

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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 FERMI UNIT 2 NUCLEAR POWER PLANT

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December 11, 2015

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
BACKGROUND	2
DISCUSSION.....	3
I. Legal Standards	3
A. Legal Standards for Admission of Contentions.....	3
B. Legal Standards for Reopening of the Record.....	6
II. The Petition Should Be Denied for Failing to Timely Proffer an Admissible Contention.....	7
A. The Proposed Contention Challenges a Rulemaking that Is Beyond the Scope of this Proceeding	8
B. The Proposed Contention Fails to Raise a Genuine Material Issue.....	10
C. The Proposed Contention Is Untimely.....	12
III. The Motion to Reopen Should Be Denied for Failing to Meet the Reopening Standards.....	13
A. Beyond Nuclear’s Motion Is Untimely and Does Not Raise an Exceptionally Grave Issue.....	13
B. Beyond Nuclear’s Motion Does Not Address a Significant Environmental Issue.....	14
C. Beyond Nuclear’s Motion Does Not Show that a Materially Different Result Would Be Likely	16
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>AmerGen Energy Co., LLC</i> (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235 (2009)	7
<i>Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC</i> (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012).....	11
<i>Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Services, LLC</i> (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC 71 (2014).....	9, 10
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001), <i>petition for reconsid'n denied</i> , CLI-02-01, 55 NRC 1 (2002) ..	4
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115 (2009)	6
<i>DTE Elec. Co.</i> (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC __ (Apr. 23, 2015) (slip op.)	11
<i>DTE Electric Co.</i> (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC __ (Apr. 23, 2015) (slip op.)	<i>passim</i>
<i>DTE Electric Co.</i> (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 81 NRC __ (Sept. 8, 2015) (slip op.).....	3
<i>Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13 (2007).....	9
<i>Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.</i> (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479 (2012)	16
<i>Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.</i> (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704 (2012)	11
<i>Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.</i> (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491 (2012)	14
<i>Exelon Generation Co., LLC</i> (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377 (2012), <i>remanding</i> , LBP-13-1, 77 NRC 57 (2013), <i>aff'g on other grounds</i> , CLI-13-7, 78 NRC 199 (2013).....	9,10

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4),
CLI-01-17, 54 NRC 3 (2001) 9

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2),
CLI-10-27, 72 NRC 481 (2010) 6

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),
CLI-05-12, 61 NRC 345 (2005) 7

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),
CLI-06-03, 63 NRC 19 (2006) 15

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),
CLI-99-10, 49 NRC 318 (1999) 4

Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4),
CLI-11-8, 74 NRC 214 (2011)6, 14

Union Elec. Co. (Callaway Nuclear Power Plant, Unit 1),
CLI-15-11, 81 NRC __ (Apr. 23, 2015) (slip op.) *passim*

Atomic Safety and Licensing Appeal Board:

Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3),
ALAB-216, 8 AEC 13 (1974) 4, 9

Atomic Safety and Licensing Board:

Arizona Pub. Serv. Co. (Palo Verde Nuclear Station, Units No. 1, 2, and 3),
LBP-91-19, 33 NRC 397 (1991), *appeal granted in part*, CLI-91-12, 34 NRC 149 (1991)..... 4, 9

Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power
Station), LBP-06-23, 64 NRC 257 (2006)..... 5

Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.
(Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC 529 (2010) 15

Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2),
LBP-12-8, 75 NRC 539 (2012), *rev'd in part*, CLI-12-19, 76 NRC 377 (2012)5, 11

DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2),
LBP-15-5, 81 NRC 249 (2015) 2

DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2),
LBP-15-25, 81 NRC __ (Sept. 11, 2015) (slip op.) 3

Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1),
LBP-11-28, 74 NRC 604 (2011) 5

