

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

<sup>1</sup> In addition to Beyond Nuclear, the intervenors include: Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Manteri, Marcee Meyers, and Shirley Steinman.

## BACKGROUND

### I. Procedural History

This proceeding concerns the application submitted by Detroit Edison Company (Applicant) for a combined license (COL) for a new nuclear reactor at the Fermi nuclear facility in Monroe County, Michigan. See Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 61,916 (Oct. 17, 2008). The Intervenor timely filed a petition for intervention in March 2009, proffering fourteen proposed contentions; the Board found standing and admitted four of the proposed contentions. LBP-09-16, 70 NRC 227, 306 (2009) *aff'd*, CLI-09-22, 70 NRC 932 (2009).<sup>2</sup> The Board subsequently admitted an additional contention in June 2010. LBP-10-09, 71 NRC 493, 522 (2010). Two of the original admitted contentions have since been dismissed via summary disposition. See Licensing Board Order (Granting Motion for Summary Disposition of Contention 3) at 8 (July 9, 2010) (unpublished); Licensing Board Order (Granting Motion for Summary Disposition of Contention 5) at 3 (Mar. 1, 2011) (unpublished). There are pending motions for summary disposition with respect to the remaining three admitted contentions.<sup>3</sup> Ten contentions submitted by the Intervenor following publication of the draft environmental impact statement (DEIS) for Fermi 3 were rejected by the Board, except to the extent that they raised issues already the subject of admitted contentions. See Licensing Board Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions), LBP-12-12, 75 NRC \_\_\_\_ (slip op.) (June 21, 2012). The Intervenor have also recently proposed a new contention related to the National Historic Preservation Act. See Intervenor's Motion for Admission of Contention No. 25

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<sup>2</sup> One of the Intervenor's initial proposed contentions, Contention 2, challenged the NRC's regulations related to spent fuel storage and was rejected by the Board as an impermissible challenge to NRC's regulations. See LBP-09-16, 70 NRC at 251. At the time of the Board's ruling, the Waste Confidence Decision Update discussed below was not yet complete, and the Board noted that a contention is inadmissible when it "seeks to litigate a matter that is, or is about to become, the subject of a rulemaking." *Id.* (internal citations omitted).

<sup>3</sup> See Applicant's Motion for Summary Disposition of Contention 15 (Apr. 17, 2012); Applicant's Motion for Summary Disposition of Contention 6 (Apr. 17, 2012); Applicant's Motion for Summary Disposition of Contention 8 (June 11, 2012).

(Challenging § 106 NHPA Mitigation for Demolition of Fermi Unit 1) at 1-2 (July 2, 2012). This contention remains pending before the Board.

On June 8, 2012, the United States Court of Appeals for the D.C. Circuit vacated the NRC's Waste Confidence Decision Update (Waste Confidence Decision) and Temporary Storage Rule and remanded those rulemakings back to the agency. *New York v. NRC*, 681 F.3d at 483. Shortly thereafter, the Intervenor, together with various other organizations, submitted a petition requesting that the NRC "suspend its final licensing decisions in all pending NRC licensing proceedings pending completion of the remanded proceedings." See *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings*, at 3 (June 18, 2012) (ADAMS Accession No. ML12170A876). These petitioners also requested that the Commission establish a 60-day timetable for submitting new site-specific contentions based on the D.C. Circuit's ruling. *Id.* at 12. As part of its response, the Staff averred that the Commission's normal adjudicatory procedures in 10 C.F.R. Part 2 provide "well-understood and appropriate means for raising contentions based on new information[.]" See *NRC Staff's Answer to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings*, at 4-5 (June 25, 2012) (Staff Answer). The Intervenor thereafter filed the present Motion, which the Staff now answers.

## II. The NRC's Waste Confidence Decision

In the National Environmental Policy Act of 1969 (NEPA), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331(a). NEPA requires the NRC to prepare an environmental impact statement (EIS) to support a major Federal action, such as issuing a license for a power reactor. 42 U.S.C. § 4332. The NRC regulations in 10 C.F.R. Part 51 govern this process. Among other things, these regulations require applicants to submit an

environmental report (ER) as part of a licensing application to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41.

Before acting on a power reactor license application, NEPA requires the NRC to address the environmental impacts of operation, including on-site storage and disposal of the reactor's spent fuel after the licensed period of operation ends. *Minnesota v. NRC*, 602 F.2d 412, 414-15, 419 (D.C. Cir. 1979). In the past, "the Commission sensibly has chosen to address high-level waste disposal generically." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999). The agency has most recently addressed issues pertaining to spent fuel storage and disposal in its Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) (Waste Confidence Decision) and a temporary storage rulemaking, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation, Final Rule, 75 Fed. Reg. 81,032 (Dec. 23, 2010) (Temporary Storage Rule).

