

August 10, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 )  
The Detroit Edison Company ) Docket No. 52-033-COL  
 )  
(Fermi Nuclear Power Plant, Unit 3) )

APPLICANT'S NOTICE OF APPEAL OF LBP-09-16

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), the Detroit Edison Company ("Detroit Edison") files, together with an attached supporting Brief, this Notice of Appeal of the Atomic Safety and Licensing Board's July 31, 2009, Memorandum and Order, which granted the request for hearing of several parties in connection with Detroit Edison's application for a combined license ("COL") for one new reactor at the Fermi site in Monroe County, Michigan.

Respectfully submitted,

/s/ signed electronically by  
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EDISON CO.

Dated at Washington, District of Columbia  
this 10th day of August 2009

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NUCLEAR REGULATORY COMMISSION

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APPLICANT'S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-16

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APPLICANT’S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-16

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), the Detroit Edison Company (“Detroit Edison” or “Applicant”) hereby appeals the Atomic Safety and Licensing Board (“Board”) decision on standing and contentions (LBP-09-16), dated July 31, 2009. That decision concerns Detroit Edison’s application for a combined license (“COL”) for one Economic Simplified Boiling Water Reactor (“ESBWR”) reactor at the Fermi site near Newport City in Monroe County, Michigan (“Fermi 3”). The Board concluded that various Petitioners<sup>1</sup> had demonstrated standing in the proceeding and also that they had offered four admissible contentions. For the reasons discussed below, we urge the Commission to reverse the Board’s finding that the Petitioners have demonstrated standing. The request for hearing should be wholly denied.<sup>2</sup>

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<sup>1</sup> Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronardo, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman (collectively, “Petitioners”).

<sup>2</sup> This appeal does not address the Board’s decision accepting four contentions for hearing.

In their hearing request, the Petitioners provided no documented evidence or information to support their assertions that construction and operation of Fermi 3 would cause them any harm. Petitioners failed to demonstrate a concrete injury-in-fact that could be redressed by a favorable decision. Instead, Petitioners merely relied on a presumption of standing based on residence within 50 miles of the site. As discussed below, this basis for standing is insufficient under contemporaneous judicial concepts of standing. Accordingly, the Commission should reverse the Board's finding of standing.

## II. FACTUAL BACKGROUND CONCERNING THE APPLICATION FOR A COMBINED LICENSE

On September 18, 2008, and as supplemented thereafter, Detroit Edison submitted an application for a COL for one ESBWR at the Fermi site in Monroe County, Michigan. The NRC accepted the application for docketing on December 2, 2008. 73 Fed. Reg. 73350. The NRC published the "Notice of Hearing and Opportunity to Petition for Leave to Intervene" on January 8, 2009. 74 Fed. Reg. 836. Petitioners timely filed a petition to intervene on March 9, 2009. The Board issued its decision with respect to the hearing request—addressing the Petitioner's standing and the admissibility of their proposed contentions—on July 31, 2009. Applying a presumption of injury based on residence in the proximity of the proposed new plant, the Board found that the Petitioners had standing to intervene. *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC \_\_ (July 31, 2009). The Board also admitted portions of four proposed contentions. The issue of standing is discussed further below.

## III. REGULATORY BACKGROUND

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has



they represent at least one member living within 50 miles of the proposed new reactor. *Id.*, at 6-8. The Board also specifically adopted the reasoning of the Board in *Calvert Cliffs* regarding the Applicant’s challenge to the proximity presumption.<sup>4</sup> For the reasons set forth below, the Board’s conclusions on standing are erroneous as a matter of law.

A. Standing Cannot Be Based on Geographic Proximity Alone

In assessing whether a petitioner has set forth a sufficient “interest” to intervene as a matter of right in a licensing proceeding, the Commission has long applied contemporaneous judicial concepts of standing. *See, e.g., Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Yankee*, CLI-98-21, 48 NRC at 195. Historically, in cases involving initial licenses for reactors, the NRC interpreted judicial concepts of standing to permit a “presumption” of standing in cases where a petitioner lived within a certain geographic area near the plant. Thus, in proceedings involving proposed nuclear power reactors, the Commission adopted a presumption, whereby a petitioner could base its standing upon a showing that his or her residence, or that of its members, was within the geographical proximity (usually taken to be 50 miles) that might be affected by a potential accidental release of fission products. *South Texas*, LBP-79-10, 9 NRC at 443; *see also, Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979).