REGULATIONS

10 C.F.R. § 2.309(a) 3
10 C.F.R. § 2.309(b) 3
10 C.F.R. § 2.309(c)..... 5
10 C.F.R. § 2.309(c)(1)7, 12
10 C.F.R. § 2.309(f)(1)..... 3, 4
10 C.F.R. § 2.309(f)(1)(iii) 4, 8
10 C.F.R. § 2.309(f)(1)(vi) 5
10 C.F.R. § 2.309(i) 1
10 C.F.R. § 2.326(a) 6
10 C.F.R. § 2.326(b)7, 10
10 C.F.R. § 2.335(a) 14
10 C.F.R. § 2.335(b) 4
10 C.F.R. § 2.335(c)..... 5
10 C.F.R. § 2.335(d) 4
10 C.F.R. § 2.335(e) 5
10 C.F.R. § 51.23(b) 11
10 C.F.R. § 51.92(a) 15

MISCELLANEOUS

Criteria for Reopening Records in Formal Licensing Proceedings,
51 Fed. Reg. 19,535 (May 30, 1986)..... 14

Notice of Acceptance for Docketing of Application, Notice of Opportunity for Hearing for Facility
Operating License No. NPF-43 for an Additional 20-year Period, DTE Elec. Co., Fermi Nuclear
Power Plant, Unit 2, 79 Fed. Reg. 34,787 (June 18, 2014)2, 12

Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014)..... 12

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INTRODUCTION

In accordance with 10 C.F.R. §§ 2.309(i) and 2.323(c), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) respectfully submits its combined answer to the Petition to Intervene¹ and Motion to Reopen the Record² filed by Beyond Nuclear on December 4, 2015 in the Fermi Nuclear Power Plant, Unit 2 (Fermi) license renewal (LR) proceeding.³ Beyond Nuclear asserts that the Fermi draft supplemental environmental impact statement (EIS) is inadequate because its evaluation of the environmental impacts of spent fuel storage and disposal relies on the NRC's Continued Storage Rule and Continued Storage generic environmental impact statement (GEIS).⁴ Beyond Nuclear does not seek to litigate the

¹ Beyond Nuclear's Hearing Request and Petition to Intervene in License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant (Dec. 4, 2015) (Petition).

² Beyond Nuclear's Motion to Reopen the Record of License Renewal Proceeding For Fermi Unit 2 Nuclear Power Plant (Dec. 4, 2015) (Motion to Reopen).

³ At times, Beyond Nuclear refers to the Fermi Unit 3 combined license proceeding, where the license has been issued, instead of the Fermi Unit 2 license renewal proceeding.

⁴ Petition at 1.

substance of its contention now and acknowledges that substantively similar contentions have been rejected by the Commission.⁵

As discussed below, Beyond Nuclear's Petition and Motion to Reopen should be denied for the same reasons substantively similar petitions and motions to reopen filed previously in multiple proceedings were denied in CLI-15-11 and CLI-15-12. In particular, the Commission should (1) deny Beyond Nuclear's Petition because it challenges a Commission rule without requesting a waiver and because it fails to raise a genuine issue of fact or law material to the Fermi LR proceeding and (2) deny Beyond Nuclear's Motion to Reopen because it does not address a significant environmental issue and because it does not demonstrate that a materially different result would be likely if the proposed new contention had been raised at the beginning of the proceeding. Moreover, the Commission should also deny the Petition and Motion because they are untimely.

BACKGROUND

On April 24, 2014, DTE submitted an application to renew the Fermi 2 operating license. The NRC published the "Notice of Hearing and Opportunity to Petition for Leave to Intervene" on June 18, 2014.⁶ Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear and CRAFT filed timely petitions to intervene on August 18, 2014.⁷ The Board issued its decision with respect to the hearing requests on February 6, 2015. After

⁵ Petition at 2-3.

⁶ 79 Fed. Reg. 34,787.

