UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

APPLICANT'S OPPOSITION TO PETITION TO SUSPEND FINAL DECISIONS AND PROPOSED NEW CONTINUED STORAGE CONTENTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

FEDERAL REGISTER NOTICES

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INTRODUCTION

In accordance with the Commission's Order, dated October 7, 2014, DTE Electric Company ("DTE") responds to both the Petition to Suspend Final Decisions and the Proposed Contention filed by the Petitioners in the Fermi 3 combined license ("COL") proceeding.[1] The Petition to Suspend and the Proposed Contention allege that the NRC's recent final Continued Storage rule ("CS Rule") and the supporting Generic Environmental Impact Statement ("GEIS") fail to include specific "safety findings" regarding the feasibility and availability of spent fuel disposal at a geologic repository and argue that the NRC may not make final licensing decisions until the NRC makes those safety findings.

The Commission should deny the Petition to Suspend and reject the Proposed Contention as a matter of law. The Petition to Suspend is unnecessary and is not in accord with

[1] *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3) *et al*, CLI-14-09, 79 NRC __ (Oct. 7, 2014) (slip op.); "Petition To Suspend Final Decisions In All Pending Reactor Licensing Proceedings Pending Issuance Of Waste Confidence Safety Findings," dated September 29, 2014 ("Petition to Suspend"); "Intervenors' Motion For Leave To File A New Contention Concerning The Absence Of Required Waste Confidence Safety Findings In The Combined Operating Licensing Proceeding For Fermi 3 Nuclear Power Plant," dated September 29, 2014 ("Proposed Contention"). The Petition to Suspend and the Proposed Contention were filed in substantially similar form in connection with other ongoing proceedings.

established NRC processes. The legal theory underlying the Proposed Contention is not supported by the Atomic Energy Act ("AEA"), is contrary to relevant precedent, and inaccurately characterizes the NRC's historic practice. Moreover, the substantive "safety" findings that Petitioners argue are necessary have not been abandoned by the NRC and are in fact addressed within the GEIS.

BACKGROUND

In 2012, the D.C. Circuit found that the NRC had failed to comply with the National Environmental Policy Act ("NEPA") in three specific areas of its 2010 update to the Waste Confidence Decision ("WCD") and accompanying Temporary Storage Rule ("TSR").[2] First, the Court of Appeals concluded that the NRC must examine the environmental impacts of a "no repository" scenario. Second, the Court of Appeals found that the NRC had not adequately assessed the risk of spent fuel pool leaks. Third, the Court of Appeals decided that the NRC had not adequately considered the consequences of potential spent fuel pool fires.

After an extensive review and numerous opportunities for public comment, the NRC promulgated a final rule on Continued Storage of Spent Nuclear Fuel adopting the generic environmental review in the GEIS.[3] In the GEIS, the NRC specifically addressed the environmental impacts of continued storage of spent nuclear fuel and the three issues raised in

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2 *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

3 "Continued Storage of Spent Nuclear Fuel," Final Rule, 79 Fed. Reg. 56238 (Sept. 19, 2014); "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel," NUREG-2157 (Aug. 2014) (ADAMS Accession No. ML14188B749); 79 Fed. Reg. 56262 (Sept. 19, 2014).

the D.C. Circuit's decision.[4] Under the rule the environmental impacts described in the GEIS are incorporated into environmental impact statements for individual licensing proceedings.[5]

DISCUSSION

A. The Petition to Suspend Is Not Authorized By NRC Regulations And Is Unnecessary

In the Petition to Suspend the Petitioners argue that the NRC must suspend all final licensing decisions until the agency promulgates generic safety findings on the technical feasibility of spent fuel disposal and the adequacy of future repository capacity or makes similar findings in individual reactor licensing proceedings.[6] The Petition to Suspend has no basis in the Commission's rules of procedure. Unlike the remand from *New York v. NRC*, there is no judicial decision compelling suspension of licensing decisions at this time. It therefore remains incumbent upon the Petitioners to follow the applicable NRC process to assert a position, rather than merely alleging a need to suspend final licensing decisions without following the process to establish their position's validity. Here, the Petitioners have filed a Proposed Contention covering the issues raised in the Petition to Suspend. Implicit in any decision to admit a contention is the possibility that the contention will be resolved in favor of an intervenor, which would then provide a basis for withholding a final licensing decision in a particular case. In the absence of such a decision, the Petition to Suspend is inappropriate and (at a minimum) premature. Resolving the Proposed Contention is the appropriate way to address the Petitioners'

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4 79 Fed. Reg. at 56241; GEIS at 1-4, App. E, App. F. In the GEIS the NRC also specifically declined to accept comments arguing that the AEA requires the NRC to make reasonable assurance "safety" findings on spent fuel storage safety after a reactor's licensed life and repository safety. GEIS at D-28 to D-29.

