

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	Docket No. 50-346-LR
)	
(Davis-Besse Nuclear Power Station, Unit 1))	May 18, 2015
)	

**FIRSTENERGY NUCLEAR OPERATING COMPANY RESPONSE OPPOSING
MOTION TO AMEND “PLACEHOLDER” CONTENTION REGARDING CONTINUED
STORAGE RULE**

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I. INTRODUCTION

On April 22, 2015, Beyond Nuclear submitted a motion to reopen the record¹ and a petition to intervene (“Petition”)² with a proposed “placeholder” contention challenging re-licensing of Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”). The proposed contention challenges the Nuclear Regulatory Commission’s (“NRC’s”) reliance on the Continued Storage Rule³ and associated Generic Environmental Impact Statement (“GEIS”)⁴ in the Draft Supplemental Environmental Impact Statement (“DSEIS”) for Davis-Besse license renewal.⁵ The NRC Staff and FirstEnergy Nuclear Operating Company (“FENOC”) filed

¹ See Beyond Nuclear’s Motion to Reopen the Record of License Renewal Proceeding for Davis-Besse Nuclear Power Plant (Apr. 22, 2015).

² See Beyond Nuclear’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Davis-Besse Nuclear Power Plant (Apr. 22, 2015) (“Petition”).

³ See Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Continued Storage Rule”).

⁴ NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Final Report (Sept. 2014) (“GEIS”).

⁵ Petition at 4.

answers on May 1 and May 4, 2015, respectively, opposing both the motion to reopen and the Petition.⁶

Beyond Nuclear has now filed a motion to amend the proposed placeholder contention (“Motion to Amend”).⁷ Beyond Nuclear explains that the “sole purpose” of the request is to reference the Final Supplemental Environmental Impact Statement (“FSEIS”) for Davis-Besse license renewal, which the NRC recently issued, in the amended placeholder contention.⁸ Indeed, Beyond Nuclear simply changed “DEIS” to “Final SEIS” in one portion of the Statement of the Contention, and added a reference to the discussion of the Continued Storage Rule in the FSEIS.⁹

In accordance with 10 C.F.R. § 2.309(i), FENOC files this Answer opposing the Motion to Amend. As discussed below, the Motion to Amend should be rejected as untimely under 10 C.F.R. § 2.309(c). Beyond Nuclear has not identified any new or materially different information in the FSEIS that was not in the DSEIS, the Continued Storage Rule, or the GEIS. Thus, the Motion to Amend does not satisfy the standards governing new or amended contentions in Section 2.309(c).

Additionally, the Motion to Amend also must be rejected because Beyond Nuclear still has not satisfied the standards in 10 C.F.R. § 2.326 for reopening the closed record of this

⁶ NRC Staff Answer to Beyond Nuclear’s Hearing Request and Petition to Intervene and Motion to Reopen the Record in the License Renewal Proceeding for Davis-Besse Nuclear Power Plant (May 1, 2015); FirstEnergy Nuclear Operating Company Response Opposing Motion to Reopen and “Placeholder” Contention Regarding Continued Storage Rule (May 4, 2015) (“FENOC Answer to Petition”). The FENOC Answer to Petition provides background information (at 3-6) and legal standards (at 6-8) that are relevant to the Motion to Amend; that information is not repeated here.

⁷ Beyond Nuclear’s Motion to Amend NEPA Placeholder Contention in License Renewal Proceeding for Davis-Besse Nuclear Power Plant (May 8, 2015) (“Motion to Amend”).

⁸ *Id.* at 1.

⁹ Compare Petition at 4-5 *With* Motion to Amend at 2-3.

proceeding. The Motion to Amend does not cure the many deficiencies in the earlier motion to reopen that Beyond Nuclear filed with the original placeholder contention.