⁷ "Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environmental Alliance of Southwestern Ontario, and Beyond Nuclear" (Joint Pet.); "Citizen's Resistance at Fermi (CRAFT) Petition for Leave to Intervene and Request for a Public Hearing upon DTE Electric's Request of 20-Year License Extension for the Enrico Fermi 2 Nuclear Reactor" (CRAFT Pet.).

narrowing and reformulating the proffered contentions, the Board found three contentions to be admissible.⁸

On March 3, 2015, DTE appealed the Board's decision admitting the three contentions. The Commission reversed the Board's admission of the three contentions and ordered the proceeding terminated.⁹ The Board terminated the proceeding on September 11, 2015.¹⁰

On November 27, 2015, Beyond Nuclear contacted counsel for the Staff and DTE to consult on the instant Motion to Reopen and Petition to Intervene. The Staff and DTE opposed the Motion and Petition to Intervene.

DISCUSSION

I. Legal Standards

A. Legal Standards for Admission of Contentions

For a hearing request to be granted, the requestor must propose at least one admissible contention that meets all of the requirements of 10 C.F.R. § 2.309(f)¹¹ and must submit that contention in a timely filing.¹² The requirements for an admissible contention are set out in 10 C.F.R. § 2.309(f)(1), which provides that a contention is admissible if it:

(i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . . ;

(ii) Provide[s] a brief explanation of the basis for the contention;

(iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;

⁸ DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC 249 (2015).

⁹ DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 81 NRC ____, ____ (Sept. 8, 2015) (slip op. at 1).

¹⁰ DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), LBP-15-25, 81 NRC ____, ____ (Sept. 11, 2015) (slip op. at 1)

¹¹ 10 C.F.R. § 2.309(a).

¹² 10 C.F.R. § 2.309(b).

(iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application

The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements are “strict by design.”¹³ Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissing the proposed contention.¹⁴

Subsection (iii) of 10 C.F.R. § 2.309(f)(1) explicitly provides that a contention must raise an issue that is within the scope of the proceeding. Challenges to the Commission's regulations and generic determinations are beyond the scope of NRC adjudications.¹⁵ A proposed contention otherwise inadmissible as an out-of-scope collateral attack on a Commission rule may, however, be entertained if (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the

¹³ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsid'n denied*, CLI-02-01, 55 NRC 1 (2002).

¹⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999), *citing Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

¹⁵ *See Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Units No. 1, 2, and 3), LBP-91-19, 33 NRC 397, 410 (1991), *appeal granted in part*, CLI-91-12, 34 NRC 149 (1991); *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974), *citing Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972) (“[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.”).

purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.¹⁶ If the presiding officer determines that the petitioner has not made the required *prima facie* showing, “no evidence may be received on [the] matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.”¹⁷ Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.¹⁸

Contentions must also raise a genuine material issue of law or fact with the specific application at bar.¹⁹ In other words, the proponent on the contention must show how resolution of the dispute would make a difference in the outcome of the licensing proceeding.²⁰ A contention that raises only a generic issue and fails to link that issue to any specific aspect of the pertinent application is inadmissible for failure to raise a genuine material issue.²¹ While a disagreement as to the interpretation of the language of a rule may raise a genuine issue of law, a challenge to the rule itself does not.²² Such a challenge fails because it does not raise a material issue of law as contemplated by the regulation.

¹⁶ 10 C.F.R. §§ 2.335(b) and (d).

¹⁷ 10 C.F.R. § 2.335(c).

¹⁸ 10 C.F.R. § 2.335(e).

¹⁹ 10 C.F.R. § 2.309(f)(1)(vi).

²⁰ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 354 (2006), *citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (Final Rule).

²¹ *Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-28, 74 NRC 604, 609 (2011).

²² *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 NRC 539, 566 (2012), *rev'd in part*, CLI-12-19, 76 NRC 377 (2012), *remanding* LBP-13-1, 77 NRC 57 (2013), *aff'd on other grounds*, CLI-13-7, 78 NRC 199 (2013).

