

June 24, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
THE DETROIT EDISON COMPANY	)	Docket No. 52-033-COL
	)	
(Fermi Nuclear Power Plant, Unit 3)	)	

APPLICANT’S RESPONSE TO PETITION TO SUSPEND

INTRODUCTION

On June 18, 2012, several individuals and organizations (“Petitioners”), including Intervenors in this proceeding, collectively filed with the Commission a “Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings” (“Petition”). The Petitioners request that the Commission (1) suspend its final licensing decisions in pending licensing proceedings pending completion of the remanded proceedings on the waste confidence decision update (“WCD”) and temporary storage rule (“TSR”); and (2) establish a process for ensuring that the remanded proceeding complies with the public participation requirements of Section 189a of the Atomic Energy Act (“AEA”).<sup>1</sup> The Detroit Edison Company (“Detroit Edison”) herein responds to the Petition.<sup>2</sup>

The Petitioners state that the Petition is not a motion for a stay of the effectiveness of a decision pursuant to 10 C.F.R. § 2.342 or any other kind of request for equitable relief.

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<sup>1</sup> Pet at 3.

<sup>2</sup> By Order dated June 19, 2012, the Commission established a deadline for responding to the Petition of 12:00 pm Eastern Daylight Time on Monday, June 25, 2012.

Likewise, the Petition does not request that the Commission suspend any licensing proceedings — they do not seek any change in the schedules for the NRC Staff’s review of reactor license applications or adjudications in pending reactor licensing cases. Instead, the Petition purports to seek only the suspension of final licensing decisions pending the NRC’s completion of the National Environmental Policy Act (“NEPA”) reviews as discussed by the U.S. Court of Appeals for the D.C. Circuit in *New York v. NRC*.<sup>3</sup> The Petitioners also seek assurances from the Commission that they will have adequate opportunity to participate in any proceeding on the remanded issues.

As discussed below, the Petition is unnecessary. If the WCD and TSR are vacated, then the NRC would necessarily comply with the AEA and NEPA prior to making any final licensing decisions in this proceeding. There is no reason to prospectively suspend final licensing decisions. As with respect to issues involving the Fukushima accident, the Commission has flexibility under both the AEA and NEPA to address the issues on remand generically or, if warranted by considerations in an individual proceeding, on a case-by-case basis. Lastly, to the extent that the Petition requests a 60-day period for raising proceeding-specific challenges to any generic conclusions made by the NRC on remand, the Petition should be denied. The Commission’s existing processes provide more than adequate opportunity for parties to raise those issues in individual proceedings.

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<sup>3</sup> Docket No. 11-1045 (D.C. Cir. June 8, 2012).

## DISCUSSION

### A. The Petition to Suspend Final Licensing Decisions Is Unnecessary

#### 1. *The Petition Is Premature*

As an initial matter, and as recognized by the Petitioners, the “mandate” for the Court’s decision in *New York v. NRC* has not yet issued. Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the judgment and is, in effect, the order that makes the decision effective. By rule, the Court’s mandate will not issue until seven calendar days after the time for a petition for rehearing expires or an order denying a petition for rehearing is issued, whichever is later.<sup>4</sup> A timely rehearing petition by the NRC or other parties in the case would automatically stay the issuance of the mandate.<sup>5</sup> The time in which a party may seek rehearing is 45 days after entry of judgment. Moreover, a circuit court can, upon a motion of a party, stay its mandate pending a petition for certiorari in the Supreme Court.<sup>6</sup> Until the mandate issues, the remand to the NRC is not effective and there would be no need for the NRC to take any action with respect to the WCD or TSR in connection with pending licensing decisions.

#### 2. *The NRC Will Comply With NEPA and the AEA*

In the event that the mandate issues without modification of the judgment in the case, the WCD/TSR matter would then be remanded to the NRC for further consideration. In that case, the Petition seeks “non-discretionary compliance with the requirements of NEPA, the AEA, and the court’s decision in *State of New York*.”<sup>7</sup> This aspect of the Petition is unnecessary.

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<sup>4</sup> Fed. R. App. P. 41(b).

<sup>5</sup> Fed. R. App. P. 41(d)(1).

<sup>6</sup> Fed. R. App. P. 41(d)(2).

<sup>7</sup> Pet. at 4.

On remand, the NRC would, of course, comply with the AEA and NEPA. And, any decision by the NRC on remand would be subject to review by the Court of Appeals. There is no need to grant a petition that merely seeks compliance with law. A “presumption of regularity attaches to the actions of Government agencies.”<sup>8</sup> The NRC Staff and the Commission will fully and properly carry out their duties without a need for the relief requested in the Petition.

B. If the Mandate Issues, the Commission Should Not Suspend Final Licensing Decisions

If the mandate issues, the Commission may decide to expeditiously conduct a rulemaking to supply the analyses identified by the Court of Appeals to support the WCD and TSR. The Court specifically upheld the NRC’s authority to address NEPA issues by generic rulemaking.<sup>9</sup> The usual notice and comment procedures, which provide opportunity for public participation, would apply during the rulemaking process. This approach would fully comply with NEPA and the AEA (including Section 189.a of the AEA).

