

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of)

DETROIT EDISON COMPANY)

(Fermi Nuclear Power Plant, Unit 3))

Docket No. 52-033-COL

CLI-09-22

MEMORANDUM AND ORDER

This proceeding concerns the application of the Detroit Edison Company (Detroit Edison) for a combined license (COL) to construct and operate one Economic Simplified Boiling Water Reactor at the Fermi nuclear power plant site in Monroe County, Michigan. On August 10, 2009, Detroit Edison timely filed a notice of appeal and supporting brief¹ challenging the Board's decision granting the request for hearing and petition to intervene jointly filed by several petitioners (Petitioners).² Detroit Edison argues that the Board erred in finding that the Petitioners had standing to intervene, and accordingly, asserts that the Board's decision should

¹ *Applicant's Notice of Appeal of LBP-09-16, Applicant's Brief in Support of Appeal from LBP-09-16* (Aug. 10, 2009)(Detroit Edison Appeal).

² LBP-09-16, 70 NRC __ (July 31, 2009)(slip op.).

be reversed. It does not challenge the Board's rulings on contention admissibility. Both the NRC Staff and Petitioners timely filed responses in opposition to Detroit Edison's appeal.³

Our rules of practice provide for an automatic right to appeal a licensing board standing and contention admissibility decision on the issue of "[w]hether the request for hearing or petition to intervene should have been wholly denied."⁴ We will defer to the Board's rulings on standing, however, unless the appeal points to an error of law or abuse of discretion.⁵

We find no error in the Board's standing determination. The appeal encompasses arguments that are substantively similar to those made by a different applicant on appeal of a licensing board's standing and contention admissibility ruling in the *Calvert Cliffs* COL proceeding.⁶ In sum, Detroit Edison claims that application of the fifty-mile proximity presumption for the standing inquiry in Commission adjudicatory proceedings is inconsistent with contemporaneous judicial concepts of standing developed in precedent from Article III courts.⁷ We recently issued a decision in *Calvert Cliffs* that rejected the similar arguments

³ *NRC Staff Brief in Opposition to the Applicant's Appeal from LBP-09-16* (Aug. 20, 2009); *Reply of Petitioners in Opposition to DTE's Appeal LBP-09-16* (Aug. 20, 2009).

⁴ 10 C.F.R. § 2.311(d)(1).

⁵ See *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC __ (May 18, 2009)(slip op. at 4); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

⁶ Compare Detroit Edison Appeal at 4-12, with *Applicant's Notice of Appeal of LBP-09-04* (Apr. 3, 2009)(Docket No. 52-016-COL) at 5-13.

⁷ See Detroit Edison Appeal at 6.

made here.⁸ As we explained in that decision, “we see no conflict between the basic requirements for standing, as applied in the federal courts, and the NRC’s proximity presumption.”⁹ For the reasons provided in our *Calvert Cliffs* decision, we *deny* Detroit Edison’s appeal and *affirm* the Board’s decision in LBP-09-16.

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

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

⁸ *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC __ (Oct. 13, 2009)(slip op.).

⁹ *Id.* (slip op. at 7).