

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION**

Ho K. Nieh, Director

In the Matter of)	Docket Nos. 50-334 and 50-412
)	50-346
)	50-440
)	
FirstEnergy Nuclear Operating Company)	License Nos. DPR-66 and NPF-73
)	NPF-3
)	NPF-58
)	
Beaver Valley Power Station, Units 1 and 2)	
Davis-Besse Nuclear Power Station, Unit 1)	
Perry Nuclear Power Plant, Unit 1)	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

By letter dated March 27, 2018, as supplemented on October 8, 2018 (Agencywide Documents Access and Management System (ADAMS) Accession Nos. ML18094A642 and ML18282A242, respectively), the Environmental Law and Policy Center filed a petition with U.S. Nuclear Regulatory Commission (NRC or the Commission) pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) 2.206, "Requests for action under this subpart." The petitioner requested that the NRC take the following actions:

(A) Issue Demands for Information

- (1) Promptly issue a Demand for Information to FirstEnergy Corp. (FE), FirstEnergy Solutions (FES), FirstEnergy Nuclear Generation, LLC (NG), and FirstEnergy Nuclear Operating Company (FENOC) requesting site-specific decommissioning

funding plans for Beaver Valley Power Station, Units 1 and 2 (BVPS), Davis-Besse Nuclear Power Station, Unit 1 (DBNPS), and Perry Nuclear Power Plant, Unit 1 (PNPP).

- (2) Promptly issue a Demand for Information to FE, FES, NG, and FENOC with regard to their reliance on external trust funds from FE and FES to satisfy their decommissioning financial obligations.
- (3) Promptly issue a Demand for Information to FE, FES, NG, and FENOC with regard to their continued reliance on parent company guarantees from FE to satisfy decommissioning funding obligations, including the ability of FE to satisfy the parent company guarantee financial test under Appendix A, "Criteria Relating to Use of Financial Tests and Parent Company Guarantees for Providing Reasonable Assurance of Funds for Decommissioning," to 10 CFR Part 30, "Rules of General Applicability to the Domestic Licensing of Byproduct Material."
- (4) Promptly issue a Demand for Information to FES, NG, and FENOC to the extent that they are relying on parent company guarantees from FES to satisfy decommissioning funding obligations, including the ability of FES to satisfy the parent company guarantee financial test under 10 CFR Part 30, Appendix A.
- (5) Promptly issue a Demand for Information to FE, FES, NG, and FENOC with regard to their proposed investment and financial contribution plans to make up the current decommissioning shortfall.

- (6) Promptly issue a Demand for Information to FE and FES with regard to each of their commitments to guarantee coverage of NG's and FENOC's decommissioning trust fund shortfalls in the event of bankruptcy.

(B) Notice of Violation and Penalties

- (1) Promptly issue a Notice of Violation against FE, FES, NG, and FENOC for operating nuclear facilities without sufficient decommissioning funds in violation of 42 U.S.C.A. Section 2201(x)(1), and 10 CFR 50.75, "Reporting and Recordkeeping for Decommissioning Planning."
- (2) Promptly issue civil penalties against FE, FES, NG, and FENOC for operating nuclear facilities without sufficient decommissioning funds in violation of 42 U.S.C.A., Section 2201(x)(1), and 10 CFR 50.75.
- (3) Promptly issue an order to suspend NG's and FENOC's licenses for BVPS, DBNPS, and PNPP.

(C) Other Requests

The petitioner also urges the NRC to prohibit NG and FENOC from placing their nuclear facilities into a safe storage (SAFSTOR) status for purely financial reasons. Under SAFSTOR, often considered "deferred dismantling," a nuclear facility is maintained and monitored in a condition that allows the radioactivity to decay; afterwards, the plant is dismantled and the property decontaminated. The petitioner requests that the NRC give immediate emergency consideration to this petition in light of FE's and FES's rapidly deteriorating financial conditions.