To promote efficiency and uniformity the Commission has a longstanding practice that issues that are, or that are about to become, the subject of a rulemaking are not subject to challenge in individual licensing proceedings.<sup>10</sup> There is no reason to depart from this approach.<sup>11</sup> Accordingly, the Commission should direct that any contentions seeking to raise

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<sup>8</sup> *United States v. Postal Serv.*, 534 U.S. 1, 10 (2001); *see also Ark. Power & Light Co.* (Arkansas Nuclear One Unit 2), ALAB-94, 6 AEC 25, 28 (1973) (“The well-recognized presumption of administrative regularity fully extends to the discharge by the staff of its responsibilities in connection with the issuance of operating licenses.”).

<sup>9</sup> *New York*, slip op. at 20.

<sup>10</sup> *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974); 10 C.F.R. § 2.335(a).

<sup>11</sup> Indeed, this approach is implicitly endorsed by Petitioners, who seek an opportunity to comment on any generic determinations that the NRC may make or challenge a generic rulemaking on site-specific grounds. Pet. at 11. The Petitioners would retain the ability

waste confidence or temporary storage issues be held in abeyance until the Commission formally initiates a rulemaking. At that point, the contentions should be dismissed.

Although the issues involved appear to lend themselves to generic resolution, the NRC also does not need to prospectively suspend all final licensing decisions until the rulemaking on remand is complete. The Court's remand order does not, in and of itself, direct the NRC Staff to conduct a rulemaking to address the remanded issues or suggest that all final licensing decisions be suspended until a rulemaking is complete.<sup>12</sup> And, the Petition does not request and does not provide a basis for suspending licensing proceedings.<sup>13</sup> The Commission therefore retains the option to address the issues involved on a case-by-case basis — particularly where doing so will help to promote timely and efficient decisions in pending cases.

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to raise a site-specific challenge based on unique considerations in accordance with the NRC's waiver rule, 10 C.F.R. § 2.335(b).

<sup>12</sup> Cf. *Virginia Elec. and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 465 (citing the Commission's rejection of an intervenor's argument that, by reason of the D.C. Circuit's remand order in *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979), all individual spent fuel modification proceedings must be suspended until a new generic rulemaking was complete). NEPA is process-driven and does not dictate any particular result. A generic rule addressing the issues identified by the Court in *New York v. NRC* would not automatically necessitate any design changes to spent fuel pools. *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980).

<sup>13</sup> The Petitioners have not shown that continuation of licensing proceedings, including licensing decisions supported by appropriate case-specific analyses, pending consideration of the rulemaking petition, would "jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge" from the NRC's evaluation of the WCD and TSR on remand. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001).

The Petitioners argue, citing CLI-10-19, that the Commission may not issue any licenses until rulemaking proceedings on the remanded issues are complete.<sup>14</sup> However, *Indian Point* does not stand for the proposition that the Commission is barred from issuing a license until the TSR rulemaking is complete. Rather, *Indian Point* stands for the proposition that the NRC cannot rely on a proposed rule in making a licensing decision. The Commission's statements in CLI-10-19, which were made when the WCD and TSR rulemakings were already underway, do not foreclose consideration of the issues identified by the Court in individual proceedings, if circumstances warrant. The NRC always has the option of addressing the issues involved in a pending rulemaking on a case-by-case basis.<sup>15</sup>

C. The Procedural Relief Sought by Petitioners Is Unnecessary

The Petitioners also request that the Commission create special procedures to govern consideration of the issues on remand. The Petitioners specifically request (1) an opportunity to comment on any draft Environmental Assessment ("EA"); and (2) at least 60 days to seek consideration, in individual licensing cases, of site-specific safety or environmental concerns raised during the remanded proceeding. The Petitioners' requests should be denied.

This request is similar to a request made in response to the events at Fukushima, where Petitioners requested that the Commission "establish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings" to include a sixty-day period for raising new issues following the publication of regulatory

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<sup>14</sup> Pet at 5, citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating, Units 2 and 3), CLI-10-19, 72 NRC 98, 100 (2010).

<sup>15</sup> The choice between proceeding by general rule or by individual, *ad hoc* litigation lies primarily in the informed discretion of the administrative agency. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942).

proposals or environmental decisions.<sup>16</sup> In CLI-11-05, the Commission rejected the request, explaining that its normal processes provide for filing new or amended contentions, submitting rulemaking comments, and making motions (including motions to reopen).<sup>17</sup> In the context of the present Petition, all of these procedural mechanisms are available in this proceeding and would allow the proceeding to continue with minimal disruption to all participants. Neither new procedures nor a separate timetable for raising new issues related to the remanded issues are warranted.

### CONCLUSION

For the foregoing reasons, the Commission should deny the request to suspend final licensing decisions. The NRC should continue its review of the Fermi 3 COL application, and the current procedures for raising issues in the proceeding should remain in place.

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<sup>16</sup> See *Union Elec. Co. d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC \_\_\_, slip op. at 32 (Sept. 9, 2011).

<sup>17</sup> *Id.* at 33.

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Dated at Washington, District of Columbia  
this 24th day of June 2012



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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO PETITION TO SUSPEND" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 24th day of June 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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