5 10 C.F.R. § 51.23(b). The impacts described in the GEIS would be "considered" in certain environmental assessments. *Id.*

6 Petition to Suspend at 3.

concerns in the first instance. Only if the Commission admits a contention and ultimately finds in favor of Petitioners on the merits would there be a reason not to make a final licensing decision, and even then, a Petition to Suspend would be unnecessary.

B. The Commission Should Deny the Petition to Suspend

The Petition fails to meet the standards the Commission has applied to requests to suspend licensing proceedings and decisions. In a recent decision, the Commission reiterated that suspension of licensing proceedings (including suspensions of final decisions) is a "drastic" action that is not warranted absent immediate threats to public health and safety, or other compelling reason.[7] In deciding whether to postpone a final licensing decision while awaiting the results of an ongoing regulatory review, the Commission considers whether moving forward with the licensing process will (1) jeopardize the public health and safety; (2) prove an obstacle to fair and efficient decisionmaking; or (3) prevent appropriate implementation of any pertinent rule or policy changes that might emerge from its ongoing evaluations.[8] The Petition to Suspend does not meet any of these criteria.

First, the Petition to Suspend does not address whether moving forward with issuance of a COL for Fermi 3 would jeopardize public health and safety, and there is no reason to suggest that it will. The Petition raises issues surrounding the safety of spent fuel disposal at a facility other than Fermi 3. Therefore, under the first criterion, no public health and safety issue related to the specific application under review is involved.[9] And none could be involved, given

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7 *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2) *et al.*, CLI-11-05, 74 NRC 141, 158 (2011).

8 *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001).

9 In *Callaway* (74 NRC at 161), addressing a request to suspend proceedings pending completion of the NRC's post-Fukushima reviews, the Commission noted that the lack of

that the operation under COL would not begin for several years. There is no reason to believe that any danger to public health and safety would result from completing the licensing process and issuing a COL for Fermi 3.[10]

Second, making a final licensing decision in the Fermi 3 proceeding will not be an obstacle to fair and efficient decisionmaking on the issues raised in the Petition to Suspend and Proposed Contention. The Intervenors' issues can be addressed in response to the Proposed Contention in accordance with the applicable rules of procedure prior to the licensing decision. Furthermore, completing the Fermi 3 COL proceeding and issuing a COL is no obstacle to the NRC evaluating the safety of a *geologic repository* prior to authorizing disposal of spent fuel at the repository. In contrast, not moving forward with final licensing decisions would obstruct fair and efficient decisionmaking by unnecessarily holding the COL hostage to issues unrelated to Fermi 3.

Third, issuing the Fermi 3 COL will not "prevent appropriate implementation of any pertinent rule or policy changes." As noted above, the safety findings that are the focus of the Petition to Suspend and Proposed Contention relate to the feasibility and availability of a geologic repository, not the construction or operation of Fermi 3. As discussed below, the NRC in the GEIS has amply documented its basis for determining that safe spent fuel disposal is

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a link between the relief requested and individual applications made it difficult to conclude that moving forward with any individual licensing decision would have a negative impact on public health and safety. The same is true here, where the Petition makes no effort to link the Fermi 3 COL application to the issues in the Petition.

[10] The NRC Staff has completed its review of spent fuel handling and storage at Fermi 3 and there are no outstanding issues. *See, e.g.*, Advanced Safety Evaluation Report for Fermi 3 COL, Chapter 9, *Auxiliary Systems*, at Section 9.1.2 (noting that Subsection 9.1.2 of the Fermi 3 COL FSAR incorporates by reference, with no departures or supplements, Section 9.1.2, "Spent Fuel Storage", of Revision 9 of the ESBWR DCD, and concluding that all nuclear safety issues relating to spent fuel storage that were incorporated by reference have been resolved) (ADAMS Accession No. ML113000122).

feasible and that a reasonable period of time for a repository to be developed and become available is 25 to 35 years.[11] Even assuming these or some other safety findings must be formalized in a rule, that generic effort can be completed independent of the Fermi 3 COL. Issuing a COL therefore will not prevent appropriate implementation of any rule or policy changes arising from the issues raised by the Petitioners.

C. The Proposed Contention Fails to Address the Standards for Reopening a Closed Proceeding

The record in the Fermi 3 COL proceeding closed on February 4, 2014.[12] Any request to raise a new issue therefore must satisfy the reopening criteria in 10 C.F.R. § 2.326. Reopening a closed proceeding is an extraordinary action. The proponent of a motion to reopen has a heavy burden to bear and stringent criteria must be met.[13] Even if a matter is timely raised and involves significant safety or environmental considerations, no reopening of the record will be required if the asserted safety or environmental issue does not exist, has been resolved, or for some other reason will have no effect on the licensing proceeding's outcome.[14]

Under 10 C.F.R. § 2.326(a), a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

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11 GEIS at Sections B.2.1, B.2.2.

12 Order (Adopting Transcript Corrections, Denying Intervenors' Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record), dated February 4, 2014.

13 *Amergen Energy Company LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668, 675 (2008); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-9, 39 NRC 122, 123 (1994); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 25 (2006) ("Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence.").

14 *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), LBP-83-41, 18 NRC 104, 109 (1983).

- The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- The motion must address a significant safety or environmental issue;
- The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; and
- The motion must be accompanied by an affidavit that set forth the factual and technical bases for the movant's claim that the reopening criteria have been satisfied.[15]

The mere possibility of future regulatory changes in the form of formal safety findings on spent fuel disposal at a geologic repository is not sufficient to demonstrate that there is a significant safety issue involving Fermi 3 that must be considered or that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. Here, the Proposed Contention does not involve any alleged deficiency in the Fermi 3 COL application or consideration of the safety of construction or operation of Fermi 3. The required affidavit providing the factual and technical basis for reopening also was not provided. Regardless, nothing in the Proposed Contention suggests that spent fuel safety findings for a geologic repository, if found by the Commission to be necessary, would lead to a different conclusion with respect to the Fermi 3 COL application. The Proposed Contention does not point to any new or different safety issue unique to Fermi 3.

Having failed to even address the reopening standard, much less show that the extraordinary action of reopening the proceeding is warranted, the Proposed Contention should be denied.

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[15] 10 C.F.R. § 2.326(b).

D. The Commission Previously Considered and Rejected the Arguments in the Petition to Suspend and the Proposed Contention

This is not the first time that these issues have been addressed by the NRC. During the Continued Storage rulemaking, the NRC considered comments submitted by Intervenors and others that the proposed rule violated the AEA "by eliminating previous safety findings that are essential to [AEA] compliance."[16] The NRC responded in the final GEIS, explaining that, although safety determinations are necessary in the context of a particular licensing activity, those determinations are not part of the NEPA process.[17] The NRC noted that the comments "conflate reasonable assurance findings made in past waste confidence proceedings with AEA safety determinations made in the licensing process,"[18] and that "those findings are not appropriate for this GEIS and are not necessary."[19] The NRC reiterated that its AEA responsibilities, including safety determinations, will continue to be met through the licensing process for specific applications. The Intervenors merely repeats those comments now in the form of a Proposed Contention. They provide no reason for the Commission to revisit the recent decision rejecting their comments.

E. The Proposed Contention Is Inadmissible

The basis for the Petition to Suspend and the proposed Continued Storage Contention are essentially the same. Petitioners assert that neither the CS Rule nor the GEIS

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16 "Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal," dated December 20, 2013 (ADAMS Accession No. ML14016A068) at 14-18.

17 GEIS at D-29.

18 *Id.*

19 *Id.* at D-30.

include findings regarding the safety of permanent spent fuel disposal. Petitioners focus on two findings from the NRC's 2010 Waste Confidence Decision:

- Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.

- Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

The Intervenors allege that omitting these safety findings violates the AEA and relevant precedent and is contrary to NRC's historic practice.[20] The Intervenors argue that the safety findings addressing the feasibility and timeframe for availability of a repository are separate and independent of the NRC's NEPA conclusions and, in the absence of generic findings, must now be made on a case-specific basis to support each reactor licensing action. The Intervenors also argues that the additional "technical findings regarding feasibility of spent fuel disposal and repository capacity also must be supported by a [new] NEPA analysis."[21] None of these arguments have merit.