(D) **Basis for Petitioner's Request**

The following points summarize the basis for the petitioner's request, as stated in the petition and the supplement:

- (1) NG's and FENOC's decommissioning trust amounts are insufficient on their own to provide reasonable assurance of funding.
- (2) FE cannot rely on rate increases forced on retail ratepayers to pay for the decommissioning trust fund shortfalls.
- (3) The costs, including SAFSTOR, may be much higher than expected because of significantly higher trust fund shortfalls, as reported by the Callan Institute and flaws in the NRC's cost estimating formula.
- (4) On March 28, 2018, FES and FENOC announced and informed the NRC by letter dated April 25, 2018 (ADAMS Accession No. ML18115A007), that they would permanently retire all four of their reactors within the next 3 years. If the plants close in 2020 and 2021, the funds cannot grow to levels that will pay for the required decommissioning.
- (5) The parent companies FE and FES filed for bankruptcy on March 31, 2018.
- (6) According to the petitioner, the transcript from a recent Federal court proceeding provides additional information about funding for FE's nuclear plant decommissioning

in the FES bankruptcy case (see Case No. 18-50757, “Motion of Debtors to Approve Settlement (dated August. 26, 2018)), which was heard on September 25, 2018, by the Honorable Judge Alan M. Koschik, for the U.S. Bankruptcy Court for the Northern District of Ohio.

Although the petition does not request specific immediate action(s), it does request “immediate emergency consideration.” Based on the information provided in the petition, the Petition Review Board (PRB) determined that the financial concerns do not raise an imminent safety issue or indicate that the licensee, FENOC, is unable to safely operate the facilities listed in the petition. The PRB concluded that there is no current public health and safety concern requiring immediate NRC action because financial concerns do not raise an imminent safety issue or indicate that FENOC is unable to safely operate the facilities listed in the petition. The petition manager informed the petitioner of this conclusion by e-mail dated May 2, 2018 (ADAMS Accession No. ML18123A299). The supplement, which the petitioner submitted on October 8, 2018 (ADAMS Accession No. ML18282A242), did not expand the scope of the petition or request additional actions that should be considered as a new petition.

Additionally, the petitioner met with the PRB on June 19, 2018, to discuss the petition. The transcript of this meeting is treated as a supplement to the petition and is publicly available online at ADAMS Accession No. ML18194A395. The transcript is also available for purchase and examination at the NRC’s Public Document Room (PDR), located at O1F21, 11555 Rockville Pike (first floor), Rockville, MD 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents in ADAMS should contact the NRC’s Public

Document Room (PDR) reference staff by telephone at 1-800-397-4209, or 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

On August 2, 2018, the petition manager informed the petitioner by letter that the PRB had determined that the petition meets the acceptance criteria for review and that the PRB has made an initial recommendation to accept the petition for review (ADAMS Accession No. ML18220B314). The petition manager also asked whether the petitioner desired an opportunity to comment on this recommendation, in person or through a teleconference, consistent with Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," dated October 25, 2000. The petitioner declined this offer for a second meeting with the PRB.

On January 8, 2019, the NRC sent the proposed director's decision to the petitioner and to the licensee for comments (ADAMS Accession Nos. ML18309A228 and ML18309A189, respectively). The petitioner responded with comments on the proposed director's decision on January 22, 2019 (ADAMS Accession No. ML19037A340). The licensee did not submit comments on the proposed director's decision. The petitioner's comments and the staff's responses to the comments are included as an attachment to this director's decision.

Based on the staff's evaluation of the petitioner's January 22, 2019, comments, the final director's decision has not changed from the proposed director's decision.

II. Discussion

FENOC Is Currently in Compliance with NRC Regulations

The NRC has a comprehensive, regulation-based, framework that provides oversight of a licensee's decommissioning funding during operations and decommissioning. During operations, licensees must biennially submit decommissioning funding status reports by March 31. At 5 years before the projected permanent shutdown of their reactors until license termination, licensees must submit annual decommissioning funding status reports by March 31 of each year. Additionally, at intervals not to exceed 3 years, a licensee must update and submit its decommissioning funding plans for its independent spent fuel storage installations (ISFSIs) to account for any changes in costs.

FE is the parent company of FES and FENOC, which are wholly owned subsidiaries. The NG owns the nuclear plants, which is a wholly owned subsidiary of FES. FENOC operates the nuclear plants. FENOC and NG are the licensees for BVPS, DBNPS, and PNPP. FENOC submitted its most recent decommissioning funding status reports for BVPS, DBNPS, and PNPP in a letter to the NRC dated March 24, 2017 (ADAMS Accession No. ML17083B221). Based on its review of these reports, the NRC staff concluded that FENOC met the minimum funding requirements for future radiological decommissioning of its NRC-licensed facilities for the 2017 reporting cycle, and that there were no shortfalls in decommissioning funding.

In accordance with 10 CFR 50.75(f)(1), FENOC is required to submit its next decommissioning funding status reports for BVPS, DBNPS, and PNPP to the NRC by March 31, 2019. The reports were submitted to the NRC on March 15, 2019 (ADAMS Accession No. ML19074A242). The NRC staff will conduct a similar review of these decommissioning funding

status reports for the units, and will consider the new expected shutdown dates, funding levels as of December 31, 2018, and any updated financial information necessary to demonstrate reasonable assurance that sufficient funds will be available for the radiological decommissioning of the sites. If the staff identifies a funding shortfall, the NRC will evaluate any such scenario on a case-by-case basis. For an operating power reactor, the NRC reserves the right to take additional steps, in accordance with 10 CFR 50.75(e)(2), including reviewing the rate of accumulation of decommissioning funds, and to take additional actions, either independently or in cooperation with the Federal Energy Regulatory Commission and the licensee's State public utility commission, as appropriate. Additional actions may include modifying the licensee's schedule for accumulating decommissioning funds. In accordance with 10 CFR 50.82(c), if a licensee permanently ceases operation before the expiration of its license, the NRC will determine the collection period for any shortfall of funds on a case-by-case basis upon application by the licensee, and will consider the specific financial situation of each licensee. The NRR continues to monitor FENOC's decommissioning financial assurance for its reactors and ISFSIs to ensure adequate funding and compliance with requirements for decommissioning funding.

Bankruptcy Proceedings

On March 31, 2018, FES, FENOC, and NG, filed a petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code. FE has not filed for bankruptcy. The U.S. Department of Justice, and the NRC's Office of the General Counsel, are working closely together to represent the NRC's interests in the bankruptcy proceeding, including protection and preservation of the decommissioning trust funds and continued compliance with the requirements for decommissioning funding. The proceeding in the U.S. bankruptcy court may result in changes to FENOC's debt structure, including reorganization and the transfer of control

of the reactor operating licenses. Any such license transfers would be subject to NRC review and approval. NRC license transfer reviews include, among other things, a review of the applicant's financial qualifications, technical qualifications, and decommissioning funding, and would provide for public participation and an opportunity to request a hearing and petition to intervene. While the bankruptcy proceeding is in progress, and until license termination, licensees are required to continue to comply with NRC regulations.

Additionally, on October 8, 2018, the petitioner submitted the transcript from the recent Federal court proceeding in the FES bankruptcy case to the NRC as a supplement to the petition (ADAMS Accession No. ML18282A242). The NRC staff reviewed this transcript and did not find any information in the supplement of which it was not previously aware or that warranted immediate action. The NRC will continue to monitor the bankruptcy proceedings and take action, as necessary, to ensure that the licensee remains in compliance with the agency's regulations.

SAFSTOR

The petition "urges the NRC to prohibit NG and FENOC from placing their nuclear facilities into SAFSTOR for purely financial reasons." Section 3.2.2, "SAFSTOR" of NUREG-0586, "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities," Supplement 1, "Regarding the Decommissioning of Nuclear Power Plants," Volume 1, issued November 2002 (ADAMS Accession No. ML023470304), lists SAFSTOR as one of three options that the NRC finds acceptable for a licensee to use in decommissioning its facility. As such, SAFSTOR is an option currently available to FENOC.

The NRC is currently considering changes to its decommissioning requirements through rulemaking. The NRC expects to publish the proposed rule later this year in the *Federal Register*. After the agency publishes the proposed rule, members of the public will be able to access the rule through a link on the NRC's public Web site at

<https://www.nrc.gov/reading-rm/doc-collections/rulemaking->

[ruleforum/active/RuleDetails.html?id=49](https://www.nrc.gov/reading-rm/doc-collections/rulemaking-ruleforum/active/RuleDetails.html?id=49). During the comment period, members of the public

may submit their comments through a link on the NRC's Web site at:

<https://www.regulations.gov/docket?D=NRC-2015-0070>.

