



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 14, 2023

Mr. David B. Hamilton
Executive Vice President
and Chief Nuclear Officer
Energy Harbor Nuclear Corp.
168 E. Market Street
Akron, OH 44308-2014

SUBJECT: BEAVER VALLEY POWER STATION, UNIT NOS. 1 AND 2, DAVIS-BESSE NUCLEAR POWER STATION, UNIT NO. 1, AND PERRY NUCLEAR POWER PLANT, UNIT NO. 1 – THRESHOLD DETERMINATION FOR A VOTING POWER INCREASE IN PARENT COMPANY (EPID L-2023-LLL-0003)

Dear Mr. Hamilton:

By letter dated January 25, 2023 (Agencywide Documents Access and Management System Accession No. ML23025A361), Energy Harbor Nuclear Corp., acting on behalf of itself and Energy Harbor Nuclear Generation LLC (collectively, the licensees), requested that the U.S. Nuclear Regulatory Commission (NRC) make a threshold determination that a holder of voting shares of its parent company, Energy Harbor Corp., may exercise up to 49.99 percent of the voting power and that this would not result in a transfer of control of the NRC licenses held by the licensees that would require prior NRC approval pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) section 50.80, "Transfer of licenses," and 10 CFR 72.50, "Transfer of license."

The NRC staff has completed its review and concludes that an exercise by Nuveen Asset Management, LLC (Nuveen) of up to 49.99 percent of the voting power would not constitute a direct or indirect transfer of control of the NRC licenses held by the licensees. Therefore, the licensees do not require the NRC's prior consent under 10 CFR 50.80 and 10 CFR 72.50 for the Amended & Restated Voting Agreement as limited to Nuveen exercising 49.99 percent of the voting power.

D. Hamilton

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If you have any questions, please contact the Project Manager, Robert Kuntz, at (301) 415-3733 or Robert.Kuntz@nrc.gov.

Sincerely,

V. Sreenivas, Acting Chief
Plant Licensing Branch III
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation

Docket Nos. 50-334, 50-412, 50-346,
and 50-440

Enclosure:
Safety Evaluation

cc: Listserv



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SAFETY EVALUATION BY THE OFFICE OF NUCLEAR MATERIAL

SAFETY AND SAFEGUARDS

THRESHOLD DETERMINATION FOR A VOTING POWER INCREASE

IN PARENT COMPANY

ENERGY HARBOR NUCLEAR CORP.

BEAVER VALLEY POWER STATION, UNIT NOS. 1 AND 2 AND ISFSI

DOCKET NOS. 50-334, 50-412, AND 72-1043

DAVIS-BESSE NUCLEAR POWER STATION, UNIT NO. 1 AND ISFSI

DOCKET NOS. 50-346 AND 72-14

PERRY NUCLEAR POWER PLANT, UNIT NO. 1 AND ISFSI

DOCKET NOS. 50-440 AND 72-69

1.0 INTRODUCTION

By letter dated January 25, 2023 (Agencywide Documents Access and Management System Accession No. ML23025A361), Energy Harbor Nuclear Corp., acting on behalf of itself and Energy Harbor Nuclear Generation LLC (collectively, the licensees), requested that the U.S. Nuclear Regulatory Commission (NRC, the Commission) make a threshold determination that a holder of voting shares of its parent company, Energy Harbor Corp. (EHC), may exercise up to 49.99 percent of the voting power and that this would not result in a transfer of control of the NRC licenses held by the licensees that would require prior NRC approval pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) section 50.80, "Transfer of licenses," and 10 CFR 72.50, "Transfer of license."

2.0 BACKGROUND

The licensees and EHC emerged from bankruptcy on February 27, 2020. EHC is owned by the previous creditors of FirstEnergy Solutions Corp. (FES) and FES debtor-affiliates who converted their claims into equity in EHC in the FES bankruptcy proceeding.

Nuveen Asset Management, LLC (Nuveen), through funds it manages, is the largest holder of voting shares of EHC, holding approximately 46 percent of the issued and outstanding shares of common stock (stock) on a fully diluted basis. Avenue Capital Management II, LP (Avenue), through funds it manages, is the second largest holder of voting shares of EHC.

The Board of Directors (Board) of EHC (currently eight members) is selected pursuant to a Stockholders Agreement in place among EHC and its stockholders. Nuveen and Avenue have certain director designation rights under this agreement. In particular, so long as Nuveen and Avenue hold a minimum threshold of outstanding EHC stock, Nuveen has the authority to designate two directors and Avenue one director. Of the two directors Nuveen can designate, one of those directors must be independent of any stockholder with director nomination rights, including Nuveen.

