

January 30, 2009 (11:06am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED JANUARY 30, 2009

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316 N. Michigan Street, Suite 520
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January 14, 2008

Ms. Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
*Hand-delivered to Monroe, MI scoping meeting NRC staff and sent via
email to NRCExecSec@nrc.gov*

RE: Request to suspend adjudication of Fermi 3 COLA pending
completion of ESBWR design certification process

To the Members of the Commission:

The Michigan Chapter of the Sierra Club, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Resistance at Fermi 2, Coalition for a Nuclear-Free Great Lakes, Don't Waste Michigan, and Toledo Coalition for Safe Energy, along with several individual residents in the Monroe, Michigan area respectfully request that the the U.S. Nuclear Regulatory Commission immediately suspend the current proceedings aimed and review and ultimately, approval of DTE Energy Company's combined construction and operating license application ("COLA") for Fermi 3, a proposed new nuclear power plant near Monroe, Michigan.

These public organizations and citizens make this request to suspend the COLA adjudication for Fermi 3 pending the commencement and completion of the design certification rulemaking proceeding for the proposed Economically Simplified Boiling Water Reactor ("ESBWR") design on which DTE's COLA depends. We ask that the Commission repudiate a recent policy statement that would unlawfully remove the COLA's design-related contents from the scope of issues that may be challenged in the COLA adjudication and refer those issues to be resolved in a separate, parallel rulemaking proceeding to our knowledge has not been scheduled or commenced, the Policy Statement on the Conduct of New Reactor Licensing Proceedings, 72 Fed. Reg. 20,963 (April 17, 2008) ("2008 Policy Statement"). The 2008 Policy Statement - which is not enforceable law or regulation - should be ignored because it violates Section 189a of the Atomic Energy Act ("AEA"), as well as judicial precedents interpreting the AEA, and the NRC's Part 52 regulations for the conduct of licensing proceedings on COLAs. *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (when an agency applies a policy in a particular situation, "it must be prepared to support the policy just as if the policy statement had never been issued").

The Commission should further reconsider and revoke a recent

decision that affirms and applies the unlawful policy, *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15 (July 23, 2008) ("CLI-08-15"). The Sierra Club and other public organizations and individuals further suggest that the manner in which the NRC is poised to conduct the licensing proceeding would deprive these groups and individuals and the general public a fair and meaningful opportunity for a hearing on the Fermi COLA, in violation of the AEA, the Administrative Procedure Act ("APA") and the NRC's own regulations. As a matter of law, the COLA is incapable of meeting the APA's requirement for an adequate hearing notice, because one of the chief "issues of . . . law" that must be included in the hearing notice - the content of the ESBWR standard design certification rule - has not been established. The legal circumstance here is that the application cannot be considered "complete" for purposes of satisfying the docketing standard in 10 C.F.R. § 2.101(a)(2) or § 2.104(b)'s requirement to provide notice of the factual issues subject to a hearing, because the underlying design is not even finished, let alone certified.

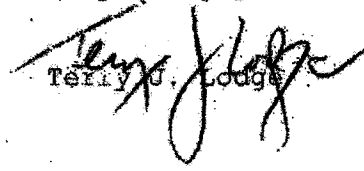
Without a fixed, certified ESBWR design, public commenters in the ongoing NEPA proceeding cannot meaningfully comment concerning operational prospects and associated environmental effects; accident scenarios and such effects; nor can they be afforded an understanding of the ongoing radiation emissions that come from all operating nuclear power plants. Furthermore, the public faces a March 9, 2009 deadline to raise trial contentions in the coming adjudication of the license. The absence of certainty about whether the ESBWR design will even be the ultimate reactor constructed by DTE (assuming that somehow nuclear is the preferred alternative against far safer and cheaper options) is a denial of due process to the public. Consequently, any licensing efforts conducted by the NRC will be riddled with doubts and conditions which will, of course, heighten the growing perception that the fix is in and that this process is merely bread and circuses.

