

December 4, 2015

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

In the Matter of)
)
DTE ELECTRIC CO.) Docket No. 50-341-LR
(Fermi Nuclear Power Plant, Unit 2))
)

**BEYOND NUCLEAR’S MOTION TO REOPEN THE RECORD
OF LICENSE RENEWAL PROCEEDING FOR
FERMI UNIT 2 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 56 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Fermi Nuclear Power Plant” (NUREG-1437, Supp. 56, Oct. 2015) (“Draft SEIS”).¹ This Motion supports the attached Beyond Nuclear’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Fermi Unit 2 (December 4, 2015) (“Petition to Intervene”). This motion to reopen the record is necessary because the hearing record is closed. Memorandum and Order LBP-15-25 (Sept. 11, 2015).

As discussed in Beyond Nuclear’s Petition to Intervene, Beyond Nuclear contends that under the National Environmental Policy Act (“NEPA”), the Draft SEIS does not provide the NRC with an adequate legal basis for renewal of the operating license for Fermi Unit 2 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

¹ Volume of the Draft SEIS is posted on ADAMS at ML15300A064.

Fuel Storage GEIS”).² 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. 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 of the Rule and GEIS to the U.S. Court of Appeals for the District of Columbia Circuit. *See Beyond Nuclear v. NRC*, Docket No. 14-1216 (filed Oct. 29, 2014).³ The sole purpose of Beyond Nuclear’s contention is to lodge a formal challenge to the NRC’s reliance, in the Draft SEIS for Fermi Unit 2, on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage GEIS for purposes of renewing the Fermi Unit 2 operating license.

This Motion to Reopen the Record and the attached Petition to Intervene are virtually identical to motions to admit new contentions that have been filed and denied in eleven other reactor licensing proceedings. *See e.g., Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), *et al.*, CLI-15-15, 81 NRC 803 (2015); *Union Electric Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC 546 (2015); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC 551 (2015). These decisions are now on appeal to the U.S. Court of Appeals for the District of Columbia Circuit, where they have been held in abeyance pending the court’s decision in *New York II*.⁴ Beyond Nuclear files this

² 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*”).

³ *Beyond Nuclear 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*”).

⁴ *See Missouri Coalition for the Environment v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1114 (filed Apr. 23, 2015); *Beyond Nuclear vs. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1173 (filed June 19, 2015); and *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1258 (filed

Motion and the attached Petition to Intervene with the expectation that they will be rejected, whereupon Beyond Nuclear intends to appeal the NRC's decision to the U.S. Court of Appeals.

II. ARGUMENT

Several overlapping factors, set forth in three regulations, govern motions to reopen and admit new contentions. *See* 10 C.F.R. §§ 2.309(c), 2.309(f), and 2.326. This motion and the accompanying contention satisfy each of these factors.

A. 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.

B. 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:

- (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

Aug. 6, 2015) (consolidated by Order dated August 7, 2015 with *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1259 (filed Aug. 6, 2015); *Blue Ridge Environmental Defense League v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1260 (filed Aug. 6, 2015); *Nuclear Information and Resource Service v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1261 (filed Aug. 6, 2015); *Sustainable Energy and Economic Development Coalition v. United States Nuclear Regulatory Commission and the United States of America*, No. 15-1262 (filed Aug. 6, 2015); and *Beyond Nuclear v. United States Nuclear Regulatory Commission and the United States of America*, D.C. Cir. No. 15-1263 (filed Aug. 6, 2015).

- (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.

- 1. This motion is timely.**

Pursuant to 10 C.F.R. § 2.326(a)(1), motions to re-open the record must be “timely.”

Petitioners must also satisfy the timeliness requirements in 10 C.F.R. §§ 2.309(c) and

2.309(f)(2).⁵ Timeliness is judged by:

whether the contention could have been raised earlier – that is, whether the information on which it is based was previously available or whether it is materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information’s availability.

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012).

This Motion and the attached contention are timely because they do not depend 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’ contention seeks the denial of license renewal for Fermi Unit 2 in the event that the Court of Appeals reverses the Continued Spent Fuel Storage Rule and/or GEIS.

- 2. This motion and the accompanying contention address a significant environmental issue.**

This Motion and the accompanying contention raise the significant environmental issue that the Draft SEIS for Fermi Unit 2 is not supported by an adequate analysis of the

⁵ 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.

environmental impacts of spent fuel storage and disposal. As discussed in Beyond Nuclear's contention – which incorporates Beyond Nuclear's comments on the proposed version of the Continued Spent Fuel Storage Rule and the draft version of the Continued Spent Fuel Storage GEIS -- the analysis referenced by the Draft SEIS for Fermi Unit 2 is seriously deficient to satisfy NEPA. *See* Petition to Intervene at 7-8. [DOUBLE-CHECK PAGE ##].

3. 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 Draft SEIS for Fermi Unit 2 as a basis for re-licensing the reactor, and therefore withdraw the renewed license for Fermi Unit 2. Thus, admission of this contention would likely produce a materially different result in this proceeding.

C. 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 the 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 license renewal decision for Fermi Unit 2, which relies on the Continued Spent Fuel Storage Rule and GEIS.

D. 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).”⁶ As discussed above in Section III.A, this Motion and Beyond Nuclear’ 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 license renewal application for Fermi Unit 2 is denied, because it relies on the Continued Spent Fuel Storage Rule and GEIS.

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

The undersigned counsel for Beyond Nuclear hereby certifies that on November 27, 2015, I 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 the motion.

IV. CONCLUSION

For the foregoing reasons, Beyond Nuclear’ Motion to Reopen the Record should be granted.

Respectfully submitted,
Signed (electronically) by:

/s/ Terry J. Lodge
Terry J. Lodge, Esq.
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627
(419) 255-7552
tjlodge50@yahoo.com
Counsel for Beyond Nuclear

⁶ See note 5 above for the requirements of 10 C.F.R. § 2.309(c).

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Secretary of the Commission**

In the Matter of) Docket No. 50-341
DTE Electric Company) December 4, 2015
(Fermi Nuclear Power Plant, Unit 2))
)

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “BEYOND NUCLEAR’S MOTION TO REOPEN THE RECORD OF LICENSE RENEWAL PROCEEDING FOR FERMI UNIT 2 NUCLEAR POWER PLANT” were served by me upon the parties to this proceeding via deposit into the NRC’s Electronic Information Exchange system this 4th day of December, 2015.

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors