

April 22, 2015

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

In the Matter of )  
FirstEnergy Nuclear Operating Co. ) Docket No. 50-346-LR  
(Davis-Besse Nuclear Power Station, Unit 1) )

**BEYOND NUCLEAR’S MOTION TO REOPEN THE RECORD OF  
LICENSE RENEWAL PROCEEDING FOR DAVIS-BESSE 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 Draft Supplement 52 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Davis-Besse Nuclear Plant, Units 1 and 2 (NUREG-1437) (March 2015) (“Davis-Besse DEIS”) to comply with the National Environmental Policy Act (“NEPA”). *See* the attached Beyond Nuclear’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Davis-Besse Nuclear Power Plant (April 22, 2015) (“Hearing Request/Petition to Intervene”). Beyond Nuclear contends that under NEPA, the Davis-Besse DEIS does not provide the NRC with an adequate legal basis for relicensing Davis-Besse 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”).<sup>1</sup>

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

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<sup>1</sup> The NRC issued the Continued Spent Fuel Storage Rule and GEIS on remand from the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) (“*New York I*”).

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 et al. v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).<sup>2</sup> The sole purpose of Beyond Nuclear's Contention is to lodge a formal challenge to the NRC's reliance, in the Davis-Besse DEIS, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS for purposes of relicensing Davis-Besse. 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:

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<sup>2</sup> *Beyond Nuclear et al. 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) ("*New York II*").

- (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).<sup>3</sup> 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 license renewal permit for Davis-Besse in the event that the Court of Appeals reverses the Continued Spent Fuel Storage Rule and/or GEIS. Because the NRC may renew the operating license for Davis-Besse before the Court reaches a decision in *New York II*, this contention must be filed now to ensure that the Court’s decision in *New York II* will be applied to the NRC’s license renewal decision for Davis-Besse.

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

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<sup>3</sup> 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.

This motion and the accompanying contention raise the significant environmental issue that the Davis-Besse DEIS is not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal. In *New York I*, the D.C. Circuit Court of Appeals vacated the analysis referenced by the Davis-Besse DEIS 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. 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, Section IV.A.

**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 Davis-Besse DEIS as a basis for re-licensing Davis-Besse, and therefore reject or revoke a license renewal permit for Davis-Besse. 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 Davis-Besse license renewal 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).”<sup>4</sup> 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 Davis-Besse license renewal decision is also reversed, because the Davis-Besse DEIS relies on the Continued Spent Fuel Storage Rule and GEIS.

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

Undersigned representative Terry Lodge certifies that on April 20, 2015, he contacted counsel for the applicant 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.

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<sup>4</sup> See note 3 above for the requirements of 10 C.F.R. § 2.309(c).

Respectfully submitted,

*Signed (electronically) by:*

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April 22, 2015

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**  
**Before the Atomic Safety and Licensing Board**

In the Matter of:	)	Docket No. 50-346-L
FirstEnergy Nuclear Operating Company	)	April 22, 2015
Davis-Besse Nuclear Power Station, Unit 1	)	
	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing BEYOND NUCLEAR’S MOTION TO REOPEN THE RECORD OF LICENSE RENEWAL PROCEEDING FOR DAVIS-BESSE NUCLEAR POWER PLANT ” was deposited in the NRC’s Electronic Information Exchange this 22<sup>nd</sup> day of April, 2015 and was served upon all parties of record.

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

/s/ Terry J. Lodge

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