The regulatory scheme embodied in 10 CFR Part 52 regulatory scheme leaves the Commission only two choices with respect to the conduct of a licensing proceeding for the proposed Fermi 3: either to hold an adjudication on the entire COLA, including the ESBWR design certification application that is incorporated by reference into the COLA; or to complete the ESBWR design certification rulemaking before holding an adjudicatory hearing on the Fermi 3 COLA. The Part 52 regulations do not give the NRC the option of removing the COLA's design-related contents from the scope of the adjudication on the COLA and referring them to a separate rulemaking for resolution.

The NRC has apparently committed to conduct a rulemaking on the ESBWR standard design certification application. The Sierra Club and other public groups and individuals respectfully suggest that the Commission must complete the ESBWR design certification rulemaking before commencing the Fermi 3 COLA adjudication and therefore, they request to suspend all further steps toward that adjudication immediately, pending completion of the ESBWR design certification rulemaking.

Thank you.

Very truly yours,


Terry J. Lodge

Hearing Docket

From: Terry Lodge [tjlodge50@yahoo.com]
Sent: Thursday, January 15, 2009 3:44 PM
To: NRCExecSec Resource
Subject: Request to suspend COL processing for Fermi 3
Attachments: Fermi 3 ltr.tif

Ms. Vietti-Cook, kindly pass the attached letter on to the Commission members.

Thank you.

Terry Lodge, Esq.
316 N. Michigan St., Ste. 520
Toledo, OH 43604
419-255-7552
Fax 419-255-8582

Received: from mail1.nrc.gov (148.184.176.41) by OWMS01.nrc.gov
(148.184.100.43) with Microsoft SMTP Server id 8.1.291.1; Thu, 15 Jan 2009
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Date: Thu, 15 Jan 2009 12:43:39 -0800

From: Terry Lodge <tjlodge50@yahoo.com>

Reply-To: tjlodge50@yahoo.com

Subject: Request to suspend COL processing for Fermi 3

To: NRCExecSec@nrc.gov

MIME-Version: 1.0

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Message-ID: <331040.17860.qm@web55404.mail.re4.yahoo.com>

Return-Path: tjlodge50@yahoo.com

Hearing Docket

From: Terry Lodge [tjlodge50@yahoo.com]
Sent: Sunday, January 18, 2009 10:24 PM
To: Hearing Docket
Cc: OGCmail@nrc.gov
Subject: [Docket No. 52-033] Objection to "nonpublic" elements of Fermi 3 COLA

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555--0001
Attention: Rulemakings and Adjudications Staff
Via email only to HearingDocket@nrc.gov

RE: [Docket No. 52-033] Objection to "nonpublic" elements of Fermi 3 COLA

Dear NRC Rulemakings and Adjudications Staff:

I am writing on behalf of the Michigan Chapter of the Sierra Club, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Resistance at Fermi 2, Coalition for a Nuclear-Free Great Lakes, Don't Waste Michigan, and Toledo Coalition for Safe Energy, along with several individual residents in the Monroe, Michigan area, who propose to seek intervenor status in the forth-coming adjudication for Fermi 3. They respectfully request that they be granted a 90-day extension beyond the March 9, 2009 deadline to file intervention contentions respecting Fermi 3.

They request this extension for two principal reasons:

1) The putative Intervenors plan to raise approximately 10 to 12 detailed contentions. They are comprised entirely of volunteers from many disciplines, many of whom work in unrelated fields and thus have to carefully arrange their donated time. In order to meet the very high requirements of 10 CFR 2.309, volunteer meetings and committee efforts will be required to organize, research and produce contentions predicated on fact. To facilitate the processes of the large, public organizations I'm speaking for, such as the Michigan Chapter of the Sierra Club, it will be necessary for them to have more than merely the short period between now and March 9.