III. Conclusion

In summary, the NRC has a comprehensive, regulation-based, framework that provides for oversight of a licensee's decommissioning funding during operation and decommissioning. The licensees' current decommissioning funding status report, dated March 24, 2017, indicates that the licensees met the minimum funding requirements for future radiological decommissioning of the NRC-licensed facilities for the 2017 reporting cycle, and that there were no shortfalls in decommissioning funding. If the NRC staff identifies a funding shortfall in its evaluation of the status reports, which were submitted to the NRC on March 15, 2019, the NRC will take appropriate action, including enforcement action, if necessary. Further, the NRC staff will continue to work with the U.S. Department of Justice to protect and preserve its interests in FENOC's compliance with decommissioning requirements in the bankruptcy proceeding. Based on the current information available, the NRC staff concludes that there is an insufficient basis to find that the licensees are out of compliance with the NRC's decommissioning financial assurance requirements. Therefore, based on the continuing oversight and actions described above, no further action is necessary at this time.

As a result of the NRC staff's evaluation, NRR has denied the petitioner's requests. The request to issue Demands for Information is denied because the licensees are required to provide the information requested, as applicable, in the decommissioning funding status reports. These decommissioning funding status reports were submitted to the NRC on March 15, 2019, and will undergo NRC review. The requests to issue a Notice of Violation and Notice of Civil Penalties to FE, FES, NG, and FENOC, and the request to issue an Order suspending NG's and FENOC's licenses, are denied as current information available to the NRC does not demonstrate that the entities are out of compliance with NRC regulations. Therefore, there is an insufficient basis on which to take enforcement action, issue civil penalties, or suspend a license.

In accordance with 10 CFR 2.206(c), a copy of this director's decision will be filed with the Secretary of the Commission for Commission review. As provided for by this regulation, the decision will constitute the final action of the Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 3rd day of April, 2019.

For the Nuclear Regulatory Commission.

/RA/

Ho K. Nieh, Director,
Office of Nuclear Reactor Regulation.

Attachment:
Petitioner's Comments on Proposed
Director's Decision and NRC Response

ATTACHMENT
PETITIONER'S COMMENTS ON PROPOSED DIRECTOR'S DECISION
AND
NUCLEAR REGULATORY COMMISSION RESPONSE

The petitioner provided comments to the U.S. Nuclear Regulatory Commission (NRC) on the proposed director's decision (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18309A157) by letter dated January 22, 2019 (ADAMS Accession No. ML19037A340).

The petitioner's comments do not alter the staff's conclusions in the proposed director's decision and, therefore, do not require modification to the final director's decision. This attachment provides the petitioner's comments on the proposed director's decision and the NRC responses to the comments.

The petitioner's comments are summarized as follows:

Comment 1 (from the petitioner's letter dated January 22, 2019, pages 1 and 2):

The NRC staff should issue Demands for Information to immediately request the updated decommissioning funding status report from FirstEnergy Corp. (FE), FirstEnergy Solutions (FES), FirstEnergy Nuclear Generation, LLC (NG), and FirstEnergy Nuclear Operating Company (FENOC). Specifically, the NRC should order FE, FES, FENOC and NG to provide the most up-to-date information on decommissioning funds with respect to: site-specific funding plans (Request No. 1), reliance on any external funds or parent company guarantees (Request

Nos. 2–4), proposed investment and financial contribution plans (Request No. 5), and commitments to guarantee coverage of shortfalls in light of bankruptcy (Request No. 6).