The Waste Confidence Decision Update and the Temporary Storage Rule support generic findings in 10 C.F.R. § 51.23(a) regarding the impacts of spent fuel storage after the licensed period of operation. See Motion at 2-3; 10 C.F.R. § 51.23(a). The Commission rendered several findings in section 51.23(a). Two of those findings are (1) that spent fuel "can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation" and (2) that "there is reasonable assurance that sufficient mined geologic repository capacity will be available . . . when necessary." 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(b) relies on § 51.23(a) to exclude "discussion of any environmental impact of spent fuel storage [during] the period following the term of the reactor operating license" in any EIS, Environmental Assessment, or ER. 10 C.F.R. § 51.23(b).

## DISCUSSION

The Intervenor based the proposed contention on the D.C. Circuit Court of Appeals' recent decision in *New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). The D.C. Circuit's decision vacated the NRC's updated Waste Confidence Decision and its Temporary Storage Rule and remanded those rulemakings to the NRC. *Id.* at 483. The proposed contention, which is not numbered, states as follows:

The DEIS for the proposed Fermi 3 does not satisfy NEPA, because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, as required by the U.S. Court of Appeals in *State of New York v. NRC*, No. 11-1045 (June 8, 2012). Therefore, unless and until the NRC conducts such an analysis, no license may be issued.

Motion at 4. At root, the Petition asserts that because the generic findings in the Commission's rulemaking have been vacated, "the NRC no longer has any legal basis for Section 51.23(b), which relies on those findings to exempt both the agency staff and license applicants from addressing long-term spent fuel storage impacts in individual licensing proceedings." Motion at 4-5.

Although the contention was filed after the initial deadline for submitting contentions in this proceeding, the Intervenor asserts that they meet the standards of § 2.309(f)(2) for late-filed contentions. Motion at 9. Considering the holding of the D.C. Circuit and that the Petition was filed within 31 days of the ruling, the Staff agrees that the Intervenor has sufficiently demonstrated the timeliness of their filing under that regulation. The Board has established that "a proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available." Licensing Board Order (Establishing schedule and procedures to govern further proceedings) at 2 (Sept. 11, 2009) (Scheduling

Order). The Intervenor filed their Motion on the first business day after the Board's 30-day deadline, and the proposed new contention is therefore timely.

The Board has previously discussed the Commission's standards for contention admissibility, which prohibit challenges to existing Commission regulations. LBP-09-16, 70 NRC at 243-45. The Intervenor recognizes that "because the mandate has not yet issued in *State of New York*, this contention may be premature." Motion at 2. Indeed, the Commission has observed, "A court acts only through its mandate. When a mandate is stayed, a decision has no binding effect . . . ." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-76-17, 4 NRC 451, 466 (1976) (citing *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962)). Thus, when a board suspended a construction permit because an appellate decision invalidated a relevant NRC regulation, the Commission overturned the board, in part, because that mandate had not yet issued. *Id.* at 467. Moreover, licensing boards have typically found contentions premature, and therefore inadmissible, when those contentions relied on court decisions for which a mandate had not issued. *E.g.*, *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-53, 16 NRC 196, 205 (1982).<sup>4</sup> As the licensing board in *Perry* stated, "Until that mandate is issued, the rules of the Commission remain in effect and this Board continues to be bound by them. As a result, the Court of Appeals' decision does not as yet provide a ground for" an admissible contention.<sup>5</sup> *Id.* at 205.

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<sup>4</sup> But see *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-82-100, 16 NRC 1550, 1556-57 (1982) (noting that because "the mandate of that case has not been issued . . . we have deferred our rulings on these requests").

<sup>5</sup> The Commission recognizes its responsibility to "act promptly and constructively in effectuating the decisions of the courts." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-76-14, 4 NRC 163, 166 (1976). Further, the Commission understands that "all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC[;] the eventual – legally required – issuance of the mandate is hardly an 'unanticipated event.'" *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006). Thus, the Commission, of course, could decide to act prior to issuance of the court's mandate. *Vermont Yankee*, CLI-76-14, 4 NRC at 166. However, in the instant case, the Board cannot admit a contention that challenges an NRC regulation before a court of appeals issues its mandate striking down that regulation.

