August 20, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

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

* * * * *

REPLY OF PETITIONERS IN OPPOSITION TO DTE'S APPEAL LBP-09-16

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* * * * *

Reply of Petitioners In Opposition To DTE's Appeal From LBP-09-16

Now come Petitioners Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Hal Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman and reply to the DTE Appeal from licensing board order LBP-09-16 (hereinafter "DTE Brief"). For the reasons set forth below, the ASLB acted within its discretion when it granted Petitioners the status of intervenors and accorded them standing to proceed.

A. The 'proximity presumption,' not 'very good jam,' is the means by which to define standing to intervene before the Commission

The NRC Staff acknowledged the standing of most of the Intervenors when the original Petition was filed with the ASLB, and provided extensive justification for its conclusions why that is appropriate. Staff Answer at pp. 9-26. But DTE maintains in its

Brief (p. 7) that the "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."

DTE's direct challenge to the 50-mile rule was rebuffed by the ASLB's articulation:

> It also observed that the NRC's proximity presumption does not disregard contemporaneous judicial concepts of standing, as suggested by the Applicant, but rather 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.' It is for this reason that the Commission has chosen not to require independent showings of injury, causation, and redress-ibility. The non-trivial increased risk constitutes injury-in-fact, is traceable to the challenged action (the NRC's licensing of a new nuclear reactor), and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the Petitioners.

ASLBP 09-16 at 7-8. It is official and indisputable policy of the Commission that there is a realistic threat of harm in the event of accident at a facility such as Fermi 3. The ESBWR design of Fermi 3 is "flawless" only so long as it remains on the drawing boards, and is incomplete and untested in three-dimensional reality. This objection by DTE is fatuous.

Putting aside for the moment the reasoning of the ASLB, DTE quite misconstrues the application here of *Summers v. Earth Island Inst.*, __ U.S. __, 07-463, slip op. (U.S. March 3, 2009). The environmental plaintiffs in *Summers* challenged the failure of the Forest Service to apply to the Burnt Ridge Project § 215.4(a) of Forest Service regulations, which implements the Appeals Reform Act (requiring prior notice and comment). The district court granted a preliminary injunction against the Burnt Ridge salvage-timber sale. Soon after, the parties

settled their dispute over the Burnt Ridge Project and the district court concluded that "the Burnt Ridge timber sale is not at issue in this case." The Government then argued that, with the Burnt Ridge sale dispute settled, and there being no other project before the court in which the plaintiffs were threatened with injury-in-fact, the plaintiffs lacked standing to challenge the regulations. However, the trial court proceeded to adjudicate the merits of the challenges anyway. The Supreme Court reversed, concluding that the "actual or imminent harm" which the plaintiffs had demonstrated to obtain the preliminary injunction had disappeared with the settlement. *Id.* at 6, 8. The fact of having settled the one and only imminent tree cutting controversy, as opposed to other prospective cuts which were not clearly-identified nor imminent, was key to the Court's determination that the challengers lacked standing. That is not the circumstance here. There is a live controversy over the combined operating license proposal for Fermi 3 and no settlement in sight which might render the matter moot and destroy Petitioners' standing.

DTE questions the proximity presumption, asserting (DTE Brief at 6) that "[t]he 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 offsite residents within 50 miles." But the recent ASLB pronouncement on standing and the proximity rule, *Calvert Cliffs 3 Nuclear Project* (COLA for Calvert Cliffs Unit 3), LBP-09-04, ___NRC __, slip op. at 12-17 (March 24, 2009), carefully explains that there

is no conflict between the requirements of actual or imminent concrete injury and the NRC's 50-mile presumption of standing:

> The presumption does not permit persons with no actual or imminent claim of injury to obtain a hearing. On the contrary, the common thread in the decisions applying the 50-mile presumption is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials. The NRC's regulations also recognize that an accidental release has potential effects within a 50-mile radius of a reactor. The Commission, rather than disregarding contemporaneous judicial concepts of standing, has applied its expertise and concluded that persons living within a 50-mile radius of a proposed new reactor face a realistic threat of harm if a release of radioactive material were to occur from the facility. For this reason, the Commission does not require such persons to make individual showings of injury, causation, and redressability. The presumption does not grant standing to persons with merely theoretical or generalized grievances, but only to those persons who live sufficiently close to a proposed new reactor that they face an increased risk of harm if a release of radioactive material were to occur. The non-trivial increased risk constitutes injury-in-fact, is traceable to the challenged action (the NRC's licensing of a new nuclear reactor), and is likely to be redressed by a favorable decision that either denies a license or mandates compliance with legal requirements that protect the interests of the petitioners. ([Footnote omitted].
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> ***** ***** *****
>
> [B]ecause we are bound by Commission and Appeal Board precedent, we are not at liberty to reject the 50-mile presumption. Applicant responds that the Commission has instructed licensing boards to apply contemporaneous judicial concepts of standing, that current judicial requirements for standing conflict with the presumption, and that therefore we are at liberty to disregard it. [Citation omitted]. In the absence of demonstrably compelling precedent, we doubt that the Commission intends for licensing boards to disregard its rulings based on their own interpretations of contemporaneous judicial concepts of standing. Otherwise, it is for the Commission, not licensing boards, to revise its rulings.
>
> ***** ***** *****
>
> In addition, various contemporaneous standing decisions find the "injury-in-fact" requirement satisfied without the type of