The Commission’s “proximity presumption” has remained relatively unchanged since it was first adopted in the late-1970s. However, judicial concepts of standing have been clarified since that time, effectively refuting the basis for the presumption. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court made clear that plaintiffs must suffer a

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<sup>4</sup> *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Serv., LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC \_\_\_, \_\_\_ (slip op. at 12-13) (March 24, 2009).

concrete, discernible injury to be able to bring suit. This injury-in-fact requirement is case-specific, “turn[ing] on the nature and source of the claim asserted”<sup>5</sup> and “whether the complainant has personally suffered the harm.” *Wilderness Soc’y v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (emphasis added). Moreover, the alleged harm must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (internal quotations omitted); *see also Summers v. Earth Island Inst.*, \_\_\_ U.S. \_\_\_, 07–463, slip op. at 11 (U.S. Mar. 3, 2009) (“Standing, [the Supreme Court has] said, ‘is not an ingenious academic exercise in the conceivable’ . . . [but] requires . . . a factual showing of perceptible harm.”) (emphasis added); *id.* at 9, 11 (declining to rely on a “statistical probability” or a “realistic threat” to establish that individuals are threatened with concrete injury). These qualifiers ensure that courts address only cases and controversies in which the plaintiff is “in a personal and individual way”<sup>6</sup> “immediately in danger of sustaining some direct injury,”<sup>7</sup> thus avoiding advisory opinions on matters “in which no injury would have occurred at all.” *Lujan*, 504 U.S. at 564 n.2.

By requiring plaintiffs to demonstrate an injury in a concrete factual context, courts also avoid claims involving “only . . . generally available grievances” shared by other members of the public. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982). When a party’s “asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*” — such as when a petitioner challenges a COL application but is not itself regulated by the NRC —

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<sup>5</sup> *Raynes v. Byrd*, 521 U.S. 811, 818 (1997).

<sup>6</sup> *Lujan*, 504 U.S. at 560 n.1.

<sup>7</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

“standing . . . is ordinarily ‘substantially more difficult’ to establish.” *Lujan*, at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). Indeed, the Supreme Court has held that “much more is needed” in terms of the “nature and extent of facts . . . averred” to show that the petitioner will be affected by the alleged injury “in such a manner as to produce causation.”<sup>8</sup> *Id.* The Supreme Court’s standing test is plainly more demanding than the Commission’s now-outdated and overly-simplified proximity presumption, which is based on no more than the speculative, hypothetical possibility of a reactor accident in the future that will somehow injure off-site residents within 50 miles.

Recently, the Supreme Court issued a decision on standing that directly undermines the basis for the proximity presumption. *See Summers*, slip op. at 11. The Court began by reiterating the principles discussed above — that is, that standing requires a concrete injury-in-fact that is actual and imminent and not hypothetical or conjectural. The Court then found that the plaintiff’s “intention” to visit the National Forests in the future, without showing that the challenged regulations would affect a specific forest visited by the plaintiff, “would be tantamount to eliminating the requirement of concrete, particularized injury in fact.” *Id.*, slip op. at 7. The Court rejected a standing test that would have accepted a statistical probability that some of an organization’s members would be threatened with concrete injury.<sup>9</sup> *Id.*, slip op. at 9.

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<sup>8</sup> Contrast this judicial requirement to demonstrate each step of the causal link with the NRC’s now-outdated holding in *Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility)*, ALAB-682, 16 NRC 150, 153 (1982) (holding that a Licensing Board was wrong to require that the petitioner, to demonstrate standing, show a causal relationship between injury and the licensing action being sought). Clearly, causation now is a required element of any judicial standing determination, even in NRC matters. *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72.

<sup>9</sup> The Court also declined to reduce the threshold for standing because the case involved a procedural injury (such as a claim under NEPA). Specifically, the Court concluded that “deprivation of a procedural right without some concrete interest that is affected by the

The Court also declined to substitute the requirement for “imminent” harm with a requirement of a “realistic threat.” *Id.*, slip op. at 11 (emphasis in original). In doing so, the Supreme Court rejected a standing test that is substantially similar to the NRC’s proximity presumption.<sup>10</sup>

As noted above, the proximity presumption is based on “the geographical zone (usually taken to be 50 miles) that might be affected by an accidental release of fission products.” *South Texas Project*, LBP-79-10, 9 NRC at 443 (emphasis added). The Board states that the proximity presumption is consistent with judicial concepts of standing because “the Commission applied its expertise to determine that persons living within a 50-mile radius of a nuclear reactor ‘face a realistic threat of harm if a release of radioactive material were to occur from the facility.’” LBP-09-16 at 7, *citing Calvert Cliffs*, slip op. at 12. But, such an exercise is inadequate under Supreme Court precedent — both because it relies on a statistical probability of an accident and because it requires a presumption that an accident would in fact lead to an injury to particular petitioners. In relying on the presumption, the Petitioners are doing nothing more than speculating about a low-probability hypothetical accident that, in turn, poses some even smaller likelihood of actually injuring them.<sup>11</sup> This is plainly inconsistent with the judicial standing requirements that an injury be concrete and not hypothetical, and that a petitioner

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deprivation—a procedural right *in vacuo*—is insufficient to create [standing].” *Summers*, slip op. at 8.