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[20] The Intervenors refer to the "removal of [these] AEA required safety findings" from the CS Rule. Petition at 1. But these findings were previously in the WCD, which was not a rule. "Waste Confidence Decision Update," Update and Final Revision of Waste Confidence Decision, 75 Fed. Reg. 81037, 81058-67 (Dec. 23, 2010). While the former 10 C.F.R. § 51.23(a) included a generic determination of the safety of interim spent fuel storage and a reasonable assurance finding on the availability of geologic repository capacity when necessary (similar to WCD Finding 2) (*see* 75 Fed. Reg. at 81032, 81037), the TSR never included any text mirroring WCD Finding 1. The Proposed Contention therefore rests, at least in part, on a faulty premise.

[21] Proposed Contention at 13.

1. The AEA Does Not Require "Safety" Findings For Spent Fuel Disposal In Connection With A Reactor Licensing Decision

Petitioners assert that in order to make a final licensing decision (for either an initial or renewed license) the AEA requires the NRC to make "currently valid" findings of "confidence or reasonable assurance" regarding the safety of spent fuel disposal.[22] Petitioners claim that, in the absence of generic findings in the new rule, those findings must be made in every individual reactor licensing proceeding.[23] Petitioners cite only general statutory provisions as support and fail to draw a connection between those provisions and a requirement for an express safety finding for geologic disposal at the time of a reactor licensing decision.[24] In fact, there is no statutory provision that supports that contention.

The Petitioners first argue that Section 182 of the AEA requires the NRC to "provide adequate protection to the health and safety of the public."[25] They also point to Section 103(d), which prohibits the NRC from issuing a license that would be "inimical to the health and safety of the public."[26] But neither provision (nor any other in the AEA) mandates the safety findings that Petitioners now demand in connection with a reactor licensing action. Rather, they are general standards that the NRC must follow in developing its regulatory programs and in making application-specific licensing decisions. These general provisions simply do not require the NRC to make express safety findings on ultimate spent fuel disposal in connection with reactor licensing.

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22 *Id*. at 3-4.

23 *Id.* at 5.

24 *Id.* at 6-8.

25 *Id.* at 6.

26 *Id.* at 7.

The Petitioners' overbroad reading of the statutory obligation would tether individual reactor licensing decisions to the suite of safety findings made for facilities across the nuclear fuel cycle — from uranium mining to enrichment to storage and to later disposal in a geologic repository. This is a stretch too far. Instead, the NRC has always held that the scope of a safety review and hearing on an application is limited to the specific authorization at issue.[27] The NRC fulfills its AEA responsibilities for each and every approval requested by an applicant or licensee. The NRC's regulatory structure provides that separate licenses (and the attendant safety findings) are necessary for reactor operation, extended operation, spent fuel storage of any duration, and a repository. At each stage, the application must satisfy the statutory provisions cited by the Petitioner — but only for the specific activities being licensed at the time.[28]

In the present case, the Proposed Contention raises issues that are not specifically directed to the Fermi 3 COL application. The Proposed Contention does not identify any specific aspect of the Fermi 3 COL application that is alleged to be deficient and never explains how the allegedly missing safety findings would lead to a different outcome than those presented in the COL application. In contrast, the licensing of a geologic repository will be (and is) the

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[27] *See, e.g.*, "Policy on Conduct of Adjudicatory Proceedings; Policy Statement," 48 NRC 18, 22 (1998) ("The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application…"); 10 C.F.R. § 2.309(f)(1)(vi) (explaining that a proposed contention must show a genuine dispute with the applicant on a material issue, including references to specific portions of the application that the petitioner disputes) (emphasis added); *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672 n.54 (2008) (certain issues not within scope of proceeding, which was limited to specific license application at hand).

[28] In the context AEA safety findings, there is no analogue to the NEPA prohibition on improper segmentation. The GEIS includes the NEPA findings required by the Court in *New York v. NRC* on the future issues of continued storage and repository availability.

subject of a separate application, NRC safety review, and hearing process. The Petitioners' arguments have no basis in the AEA or the agency's regulatory framework.