Where the original date for the filing of contentions has passed, the provisions of 10 C.F.R. § 2.309(c) apply. Section 2.309(c) provides that contentions filed after the deadline will not be entertained absent a determination by the presiding officer that the proponent of the contentions has demonstrated good cause by showing that:

- (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.

Whether a contention is timely filed depends in large part on when the new information became available. The Commission generally considers a contention based on new information to be filed in a timely fashion if the contention is filed within 30 days of the availability of the new information. When information is later repeated in a Staff document, however, the date that controls for timeliness purposes is the date that the information first became available, not the later date when the Staff “collect[ed], summarize[d] and place[d] into context the facts supporting the contention.”²³

B. Legal Standards for Reopening of the Record

The Commission has stated that a petitioner seeking to introduce a new contention after the record has been closed should “address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing.”²⁴ Section 2.326(a) of the Commission’s regulations states that a motion to reopen will not be granted unless the following criteria are satisfied:

²³ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010). See also *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 224-225 (2011).

²⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

(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.

Additionally, one or more affidavits showing that the motion to reopen meets the above three criteria must accompany the motion.²⁵ Each affidavit must contain statements from competent individuals with knowledge of the facts alleged or experts in disciplines appropriate to the issues raised.²⁶ Moreover, the motion to reopen and its supporting documentation must be strong enough, in the light of any opposing filings, to avoid summary disposition.²⁷ The Commission has held that “[t]he burden of satisfying the reopening requirements is a heavy one [and that] proponents of a reopening motion bear the burden of meeting all of [these] requirements.”²⁸ Section 2.326(d) further provides that a motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the requirements in 10 C.F.R. § 2.309(c) (discussed above) for contentions submitted after the original deadline for filing.

II. The Petition Should Be Denied for Failing to Timely Proffer an Admissible Contention

Beyond Nuclear’s proposed contention asserts that, “the NRC lacks a lawful basis under [the National Environmental Policy Act of 1969, as amended, (NEPA)] for re-licensing Fermi

²⁵ 10 C.F.R. § 2.326(b).

²⁶ *Id.* See also *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 291-93 (2009).

²⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) (PFS), citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523-4 (1973).

²⁸ *Oyster Creek*, CLI-09-7, 69 NRC at 287 (internal quotations omitted, alteration in original).

Unit 2 because it relies on the Continued Spent Fuel Storage GEIS.”²⁹ The Petition goes on to identify seven specific alleged failures in the Continued Storage Rule and GEIS.³⁰

Simply stated, Beyond Nuclear’s proposed contention is an impermissible challenge to the Commission’s Continued Storage Rule and GEIS. As the Commission held in *Callaway* and *Fermi 3* with respect to a substantively identical proposed contention, a “placeholder” contention such as the instant contention is not admissible under the Commission’s rules of practice because it impermissibly challenges an agency regulation and is therefore outside the scope of an individual licensing proceeding.³¹ Additionally, Beyond Nuclear does not raise any site-specific environmental issues with respect to the Fermi LR application and, thus, does not show that a genuine dispute exists with the applicant on a material issue of law or fact. Finally, Beyond Nuclear’s Petition is untimely. For all of these reasons, Beyond Nuclear’s Petition should be denied.

A. The Proposed Contention Challenges a Rulemaking that Is Beyond the Scope of this Proceeding

Beyond Nuclear’s proposed contention is a challenge to the Continued Storage Rule and GEIS and, as a challenge to a Commission rule, it is a challenge that is beyond the scope of a license renewal proceeding.³² Every alleged failure and violation of NEPA that Beyond Nuclear asserts is an alleged failure or violation by virtue of the Continued Storage Rule or GEIS.³³ Beyond Nuclear’s only complaint with the Fermi DSEIS is the fact that the Continued Storage

²⁹ Petition at 7.

³⁰ *Id.* at 7-8.

³¹ *Callaway*, CLI-15-11, 81 NRC at 549; *Fermi*, CLI-15-12, 81 NRC at 553.

