the Fermi 3 FEIS. The NRC Staff concluded that the potential impacts of at-reactor continued storage during the short-term timeframe in the GEIS are consistent with the evaluation in the Fermi 3 FEIS.<sup>13</sup> The NRC Staff also concluded that the impact determinations for at-reactor storage in NUREG-2157 for the long-term and indefinite timeframes do not present a seriously different picture of the environmental impacts. The NRC Staff based its conclusions on the impacts that the NRC can predict with certainty, which are SMALL; the uncertainty reflected by the ranges in the long-term and indefinite timeframes; and the relatively low likelihood of impacts in those timeframes. The NRC Staff further concluded that continued at-reactor storage is not expected to contribute noticeably to cumulative impacts. Based on that analysis, the NRC Staff determined that the information in NUREG-2157 does not present a seriously different picture of the environmental impacts of the proposed action when compared to the impacts that were described in the Fermi 3 FEIS.

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<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*, citing *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC 141, 167-68 (2011).

<sup>13</sup> *See, e.g., Tinicum Township v. U.S. Dep’t. of Transp.*, 685 F.3d 288 (3d Cir. 2012) (“Where new information merely confirms the agency’s original analysis, no supplemental EIS is indicated.”).

## DISCUSSION

### A. The Petition to Supplement Does Not Comply with NRC Regulations for Challenging the Fermi 3 FEIS

The Petition to Supplement is not based on any specific regulation or procedure under the NRC’s Rules of Practice, and in fact is inconsistent with the established procedures for challenging an FEIS or NRC licensing decision. Under the Fermi 3 circumstances, Petitioners should have filed a timely contention challenging the NRC Staff’s determination that an FEIS “supplement” is not necessary. That filing should have been supported by a motion to reopen the record. Petitioners did neither. They offer no substantive challenge to the Staff’s Fermi 3 environmental review.

Under the NRC’s Rules of Practice, challenges to the adequacy of the Fermi 3 FEIS or to the NRC Staff’s new and significant information evaluation must be in the form of a proposed contention.<sup>14</sup> The Petition to Supplement was not, however, accompanied by a proposed contention. Even if the Petitioners had submitted a proposed contention, it would not have been timely.<sup>15</sup> Petitioners must file proposed contentions based on the availability of new information. Here, the NRC Staff’s assessment of new and significant information for Fermi 3 was available on December 1, 2014.<sup>16</sup> To be timely, a challenge to the adequacy of that

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<sup>14</sup> 10 C.F.R. § 2.309(a), (f).

<sup>15</sup> 10 C.F.R. § 2.309(c), (f)(2).

<sup>16</sup> *See also* SECY-14-0132, “Staff Statement in Support of the Uncontested Hearing for Issuance of Combined License for the Fermi Nuclear Plan Unit 3,” dated November 20, 2014 at 19-20 (noting the NRC Staff’s conclusion that the information in NUREG-2157 does not present a seriously different picture of the environmental impacts of the proposed action when compared to the impacts that were described in the Fermi 3 FEIS).

evaluation should have been filed within 30 days.<sup>17</sup> Having failed to timely follow the appropriate processes for challenging the Fermi 3 FEIS or the NRC Staff's new and significant information evaluation, the Petition to Supplement should be rejected.<sup>18</sup>

In addition, the record in the Fermi 3 COL proceeding closed on February 4, 2014.<sup>19</sup> Any request by Petitioners to raise a new issue therefore must satisfy the reopening criteria in 10 C.F.R. § 2.326, based on an affidavit accompanying the motion. The proponent of a motion to reopen has a heavy burden to bear and stringent criteria must be met.<sup>20</sup> The motion must be timely, must address a significant safety or environmental issue, and must demonstrate that a materially different result would be likely.<sup>21</sup>

As noted above, the Petition to Supplement was not timely. But, even if it had been filed in a timely manner, the Petitioners do not seek any substantive consideration of the

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<sup>17</sup> *Southern Nuclear Operating Co.* (Vogle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 218 and n.8 (2011).

