

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

In the Matter of)
)
DETROIT EDISON CO.) Docket No. 52-033 COL
)
(Fermi Unit 3))
)
_____)

CLI-09-04

MEMORANDUM AND ORDER

On January 18, 2009, the Michigan Chapter of the Sierra Club, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Resistance at Fermi 2, Coalition for a Nuclear-Free Great Lakes, Don't Waste Michigan, Toledo Coalition for Safe Energy, and several individuals (collectively, "Petitioners"), e-mailed an "Objection to 'nonpublic' elements of Fermi 3 [combined license application ("COLA")] ("Objection") to the Hearing Docket.¹ The Objection contained five requests, including a request to extend the contention-filing deadline by ninety days. The Applicant filed a response opposing an extension of the contention filing deadline. As explained below, the Commission denies four of Petitioners' requests and grants one.

¹ The Petitioners failed to file this Objection in compliance with 10 C.F.R. § 2.302, which requires all filings in adjudicatory proceedings to be sent through the NRC's E-Filing system. The electronic filing requirements were outlined in the notice of hearing. All future filings in this proceeding must comply with this requirement.

As noted above, Petitioners ask the Commission to extend the March 9, 2009, deadline for filing hearing requests, petitions to intervene, and contentions by ninety days. Under 10 C.F.R. § 2.307(a), the Commission or presiding officer may extend a time limit upon a showing of good cause. Here, Petitioners argue that both the difficulties in coordinating action among volunteers and large public interest organizations and the challenge of simultaneously preparing for an environmental scoping meeting on the COLA while drafting contentions justify the extension. But many, if not most, groups that seek to intervene in NRC proceedings are organizations that rely on volunteers and must draft contentions while also balancing other obligations. Consequently, Petitioners have shown no special circumstances amounting to good cause for an extension.

Moreover, the license application at issue has been a matter of public record since October 17, 2008, when the NRC Staff published a notice in the *Federal Register* stating that the application was available on the NRC's website.² As a result, by the time the March 9, 2009, deadline to file contentions arrives, Petitioners will have had nearly five months to review the application and prepare contentions.

Next, Petitioners argue that they must consult with experts to craft their requests for access to Safeguards Information ("SGI") and sensitive, unclassified, non-safeguards information ("SUNSI") and therefore request "\$20,000 authorization from the agency per category of documentation concealed." Congress has explicitly prohibited the NRC from paying the expenses of or otherwise compensating intervening in its proceedings.³ Thus, the

² Detroit Edison Company; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 61,916 (Oct. 17, 2008).

³ Pub.L. 102-377, Title V, § 502, 106 Stat. 1342 (Oct. 2, 1992), 5 U.S.C. § 504 note.

Commission cannot grant this request.

In addition, Petitioners ask for “a blanket waiver of the \$191 fee required for seeking access to these SUNSI and SGI documents.” To be clear, the order only assesses the fee for requests for access to SGI.⁴ The Commission uses the access fee to pay the costs it incurs in determining whether the individual should be granted access to SGI.⁵ These costs include a fee to the Federal Bureau of Investigations as part of the background check. The statutory ban on paying the expenses of or otherwise compensating intervening in the Commission’s proceedings may preclude the Commission from granting this request. But, the Commission need not reach that issue. Even assuming the Commission could grant this request, Petitioners have not presented a compelling reason, unique to their circumstances, to do so. Petitioners claim that because they are mainly non-profit, public interest groups, the Commission should waive the fee. But, many entities that petition to intervene in NRC proceedings are public interest groups. Petitioners’ argument shows no special reason for departing from well-established NRC practice and granting a waiver in this case.

Next, Petitioners demand “urgent action to provide [Petitioners] a list of the categories of documents kept secret under SUNSI and SGI categorizations. [Petitioners] further request a document-by-document itemization and summarization, even if in redacted form.” Petitioners’ open-ended demand does not specify which particular documents they would like the NRC to categorize, itemize, and summarize. Nonetheless, earlier in the Request, Petitioners complain that the Commission’s prior order providing mechanisms to access SUNSI and SGI “reinforces

⁴ 74 Fed. Reg. at 838.

⁵ See 10 C.F.R. § 73.57(d)(3)(ii).

strictures against public access to portions of the COLA.” Thus, the Commission interprets this demand as a request for information concerning redacted portions of the application. This interpretation is reasonable because the proper focus of any contention should be the application.⁶ In this case, the only redacted portion of the application is Part 8, the security plan, which contains SGI. Section 13.6.1 of the NRC’s Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants (NUREG-0800) describes the type of information the NRC staff expects the applicant to provide in the COLA’s security plan.⁷ In short, the public record already indicates the nature of the redacted information. There is no basis or justification for Petitioners’ request.

Finally, Petitioners object to the provision in the NRC’s January 8, 2009 hearing notice and order requiring potential parties to submit requests for access to SGI and SUNSI within ten days -- that is by January 18, 2009.⁸ Early in 2008, the Commission amended its regulations to authorize the Secretary of the Commission to issue orders establishing procedures and timelines for potential parties to obtain access to SGI or SUNSI when seeking to intervene in NRC adjudicatory proceedings in which SGI or SUNSI may be involved.⁹ At the same time, the Commission approved procedures to be imposed by the Secretary that include a requirement to

⁶ See 10 C.F.R. § 2.309(f)(1)(vi).

⁷ NUREG-0800 is available on the NRC’s public website at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0800/>.

⁸ Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009).