³² See 10 C.F.R. § 2.309(f)(1)(iii).

³³ See Petition at 7-8.

Rule adopted the environmental impacts described in the Continued Storage GEIS and deemed them incorporated into the DSEIS.³⁴

Commission regulations bar such challenges to its rules: 10 C.F.R. § 2.335(a) provides that “no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” Contentions that challenge Commission regulations or its regulatory processes are beyond the scope of adjudicatory proceedings and have been regularly dismissed as such.³⁵ Most recently and to the point, in ruling on a substantively identical proposed contention in *Callaway* and *Fermi 3*, the Commission held that such a contention was not admissible because it impermissibly challenges an agency regulation and is therefore outside the scope of an individual licensing proceeding.³⁶ Further, in its Continued Storage decision in CLI-14-08, the Commission also wrote: “Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings.”³⁷ For this same reason, contentions that challenge the NRC’s generic environmental impact statement for license renewal have been rejected in case after case.³⁸ In CLI-14-08, the Commission explained,

³⁴ *Id.* at 7.

³⁵ See, e.g., *Callaway*, CLI-15-11, 81 NRC at 549; *Fermi*, CLI-15-12, 81 NRC at 553; *Palo Verde*, LBP-91-19, 33 NRC at 400, 410, *appeal granted in part*, CLI-91-12, 34 NRC 149 (1991); *Peach Bottom*, ALAB-216, 8 AEC at 20, *citing Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972) (“[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.”).

³⁶ *Callaway*, CLI-15-11, 81 NRC at 549; *Fermi*, CLI-15-12, 81 NRC at 553.

³⁷ *Calvert Cliffs*, CLI-14-08, 80 NRC at 79 n.27, *citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

³⁸ See, e.g., *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 386 (2012), *remanding*, LBP-13-1, 77 NRC 57 (2013), *aff’g on other grounds*, CLI-13-7, 78 NRC 199 (2013); *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 20 (2007); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-12 (2001).

“[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.”³⁹ Consistent with the recent *Callaway* and *Fermi 3* decisions, as well as CLI-14-08 and longstanding case law, the Commission should deny Beyond Nuclear’s challenge to the Continued Storage Rule and GEIS.

Nevertheless, in accordance with the provisions of 10 C.F.R. § 2.335, Beyond Nuclear could still have challenged the Continued Storage Rule and GEIS in this adjudicatory proceeding had it sought and obtained a waiver of the prohibition against such challenges. In order to obtain such a waiver, 10 C.F.R. § 2.335(b) requires that a petitioner provide an affidavit demonstrating that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the regulation would not serve the purposes for which the regulation was adopted. But Beyond Nuclear has not done this; instead, Beyond Nuclear states that “its contention is not accompanied by a petition for a waiver” and explains that this is because “[n]o purpose would be served by such a waiver, because Beyond Nuclear does not seek an adjudicatory hearing on the NRC’s generic environmental findings.”⁴⁰ Given that Beyond Nuclear’s proposed contention challenges the NRC’s Continued Storage Rule and GEIS and that Beyond Nuclear has affirmatively decided to forego petitioning for a waiver, the Commission should deny Beyond Nuclear’s Petition.⁴¹

B. The Proposed Contention Fails to Raise a Genuine Material Issue

Beyond Nuclear asserts, without referencing any specific portions of the Fermi LR application, that its 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

³⁹ *Calvert Cliffs*, CLI-14-08, 80 NRC at 79.

⁴⁰ Petition at 2 n.2.