2. Judicial Precedent Does Not Require Express Safety Findings Regarding Disposal

Lacking a basis in the AEA, the Petitioners point to judicial precedent to support their argument that the AEA requires findings on the technical feasibility and availability of a repository in connection with reactor licensing. However, the decisions that the Petitioners cite conclude that the AEA requires no such findings. Specifically, in *Natural Resources Defense Council v. NRC*, the Court of Appeals examined the NRC's denial of a rulemaking petition filed by the NRDC. NRDC had requested that the NRC determine whether radioactive wastes could be disposed of safely and asked the NRC — citing the AEA — to stop issuing reactor operating licenses until a determination was made.[29] The Court of Appeals held, as Petitioners acknowledge (at 10-11), that under the AEA the NRC did not need to make definitive findings on repository safety until repository licensing.[30] This should end the inquiry.

But, the Petitioners now argue that *NRDC* was premised on the "NRC's promise that in the meantime, it 'would not continue to license reactors if it did not have reasonable assurance [*sic.*] that the wastes can and will in due course be disposed of safely.'"[31] The Court of Appeals, however, did not equate any such "promise" to a legal obligation to make a

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29 582 F.2d 166 (2d Cir. 1978).

30 *Id*. at 175.

31 Proposed Contention at 11, *citing NRDC v. NRC*, 582 F.2d at 174 n.13. Petitioners alter the cited quotation by changing the word "confidence" in the decision to "assurance" in their brief.

repository "safety" finding prior to issuing a reactor license.[32] Instead, the Court of Appeals explained that no such finding was required:

> It is our conclusion that NRDC simply reads too much into the AEA. Indeed, if the [Atomic Energy Commission] had interpreted the statute to require the affirmative determination regarding permanent disposal of high-level waste sought by NRDC, no commercial production or utilization facilities would be in operation today. We are satisfied that Congress did not intend such a condition.[33]

The Court of Appeals did not "condition" its holding on the NRC's statement that it would not continue to license reactors if it did not have "reasonable confidence" that wastes could, and would, in due course be disposed of safely. The Court also did not offer any opinion as to what would constitute "reasonable confidence" or suggest a particular form in which any "confidence" should be formalized. In fact, the Court of Appeals remarked that "NRC is not required to …

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[32] The Intervenors misquote and significantly mischaracterize the decision when they state in their brief that the "Second Circuit concluded that:

> [T]he NRC's long-continued regulatory practice of issuing operating licenses, with an implied finding of reasonable assurance that safe permanent disposal of [spent reactor fuel] can be available when needed, is in accord with the intent of Congress underlying the AEA and the [Energy Reorganization Act]."

Proposed Contention at 9, *citing NRDC v. NRC*, 582 F.2d at 170 (emphasis added). Petitioners omitted the first part of the quoted sentence. In fact, the quoted passage is part of the Court's summary of the NRC's position, not the Court's holding. And the NRC's position was that it need not make the reasonable assurance safety findings demanded by the petitioners at the time. The quote in full reads:

> NRC maintains that it need not do so and that its long-continued regulatory practice of issuing operating licenses, with an implied finding of reasonable assurance that safe permanent disposal of such wastes can be available when needed, is in accord with the intent of Congress underlying the AEA and [Energy Reorganization Act] …

Id.

[33] *Id.* at 171.

withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely."[34] *NRDC* therefore provides no support for the Petitioners' position.

A different "waste confidence" issue was addressed in *Minnesota v. NRC*.[35] In *Minnesota*, the Court of Appeals addressed the petitioners' claim that, "[p]rior to issuance of a license amendment permitting expansion of on-site storage capacity [at two nuclear plants], the NRC must make a determination of probability that the wastes be safely handled and disposed of."[36] Contrary to Petitioners' argument here, the Court of Appeals did not require the NRC to make specific findings regarding safe repository disposal prior to licensing or reach a conclusion contrary to *NRDC*. Instead, *Minnesota* addressed the NRC's consideration of <u>interim storage</u> of spent fuel until a repository became available and whether "there has been an NRC disposition in generic proceedings that is adequate" to address the issue.[37]

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34 *NRDC v. NRC*, 582 F.2d at 175. The Second Circuit stated in no uncertain terms:

> Finally, if there were any doubt over the intent of Congress (1) not to require NRC to make the definitive determination requested by NRDC and (2) not to require a moratorium on nuclear power reactor licensing pending an affirmative determination, we are persuaded that the matter was laid to rest by enactment of the Energy Reorganization Act of 1974. … Therein, Congress expressly recognized and impliedly approved NRC's regulatory scheme and practice under which the safety of interim storage of high-level radioactive wastes at commercial nuclear power reactor sites has been determined separately from the safety of Government-owned permanent storage facilities which have not, as yet, been established.

