

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 HEARING REQUEST  
AND PETITION TO INTERVENE IN LICENSE RENEWAL  
PROCEEDING FOR DAVIS-BESSE NUCLEAR POWER PLANT**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2), Beyond Nuclear requests a hearing and seeks leave to intervene in the Nuclear Regulatory Commission’s (“NRC’s”) license renewal proceeding for the Davis-Besse nuclear power plant. This Hearing Request/Petition to Intervene is supported by the attached Beyond Nuclear’s Motion to Reopen the Record of License Renewal Proceeding for Davis-Besse Nuclear Power Plant (April 22, 2015).

Beyond Nuclear seeks admission of a single “place-holder” contention challenging the NRC’s reliance, in proposing to re-license Davis-Besse, 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>

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Beyond Nuclear notes that similar place-holder contentions have been filed in other NRC licensing cases, including license renewal proceeding for Callaway Unit 1 and the Fermi Unit 3 COL proceeding. *See* Missouri Coalition for the Environment’s Hearing Request and Petition to

While Beyond Nuclear seeks admission of its contention, it does not seek to litigate the substantive content 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 et al. v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).<sup>2</sup>

The sole purpose of this contention is to lodge a formal challenge to the NRC's complete and unqualified reliance, in the separate license renewal proceeding for Davis-Besse, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS. Beyond Nuclear submits its contention with the reasonable expectation that it will be denied, because the subject matter of the contention is generic. Beyond Nuclear respectfully submits that nevertheless, the filing of a contention is the only procedural means offered by Commission regulations for ensuring 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

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Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Dec. 8, 2014); Beyond Nuclear's Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant (Feb. 12, 2015).

*Beyond Nuclear v. NRC* was consolidated with four other cases and is now captioned *New York et al. v. NRC*, Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (filed October 31, 2014) ("*New York II*").

and GEIS. Upon denial of Beyond Nuclear's contention, Beyond Nuclear intends to immediately appeal the decision to the U.S. Court of Appeals and request that the case be held in abeyance pending the Court's decision in *New York II*.<sup>3</sup>

## II. DEMONSTRATION OF STANDING

Headquartered in Takoma Park, Maryland, Beyond Nuclear is a national watchdog organization on the nuclear power and radioactive waste industries, as well as on the federal government agencies that are supposed to protect the public and the environment from the risks of radiation and radioactive waste to human health and ecosystems. Beyond Nuclear aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abandon both to safeguard our future, including on the risks associated with the inevitable generation of radioactive waste by the nuclear industry. Beyond Nuclear advocates for an energy future that is sustainable, benign, and democratic.

Beyond Nuclear seeks admission of its contention in order to protect its members' interest in a clean and healthy environment, including protection from the health and environmental hazards posed by generation of spent fuel at the proposed Davis-Besse nuclear reactors. The organization has standing to intervene through members who live, work, and/or own property within 50 miles of the proposed Davis-Besse, and their interests may be affected by the results of the proceeding. *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). Their health, safety, property value, and means of livelihood could be adversely affected if the NRC permits Davis-Besse to operate in a manner that is unsafe or harmful to the environment. Beyond Nuclear has attached declarations from members \_\_\_\_, who have authorized Beyond Nuclear to bring this legal action on their behalves.

## III. FACTUAL AND PROCEDURAL BACKGROUND

For several decades, the NRC relied on its "Waste Confidence" decision and Temporary Storage Rule to address, in reactor licensing and re-licensing proceedings, safety and environmental issues associated with spent fuel storage and disposal. In 2010, the NRC published updates to the Waste Confidence decision (the "Waste Confidence Update") and Temporary Storage Rule, which were challenged by several state governments, an Indian tribe, and environmental organizations. Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) and Temporary Storage Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) ("*New York I*"), the U.S. Court of Appeals vacated the Waste Confidence Update and Temporary Storage Rule, and remanded them to the NRC for further proceedings. Shortly thereafter, in response to petitions by Beyond Nuclear and other parties, the NRC suspended licensing and re-licensing decisions for all reactors, pending completion of the environmental studies ordered by the U.S. Court of Appeals. *Calvert Cliffs 3 Nuclear Power Project, LLC et al.*, CLI-12-16, 76 NRC 63 (2012) ("*CLI-12-16*").

On September 13, 2013, in response to the Court's remand in *New York I*, the NRC published a proposed rule entitled Waste Confidence – Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013) ("Proposed Waste Confidence Rule"). The NRC also published a Draft Waste Confidence GEIS (NUREG-2157, noticed at 78 Fed. Reg. 56,621 (Sept. 13, 2013)).