⁴¹ See *Limerick*, CLI-12-19, 76 NRC at 386-87; *Callaway*, CLI-15-11, 81 NRC at 549.

license for Fermi Unit 2.”⁴² As explained above, Beyond Nuclear’s contention is an inadmissible attack on the Commission’s Continued Storage Rule and GEIS and, as such, it cannot raise a genuine issue for dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).⁴³

Additionally, it is well established that an admissible contention “must raise a genuine dispute with the license application” in order to demonstrate that a material issue for hearing exists.⁴⁴ All Beyond Nuclear disputes is the incorporation of the Continued Storage Rule and GEIS into the Fermi DSEIS. This incorporation was, however, mandated by the Commission. The Continued Storage Rule itself provides that:

The environmental reports described in . . . [§] 51.53 [Postconstruction environmental reports] . . . are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an [Independent Spent Fuel Storage Installation (ISFSI)] for the period following the term of the reactor operating license The impact determinations in [the Continued Storage GEIS] regarding continued storage shall be deemed incorporated into the environmental impact statements described in . . . [§] 51.95 [Postconstruction environmental impact statements]^[45]

As the *Limerick* board observed, “while a disagreement over the proper interpretation of NRC regulations may give rise to an admissible contention,” an interpretation that is in direct conflict with the plain meaning of a regulation and the agency’s Statements of Consideration fails “to present a genuine dispute of fact or law . . . as required by NRC regulations.”⁴⁶ Beyond Nuclear’s proposed contention, which is in direct conflict with the Continued Storage Rule, thus

⁴² Petition at 9.

⁴³ See *Limerick*, LBP-12-8, 75 NRC at 566, 566 n.188, *rev’d on other grounds*, CLI-12-16, 76 NRC 377 (2012); *Callaway*, CLI-15-11, 81 NRC at 549.

⁴⁴ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 709 (2012).

⁴⁵ 10 C.F.R. § 51.23(b) (emphasis added). See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC 535, 539 (2015) (holding that, by the terms of the plain language of 10 C.F.R. § 51.23(b), the environmental impacts in the Continued Storage GEIS have already been incorporated into the NRC’s environmental evaluations in individual licensing proceedings “by operation of law”).

⁴⁶ *Limerick*, LBP-12-8, 75 NRC at 566.

fails to present a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.

C. The Proposed Contention Is Untimely

The initial deadline for filing contentions in the Fermi LR proceeding was August 18, 2014.⁴⁷ A petition to intervene filed after this deadline will not be entertained absent a determination that the petition was timely filed based on the availability of previously unavailable and materially different information.⁴⁸ However, instead of identifying previously unavailable and materially different information as providing good cause for its late filing of its Petition, Beyond Nuclear states that the Petition “does not depend at all on past information.”⁴⁹ This assertion, though, is incorrect. The entirety of Beyond Nuclear’s statement of its proposed new contention is an argument against the Continued Storage Rule and GEIS⁵⁰ and this argument does indeed depend on past information: it relies on the Continued Storage Rule and GEIS themselves, which were published in the *Federal Register* on September 19, 2014.⁵¹ The Continued Storage Rule went into effect on October 20, 2014, and Beyond Nuclear had an obligation to raise its contention in a timely manner based on the effective date of the rule, at the latest.⁵² The Petition should therefore be denied as untimely.

⁴⁷ See 79 Fed. Reg. 34,787.

⁴⁸ 10 C.F.R. § 2.309(c)(1).

⁴⁹ Petition at 9.

⁵⁰ *Id.* at 7-8.

⁵¹ See Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (Final Rule).

⁵² Additionally, Beyond Nuclear notes that its contention is similar to contentions filed in other proceedings. Petition at 2-3. Beyond Nuclear was the proponent of several of those contentions including a contention filed in the Fermi Unit 3 COL proceeding and in the Davis Besse LR proceeding. The fact that Beyond Nuclear subsequently took more than seven months to file a substantively identical contention in Fermi LR only reinforces the contention’s untimeliness.

Beyond Nuclear attempts to cure this pleading deficiency by asserting that its Petition is timely because it “depends on an event that will occur in the future”⁵³ However, Beyond Nuclear cites no authority supporting this assertion that filing timeliness before the Commission can be measured from an event that has not yet occurred, and the Staff has not identified any cases that support such a theory. Moreover, such a theory could be used to support the endless filing of late contentions based on claims that some event in the future may eventually provide a basis for the filings.