Id. at 174 (footnote omitted).

35 602 F.2d 412 (D.C. Cir. 1979).

36 *Id.* at 416.

37 *Id.* at 418.

The Court of Appeals in *Minnesota* remanded to the NRC "the specific problem isolated by the petitioners [of] determining whether there is reasonable assurance that an off-site storage solution will be available by . . . the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates."[38] The Court of Appeals recognized prior NRC "assurances of confidence" that a solution to the waste disposal issue would be found and inquired as to "the basis of those assurances of confidence."[39] The Court of Appeals agreed with the NRC that "it could properly consider the complex issue of nuclear waste disposal in a 'generic' proceeding such as a rulemaking," but the Court of Appeals would "not dictate the procedures of the 'generic' proceeding."[40] *Minnesota* therefore does not require the NRC to make express findings on the feasibility of safe disposal or the availability of repository capacity. Nor does *Minnesota* proscribe either the procedures to be used to elaborate the NRC's "assurances of confidence" in interim safe storage or the form in which that confidence must be established.[41]

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38 *Id.*.

39 *Id.* at 419.

40 *Id.* at 417.

41 In response to the remand in *Minnesota*, the NRC initiated a hybrid evidentiary hearing and rulemaking "to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available." This effort led the NRC in 1984 to promulgate the storage rule (or TSR) at 10 C.F.R. § 51.23. "Storage and Disposal of Nuclear Waste; Notice of Proposed Rulemaking," 44 Fed. Reg. 61372, 61373 (Oct. 25, 1979).

The Court of Appeals examined the NRC's 2010 update to the TSR and WCD in *New York v. NRC*.[42] The Court of Appeals considered only whether the NRC complied with NEPA. The Court of Appeals did not address the NRC's AEA responsibilities. The Court of Appeals mentioned *Minnesota* only to explain the TSR's and WCD's genesis and support the acceptability of a generic approach.[43] The Court did not examine the AEA issues raised in *NRDC* or *Minnesota* and reached no conclusion on the need for affirmative repository safety determinations as part of a reactor licensing review.

At bottom, the three cases cited by Petitioners do not support their position. No court has interpreted the AEA to require specific safety findings on the feasibility and availability of a disposal repository in connection with reactor licensing. Instead, the cases establish that explicit findings on repository safety are not necessary for reactor licensing under the AEA.

3. NRC's Prior Statements And Waste Confidence Decision Do Not Suggest That Safety Findings Regarding Disposal Are Required For Reactor Licensing

The Petitioners next contend that the NRC has interpreted the AEA to require express findings on the safety of repository disposal.[44] As noted above, Petitioners cite the NRC's 1977 statement that it "would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely."[45] Petitioners read too much into this statement. In the 2010 WCD update, the NRC made clear that its previous

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42 681 F.3d 471 (D.C. Cir. 2012).

43 *Id*. at 473, 474, 476, and 480.

44 Proposed Contention at 8.

45 *Id.* (citations omitted).

statement in *NRDC* was "a matter of policy."[46] The NRC has never stated that the AEA requires an affirmative safety finding regarding repository disposal before a reactor license may be issued.[47] That the NRC *chose* to address general "assurances of confidence" in the feasibility and availability of a disposal facility through "Findings" in the WCD does not mean that the AEA *requires* express repository safety findings for each licensing action.

Petitioners next claim that "the NRC has stated that henceforth, it will make all AEA-based safety findings in individual licensing proceedings."[48] As support, Petitioners cite a statement in the GEIS in which the NRC states that it makes no AEA safety determinations regarding continued spent fuel storage in the GEIS, but rather, will make those determinations in individual licensing actions.[49] However, the discussion in the GEIS applies only to spent fuel *storage*, and is not relevant to the Petitioners' claims directed (and limited) to spent fuel *disposal*.[50] And, the GEIS statement on its face does not define the "AEA safety determinations" that will be made in particular licensing cases and therefore does not concede that determinations

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46 75 Fed. Reg. at 81038.

