



**ENVIRONMENTAL LAW & POLICY CENTER**  
Protecting the Midwest's Environment and Natural Heritage

January 22, 2019

**Via U.S. and Electronic Mail**

Mr. Craig G. Erlanger, Director  
Division of Operating Reactor Licensing  
Office of Nuclear Reactor Regulation  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

RE: *OEDO-18-00160 – ELPC Comments on Proposed Director's Decision on 10 CFR 2.206  
Petition for Citizen Complaint and Request for Enforcement Action Regarding  
FirstEnergy Nuclear Facility Operations in Ohio and Pennsylvania*

Dear Mr. Erlanger,

On January 8, 2019, the U.S. Nuclear Regulatory Commission (“NRC”) staff’s proposed Director’s Decision was issued addressing the Environmental Law & Policy Center (“ELPC”) Citizen Petition requesting enforcement action against First Energy Corp. (“FE”), First Energy Solutions (“FES”), FirstEnergy Nuclear Operating Company (“FENOC”), and FirstEnergy Nuclear Generation (“NG”) for failure to comply with nuclear decommissioning funding requirements under 42 U.S.C.A. § 2201(x)(1) for the Davis-Besse, Perry and Beaver Valley Units 1 and 2 nuclear plants located in Ohio and Pennsylvania (“the Nuclear Plants”). ELPC hereby responds to the proposed Director’s Decision in the limited manner allowed: by “provid[ing] comments on any portions of the decision that you believe are inaccurate or on any issues in the petition that have not been fully addressed.” Letter from Craig Erlanger, Director, U.S. Nuclear Regulatory Commission, to Margrethe Kearney and Andrene Dabaghi, Petitioners, Environmental Law and Policy Center (Jan. 8, 2019).

Although the proposed Director’s Decision determined that FENOC met the minimum funding requirements for future radiological decommissioning for the 2017 reporting cycle (Proposed Director’s Decision at 6–7), the proposed Director’s Decision recognizes that FENOC will soon submit its next decommissioning funding status reports for the Nuclear Plants by March 31, 2019. The NRC staff will then “conduct a similar review” based on the new shutdown dates and updated financial information. *Id.* at 7. Around the time that the Director’s Decision will reach the Commission for its possible review, *id.* at 10, the updated decommissioning funding status reports will be available, and the factual basis for the current proposed Director’s Decision will be outdated and inaccurate. Indeed, the December 31, 2018 data for the Nuclear Plants is presently available. The NRC staff could request that information from FE, FES, FENOC and NG today, and could and should obtain that decommissioning trust

35 East Wacker Drive, Suite 1600 • Chicago, Illinois 60601  
(312) 673-6500 • [www.ELPC.org](http://www.ELPC.org)

Harry Drucker, Chairperson • Howard A. Learner, Executive Director  
Chicago, IL • Columbus, OH • Des Moines, IA • Duluth, MN • Grand Rapids, MI • Indianapolis, IN  
Jamestown, SD • Madison, WI • Minneapolis/St. Paul, MN • Sioux Falls, SD • Washington, D.C.



fund data immediately, instead of relying on outdated and inaccurate data for the proposed Director's Decision.

The proposed Director's Decision concludes that the licensees complied with requirements *for the 2017 reporting cycle*, *id.* at 7, but ELPC did not confine its Demands for Information or Requests for Enforcement Action to violations that occurred during the 2017 reporting cycle. *See* ELPC Citizen Petition at 8–9. On the contrary, out of concern for the present state of FES' decommissioning funding, ELPC requested that the NRC order FE, FES, FENOC and NG to provide the most up-to-date information on decommissioning funds with respect to: site-specific funding plans (Request No. 1); reliance on any external funds or parent guarantees (Request Nos. 2–4); proposed investment and financial contribution plans (Request No. 5); and commitments to guarantee coverage of shortfalls in light of bankruptcy (Request No. 6). *Id.*