By filing a petition based on documents published many months earlier and by not identifying any other potentially new and materially different documents, but instead relying on an unsupported theory of future new and materially different information, Beyond Nuclear has not filed its Petition in a timely fashion and, thus, the Petition should be denied.

III. The Motion to Reopen Should Be Denied for Failing to Meet the Reopening Standards

Beyond Nuclear does not meet the Commission’s reopening standards provided in 10 C.F.R. § 2.326(a)(1)-(3) because its Motion to Reopen is untimely without raising an exceptionally grave issue, it does not address a significant environmental issue, and it does not demonstrate that a materially different result would be likely if the proposed new contention had been raised at the beginning of the proceeding. Accordingly, Beyond Nuclear’s Motion to Reopen should be denied.

A. Beyond Nuclear’s Motion Is Untimely and Does Not Raise an Exceptionally Grave Issue

Under 10 C.F.R. § 2.326(a)(1), a motion to reopen “must be timely.” As discussed above, the issues raised in Beyond Nuclear’s Motion to Reopen are not timely because they are based on the analyses contained in the Continued Storage Rule and GEIS that were published

⁵³ Petition at 9.

on September 19, 2014.⁵⁴ Nonetheless, 10 C.F.R. § 2.326(a)(1) provides an exception to its timeliness requirement for when the motion to reopen raises “an exceptionally grave issue.” The Commission “anticipates that this exception will be granted rarely and only in truly extraordinary circumstances.”⁵⁵ The Commission has stated that “an untimely raised environmental issue could be ‘exceptionally grave,’ depending on the circumstances of the case and the facts presented.”⁵⁶ However, Beyond Nuclear has not made any arguments or presented any facts in support of the existence of an exceptionally grave issue. Therefore, Beyond Nuclear’s Motion to Reopen is untimely and this untimeliness cannot be excused.

B. Beyond Nuclear’s Motion Does Not Address a Significant Environmental Issue

Under 10 C.F.R. § 2.326(a)(2), a motion to reopen must address a significant safety or environmental issue. When a motion to reopen is untimely, the 10 C.F.R. § 2.326(a)(1) “exceptionally grave issue” test supplants the 10 C.F.R. § 2.326(a)(2) “significant safety or environmental issue” test.⁵⁷ As discussed above, the claims in Beyond Nuclear’s Motion to Reopen are untimely and do not raise an “exceptionally grave” issue; therefore, Beyond Nuclear’s Motion to Reopen also does not meet the requirements of 10 C.F.R. § 2.326(a)(2).

Moreover, even if Beyond Nuclear had filed its Motion to Reopen in a timely fashion, the motion still does not raise a significant environmental issue under 10 C.F.R. § 2.326(a)(2). For environmental issues, the Commission has found that the standard for showing significance to reopen a closed record is analogous to the standard for supplementing an environmental impact

⁵⁴ See Motion to Reopen at 1.

⁵⁵ Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986) (Final Rule).

⁵⁶ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 500-501 (2012).

⁵⁷ *Vogtle*, CLI-11-8, 74 NRC at 225 n.44 (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988)).

statement.⁵⁸ This standard is that the Staff must prepare a supplement to a final environmental impact statement if: “(1) [t]here are substantial changes in the proposed action that are relevant to environmental concerns; or (2) [t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁵⁹ Any such new information must “paint a ‘*seriously*’ different picture of the environmental landscape.”⁶⁰

Beyond Nuclear asserts that its Motion to Reopen raises the significant environmental issue that the Fermi DSEIS, because of its dependence on the Continued Storage Rule and GEIS, lacks an adequate analysis of the environmental impacts of spent fuel storage and disposal such that it fails to provide sufficient support for the proposed licensing action.⁶¹ Beyond Nuclear does not explain how there is new and significant information relevant to its environmental concerns and how that information bears on the Fermi LR application such that it paints a seriously different picture of the environmental landscape. Instead, Beyond Nuclear relies solely on its comments on the draft Continued Storage Rule and GEIS,⁶² but fails to explain how these comments paint a new and seriously different picture of the environment. Accordingly, Beyond Nuclear’s claims do not constitute a significant environmental issue under 10 C.F.R. § 2.326(a)(2) and its Motion to Reopen should be denied.