47 Petitioners also cite the NRC's brief in *New York v. NRC*, in which the NRC stated that "[t]he Waste Confidence decision and related environmental rule in 10 C.F.R. § 51.23, like those that preceded it since 1984 … also fulfill NRC's important responsibilities under the AEA." Proposed Contention at 8, Attachment. The NRC's statement demonstrates nothing more than an acknowledgement that, at most, an *implied* finding of confidence in repository safety is necessary under the AEA. This is entirely consistent with *NRDC* and *Minnesota.*

48 Proposed Contention at 15, *citing* GEIS at D-9.

49 *Id.*

50 *Compare* GEIS at D-9 (explaining that the NRC is not making a safety determination under the AEA to allow for the continued storage of spent fuel because those determinations are made as part of individual licensing actions) *with* Proposed Contention at 2, 3 n.6 (contesting the lack of a safety finding for ultimate spent fuel disposal and conceding that "the validity of [] storage-related findings … are not challenged in the attached Contention or this Petition to Suspend").

related to the safety of disposal will be necessary at that time. In any event, the NRC has not abandoned its assurances of confidence in safe repository disposal. As discussed below, the GEIS amply demonstrates that those assurances are stronger than ever.

4. The GEIS Includes the Prior Waste Confidence Findings on Spent Fuel Disposal

The Petitioners' claim that the NRC now lacks "confidence" in the feasibility, availability, and safety of a disposal facility reflects a myopic reading of the record. Although neither Finding 1 nor 2 is in the CS Rule text, both issues are addressed in the GEIS.[51] The GEIS confirms that the NRC has not abandoned its prior conclusions. Finding 1 regarding the technical feasibility of a geologic repository is discussed at length in GEIS Section B.2.1, while Finding 2 regarding the availability of geologic disposal capacity is now addressed in GEIS Section B.2.2.[52] The GEIS findings comport with the agency's prior representations to the Courts of Appeals of an "implied finding" or generic declaration of "confidence" that spent fuel can be disposed of safely and that a repository will be available when needed.[53]

With respect to the former Finding 1, the GEIS states that the traditional safety finding on a repository's technical feasibility "continues to undergird the environmental

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51 79 Fed. Reg. at 56244.

52 Finding 3 (reasonable assurance that spent fuel will be managed safely pending disposal) is addressed in Section B.3.3; Finding 4 (reasonable assurance that spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond a reactor's operating life) is addressed in Sections B.3.1 and B.3.2, and; Finding 5 (reasonable assurance that safe onsite or offsite spent fuel storage will be available when needed) is addressed in Section B.3.3.

53 In any event, the need for a determination on the timing of repository availability is now moot. The purpose of former Finding 2 was to provide a timeframe for examining the environmental impacts of continued spent fuel storage. *See, e.g.*, 75 Fed. Reg. at 81042 (describing how different "target dates" for repository availability in Finding 2 would affect the NRC's assessment of environmental impacts). Now that the NRC has assessed the environmental impacts for an indefinite period of spent fuel storage, a determination of the timeframe for repository availability is no longer necessary under NEPA.

analyses."[54] The GEIS explains in detail that a geologic repository is technically feasible. The agency notes its past findings on technical feasibility and cites subsequent evidence that further supports its conclusion. For example, the GEIS cites the Blue Ribbon Commission on America's Nuclear Future, which stated that the consensus within the scientific and technical community is that safe geologic disposal is achievable with currently available technology.[55] The GEIS also points to studies by the International Atomic Energy Agency, as well as the Department of Energy's experience with Yucca Mountain and the Waste Isolation Pilot Plant.[56] The GEIS notes that the activities of European countries further support the technical feasibility of a repository.[57] Based on its comprehensive assessment and the extensive information referenced in the record, the NRC "concludes that … a geologic repository is technically feasible."[58]

The NRC similarly addresses the availability of a repository (formerly Finding 2) in the GEIS. As it did in previous WCDs, the NRC looks to the developments of other countries to inform the timeframe for siting, licensing, constructing, and opening a geologic repository.[59] Although it acknowledges the various factors that influence the timing of geologic disposal, such as public acceptance, Congressional action, and funding,[60] the NRC concludes that, "[b]ased on the evaluation of international experience with geologic repository programs — including the

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54 GEIS at B-1.

55 *Id.* at B-2, *citing* Blue Ribbon Commission on America's Nuclear Future, Section 4.3.

56 *Id.* at B-3 – B-4.

57 *Id.* at B-5.

58 *Id.* at B-33.

59 *Id.* at B-5.