Response 1:

This comment restates the petitioner's original requests. As stated in the proposed director's decision, the next decommissioning funding status reports for Beaver Valley Power Station, Units 1 and 2, Davis-Besse Nuclear Power Station, Unit 1, and Perry Nuclear Power Plant, Unit 1 are due to the NRC by March 31, 2019, and were submitted on March 15, 2019 (ADAMS Accession No. ML19074A242). If the staff identifies a funding shortfall in those reports, the NRC will evaluate any such scenario on a case-by-case basis. For an operating power reactor, the NRC reserves the right to take additional steps, in accordance with paragraph 50.75(e)(2) of Title 10 of the *Code of Federal Regulations* (10 CFR), including reviewing the rate of accumulation of decommissioning funds, and to take additional actions, either independently or in cooperation with the Federal Energy Regulatory Commission and the licensee's State public utility commission, as appropriate. Additional actions may include modifying the licensee's schedule for accumulating decommissioning funds. In accordance with 10 CFR 50.82(c), if a licensee permanently ceases operation before the expiration of its license, the NRC will determine the collection period for any shortfall of funds on a case-by-case basis upon application by the licensee, and will consider the specific financial situation of each licensee. The NRC Office of Nuclear Reactor Regulation continues to monitor FENOC's decommissioning financial assurance for its reactors and ISFSIs to ensure adequate funding and compliance with requirements for decommissioning funding.

The Petition Review Board (PRB) determined that no further actions were needed, and the NRC made no changes to the final director's decision as a result of this comment.

Comment 2 (from the petitioner's letter dated January 22, 2019, page 2):

The Environmental Law and Policy Center (ELPC) requested that the NRC postpone acting upon the proposed director's decision and hold open ELPC's petition until the NRC can review the December 31, 2018, decommissioning funding status information.

Response 2:

In the proposed director's decision, the NRC described the existing requirements and processes in place to monitor the decommissioning funding status of the licensees. If the report demonstrates that FENOC has sufficient funding in its trust, then no further action is necessary. For licensees that are no longer rate-regulated or do not have access to a non-bypassable charge, as is the case for FENOC and NG, any shortfalls identified in the report must be corrected by the time the next decommissioning funding status reports are due (March 31, 2020).

The PRB determined that no further actions were needed, and the NRC made no changes to the final director's decision as a result of this comment.

Comment 3 (from the petitioner's letter dated January 22, 2019, pages 2 and 3):

If the NRC does not act now to ensure that FES, FENOC, and NG reserve adequate funds for decommissioning, parent company FE could seek to fully extricate itself from any decommissioning obligations before the NRC can identify the extent of the funding shortfalls.

Response 3:

As stated in the proposed director's decision, the U.S. Department of Justice, and the NRC's Office of the General Counsel, are working closely together to represent the NRC's interests in the bankruptcy proceeding, including protection and preservation of the decommissioning trust funds and continued compliance with decommissioning requirements. The proceeding in the U.S. Bankruptcy Court may result in changes to FENOC's debt structure, including reorganization and the transfer of control of the reactor operating licenses. Any such license transfers would be subject to NRC review and approval. As such, NRC approval of a license transfer would be required before FE could be removed from the current corporate structure for purposes relating to NRC licensing. NRC license transfer reviews include, among other things, a review of the applicant's financial qualifications, technical qualifications, and decommissioning funding. To approve the license transfer, the NRC must find that the applicant has demonstrated that there is reasonable assurance that sufficient funds will be available for the decommissioning process. Ultimately, the licensee is responsible for compliance with NRC decommissioning financial assurance regulations, and the NRC will continue to monitor the remaining licensee's continued compliance. While the bankruptcy proceeding is in progress, and until license termination, licensees are required to continue to comply with NRC regulations.

The PRB determined that no further actions were needed, and the NRC made no changes to the final director's decision as a result of this comment.

Comment 4 (from the petitioner's letter dated January 22, 2019, page 3):

There is no suggestion in the proposed Director's Decision that the NRC has reviewed Chapter 11 monthly statements of financial affairs, nor that it has assessed the status of the Chapter 11 proceedings.

Response 4:

As stated in the proposed director's decision, the U.S. Department of Justice and the NRC's Office of the General Counsel are working closely together to represent the NRC's interests in the bankruptcy proceeding, including protection and preservation of the decommissioning trust funds and continued compliance with decommissioning requirements. The U.S. Department of Justice has reviewed Chapter 11 monthly statements of financial affairs, and is actively involved in the status of the Chapter 11 proceedings.

The PRB determined that no further actions were needed, and the NRC made no changes to the final director's decision as a result of this comment.