2) The January 8, 2009 "Notice of Hearing and Opportunity to Petition for Leave to Intervene" for Fermi 3 contained an "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation". This order reinforces strictures against public access to portions of the COLA which are not described in any way, and obligates parties considering intervention to commit within 10 days of the notice to obtaining security clearances and finding out what they can to base intervention contentions on the secret (albeit unclass-ified) information.

On January 8, 2009 the NRC issued a press release on its website entitled "NRC Announces Opportunity to Participate in Hearing on New Nuclear Reactor Application for Fermi Site." Although the press release mentioned that the application appears on the NRC Web site "minus proprietary and security-related details," it gave no indication of the impending ten-day deadline by which interveners and potential interveners must act to preserve access to "Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3."

Obscuring this public notice even further was the press release's posting not on the NRC homepage, as is standard practice for new releases, but rather by hiding it in an old news archive section on the initial date of its publication.

After we reviewed the pertinent Federal Register Notice ("Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3," Federal Register / Vol. 74, No. 5 / Thursday, January 8, 2009/ Notices, pages 836 to 840), we learned that the Order gave an exceedingly short ten day deadline -- through today, January 18, 2009 -- for interveners and potential interveners against Fermi 3 to fulfill detailed procedures for applying for access to this "Sensitive Unclassified Non-Safeguards Information and Safeguards Information." We also know that the information to which the public has been denied access is not classified. As potential intervenors who oppose a combined Construction and Operating License (COL) being granted to DTE Energy to build and run a new third reactor at the Fermi nuclear power plant, we object to the exceedingly short deadline for action. There is no practicable way we can access that information and to comment from a scoping perspective (by February 9, 2009), much less to prepare adjudication contentions by March 9, 2009. We are systematically forbidden from even understanding what information has been kept from the public unless we get clearances and access.

When the Notice and Order appeared in the Federal Register on January 8th, only six days remained until the NRC's environmental scoping meeting for public comment on the Fermi 3 proposal. The potential intervenors, who had only two weeks earlier been notified about the impending January 14 environmental scoping meeting (via an NRC press release posted in the afternoon hours of Christmas Eve, 2008) were quite busy and preoccupied at that particular moment, researching and preparing public comments for this important NEPA event. Having just fulfilled our responsibilities just this past Wednesday by testifying at the January 14th NRC meeting, we now are obligated to respond to the Order regarding SUNSI and SGI by today. Given the overlapping NRC procedures and deadlines following in rapid succession, we believe the NRC has imposed enormous and unreasonable burdens on the public.

The potential intervening organizations are non-profit, with some being entirely volunteer, all acting in the *bona fide* public interest. For this

reason, we request a blanket waiver of the \$191 fee required for seeking access to these SUNSI and SGI documents.

At this point, the NRC has placed the public in the position of investing significant limited resources to sign up and obtain clearances merely to learn whether there are nonpublic items that might have pertinence to an intervention. This arrangement must be solely for the benefit of the utility applicant, because there is certainly none accruing to the public.

Since the NRC wall of secrecy denies collective access to the potential intervenors to view and understand the concealed documents, through a multitude of eyes with collective expertise, it will be necessary for us to retain one or more expert witnesses who can negotiate the NRC's high hurdles to gain access to SUNSI and SGI. In order to decide what type(s) of expert(s) would be necessary, we must have at least summary identifying and descriptive information of the concealed categories of documentation. The foreshortened deadline for us to take action effectively denies the putative intervenors due process.

The NRC has, in practice, made it necessary for the intervenors to consult experts merely to get threshold information. We suggest that it is thus incumbent on the NRC to finance those experts for the public. To that end, we hereby request \$20,000.00 authorization from the agency per category of documentation concealed, for purposes of retaining experts.