⁹ See Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information, 73 Fed. Reg. 10,978, 10,979 (Feb. 29, 2008).

submit a request for access to SGI or SUNSI within ten days of the issuance of the notice of opportunity for hearing.¹⁰ The Commission approved these procedures after providing an opportunity for public comment.¹¹ The Commission remains convinced that ten days from the publication of the Federal Register notice is a reasonable amount of time to request access to SUNSI or SGI, given the public availability of applications well before the ten-day period starts and the relatively minimal effort necessary to file a request for SUNSI or SGI.

Nonetheless, although the Commission has included the ten-day deadline in recent hearing notices,¹² the Commission recognizes that the practice is a new one, with which many petitioners may be unfamiliar. Moreover, Petitioners' Objection included a series of requests seeking resources to assist the Petitioners in preparing their requests for access to SUNSI or SGI. They filed a request for funds to hire experts, a request to waive the SGI access fee, and a request for more detail on the type of information redacted in the COLA. As explained above, the Commission finds no merit in any of these requests, but believes that Petitioners in this case made them in good faith. In these circumstances, the Commission exercises its discretion to grant Petitioners a ten-day extension from the date of this order to file requests for access to SUNSI or SGI or both. The Commission will not so readily excuse non-compliance with the ten-

¹⁰ Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (Feb. 29, 2008) (ML080380626).

¹¹ See Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment Period and Notice of Availability of Proposed Procedures for Comment, 72 Fed. Reg. 43,569, 43,570 (Aug. 6, 2007) (announcing the availability of proposed access procedures for public comment).

¹² *E.g.*, Entergy Operations, Inc. et al.; Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Grand Gulf Unit 3, 73 Fed. Reg. 37,511 (July 1, 2008).

day deadline in future proceedings, however.

In addition to their Objection, Petitioners have submitted a “Request to suspend adjudication of Fermi 3 COLA pending completion of [Economic Simplified Boiling-Water Reactor (“ESBWR”)] design certification process” (“Request”). The Applicant has also opposed this Request. As the Request notes, the Commission recently issued a policy statement indicating that a COLA may reference a docketed design certification that the Commission has not yet approved.¹³ The policy statement also notes that an Atomic Safety and Licensing Board should hold any contentions on the design filed in the COLA adjudication in abeyance, pending the results of the rulemaking proceeding on the design certification.¹⁴ The Request acknowledges that the Commission recently applied this policy in *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC ____ (July 23, 2008), but asks the Commission to repudiate or revoke its policy in this case and suspend this proceeding until the completion of the ESBWR design certification process.

In Petitioners’ view, the Commission’s policy violates the Atomic Energy Act of 1954, as amended (“AEA”), 10 C.F.R. Part 52, and case law interpreting the AEA. Petitioners do not indicate precisely how the policy statement and the *Shearon Harris* Order violate the AEA, 10 C.F.R. Part 52, or judicial precedent. In fact, 10 C.F.R. § 52.55(c) explicitly envisions concurrent proceedings on a design certification rule and a COLA. It specifically permits an applicant to reference a design certification that the Commission has docketed but not granted, but provides that in such cases the applicant proceeds “at its own risk.”

¹³ Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972-73 (Apr. 17, 2008).

¹⁴ *Id.*

In addition, Petitioners assert that because the COLA references the ESBWR, the NRC's notice of hearing on the COLA violates the Administrative Procedure Act's notice requirement.¹⁵ Petitioners claim that the NRC cannot provide adequate notice of the hearing because the COLA does not reference the content of the final ESBWR. Thus, they allege that the public will be unable to participate meaningfully in these proceedings because the ESBWR design may change during the rulemaking process and thereby alter the COLA proceedings. Petitioners have had adequate notice of the COLA and the documents it references. The NRC has published the design details of the ESBWR on its website, and the public has a full opportunity to participate in the rulemaking proceeding on that design certification. While potential changes to the ESBWR may impact the COLA proceedings, the possibility of significant change in a facility design is inherent in COLA (or any other licensing) proceedings. Indeed, the Commission's rules of practice provide opportunities to file new or amended contentions to address such developments when they arise.¹⁶ Petitioners will be able to participate meaningfully in these proceedings. Thus, the Commission, consistent with its decision in *Shearon Harris*, declines to suspend these proceedings pending the outcome of the ESBWR design certification process.

¹⁵ 5 U.S.C. § 554.

¹⁶ See 10 C.F.R. §§ 2.309(c) and (f)(2).

In his dissent, Commissioner Jaczko indicates that providing Petitioners an extension to file Petitions to Intervene and a further extension to seek access to SGI and SUNSI would have no impact on the schedule for reviewing the ESBWR design. But absent a showing of good cause by Petitioners as to the necessity of these extensions, the lack of impact on the review schedule is not compelling. Therefore, the Commission grants these Petitioners a ten-day extension from the date of this order to the deadline for filing requests for access to SGI and SUNSI. The Commission denies Petitioners' remaining requests.

IT IS SO ORDERED.

[NRC SEAL]

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of February, 2009.

Commissioner Gregory B. Jaczko, dissenting, in part:

I agree with my colleagues that the interested petitioners in this matter should be afforded additional time for seeking access to Sensitive Unclassified Non-Safeguards Information (SUNSI) and Safeguards Information (SGI). But, I would have provided the organizations more time for both seeking access to SUNSI, and for filing contentions in this matter. The application at issue references the Economic Simplified Boiling Water Reactor (ESBWR) design. There is currently no review schedule for this design. Yet the review of the ESBWR design is required to be completed before a Combined License can be issued. With no established end date for review of the ESBWR, there would be no impact on the schedule were we to provide interested members of the public with additional time in which to exercise their statutory right to an opportunity for a hearing.