

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))

DTE ELECTRIC COMPANY ANSWER OPPOSING
PETITION TO INTERVENE AND MOTION TO REOPEN

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), DTE Electric Company (“DTE”) answers both the petition to intervene and motion to reopen filed by Beyond Nuclear.¹ Beyond Nuclear seeks to admit a “single ‘place-holder’ contention challenging the NRC’s reliance, in proposing to re-license Fermi Unit 2, on the [Continued Storage Rule].”² Beyond Nuclear does not seek to litigate its contention in an adjudicatory hearing. Instead, the “sole purpose” of this contention is “to lodge a formal challenge to the NRC’s complete and unqualified reliance” on the Continued Storage Rule and GEIS so that, when denied by the Commission, Beyond Nuclear can appeal the decision to the U.S. Court of Appeals.³

¹ “Beyond Nuclear’s Hearing Request and Petition to Intervene in License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant,” Dec. 4, 2015 (“Hearing Request”); “Beyond Nuclear’s Motion to Reopen the Record of License Renewal Proceeding for Fermi Unit 2 Nuclear Power Plant,” dated Dec. 4, 2015 (“Motion to Reopen”).

² Hearing Request at 1, citing “Continued Storage of Spent Nuclear Fuel; Final Rule,” 79 Fed. Reg. 56238 (Sept. 19, 2014) (“Continued Storage Rule”); *see also* “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” NUREG-2157 (Aug. 2014) (ADAMS Accession No. ML14188B749) (“Continued Storage GEIS”); 79 Fed. Reg. 56262 (Sept. 19, 2014).

³ Hearing Request at 2-3.

The Commission should deny the Hearing Request and Motion to Reopen. The proposed contention is a direct challenge to the NRC’s application of the Continued Storage Rule, which incorporates the Continued Storage GEIS by reference into site-specific licensing decisions. NRC regulations may not be challenged in individual licensing proceedings (absent a waiver). The Hearing Request should be denied on this basis alone. There is, in any event, no substantive or procedural basis for a “placeholder” contention — much less an untimely one — under the Atomic Energy Act, the National Environmental Policy Act (“NEPA”), or the NRC’s Rules of Practice. The Motion to Reopen also should be denied because it fails to satisfy the standards for reopening in 10 C.F.R. § 2.326.

BACKGROUND

On August 18, 2014, Beyond Nuclear filed a timely hearing request for the Fermi 2 license renewal proceeding. The Licensing Board initially admitted two of Beyond Nuclear’s proposed contentions in a decision (LBP-15-05), dated February 6, 2015. On appeal, the Commission reversed the decision to admit Beyond Nuclear’s contentions.⁴ The proceeding was terminated on September 11, 2015. There is currently no pending adjudicatory proceeding for the Fermi 2 license renewal application.

While the Licensing Board was considering Beyond Nuclear’s initial hearing request, the NRC completed the Continued Storage GEIS and promulgated the final Continued Storage Rule. In the Continued Storage GEIS, the NRC specifically addressed the environmental impacts of continued storage of spent nuclear fuel.⁵ Under the rule the

⁴ See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, __ NRC __ (slip op. Sept. 8, 2015).

⁵ 79 Fed. Reg. at 56241; GEIS at 1-4, App. E, App. F.

environmental impacts described in the Continued Storage GEIS are incorporated into environmental impact statements for individual licensing proceedings.⁶

On November 6, 2015, the NRC Staff published a draft plant-specific supplement, Supplement 56, to NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (“License Renewal GEIS”), regarding the renewal of the Fermi 2 operating license for an additional 20 years of operation. The supplement notes (at 4-82) that the discussion of the onsite storage of spent nuclear fuel incorporates the generic environmental impact determinations codified in Table B-1 to 10 C.F.R. Part 51 based on the Continued Storage GEIS.

Beyond Nuclear now has filed another, untimely intervention petition in which it argues that the recently released draft supplemental environmental impact statement (“DSEIS”) for Fermi 2 license renewal is inherently flawed because it relies on the NRC’s generic analysis of the environmental impacts of continued spent fuel storage in the Continued Storage Rule and GEIS.

DISCUSSION

A. The Commission Should Deny the Hearing Request

1. *The Proposed Contention Is Inadmissible*

Beyond Nuclear offers only one contention. That proposed contention challenges the NRC Staff’s reliance on the generic conclusions of the Continued Storage GEIS in the DSEIS for Fermi 2 license renewal, as dictated by the Continued Storage Rule at 10 C.F.R. § 51.23. But, the Fermi 2 license renewal proceeding is not the appropriate forum for raising challenges to the Continued Storage Rule. Absent a waiver, no rule or regulation of the

⁶ 10 C.F.R. § 51.23(b).