60 *Id.* at B-8, B-9.

issues some countries have overcome — and the Blue Ribbon Commission's affirmation of the geologic repository approach, the NRC continues to believe that 25 to 35 years is a reasonable period for repository development (*i.e.*, candidate site selection and characterization, final site selection, licensing review, and initial construction for acceptance of waste)."[61]

Despite the detailed discussion of the substance of former Findings 1 and 2, the Petitioners argue that the GEIS does not actually include the safety findings because the "reasonable assurance" language in prior iterations of Findings 1 and 2 does not appear in the GEIS or CS Rule.[62] Petitioners claim that the GEIS's conclusions are insufficient because they do not assert any level of assurance.[63] This argument is baseless. The NRC restates the findings as "conclusions" in the GEIS, providing an equivalent (if not greater) level of "assurance" as Findings 1 and 2 in the 2010 WCD.[64] Petitioners' argument elevates form over substance.

Petitioners also imply that it is improper to make findings on repository safety in a GEIS, rather than in the CS Rule or a separate WCD.[65] This implication is misguided. The NRC's conclusions on repository safety have always been part of the environmental analysis supporting the rule. For example, in the 2010 TSR, the NRC stated that "the update and revision

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61 *Id.* at B-8 – B-9. This conclusion is further supported by the NRC's recently released Volume 3 of the Safety Evaluation Report for Yucca Mountain, in which the NRC found that the Department of Energy's license application demonstrated compliance with the NRC's requirements for post-repository closure safety. NUREG-1949, Vol. 3, "Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada: Repository Safety After Permanent Closure" (Oct. 2014).

62 Proposed Contention at 13.

63 *Id.*

64 The finding of feasibility is now not even qualified by "reasonable assurance" as it was in the 2010 TSR.

65 Proposed Contention at 2, 12-13.

of the Waste Confidence Decision is the [Environmental Assessment ("EA")] supporting the amendment of the generic determination in 10 CFR 51.23(a)."[66] Both Findings 1 and 2 were included in the WCD and therefore were part of the EA for the TSR.[67] The conclusions regarding repository safety supporting the CR Rule are also included in the environmental analysis underlying the rule: the GEIS. There is no meaningful distinction between making Findings 1 and 2 in the WCD and making equivalent conclusions in the GEIS.

5. There Is No Required NEPA Evaluation Beyond the Continued Storage Rule And GEIS

The Petitioners last claim that the safety findings on repository feasibility and the availability of disposal capacity must themselves be supported by a new NEPA environmental review, presumably encompassing the scope of a repository environmental review.[68] They argue that there is no EIS or EA "that could support the NRC's findings … as required by the Court of Appeals in *New York*."[69] This argument is circular. As discussed above, there is no requirement that the NRC make explicit AEA-based safety findings on a disposal facility in connection with a reactor licensing proceeding. Instead, those findings (and the attendant NEPA environmental review related to those findings) would be made as part of a repository licensing review. There

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66 75 Fed. Reg. at 81034.

67 Only Finding 2 was included in the rule language.

68 Proposed Contention at 13-14. Petitioners argue that the Department of Energy's EIS for the Yucca Mountain project is not sufficient because it addresses the impacts of a single repository and is "unfinished." *Id*. at 14.

69 *Id.* at 15.

is no requirement to conduct a NEPA analysis for licensing decisions that have not been, and need not be, made at this time.[70]

Moreover, nothing in *New York* or in NEPA mandates an EIS or EA for an assessment of the technical feasibility or availability of disposal in a geologic repository. The discussion of NEPA in the context of repository availability in *New York* was limited to assessing the environmental impacts of an "indefinite storage" or "no repository" scenario. That scenario is addressed in detail in the GEIS. And, the GEIS conclusions on repository feasibility and availability are not themselves "licensing" actions or "major federal actions" that trigger NEPA.

[70] There is a generic NEPA analysis for disposal at a federal repository in 10 C.F.R. Part 51, Table S-3, which is sufficient to support reactor licensing decisions. 10 C.F.R. § 51.51.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition to Suspend and Proposed Contention.

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Dated at Washington, District of Columbia
this 31st day of October 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S OPPOSITION TO PETITION TO SUSPEND FINAL DECISIONS AND PROPOSED NEW CONTINUED STORAGE CONTENTION" in the above captioned proceeding have been served via the Electronic Information Exchange this 31st day of October 2014.

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