Under the Federal Rules of Appellate Procedure, a “court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc or motion for stay of mandate, whichever is later.” Fed. R. App. P. 41(b). On July 6, 2012, at the Commission’s request, the D.C. Circuit extended the period of time to file a petition for rehearing of *New York v. NRC* to August 22, 2012. *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (order granting unopposed motion to extend time period to seek rehearing). As a result, under Rule 41(b), the mandate is not likely to issue until at least August 29, 2012. Accordingly, because 10 C.F.R. § 51.23(b) remains in effect until the mandate issues, NRC regulations will continue to require the Board to exclude the Intervenor’s contention until the court issues the mandate. *Seabrook Station*, CLI-76-17, 4 NRC at 466. Consequently, the admissibility of the underlying contention depends on whether the mandate has issued when this Board rules on the Motion and proposed contention.<sup>6</sup>

If the D.C. Circuit’s mandate issues before the Board rules on the contention’s admissibility, upon the mandate’s issuance, the contention as pled would satisfy each of the section 2.309(f)(1) criteria and would be admissible as a contention of omission. See Motion at 4-9. This determination, however, would remain subject to direction or action taken by the Commission in response to the D.C. Circuit’s ruling, including any generic rulemaking action and/or issuance of any Commission instruction with respect to how contentions based on the court’s ruling are to be addressed in individual NRC proceedings. For example, in the event that the Commission solely undertakes a generic rulemaking approach to address these issues, the contention may need to be dismissed. See, e.g., *Oconee*, CLI-99-11, 49 NRC at 345

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<sup>6</sup> See 10 C.F.R. § 2.335(a) (noting that unless a party seeks a waiver of Commission regulations, “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding”).

("Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'").

If the D.C. Circuit's mandate has not issued by the time the Board rules on the contention, then 10 C.F.R. § 51.23 will remain in place. That regulation excludes from NRC NEPA documents a consideration of the environmental impacts of onsite spent fuel storage after the licensed term of operation. Because the contention demands such a consideration, Motion at 4, the contention at present would constitute an impermissible attack on existing Commission regulations. 10 C.F.R. § 2.335(a). Accordingly, pending the issuance of the court's mandate, the Board should reject the contention, subject to refiling without prejudice when, and if, the mandate issues. If the Intervenors refile the contention after the court issues the mandate, it would be timely if filed within 30 days of the mandate's issuance and would be admissible provided the claims it raises do not become the subject of a generic rulemaking. 10 C.F.R. § 2.309(f)(2); *Oconee*, CLI-99-11, 49 NRC at 345. See *also* Scheduling Order at 2.



CONCLUSION

For the foregoing reasons, the Staff agrees with the Intervenor that the contention would be admissible upon issuance of the D.C. Circuit's mandate in *New York v. NRC*. However, if the Board rules before that time, the contention must be rejected as an impermissible challenge to NRC regulations. Finally, the admission of this contention is subject to any further action by the Commission, including commencement of a generic rulemaking to address these matters, and/or the issuance of instructions as to how the contention should be addressed.

Respectfully submitted,

**/signed (electronically) by/**

Marcia Carpentier  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
(301) 415-4126  
Marcia.Carpentier@nrc.gov

Dated at Rockville, Maryland  
This 3rd Day of August, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT FERMI 3 NUCLEAR POWER PLANT have been served upon the following persons by Electronic Information Exchange and electronic mail this 3rd day of August, 2012:

Ronald M. Spritzer, Chair  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Ronald.Spritzer@nrc.gov

Office of Commission Appellate  
Adjudication  
Mail Stop O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: OCAEmail@nrc.gov

Anthony J. Baratta  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Anthony.Baratta@nrc.gov

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: HEARINGDOCKET@nrc.gov

Randall J. Charbeneau  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Randall.Charbeneau@nrc.gov

Bruce R. Matters  
Detroit Edison Company  
One Energy Plaza, 688 WCB  
Detroit, Michigan 48226  
E-mail: matersb@dteenergy.com

David Repka, Esq.  
Tyson R. Smith, Esq.  
Counsel for the Applicant  
Winston & Strawn, LLP  
1700 K Street, NW  
Washington, DC 20006-3817  
E-mail: drepka@winston.com  
trsmith@winston.com

Terry J. Lodge, Esq.  
Counsel for Petitioners  
316 N. Michigan St., Ste. 520  
Toldeo, OH 43604-5627  
E-mail: tjlodge50@yahoo.com

Respectfully Submitted,

**/Signed (electronically) by/**  
Marcia Carpentier  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
(301) 415-4126  
Marcia.Carpentier@nrc.gov

Dated at Rockville, Maryland  
This 3rd day of August, 2012