As we seek dialogue with NRC, we need additional time to respond to this Order, and to determine how to engage in this proceeding under protest. We hereby request an additional 90 days beyond the current March 9, 2009 deadline in which to formulate our interventions. This is consistent with our request at the January 14 NRC environmental scoping meeting in Monroe where we asked for an additional 90 days beyond the February 9th deadline for public comments on the NRC environmental scoping. We further request an additional 90 days beyond today's deadline to allow us to further interaction between NRC and COL applicant DTE Energy with us on these concealed SUNSI and SGI documents.

We find this SUNSI and SGI concealment procedure lacking in the basic transparency required for informed democratic decision making and so have a number of questions. What is the legal and regulatory basis for categorizing these documents? Specifically which divisions and staff persons within NRC made the decisions to exclude the unknown items from the public domain? What are the explicit regulatory and legal criteria upon which these decisions are made?

To summarize, we challenge the categorization of these documents as SUNSI and SGI; we protest the overly burdensome nature of the NRC's procedural requirements and timetable for intervenor action; and so we have issued this letter in order to preserve our rights in this proceeding.

We demand your urgent action to provide us a list of the categories of

documents kept secret under SUNSI and SGI categorizations. We further request a document-by-document itemization and summarization, even if in redacted form.

Please note, we are filing this letter in order to comply as best we can with today's deadline and to preserve our opportunity for SUNSI and SGI document review and access. This letter should not be construed as our acquiescence to procedures which, in our estimation, remain to be demonstrated by the utility and the NRC as being in the public interest.

We look forward to a frank and transparent discussion with the NRC on these urgent matters.

Thank you.

For the potential Intervenors,

/s/ Terry J. Lodge

Terry J. Lodge, Esq.
316 N. Michigan St., Ste. 520
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(419) 255-7552
Fax (419) 255-8582

Cc (via email only to OGCmail@nrc.gov): Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555-0001

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Reply-To: tjlodge50@yahoo.com

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To: HearingDocket@nrc.gov

CC: OGCmail@nrc.gov

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Return-Path: tjlodge50@yahoo.com

Hearing Docket

From: Hearing Docket
Sent: Friday, January 30, 2009 10:49 AM
To: EJduncan@winston.com; matersb@dteenergy.com; rwilson@winston.com; dreпка@winston.com; jrund@morganlewis.com; trsmith@winston.com
Cc: tjlodge50@yahoo.com; Maxwell Smith; Marcia Carpentier; Hearing Docket; Emile Julian; Emile Julian; Kathryn Winsberg
Subject: Fermi-52-033-COL - Letters from Terry Lodge
Attachments: 1-14-09 Terry Lodge Ltr. to the Secretary.pdf; 1-18-09 Terry Lodge Ltr. to the Secretary.pdf

We are attaching for your information and/or consideration two email's that were sent by Terry Lodge on behalf of several organizations to the NRC. The items are being sent to you because it does not appear that Mr. Lodge served his letters on you as applicant's counsel.

Emile L. Julian
Assistant for Rulemakings
and Adjudications
Office of the Secretary, NRC
(301) 415-1966

Received: from HQCLSTR01.nrc.gov ([148.184.44.76]) by TWMS01.nrc.gov
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<matersb@dteenergy.com>, "rwilson@winston.com" <rwilson@winston.com>,
"drepka@winston.com" <drepka@winston.com>, "jrund@morganlewis.com"
<jrund@morganlewis.com>, "trsmith@winston.com" <trsmith@winston.com>
CC: "tjlodge50@yahoo.com" <tjlodge50@yahoo.com>, Maxwell Smith
<Maxwell.Smith@nrc.gov>, Marcia Carpentier <Marcia.Carpentier@nrc.gov>,
Hearing Docket <hearingdocket@nrc.gov>, Emile Julian <Emile.Julian@nrc.gov>,
Emile Julian <elj@nrc.gov>, Kathryn Winsberg <Kathryn.Winsberg@nrc.gov>
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Date: Fri, 30 Jan 2009 10:48:34 -0500
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