Finally, even if the Motion to Amend is considered procedurally acceptable, it does not cure the multiple defects that abound in the original placeholder contention and make it inadmissible under 10 C.F.R. § 2.309. As discussed in FENOC's May 4, 2015 Answer to the Petition, the original placeholder contention is inadmissible because it impermissibly challenges the Continued Storage Rule and GEIS, and fails to demonstrate a genuine dispute on a material issue of law or fact with either the License Renewal Application or the DSEIS.¹⁰ Moreover, the Commission recently rejected substantively identical motions and petitions in *Callaway* (CLI-15-11) and *Fermi* (CLI-15-12).¹¹ The amended placeholder contention's reference to the FSEIS does not cure any of the fatal flaws in its predecessor. Therefore, the Motion to Amend should be rejected in its entirety for being procedurally and substantively defective.

II. DISCUSSION

A. The Motion to Amend Is Untimely

A motion to amend a contention filed after the original deadline¹² must satisfy the requirements of 10 C.F.R. § 2.309(c)(1)(i)-(iii).¹³ Section 2.309(c)(1) states:

Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

¹⁰ See FENOC Answer to Petition at 15-20.

¹¹ See *Union Elec. Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC ___, slip op. (Apr. 23, 2015); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC ___, slip op. (Apr. 23, 2015).

¹² The original deadline for timely petitions to intervene in this proceeding expired on December 27, 2010, well over four years ago. See Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License No. NPF-003 for an Additional 20-Year Period; Firstenergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, Unit 1, 75 Fed. Reg. 65,528 (Oct. 25, 2010).

¹³ See also 10 C.F.R. § 2.309(f)(2) (allowing new and amended contentions based on a final EIS if the contention complies with 10 C.F.R. § 2.309(c)).

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

The Motion to Amend briefly addresses,¹⁴ but does not satisfy, these requirements. As explained above, Beyond Nuclear does not discuss nor rely upon any new information in the FSEIS. Instead, it simply replaces the reference to the DSEIS with a reference to the FSEIS.¹⁵ The NRC's reliance upon a generic determination regarding continued storage of spent nuclear fuel for Davis-Besse license renewal is not new information, because the NRC took the same position in the DSEIS, as acknowledged by Beyond Nuclear.¹⁶ Therefore, this information is neither new nor materially different from information previously available.

Moreover, the Continued Storage Rule itself (published in September 2014) states at 10 C.F.R. § 51.23(a) that “[t]he Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in [the GEIS]” and at Section 51.23(b) that the impact determinations in the GEIS “shall be deemed incorporated” into EISs for individual projects. Thus, the regulations already specify that EISs rely upon the Continued Storage Rule and GEIS. The Motion to Amend does not identify any new information in the FSEIS to the contrary.

¹⁴ Motion to Amend at 3-4.

¹⁵ *Id.* at 2-3.

¹⁶ See Petition at 4; see also NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 52, Regarding Davis-Besse Nuclear Power Station, Draft Report for Comment, at 6-2 to 6-3 (Feb. 2014) (“The revised rule and supporting EIS are expected to provide the necessary NEPA analyses of waste confidence-related human health and environmental issues.”), available at ADAMS Accession No. ML14050A290.

Beyond Nuclear argues that the Motion to Amend is timely because it is filed within 10 days of the public availability of the FSEIS.¹⁷ In its view, the FSEIS is the “NRC’s official decision-making document,” and it “explicitly references and discusses the Continued Spent Fuel Storage Rule and GEIS.”¹⁸ As discussed above, however, the Motion to Amend does not identify any information in the FSEIS that is new and materially different from information that was available earlier in the DSEIS, Continued Storage Rule, or GEIS. The Commission has explained that it is the availability of the information that determines when a contention is timely, not the publication of a new document.¹⁹

For these reasons, the Motion to Amend is untimely under 10 C.F.R. § 2.309(c) and should be summarily rejected.

B. Beyond Nuclear Still Has Not Satisfied the High Standards for Reopening the Closed Record of this Proceeding

The record of this proceeding is closed.²⁰ Beyond Nuclear submitted a motion to reopen pursuant to 10 C.F.R. § 2.326 with the original placeholder contention on April 22, 2015. FENOC explained in its earlier response to that motion to reopen that the motion does not satisfy any of the Section 2.326 standards.²¹ That earlier motion to reopen remains pending before the

¹⁷ Motion to Amend at 4.