⁵⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 28-29 (2006).

⁵⁹ 10 C.F.R. § 51.92(a).

⁶⁰ *PFS*, CLI-06-3, 63 NRC at 28 (quoting *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original)).

⁶¹ Motion to Reopen at 4-5.

⁶² *See id.*

C. Beyond Nuclear's Motion Does Not Show that a Materially Different Result Would Be Likely

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen “must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.” One Board has explained that, under this standard, “[t]he movant must show that it is *likely* that the result would have been materially different, i.e., that it is more probable than not that [the movant] would have prevailed on the merits of the proposed new contention.”⁶³ The Commission has made clear that the evidence provided in support of a motion to reopen must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding.⁶⁴

Beyond Nuclear has not demonstrated that a materially different result would be likely in this proceeding had its proposed new contention been considered initially. In its Motion to Reopen, Beyond Nuclear claims that the purpose of its new contention is to ensure that the NRC will withdraw the Fermi DSEIS as a basis for re-licensing Fermi and, therefore, withdraw the renewed license for Fermi, if the U.S. Court of Appeals for the District of Columbia Circuit vacates the Continued Storage Rule and GEIS.⁶⁵ Although Beyond Nuclear does assert that the admission of its proposed new contention would likely produce a materially different result in this proceeding, Beyond Nuclear's logic is flawed. First, Beyond Nuclear appears to contradict itself in asserting that *admission* of its contention would produce a materially different result because it also concedes that it is submitting its new contention with the reasonable expectation

⁶³ *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC 529, 549 (2010) (emphasis in original).

⁶⁴ *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 498 (2012).

⁶⁵ Motion to Reopen at 5. The Staff notes that no renewed license has been issued, so there would be no renewed license to withdraw at this point.

that it will be *denied*, because the subject matter of the contention is generic.⁶⁶ Second, Beyond Nuclear provides no evidence to establish the likelihood that its challenge to the Continued Storage Rule and GEIS would prevail especially given the fact that the very same comments on which it is based were available to the Commission at the time of its approval of the Continued Storage Rule and GEIS. Finally, Beyond Nuclear has not shown that a materially different result would be likely because, as explained above, Beyond Nuclear has failed to proffer an admissible contention under 10 C.F.R. §§ 2.309(f)(1) and 2.309(c). Beyond Nuclear also describes its contention as a “placeholder” that it does not intend to litigate before the NRC but, instead, only intends to appeal upon its denial.⁶⁷ However, as the Commission held in *Callaway* and *Fermi 3*, such “placeholder” contentions are not necessary to ensure that a petitioner’s challenge to a Commission rule receives a full and fair airing.⁶⁸

CONCLUSION

For the reasons discussed above, Beyond Nuclear’s Petition to Intervene and Motion to Reopen should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 11th day of December, 2015

⁶⁶ Petition at 2.

⁶⁷ Motion to Reopen at 1-2.

⁶⁸ See *Callaway*, CLI-15-11, 81 NRC at 549; *Fermi*, CLI-15-12, 81 NRC at 553. Instead, the Commission stated that, “[s]hould the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS, we would take appropriate action consistent with the court’s direction.” *Callaway*, CLI-15-11, 81 NRC at 550.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "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 FERMI UNIT 2 NUCLEAR POWER PLANT," dated December 11, 2015 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 11th day of December, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 11th day of December, 2015