<sup>10</sup> *Summers* also effectively forecloses the types of standing analyses that have recently been used in the Court of Appeals for the D.C. Circuit to permit a finding of injury-in-fact based on a showing that harm was “substantially probable.” *See Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996); *Nat. Res. Def. Council v. U.S. Env. Prot. Agency*, 464 F.3d 1 (D.C. Cir 2006).

<sup>11</sup> Unlike the regulatory framework at the time that the proximity presumption was first adopted, the NRC now (after Three Mile Island) has in place specific emergency planning regulations that are intended to avoid or mitigate any injury from an accidental release. Therefore, the presumption that an accident would necessarily cause an injury to Petitioners can no longer be sustained as a factual or regulatory matter.

establish that he or she will personally be injured. Moreover, the use of the term “presumption” itself implies that there is no factual showing of any actual harm. This is inconsistent with the requirement that a party affirmatively “demonstrate” standing. *See, e.g.*, 10 C.F.R. § 2.309(a). For all of these reasons, the proximity presumption should be abandoned in favor of a more rigorous analysis specific to each petitioner.

The cases cited by the Board in *Calvert Cliffs* (and adopted by the Board in *Fermi*) do not support continued use of the proximity presumption. The *Calvert Cliffs* Board stated that various contemporaneous standing decisions find the “injury-in-fact” requirement satisfied without quantitative proof of harm. LBP-09-04, at 15. However, those cases involved actual discharges rather than speculative, hypothetical accidents. For example, application of the proximity presumption is unlike the situation in *Friends of the Earth v. Laidlaw Env’t Servs.*, 528 U.S. 167, 182-184 (2000). In *Laidlaw*, it was undisputed that actual discharges into the river were occurring and that, in light of those discharges, an injury to the plaintiffs was reasonably threatened. Here, there is no assertion of standing based on ongoing or regular discharges, only an assertion of “concern” for a possible accident. The Petitioners are merely speculating that an accident may occur, which, in turn, may affect them. *See also Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 2006) (standing based, in part, on existence of ongoing discharges).<sup>12</sup> Further, in contrast to conclusory and non-specific affidavits based on mere proximity, the Court in *Covington v. Jefferson County* found standing based, in part, on a factual showing of fires, of animals, insects and other scavengers attracted to uncovered garbage, and of groundwater contamination. 358 F.3d 626, 638-641 (9th Cir. 2004). The Commission

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<sup>12</sup> In the absence of an actual discharge, there could be no standing based on a “risk of an accidental release” or fear from an accidental release. *See, e.g., Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (holding that fear of an accident is not a cognizable injury under NEPA).

should, consistent with contemporaneous judicial concepts, revisit and reverse the proximity presumption. In its place, the Commission must require a more rigorous, case-specific showing of standing.

B. Individual and Organizational Petitioners Have Not Demonstrated Standing

As discussed above, judicial concepts of standing dictate a significantly increased level of scrutiny and an increased showing necessary to establish standing.<sup>13</sup> Under these standards, Petitioners fail to demonstrate standing. The affidavits submitted by Petitioners are substantively identical. Each asserts the same, insufficient bases for intervention. Petitioners rely on: (1) residency within 50 miles of the Fermi site; and (2) the “concern” that “construction and operation of the proposed nuclear plant could adversely effect [Petitioners’] health and safety and the integrity of the environment in which [Petitioners] live.”<sup>14</sup> Specifically, the affidavits express concern about “the risk of the accidental release of radiation into the environment and the potential harm to groundwater and surface waters.” That, however, is the extent of Petitioners’ alleged injuries.

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<sup>13</sup> Application of contemporaneous concepts should not be a bar to establishing standing. Courts find standing regularly and Licensing Boards in materials cases frequently evaluate standing without resort to the proximity presumption. Rather than rely simply on a geographical proximity, petitioners should be required to affirmatively demonstrate that they would be directly impacted by construction or operation of Unit 3.

<sup>14</sup> Each individual affidavit contains the following identical paragraph as the basis for standing:

I am concerned that if the NRC grants the Detroit Edison Company COLA, the construction and operation of the proposed nuclear power plant could adversely affect my health and safety and the integrity of the environment in which I live. I am particularly concerned about the risk of the accidental release of radiation into the environment and the potential harm to groundwater and surface waters.