¹⁸ *Id.*

¹⁹ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 496 (2010); *see also Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 224-25 (2011) (concluding that the contention was not timely because information was already available to be “pieced” together).

²⁰ *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-15-9, 81 NRC ___, slip op. at 3 (Mar. 10, 2015).

²¹ *See* FENOC Answer to Petition at 10-15. The reopening standards are “high” and “stringent.” *See* Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538-539 (May 30, 1986) (“The purpose of this rule is not to foreclose the raising of important safety issues, but to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise, it is doubtful whether a proceeding could ever be completed.”); *see also Va. Elec. & Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 (2012) (“The courts of appeals have repeatedly approved our practice of . . . holding new contentions to the higher ‘reopening’ standard.”); *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station),

Commission. Beyond Nuclear’s filing of the Motion to Amend has not cured any of those deficiencies, and otherwise does not provide any basis to satisfy the reopening standards.²²

The three criteria for a motion to reopen are set forth in 10 C.F.R. § 2.326(a):

- (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.

Beyond Nuclear has yet to satisfy any of these criteria. First, the filings related to the placeholder contention are not timely. As discussed above in Section II.A, the Motion to Amend is untimely because Beyond Nuclear has not identified any new and materially different information in the FSEIS. Second, Beyond Nuclear still has not raised a significant safety or environmental issue. Indeed, Beyond Nuclear had earlier conceded that it does not seek to litigate these Continued Storage Rule issues and that it already had raised its concerns in other contexts.²³ Reference to the FSEIS in the Motion to Amend does not cure that failure. Third, the placeholder contention would not lead to a materially different result, because Beyond Nuclear is re-raising the same issues that have already been rejected by the Commission as part of the

CLI-11-2, 73 NRC 333, 337-38 (2011) (characterizing the Section 2.326 requirements as a “deliberately heavy” burden to ensure finality).

²² See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 25 (2008), *affirmed*, CLI-08-28, 68 NRC 658 (2008) (concluding that “because the new basis proffered by [intervenors] alters the issue presented for this Board’s consideration, [intervenors’ motion to supplement the basis of their pending contention]—if it is to be granted—must satisfy the requirements in 10 C.F.R. § 2.326 for reopening the record”).

²³ Petition at 1-2. Also, because the placeholder contention is not admissible, it does not raise a significant issue. See *Callaway*, CLI-15-11, slip op. at 4 n.17 (“Because [the petitioner] has not submitted an admissible contention, it necessarily has not satisfied our reopening standards because it has not raised a significant environmental issue . . .”). The amended placeholder contention remains inadmissible, as discussed in Section II.C below.

rulemaking for the Continued Storage Rule, and therefore these same arguments do not create a materially different result now. Beyond Nuclear’s reference to the FSEIS does not change this outcome.²⁴

Finally, beyond the three criteria in Section 2.326(a), Section 2.326(b) further requires that a motion to reopen be accompanied by affidavits that support *each* of the bases satisfying the criteria in Section 2.326(a). Beyond Nuclear failed to provide any such affidavits with the original placeholder contention, and provided no affidavits as part of the Motion to Amend. Therefore, it continues to fail to satisfy this important requirement.

For these additional reasons, the Motion to Amend should be rejected pursuant to 10 C.F.R. § 2.326, because Beyond Nuclear still has not satisfied the reopening criteria.

C. The Amended Contention Is Inadmissible

Even if the Motion to Amend were considered to be procedurally acceptable—which it is not—it still should be rejected because it does not proffer an admissible contention. The original placeholder contention is deficient for multiple, independent reasons. As explained below, the amended placeholder contention does not cure any of those deficiencies. Therefore, it too should be rejected for the same reasons.

1. The Amended Contention Impermissibly Challenges the Continued Storage Rule and GEIS

As FENOC explained in its answer to the Petition, the original placeholder contention directly challenges the Continued Storage Rule and GEIS.²⁵ Specifically, the proposed contention challenges reliance on the “generic conclusions of the Continued Spent Fuel Storage

²⁴ See also *Callaway*, CLI-15-11, slip op. at 4 n.17 (“Because [the petitioner] has not submitted an admissible contention, it necessarily has not satisfied our reopening standards because it . . . has not demonstrated that a materially different result would be likely if the contention had been considered initially.”).

²⁵ FENOC Answer to Petition at 15-18.

Rule and GEIS” in the Davis-Besse license renewal proceeding.²⁶ That is directly contrary to 10 C.F.R. § 51.23, which makes generic determinations regarding environmental impacts in the GEIS and deems those impact determinations to be incorporated into EISs. As provided in 10 C.F.R. § 2.335(a), a proposed contention that challenges an NRC rule without a waiver is outside the scope of this proceeding because “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.” Beyond Nuclear did not request a waiver, much less satisfy the stringent requirements governing such a waiver request set forth in 10 C.F.R. § 2.335.

The amended contention continues to challenge the Continued Storage Rule. Indeed, the contention continues to challenge reliance on the “generic conclusions of the Continued Spent Fuel Storage Rule and GEIS.”²⁷ With respect to the GEIS, the Commission has stated that “[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings.”²⁸ Beyond Nuclear’s reference to the FSEIS does not alter the placeholder contention’s impermissible challenge to the Continued Storage Rule and GEIS. And Beyond Nuclear still has not requested a waiver. Therefore, the amended contention should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).²⁹

²⁶ Petition at 4.

²⁷ Motion to Amend at 2.

²⁸ *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC ___, slip op. at 9 (Aug. 26, 2014); *see also id.* at 9 n.27 (stating that “[c]ontentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings”).

²⁹ This conclusion is consistent with the Commission’s holding in *Callaway* in which it rejected a similar contention, concluding that “the proposed contention is not admissible under our rules of practice because it impermissibly challenges an agency regulation and is therefore outside the scope of this individual licensing proceeding.” *Callaway*, CLI-15-11, slip op. at 4; *see also Fermi*, CLI-15-12, slip op. at 4 (“[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.”).

2. The Amended Contention Does Not Demonstrate a Genuine Dispute

FENOC also explained that the original placeholder contention does not demonstrate a genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).³⁰ Section 2.309(f)(1)(vi) requires that a proposed contention “include references to specific portions of the application (including applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute.” Because the original proposed contention fails to challenge any portion of the License Renewal Application (including the Environmental Report) or the DSEIS, it has not demonstrated a genuine dispute with the applicant.

The amended contention does not cure that deficiency. Beyond Nuclear does not identify any information in the License Renewal Application or the FSEIS that it challenges. Instead, it challenges the reliance on the Continued Storage Rule and GEIS in the Davis-Besse FSEIS.³¹ In this regard, Beyond Nuclear continues to identify the same seven bases for the amended contention, all of which challenge generic issues related to the GEIS.³² Therefore, as the Commission ruled on similar contentions in *Fermi* and *Callaway*, the amended contention should be denied because it simply does not demonstrate a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).³³

III. CONCLUSION

As demonstrated above, the Motion to Amend is untimely under 10 C.F.R. § 2.309(c); Beyond Nuclear still has not satisfied the motion to reopen standards in 10 C.F.R. § 2.326; and

³⁰ FENOC Answer to Petition at 18-19.

³¹ See Motion to Amend at 2-3.

³² Compare *id.* With Petition at 4-5.

³³ See *Callaway*, CLI-15-11, slip op. at 4; see also *Fermi*, CLI-15-12, slip op. at 4 (stating that “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”).

the Motion to Amend fails to include an admissible contention, as required by 10 C.F.R. § 2.309(f). Therefore, the Motion to Amend must be rejected.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of “FirstEnergy Nuclear Operating Company Response Opposing Motion to Amend ‘Placeholder’ Contention Regarding Continued Storage Rule” was submitted through the NRC’s E-filing system.

Signed (electronically) by Stephen J. Burdick
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