ELPC petitioned the NRC to demand updated financial information from FE, FES, FENOC and NG given several transformational events that occurred between the March 2017 decommissioning funding status report and present-day. *See* Accession No. ML17083B221. The 2017 decommissioning funding status report, which relies on financial data from December 2016, *id.* at 1, fails to account for:

- (1) FirstEnergy Solutions' deteriorating financial condition, which culminated in its bankruptcy filing on March 31, 2018.
- (2) FirstEnergy Solutions' announcement that it plans to shut down the Davis-Besse, Perry and Beaver Valley nuclear power plants.
- (3) FirstEnergy Solutions bumping up the decommissioning dates to much sooner than originally calculated: 2020 for Davis-Besse and 2021 for Perry and Beaver Valley.
- (4) Parent company FirstEnergy Corporation's publicly-announced intention to sever itself completely from the Nuclear Plants, including from any decommissioning liabilities they carry.

ELPC raised these four significant developments with the Petition Review Board during its meeting on June 19, 2018. *Tr. of Proceedings*, Accession No. ML18194A395 at 29–30. For these reasons, a dismissal of the Citizen Petition at this stage—before the NRC has reviewed FE, FES, FENOC, and NG's updated December 31, 2018 decommissioning trust fund data to be filed soon on March 31, 2019 and that could be obtained even sooner—would be premature.

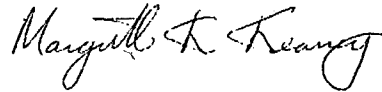
The NRC assures ELPC that it will review FENOC's next decommissioning funding status report after March 2019. Proposed Director's Decision at 7. However, this wait-and-see approach fails to recognize the time sensitivity of the bankruptcy proceedings in which the Debtors and interested parties are working swiftly towards a plan for reorganization. *See, e.g.,* REORG RESEARCH, *FES to Terminate Exelon APA as Debtors Enter 'Final stages' of Negotiations on Plan Support Agreement* (Jan. 15, 2019). If the NRC does not act now to ensure that FES, FENOC and NG reserve adequate funds for decommissioning, parent company FE

could seek to fully extricate itself from any decommissioning obligations before the NRC can identify the extent of the funding shortfalls.

By law, debtors in every Chapter 11 proceeding must file a monthly statement of financial affairs. There is no suggestion in the proposed Director's Decision that the NRC has reviewed any of these statements nor that it has assessed the status of the Chapter 11 proceedings, now almost a year old. While negotiations with creditors are taking place, according to news accounts, debtors FES, FENOC and NG have declined to permit ELPC and other organizations to participate in the discussions to focus the attention of debtors and creditors alike on the decommissioning and environmental protection funding demands of federal law. Those obligations are inescapable—in or out of Chapter 11. Whatever the conclusions reached with respect to the 2017 reporting cycle, the 2018 petition for bankruptcy casts a broad and deep shadow that can no longer be ignored.

For the foregoing reasons, ELPC respectfully requests that the NRC re-consider its Demands for Information and immediately require FE, FES, FENOC and NG to provide updated decommissioning funding status information as of December 31, 2018. Additionally, ELPC requests that until the NRC can review the decommissioning funding status information as of December 31, 2018, which should be reasonably available at this time, the NRC and its Staff should postpone acting upon the proposed Director's Decision and hold open ELPC's Citizen Petition pending further consideration.

Respectfully submitted,



Margrethe Kearney  
Andrene Dabaghi  
Environmental Law & Policy Center  
35 E. Wacker Drive, Ste. 1600  
Chicago, IL 60601  
(312) 673-6500  
[mkearney@elpc.org](mailto:mkearney@elpc.org)  
[adabaghi@elpc.org](mailto:adabaghi@elpc.org)

CC: [Bhalchandra.Vaidya@nrc.gov](mailto:Bhalchandra.Vaidya@nrc.gov)  
[Craig.Erlanger@nrc.gov](mailto:Craig.Erlanger@nrc.gov)