There is no information regarding frequency of use of Lake Erie or the extent of contacts with areas potentially impacted by Unit 3, other than the geographical location of their residences and their generalized fear of health or environmental impacts.<sup>15</sup> Standing declarations in judicial proceedings typically focus on specific contacts with the affected areas, including frequency of past visits and intent to visit areas again in the future. Alternatively, they describe in detail the extent and nature of the petitioners interests in a project or site. Here, however, other than a general “concern” regarding Fermi 3, Petitioners have established no direct personal interest in the construction or operation of the proposed new unit.<sup>16</sup> Thus, there is no particularized injury of the sort necessary to establish standing.<sup>17</sup>

Likewise, there is no discussion about how the accidental releases mentioned in the affidavits will *cause* an injury to Petitioners at off-site locations. Apart from a hypothetical accidental release, there is no discussion of how construction or routine operation would cause an injury to Petitioners. There is simply no information regarding causation. Conclusory

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<sup>15</sup> Even with the proximity presumption, a petitioner that bases its standing on its proximity to a nuclear facility must still describe the nature of its property or residence and its proximity to the facility, and should describe how the health and safety of the petitioner may be jeopardized. *Northern States Power Co. (Pathfinder Atomic Plant)*, LBP-89-30, 30 NRC 311, 315 (1989).

<sup>16</sup> Mere “concern” about the “risk” of accidental releases is insufficient injury for standing. *See, e.g., Metropolitan Edison*, 460 U.S. at 766 (holding that fear of an accident is not a cognizable injury under NEPA); *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, CLI-85-14, 22 NRC 177, 180 (1985) (holding that mere exposure to the risk of full power operation of a facility does not constitute irreparable injury when the risk is so low as to be remote and speculative).

<sup>17</sup> A “generalized grievance” shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 333 (1983).

allegations about potential radiological harm from the facility in general are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251.

Even the admitted contentions do not provide a basis for standing. Petitioners simply do not assert that, or explain how, the alleged deficiencies in the COLA will cause injury to them. For example, in Contention 8, Petitioners have not established any personal interest in the eastern fox snake or shown how they would be injured if construction of the new unit affects the eastern fox snake. Nor have Petitioners asserted in Contention 3 that they personally would be harmed by extended on-site storage of low-level waste.<sup>18</sup> Although Contention 5 vaguely mentions potential impacts to drinking water on Catawba Island, which is 34 miles from Fermi, there is no connection made between that potential harm and any of the Petitioners. Similarly, Petitioners do not show in Contention 6 how increased algal production would cause any direct injuries (*e.g.*, if they regularly swim in Lake Erie and curtail use due to algae). The Petitioners' affidavits and contentions do not demonstrate the requisite injury-in-fact, causation, or redressibility for standing.<sup>19</sup>

Finally, Licensing Boards have consistently interpreted the Commission's intent to be firmly directed to deciding what is "remote and speculative" by examining the probabilities inherent in a proposed accident scenario. *Carolina Power & Light Co.* (Shearon Harris Nuclear

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<sup>18</sup> Those individuals affected by extended on-site storage of low-level waste will be workers in the plant, not members of the general public. *See, e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (holding that a member of the public does not have standing to raise an issues that deals with the protection of workers in the plant, not protection of the general public).

<sup>19</sup> In LBP-09-16, the Board discusses the required nexus between the "injury" and the "relief." *Id., citing Crow Butte Resources, Inc.* (License Renewal), CLI-09-09, 69 NRC \_\_, \_\_ (slip op. at 9-10) (May 18, 2009). We are not attempting to challenge or revisit the Commission or Licensing Board decision on that point. Instead, we are simply pointing out that, *in the absence of a proximity presumption*, there is no basis for an injury-in-fact, causation, or redressibility in the Petitioners' affidavits or in their contentions.

Power Plant), LBP-00-19, 52 NRC 85, 97 (2000). Petitioners provide no information to suggest that an accident is probable or that it is likely to impact Petitioners personally. Even if Petitioners had made the argument, the risk of an accidental release of radioactive material to the environment referenced in their affidavits would be too vague and non-specific to support a concrete showing of actual harm to Petitioners. In any event, as discussed above, judicial concepts of standing require a showing that the challenged action result in imminent and actual harm; a statistical probability of harm or even a “realistic threat” is not sufficient. *Summers*, slip op. at 9, 11. Hence, in accordance with contemporaneous judicial concepts of standing, the risk of the alleged harm is too speculative to constitute the concrete injury needed for standing purposes.

#### V. CONCLUSION

The Commission should grant the appeal to bring Commission standing jurisprudence into line with contemporaneous concepts of judicial standing. The proximity presumption, which at one time was consistent with judicial standing principles, is no longer valid. Petitioners in NRC proceedings should be required to establish standing through a specific showing of injury, causation, and redressibility. Here, Petitioners have failed to make such a showing. Accordingly, the Commission should reverse the Board’s decision regarding standing in LBP-09-16. The Petition should be denied and the proceeding should be terminated.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 10th day of August 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S NOTICE OF APPEAL OF LBP-09-16” and “APPLICANT’S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-16” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 10th day of August 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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