Commission is subject to attack in any adjudicatory proceeding.⁷ Every one of the seven bullets in Beyond Nuclear’s statement of its proposed contention (at 7-8) disputes the adequacy of the Continued Storage Rule or GEIS, not the Fermi 2 license renewal application or DSEIS.⁸ And if there were any remaining doubt as to Beyond Nuclear’s ability to challenge the NRC Staff’s reliance on the Continued Storage Rule and GEIS in the Fermi 2 DSEIS, the Commission explicitly addressed the Continued Storage rule’s applicability to contentions in individual licensing proceedings, explaining that its “generic determinations will not be revisited and may not be challenged in individual licensing proceedings without the grant of a waiver under 10 CFR 2.335.”⁹ Because Beyond Nuclear did not seek a waiver,¹⁰ the proposed contention must be denied as an impermissible challenge to a Commission regulation.

In addition, the Hearing Request fails to establish a material dispute with the license renewal application or DSEIS. If a petitioner believes a license application or DSEIS fails to adequately address a relevant issue, then the petitioner must directly controvert a position taken in the relevant document and “explain why [it] is deficient.”¹¹ Here, none of the bases pertain specifically to the Fermi 2 license renewal application or to the site-specific discussion in

⁷ 10 C.F.R. § 2.335(a)

⁸ Beyond Nuclear even acknowledges that the NRC is likely to deny its petition “because the subject matter of the contention is generic.” Hearing Request at 2.

⁹ 79 Fed. Reg. at 56243; *see also Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __, __ (Aug. 26, 2014) (slip op. at 9 n.27).

¹⁰ Beyond Nuclear acknowledges that it did not seek a waiver, but states that no purpose would be served by such a waiver request because it does not seek an adjudicatory hearing on NRC’s generic environmental findings. Hearing Request at 2 n.2. Absent a waiver, the contention is barred by NRC regulations.

¹¹ *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

the DSEIS. As a result, the contention wholly fails to demonstrate a genuine dispute with the application of the DSEIS on a material issue.

2. *The Proposed Contention Is Untimely*

Apart from the failure to present an admissible contention, the Hearing Request is untimely.¹² Beyond Nuclear does not discuss or rely upon any new information in the DSEIS in formulating its proposed contention. Instead, the proposed contention challenges the Continued Storage Rule itself, in which the Commission “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 that the impact determinations in the GEIS “shall be deemed incorporated” into EISs for individual projects.¹³ The proposed contention therefore relates to the adequacy of the NRC’s Continued Storage rule generally, not its specific application in the Fermi 2 DSEIS.

The Continued Storage Rule was published on September 19, 2014. To be timely, a challenge to the adequacy of that evaluation should have been filed within 30 days. The Motion to Reopen and Hearing Request, however, were filed well beyond that period. Beyond Nuclear claims that the contention is timely because it “does not depend at all on past information,” but instead is a “placeholder” for a raising a future challenge on the basis of a future Court of Appeals decision. But, Beyond Nuclear does not explain why it could not have filed a contention — “placeholder” or otherwise — based on the final (or even proposed)

¹² A contention filed after the original deadline must meet the requirements of 10 C.F.R. § 2.309(c)(1)(i)-(iii), which require the petitioner to demonstrate 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.

¹³ 10 C.F.R. § 51.23(a) and (b).

Continued Storage Rule. In fact, another organization, CRAFT, proposed a contention that relied in part on the draft Continued Storage Rule and GEIS at the outset of the Fermi 2 license renewal proceeding.¹⁴ In the absence of any reference to new information in the Hearing Request or DSEIS, the proposed contention is untimely.

3. *There Is No Basis For A “Placeholder” Contention*

The Hearing Request states (at 2) that a “placeholder” 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 Fermi Unit 2 license renewal proceeding.”¹⁵ However, the NRC’s Rules of Practice do not recognize a petition of this sort, and Beyond Nuclear has not demonstrated the need for a “placeholder” contention to preserve future litigation options.¹⁶ In fact, the Commission has repeatedly rejected calls to admit similar placeholder contentions in other proceedings, noting that admission of a “placeholder”

¹⁴ “Citizens’ Resistance at Fermi 2 (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,” dated August 18, 2014, at 13-15.

¹⁵ Hearing Request at 2.

¹⁶ *See, e.g., Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 490 (2008) (denying admission of contention intended to function as a placeholder for future litigation); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (affirming denial of intervenors’ motion for leave to file new contentions intended as a “placeholder” for a future motion to reopen the record); *id.* (noting that NRC regulations do not contemplate “placeholder” contentions, which are tantamount to impermissible “notice pleadings”); *Exelon Generation Company, LLC* (Byron Nuclear Station, Units 1 and 2; Braidwood Nuclear Station, Units 1 and 2), CLI-14-06, __ NRC __ (2014) (slip op. at 5) (noting that Commission rules do not contemplate motions filed “as a ‘placeholder’ for a further motion to be filed later”).

contention “is not necessary to ensure” that challenges to the Continued Storage Rule and GEIS “receive a full and fair airing.”¹⁷

And, even if the Court of Appeals were to remand the Continued Storage Rule or GEIS, Beyond Nuclear would not automatically be entitled to a hearing on spent fuel storage issues in the Fermi 2 proceeding. The NRC would take appropriate action consistent with the court’s direction. But, neither a hearing on spent fuel storage issues or vacating the renewed license would necessarily follow.¹⁸ Petitioners would need to seek those remedies before the Commission or in the Court of Appeals at the appropriate time. There is simply no basis for allowing a “placeholder” contention in this proceeding now to somehow preserve a future judicial remedy — much less one based on speculation regarding the outcome of pending litigation on the Continued Storage Rule.