3.0 EVALUATION

The NRC staff reviewed the licensees' request for a threshold determination that Nuveen may exercise up to 49.99 percent of the voting power in EHC and that this would not involve a direct or indirect transfer of control of the NRC licenses held by the licensees that would require prior NRC approval pursuant to 10 CFR 50.80 and 10 CFR 72.50. The regulation at 10 CFR 50.80(a) states, in part, that:

No license for a ... utilization facility ... or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing.

The regulation at 10 CFR 72.50(a) states, in part, that:

No license ... for an [independent spent fuel storage installation (ISFSI)] ... shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing.

As stated in the licensees' threshold determination request, EHC and Nuveen had previously entered into a voting agreement that prevented Nuveen from exercising voting rights in excess of the percentage of equity ownership it held at the time the voting agreement was executed, which was 39 percent. EHC and Nuveen have since executed an Amended & Restated Voting Agreement (A&R Voting Agreement) that allows Nuveen to exercise its voting rights in stock it owns up to the lesser of: (i) Nuveen's actual percentage of the voting power of the issued and outstanding shares of voting stock of EHC held in the aggregate by all stockholders of EHC at the applicable time (the voting power), and (ii) the lesser of Nuveen's percentage of the voting power (A) authorized by the Federal Energy Regulatory Commission and (B) authorized by the NRC either in its 2020 threshold determination related to the voting agreement (ML20164A230) or any subsequent order or threshold determination by the NRC granting approval for Nuveen to exercise voting rights as a stockholder consistent with such order or threshold determination; in each case, determined as of the date of the exercise of such voting power.

Since the NRC's 2020 threshold determination, EHC has made purchases contemplated under its stock redemption program. In addition, Nuveen has acquired additional stock from other EHC stockholders such that Nuveen's beneficial interest in EHC has increased from approximately 39 percent to approximately 46 percent as of December 31, 2022. Consistent with the voting agreement and the NRC's 2020 threshold determination, Nuveen has been restricted to only voting approximately 39 percent of its interest in EHC, notwithstanding the increase in its stock ownership. However, with the execution of the A&R Voting Agreement, Nuveen would be able to exercise additional voting power above the 39 percent authorized by the NRC's 2020

threshold determination upon, among other things, any subsequent NRC threshold determination. Therefore, the licensees requested a threshold determination that an exercise by Nuveen of up to 49.99 percent of the voting power would not constitute a change in control of the licensees' NRC licenses that requires prior NRC consent under 10 CFR 50.80 or 10 CFR 72.50 such that, should the NRC provide the requested threshold determination, under the A&R Voting Agreement, (i) Nuveen's voting power would currently be equal to its actual voting power of approximately 46 percent and (ii) if Nuveen's actual voting power were to exceed 49.99 percent, Nuveen's voting power would be capped at 49.99 percent by virtue of the NRC's threshold determination only authorizing Nuveen to exercise voting power up to 49.99 percent.

The Stockholders Agreement continues to restrict Nuveen to designating no more than two directors of the Board of EHC, with one of those directors required to be independent of any stockholder with director nomination rights, including Nuveen. In the event that Nuveen acquires additional EHC stock above the 49.99 percent threshold, Nuveen will hold only a beneficial (i.e., economic non-controlling) interest in such additional ownership percentage until necessary regulatory approvals are acquired. As a result of the provisions in the A&R Voting Agreement, Nuveen will remain unable to exert majority stockholder control over EHC even if it accrues beneficial ownership of a majority of outstanding shares, and will remain unable to exert control over the Board of EHC due to the restrictions in the Stockholders Agreement.

As stated in the licensees' threshold determination request, the financial and technical qualifications of the licensees to own and operate the four above-referenced reactors and three ISFSIs (the facilities) will not be affected by the A&R Voting Agreement and a threshold determination that an exercise by Nuveen of up to 49.99 percent of the voting power would not constitute a change in control that requires prior NRC consent under 10 CFR 50.80 or 10 CFR 72.50. There will be no physical changes to the facilities, no changes in their day-to-day operations, and no material changes to equipment operating procedures in connection with the proposal. The facilities' onsite organizations will remain unchanged by the proposal and the onsite organizational structure, including lines of authority and communication, will not be affected by the proposal. There will also be no changes to the EHC corporate structure as a result of the proposal.

4.0 CONCLUSION

Based on the above, the NRC staff concludes that an exercise by Nuveen of up to 49.99 percent of the voting power would not constitute a direct or indirect transfer of control of the NRC licenses held by the licensees. Therefore, the licensees do not require the NRC's prior consent under 10 CFR 50.80 and 10 CFR 72.50 for the A&R Voting Agreement as limited to Nuveen exercising 49.99 percent of the voting power.

Contributor: Trent L. Wertz

Date: March 14, 2023

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