<sup>18</sup> NEPA does not supersede the NRC's procedural rules. Federal courts leave to an agency's discretion the manner in which the agency determines whether information is new or significant to warrant supplementation of an environmental impact statement, including the application of its procedural rules. *See, e.g., Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-77 (1989); *Massachusetts v. United States*, 522 F.3d 115, 130 (1st Cir. 2008); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990).

<sup>19</sup> Order (Adopting Transcript Corrections, Denying Intervenors' Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record), dated February 4, 2014.

<sup>20</sup> *Amergen Energy Company LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668, 675 (2008); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 25 (2006) ("Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence.").

<sup>21</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 496-497 (2012); *see also id.* at 496 (noting that the purpose of the reopening rule "is to raise the threshold -- increase the showing necessary -- for last-minute claims for additional hearings").

GEIS in the Fermi 3 FEIS. They do not even acknowledge the NRC Staff's evaluation of new and significant information for Fermi 3. That evaluation specifically concludes that supplementation of the FEIS is not needed. And, nothing in the Petition to Supplement suggests that reconsideration of the issue would lead to a different outcome. The Petition to Supplement simply does not point to any new or different environmental issue unique to Fermi 3 or establish any legal or substantive deficiency with the NRC Staff's new and significant information analysis for Fermi 3.<sup>22</sup> The required affidavit providing the factual and technical basis for reopening also was not provided.<sup>23</sup> Having failed to even address the reopening standard, much less show that the extraordinary action of reopening the record is warranted, the Petition to Supplement should be denied straightaway.<sup>24</sup>

B. The Petition to Supplement's Proposed Remedy Is Unwarranted

The Petitioners have provided no basis for their argument that supplementation of the Fermi 3 FEIS is needed to satisfy NEPA. Specifically, 10 C.F.R. Part 51, Subpart A, Appendix A, § 1(b), does not require that the NRC "take the additional step of incorporating by reference and summarizing the Continued Spent Fuel Storage GEIS in the text of FEISs for

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<sup>22</sup> NRC adjudications are not "EIS editing sessions" and the burden is on the proponent of a contention to show that the NRC Staff's analysis or methodology is unreasonable or insufficient. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

<sup>23</sup> "Evidence contained in [the] affidavits must meet the admissibility standards [in 10 C.F.R. § 2.337]." 10 C.F.R. § 2.326(b). That is, it must be "relevant, material, and reliable." 10 C.F.R. § 2.337(a). Further, the "[a]ffidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." 10 C.F.R. § 2.326(b).

<sup>24</sup> The absence of any motion to reopen and the Petitioners' failure to even address the reopening standards provides a compelling basis for the Commission to expeditiously deny the petition with respect to Fermi 3. As noted above, prompt resolution of the issues raised in the Petition to Supplement is necessary to avoid unwarranted delay in the licensing process for Fermi 3.

individual reactors,” as argued by Petitioners.<sup>25</sup> Nor does it prohibit anything that the NRC has done on this issue. The Continued Storage Rule by its terms provides that the GEIS findings are deemed to be incorporated into individual reactor decisions. The Continued Storage Rule in this regard is self-effectuating. Moreover, as discussed above, the Staff has specifically considered the implications of the Continued Storage Rule and GEIS for the Fermi 3 FEIS, consistent with its commitment in SECY-14-0072.<sup>26</sup> These internal reviews of “new and significant” information do not themselves require supplementation of an EIS.<sup>27</sup> Given the very ample public notices, disclosures, and comment opportunities on Continued Storage issues, there is simply no basis for the argument that supplementation or specific references to the rule and GEIS are somehow necessary to meet NEPA’s disclosure objective.<sup>28</sup>

The Petition to Supplement also states that Petitioners “seek an opportunity to lodge ‘placeholder’ contentions challenging the NRC’s reliance, in individual licensing proceedings, on the Continued Spent Fuel Storage GEIS which is now on appeal before the U.S.

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<sup>25</sup> Petition to Supplement at 6.

<sup>26</sup> *See supra*, note 9.

