

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of:

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

CLI-15-12

MEMORANDUM AND ORDER

Beyond Nuclear moves to reopen the record of this proceeding and seeks a hearing on its claim that the final environmental impact statement prepared in connection with this combined license application violates the National Environmental Policy Act by failing to consider the environmental impacts associated with the continued storage of spent nuclear fuel.¹ For the reasons discussed below and explained in the related decision also issued today in the *Callaway* license renewal matter, Beyond Nuclear's request is denied.²

¹ See *Beyond Nuclear's Hearing Request and Petition to Intervene in Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015) (Petition); *Beyond Nuclear's Motion to Reopen the Record of Combined License Proceeding for Fermi Unit 3 Nuclear Power Plant* (Feb. 12, 2015) (Motion).

² See *Union Electric Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11 (Apr. 23, 2015) (slip op.).

During this combined license proceeding, the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded our 2010 Waste Confidence Decision and Temporary Storage Rule.³ For various licensing actions, including this one, the Decision and Rule served as part of the environmental analysis of the impacts of spent fuel storage after the end of a reactor's license term, pending ultimate disposal of spent fuel in a repository. In response to the court's decision, Beyond Nuclear, together with other petitioners, sought to suspend final licensing decisions in this and other proceedings pending completion of our action on the remanded Waste Confidence proceeding.⁴ We suspended final licensing decisions until we addressed the court's remand and instructed the boards in the affected proceedings to hold the contentions in abeyance pending our further order.⁵

Last year, concurrent with our approval of the final Continued Storage Rule and companion Generic Environmental Impact Statement (GEIS), we lifted the suspension on final licensing decisions and directed that the proposed contention in this matter (among others) be dismissed.⁶ We observed that, "[a]s part of the analysis underpinning the GEIS . . . we

³ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

⁴ *Petition to Suspend Final Licensing Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings* (June 18, 2012). Beyond Nuclear (together with several other intervenors) filed a new contention asserting that the draft environmental impact statement failed to address the environmental impacts associated with spent fuel pool leaks and fires, and the lack of a permanent spent fuel storage facility. *Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant* (July 9, 2012).

⁵ *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012). At that time, we observed, "[t]o the extent the NRC takes action with respect to waste confidence on a case-by-case basis, litigants can challenge such site-specific agency actions in our adjudicatory process." *Id.* at 67 (but citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 ("[L]icensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.")).

⁶ *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 77-79 (2014). The Board dismissed (continued . . .)

concluded that the impacts of continued storage will not vary significantly across sites; the impacts of continued storage at reactor sites, or at away-from-reactor sites, can be analyzed generically.”⁷ These generic determinations, therefore, were appropriately excluded from litigation in individual proceedings.⁸

Beyond Nuclear has now filed a fresh intervention petition in which it argues that the environmental analysis for the Fermi combined license is inherently flawed because it relies on the NRC’s generic analysis in the Continued Storage GEIS of the environmental impacts of the continued storage of spent fuel, yet did not supplement the final environmental impact statement to reflect these impacts.⁹ Beyond Nuclear seeks to reopen the record in this proceeding to file a “placeholder” contention in anticipation that the court of appeals will overturn our recently promulgated Continued Storage Rule.¹⁰ The NRC Staff and the applicant, DTE Electric Company, oppose the petition to intervene and motion to reopen.¹¹

the continued storage contention consistent with our direction. Order (Denying Motion to Admit Waste Confidence Contention) (Oct. 6, 2014), at 3 (unpublished).

⁷ *Calvert Cliffs*, CLI-14-8, 80 NRC at 78-79. We stated additionally that “the assumptions used in the analysis are sufficiently conservative to bound the impacts such that variances that may occur between sites are unlikely to result in environmental impact determinations greater than those presented in the GEIS.” *Id.* at 79 (citation omitted).

⁸ *Id.* at 79.

⁹ See “NUREG-2105, Final Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, Vols. 1-4 (Jan. 2013) (ADAMS accession nos. ML12307A172, ML12307A176, ML12307A177, ML12347A202). Petition at 1, 7, 9 n.5; NUREG-2157, Vols. 1 & 2, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS accession nos. ML14196A105 and ML14196A107).

¹⁰ *Beyond Nuclear v. NRC*, Docket No. 14-1216 (D.C. Cir. filed Oct. 29, 2014); see Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014).

¹¹ *NRC Staff Answer to Beyond Nuclear’s Motion to Reopen the Record and Petition to Intervene* (Feb. 27, 2015); *Applicant’s Response Opposing Beyond Nuclear’s Motion to Reopen and Request for Hearing* (Feb. 27, 2015)

Beyond Nuclear seeks to lodge with us a “placeholder” contention; it does not seek to litigate the substance of the contention now and candidly acknowledges that our rules of practice do not allow litigants to challenge our regulations within the context of individual license proceedings, absent a request for a waiver.¹² Rather, Beyond Nuclear states that it filed the petition to ensure that the decision resulting from its federal court challenge to the Continued Storage Rule and GEIS will be applied to this combined license proceeding.¹³ With respect to the bases of its contention and its rationale for moving to reopen this proceeding, Beyond Nuclear’s pleadings are substantively identical to those filed in the *Callaway* license renewal proceeding, which we also rule on today.¹⁴ Particularly, the contention challenges the generic findings in the GEIS; Beyond Nuclear does not, in its new contention, specifically challenge the *Fermi* combined license application or the final environmental impact statement.¹⁵

As we explained in the *Callaway* decision, a contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver.¹⁶ Further, because the contention does not engage the *Fermi* combined license application, Beyond Nuclear has not demonstrated a genuine dispute with the applicant on a material issue.¹⁷

¹² Petition at 1-2. Beyond Nuclear does not seek a rule waiver. *Id.* at 2 n.2.

¹³ *Id.* at 2.

¹⁴ Compare *Missouri [Coalition] for the Environment’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant* (Dec. 8, 2014) (ML14342B010), and *Missouri [Coalition] for the Environment’s Motion to Reopen the Record of License Renewal Proceeding for Callaway Unit 1 Nuclear Power Plant* (Dec. 8, 2014) (ML14342B011), with Petition, and Motion.

¹⁵ Petition at 8-9.

¹⁶ *Callaway*, CLI-15-11, 81 NRC at __ (slip op. at 3-5).

¹⁷ *Id.* at __ (slip op. at 4). Moreover, the lack of an admissible contention necessarily precludes reopening the proceeding. *Id.* at __ (slip op. at 4 n.17).

For the reasons explained in *Callaway* and as discussed above, we *deny* Beyond Nuclear's motion to reopen the record of this proceeding and admit a new contention.

IT IS SO ORDERED.

For the Commission

NRC Seal

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April, 2015

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-12)** have been served upon the following persons by Electronic Information Exchange.

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Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL
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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland,
this 23rd day of April, 2015