B. The Commission Should Deny the Motion to Reopen

Beyond Nuclear’s Request for Hearing was accompanied by a Motion to Reopen.¹⁹ As the proponent of the Motion to Reopen, Beyond Nuclear has a heavy burden to bear and stringent criteria must be met.²⁰ Any motion to reopen must satisfy the reopening

¹⁷ *Union Elec. Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC __ (April 23, 2015) (slip op. at 5); *see also DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC __ (April 23, 2015) (slip op.); *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2) *et al.*, CLI-15-15, 81 NRC __ (June 29, 2015) (slip op.).

¹⁸ *See, e.g., Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987).

¹⁹ Because the Fermi 2 proceeding was terminated after the Commission concluded that the petitioners’ had not proffered an admissible contention and before any evidence was taken, there is no record of the proceeding to “reopen.” Nevertheless, for completeness, DTE opposes the Motion to Reopen for the reasons discussed herein.

²⁰ *Amergen Energy Company LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668, 675 (2008); *see also Private Fuel Storage, L.L.C.* (Independent Spent

criteria in 10 C.F.R. § 2.326 based on an affidavit accompanying the motion. The motion must be timely, must address a significant safety or environmental issue, and must demonstrate that a materially different result would be likely.²¹ Beyond Nuclear fails to satisfy all three of those criteria.²²

Here, the Motion to Reopen was not timely for the reasons discussed above. Even if the motion had been filed in a timely manner, Beyond Nuclear still does not seek any substantive reconsideration of the DSEIS for Fermi 2 license renewal that would warrant reopening of the record. And, nothing in the Motion to Reopen suggests that reconsideration of the issue would lead to a different outcome. Beyond Nuclear does not point to any new or different environmental issue unique to Fermi 2 or establish any legal or substantive deficiency with the NRC Staff's DSEIS for Fermi 2. In fact, Beyond Nuclear acknowledges that it "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."²³ Re-raising previously-rejected arguments falls far short of the showing

Fuel Storage Installation), CLI-06-3, 63 NRC 19, 25 (2006) ("Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence.").

²¹ *Pilgrim*, CLI-12-10, 75 NRC at 496-497.

²² In *Union Electric Company* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, ___ NRC ___ (April 23, 2015) (slip op. at 4 n.17), the Commission explained that where, as here, the proponent of a motion to reopen has not submitted an admissible contention, it necessarily has not satisfied the NRC's reopening standards because it has not raised a significant environmental issue and has not demonstrated that a materially different result would be likely if the contention had been considered initially.

²³ Hearing Request at 1-2.

needed for reopening — particularly when Beyond Nuclear never engages substantively with the Fermi 2 DSEIS’s evaluation of waste impacts.

Beyond Nuclear also ignores the requirement in 10 C.F.R. § 2.326(b) to support its motion with affidavits addressing the reopening criteria, each of which “must be separately addressed, with a specific explanation of why it has been met.” Although Beyond Nuclear claims that it did not need to submit such affidavits because the issues raised are “purely legal,” the basis for its motion and contention is a series of alleged deficiencies in the Continued Storage Rule and GEIS.²⁴ Beyond Nuclear’s failure to satisfy 10 C.F.R. § 2.326(b) therefore provides a separate and independent basis for denying the motion.²⁵

CONCLUSION

For all of the above reasons, Beyond Nuclear has failed to submit an admissible contention or satisfy the criteria for a Motion to Reopen. Accordingly, both the Hearing Request and Motion to Reopen should be denied.

Respectfully submitted,

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²⁴ Motion to Reopen at 5; *see also* Hearing Request at 8 (listing supposed technical, environmental, and procedural errors in the Continued Storage Rule and GEIS).

²⁵ *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 222 (noting that a pleading “could have been rejected solely on the basis of the Appellants’ failure to comply fully with section 2.326(b)”).

COUNSEL FOR DTE ELECTRIC
COMPANY

Dated in Washington, D.C.
this 21st day of December 2015

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CERTIFICATE OF SERVICE

I certify that copies of the “DTE ELECTRIC COMPANY ANSWER OPPOSING PETITION TO INTERVENE AND MOTION TO REOPEN” has been served on this 21st day of December 2015 by Electronic Information Exchange, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

/s/ signed electronically by
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Dated in Washington, D.C.
this 21st day of December 2015