<sup>27</sup> *See Marsh*, 490 U.S. at 373 (“[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision[-]making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”); *see also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997) (upholding use of internal agency review to evaluate significance of new information); *Laguna Greenbelt, Inc. v. United States Dep’t. of Transp.*, 42 F.3d 517, 529-30 (9th Cir. 1994) (same).

<sup>28</sup> In CLI-14-08, the Commission described the public participation for the Continued Storage rulemaking as involving a “robust public comment period” that included an “extensive campaign of public meetings across the United States.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-14-08, 80 NRC \_\_, \_\_ (slip op. at 6) (2014). During the comment period, the NRC staff held thirteen public meetings across the country, received over 33,000 comment submissions, and recorded approximately 1,600 pages of public meeting transcripts. *Id.* at 11 n.35.

Court of Appeals for the D.C. Circuit.”<sup>29</sup> However, the NRC’s Rules of Practice do not recognize a petition of this sort, and the Petitioners have not demonstrated either a procedural basis or the necessity for “place holder” contentions.

Under the NRC’s Rules of Practice, Petitioners must file any contentions at the appropriate time. If Petitioners seek to challenge an NRC license that relies upon the Continued Storage Rule or GEIS, they must follow the NRC’s Rule of Practice to raise their issue and protect their rights. The Petitioners claim that “[u]nder NRC regulations for the admissibility of contentions, it would not be possible to submit such placeholder contentions until the Continued Spent Fuel Storage GEIS is actually incorporated into the site-specific EISs.”<sup>30</sup> But, the Petition to Supplement does not explain why the Petitioners could not file a contention based on the NRC Staff’s new and significant information assessment for Fermi 3. In fact, the Petition to Supplement does not even acknowledge the existence of the NRC Staff’s new and significant information evaluation for Fermi 3.<sup>31</sup>

More generally, the Petition to Supplement does not provide any regulatory basis for a “placeholder” contention to preserve future litigation options.<sup>32</sup> Even if the Court of

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<sup>29</sup> Petition to Supplement at 10.

<sup>30</sup> *Id.*

<sup>31</sup> In its “new and significant” information review for Fermi 3, the NRC Staff determined that the Fermi 3 FEIS, as originally drafted, remained acceptable after considering the Continued Storage GEIS and Rule. Supplementing the FEIS to add a citation to a document that merely confirms the analysis already presented is wholly unnecessary. *See Exelon Generating Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (explaining that it is an intervenor’s burden to show an issue’s significance and materiality and emphasizing that the adjudicatory process should not be used to flyspeck environmental documents or to add details or nuances).

<sup>32</sup> *See, e.g., Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 490 (2008) (denying admission of contention intended to function as a placeholder for future litigation); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear

Appeals were to remand the Continued Storage Rule or GEIS, a remedy of vacating a license would not automatically follow in a NEPA case.<sup>33</sup> Petitioners would need to seek that remedy in the Court of Appeals at an appropriate time. There is simply no basis for allowing a “placeholder” contention in this proceeding to somehow preserve a future judicial remedy — much less one based on speculation regarding the outcome of pending litigation on the Continued Storage Rule.

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Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (affirming denial of intervenors’ motion for leave to file new contentions intended as a “placeholder” for a future motion to reopen the record); *id.* (noting that NRC regulations do not contemplate “placeholder” contentions, which are tantamount to impermissible “notice pleadings”); *Exelon Generation Company, LLC* (Byron Nuclear Station, Units 1 and 2; Braidwood Nuclear Station, Units 1 and 2), CLI-14-06, \_\_ NRC \_\_ (2014) (slip op. at 5) (noting that Commission rules do not contemplate motions filed “as a ‘placeholder’ for a further motion to be filed later”).

<sup>33</sup> *See, e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

CONCLUSION

For the foregoing reasons, the Commission should expeditiously deny the Petition to Supplement.

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Dated at Washington, District of Columbia  
this 12th day of February 2015

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) Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S OPPOSITION TO PETITION TO SUSPEND FINAL DECISIONS AND PROPOSED NEW CONTINUED STORAGE CONTENTION” in the above captioned proceeding have been served via the Electronic Information Exchange this 12th day of February 2015.

Respectfully submitted,

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