On December 20, 2013, Beyond Nuclear joined thirty-two other environmental organizations in submitting Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate

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In this context, Beyond Nuclear notes that its contention is not accompanied by a petition for a waiver of 10 C.F.R. §§ 51.71(d), 51.95(c)(2), or any of the other regulations on which the Commission relies to bar members of the public from litigating generic NEPA issues in individual licensing proceedings. No purpose would be served by such a waiver, because Beyond Nuclear does not seek an adjudicatory hearing on the NRC's generic environmental findings. Instead, Beyond Nuclear's only purpose in raising its contention is to ensure that any decision by the U.S. Court of Appeals regarding the validity of the Continued Spent Fuel Storage Rule and GEIS will also be applied to this proceeding, in which the NRC relies on them.

All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal (ADAMS Accession No. ML14030A152, corrected on Jan. 7, 2014 in ML14024A297) (“Beyond Nuclear et al. Comments”). The Beyond Nuclear et al. Comments were supported by expert declarations by Dr. Arjun Makhijani, David Lochbaum, Dr. Gordon Thompson, and Mark Cooper (ADAMS Accession No. ML14030A152). The comments and supporting declarations made detailed and comprehensive criticisms of the Proposed Waste Confidence Rule and Draft Waste Confidence GEIS, charging that they were inadequate to satisfy NEPA or the Atomic Energy Act on both legal and technical grounds. Other organizations, as well as state and local governments, also filed comments critical of the Proposed Rule and Draft GEIS.

In February 2014, the NRC issued a draft version of Supplement 52 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Davis-Besse Nuclear Power Station (NUREG-1437) (“Davis-Besse DEIS”). The Davis-Besse DEIS stated that the Commission had directed the NRC Staff to revise the Waste Confidence Rule and to prepare a generic environmental impact statement (“EIS”) regarding the impacts of continued storage of spent fuel. *Id.* at 6-2. The DEIS also stated that “[t]he revised rule and supporting EIS are expected to provide the necessary NEPA analyses of waste confidence-related human health and environmental issues.” *Id.* at 6-3.

In September 2014, despite significant criticisms of the proposed Continued Spent Fuel Storage Rule and Draft Continued Spent Fuel Storage GEIS, the NRC published the Final Continued Spent Fuel Storage Rule and Final Continued Spent Fuel Storage GEIS, without changing its environmental analysis in any significant respect. The Final Continued Spent Fuel Storage Rule also omitted “Waste Confidence” safety findings required by the Atomic Energy Act. Upon issuance of the Rule and GEIS, the Commission lifted the suspension of licensing and re-licensing for Davis-Besse and other reactors. *Calvert Cliffs 3 Nuclear Power Project, LLC et al.*, CLI-12-08, 80 NRC 71 (2014).

Beyond Nuclear also joined seven other environmental organizations in seeking judicial review of the Rule and GEIS by the U.S. Court of Appeals for the District of Columbia Circuit under NEPA, the Atomic Energy Act, and the Administrative Procedure Act, *inter alia*. *Beyond Nuclear et al. v. NRC*, No. 14-1216 (filed Oct. 29, 2014). The case was consolidated with similar appeals by the States of New York, Connecticut, Massachusetts, and Vermont; the Prairie Island Indian Community; and Natural Resources Defense Council. *See New York et al. v. NRC*, Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) (filed October 31, 2014) (“*New York II*”). The parties are now awaiting a briefing schedule.

#### IV. CONTENTION

##### A. Statement of Contention

In the DEIS, the NRC proposes to rely on the generic conclusions of the Continued Spent Fuel Storage Rule and GEIS for its analysis of the environmental impacts of spent fuel storage. This reliance is also codified in 10 C.F.R. § 51.23(b), which provides that the Continued Spent Fuel Storage GEIS is incorporated by reference into the Davis-Besse DEIS.<sup>4</sup> For all of the reasons stated in Beyond Nuclear et al.’s Comments on the Draft Waste Confidence GEIS, however, the Continued Spent Fuel Storage Rule and GEIS fail to provide the NRC with a lawful basis under NEPA for licensing Davis-Besse. As discussed in Beyond Nuclear et al.’s comments on the Rule and GEIS, they suffer from the following failures:

- In blatant violation of NEPA and the Court’s decision in *New York I*, the Continued Spent Fuel Storage GEIS fails to examine the probability and consequences of failure to site a repository. Instead of examining the risk of failing to site a repository, the GEIS rationalizes the risk away, by arbitrarily assuming that spent fuel will be protected by “institutional controls” for an infinite period of time at reactor sites. This assumption is not only absurd and inconsistent with the Nuclear Waste Policy Act (“NWPA”), but it also defeats the Court’s purpose of forcing NRC to reckon with the environmental consequences of its failure to site a repository.
- The GEIS fails to acknowledge that the Continued Spent Fuel Storage Rule is a licensing action, and therefore it distorts the statement of purpose and need for the rule as relating to administrative rather than environmental concerns. As a result, the GEIS also mischaracterizes the alternatives that must be considered. Instead of evaluating alternatives related to storage and disposal of spent fuel, the GEIS examines alternatives related to the administrative question of how to prepare an EIS. The result is a farcical cost-benefit analysis that utterly fails to address alternatives for avoiding or

<sup>4</sup> 10 C.F.R. § 51.23(b) states that the Continued Spent Fuel Storage GEIS is deemed incorporated into EISs prepared under 10 C.F.R. § 51.95 (which governs preparation of draft and final supplemental EISs for reactor license renewal)

mitigating the environmental impacts of storing spent fuel or siting a repository.

- The GEIS' analysis of the environmental impacts of extended spent fuel storage ignores the fact that NRC knows very little about the behavior of spent fuel in long-term or indefinite storage conditions, especially the potentially significant effects of long-term dry cask storage on high burnup fuel integrity. In violation of NEPA, the NRC makes no attempt to quantify these uncertainties.
- The GEIS fails to fully consider the environmental impacts of spent fuel pool leaks and fires. In violation of NEPA, the GEIS relies upon incomplete data, adopts a flawed concept of risk and ignores a range of causes for accidents.
- In violation of NEPA, the GEIS makes no attempt to show how the environmental impacts associated with the Continued Spent Fuel Storage Rule will be quantified and incorporated into cost-benefit analyses for nuclear reactors. Although spent fuel disposal and long-term storage costs are high enough to tip the balance of a cost-benefit analysis for reactor licensing away from licensing, nowhere does the NRC explain how it will take these costs into account in reactor licensing decisions.
- In violation of NEPA, the GEIS fails to support the limited conclusions in the Continued Spent Fuel Storage Rule and GEIS regarding the technical feasibility of spent fuel disposal.
- The NRC has splintered the analysis of environmental impacts associated with storage and disposal of spent fuel into an array of safety findings and environmental analyses. While the issues covered by these separate findings and analyses overlap and involve cumulative impacts, the NRC refuses to integrate them. The NRC also refuses to correct inconsistencies between them.

**B. Statement of Basis for the Contention**

The basis for Beyond Nuclear's contention is provided in the Beyond Nuclear et al. Comments and attachments (including the declarations of Dr. Arjun Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

**C. Demonstration that the Contention is Within the Scope of the Proceeding**

The contention is within the scope of the proceeding because it challenges the adequacy of the NRC's NEPA review for the proposed re-licensing of Davis-Besse.

**D. Demonstration that the Contention is Material to the Findings the NRC Must Make to License This Reactor**

The contention is material to the findings that the NRC must make in order to re-license Davis-Besse because it asserts that the environmental findings in the Continued Spent Fuel Storage Rule and the Continued Spent Fuel Storage GEIS are not supported and are legally deficient.

**E. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along with Appropriate Citations to Supporting Scientific or Factual Materials**

The statements of fact or expert opinion supporting the contention are set forth in the Beyond Nuclear et al. Comments and attachments (including the declarations of Dr. Arjun Makhijani, Dr. Gordon Thompson, David Lochbaum, and Mark Cooper).

**F. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact**

This contention raises a genuine dispute with both the applicant and the NRC regarding whether the NRC has satisfied NEPA for the purpose of renewing the operating license for Davis-Besse.

**V. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. §§ 2.309(c) and 2.309(f)(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.

This Hearing Request/Petition to Intervene is timely because it does not depend at all on past information. Instead, it is a "place-holder" that depends 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 renewed license 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 this proceeding.

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

Undersigned attorney Terry J. Lodge certifies that on April 20, 2015, he contacted counsel for FirstEnergy and the NRC Staff in an attempt to obtain their consent to this Hearing Request/Petition to Intervene. Counsel for both parties stated that they would oppose it.

**VII. CONCLUSION**

For the reasons stated, Beyond Nuclear respectfully requests that its contention be admitted.

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 HEARING REQUEST AND PETITION TO INTERVENE IN 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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