quantitative proof of harm Applicant contends is required.[1] In these cases, it was sufficient that persons living in or using an area near the defendant's facility stated that they "feared" or were "concerned" they would be harmed by discharges from that facility, even though they did not attempt to quantify the risk of harm they might suffer. These contemporaneous standing decisions are consistent with the NRC's presumption finding petitioners to have standing based on the proximity of their residences to a proposed new reactor and their concern that the new facility may endanger their health and safety and the environment in which they live.

Furthermore, Applicant's argument fails to undermine the basis of the 50-mile presumption. As noted above, the presumption reflects the potential effect at significant distances from the facility of the accidental release of radioactive materials. Applicant here has provided no evidence to show that the effects of an accidental release from CCNPP-3 (much less nuclear reactors generally) would be limited to a shorter distance from the facility. The rationale for the 50-mile presumption does not depend upon the probability that a proposed reactor is likely to generate an accidental release of radioactive materials, but rather the fact that, if such an accident were to occur, it could realistically impact the geographic area within which the petitioners reside.

We also note that, although we can easily determine whether petitioners reside within 50 miles of the facility, it would be far more difficult for a licensing board to determine reliably the risk of an accidental release at this early stage of the proceeding. An applicant's vendor will typically have prepared a probabilistic risk assessment for the reactor design. However, at this early stage 'there is not yet available either the Final Environmental [Impact] Statement or the Safety Evaluation Report and, thus, neither we nor the petitioners have the benefit even of the Staff's own ultimate appraisal respecting accident probabilities.' [Footnote omitted]. Thus, if we were to require proof of the likelihood of an accident at this stage in the proceeding, we could be forced to rely on the vendor's estimates, which should still be considered preliminary at this point. This would frustrate the public's opportunity to dispute and put to the test

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[1]Citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Serv.*, 528 U.S. 167, 182-84 (2000) (Injury-in-fact was adequately documented by the affidavits and testimony of members of the plaintiff organizations asserting that the defendants pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests; plaintiffs did not have to show that the discharges actually harmed the environment); *Covington v. Jefferson County*, 358 F.3d 626, 638-41 (9th Cir. 2004) (sufficient to allege that defendant's actions "caused 'reasonable concern' of injury to" the plaintiff); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996) (affiants' "concern" that discharges would impair water quality is sufficient).

> the applicant's claims concerning the safety of the proposed new reactor, which is the opportunity that AEA Section 189a was intended to provide.
>
> Although the Commission has encouraged licensing boards to apply contemporaneous concepts of standing, the ultimate test is not whether the NRC's test for standing conforms to that applied by federal courts, but whether the NRC's test represents a reasonable construction of Section 189a.[2] Under Applicant's proposed new test, licensing boards would have to defer to the vendor's preliminary risk assessment except in the unusual instance in which the petition to intervene demonstrates that the risk of harm exceeds some (vaguely defined) numerical threshold. We doubt that placing such an onerous burden on petitioners would constitute a reasonable interpretation of the AEA. As long as the petitioners reside within an area that could realistically be impacted if an accidental release occurs, it is reasonable and consistent with Section 189a to find that they have standing to challenge Applicant's safety claims and its environmental analysis under NEPA. [Footnote omitted].

It is ludicrous for DTE to suggest that Petitioners are relying on a "conjectural," "hypothetical" or "speculative" injury (Brief p. 3). DTE's antics induce something akin to Alice's plaintive frustration in Through the Looking Glass:

> "It's very good jam," said the Queen.
>
> "Well, I don't want any to-day, at any rate."
>
> "You couldn't have it if you did want it," the Queen said.
>
> "The rule is jam tomorrow and jam yesterday but never jam to-day."
>
> "It must come sometimes to 'jam to-day,'" Alice objected.
>
> "No it can't," said the Queen. "It's jam every other day; to-day isn't any other day, you know."
>
> "I don't understand you," said Alice. "It's dreadfully confusing."[3]

The dreadfully confusing DTE dogma that radiation exposure to the public is impossible is belied by what DTE told the City of Windsor in the hopes of diffusing opposition to Fermi 3. In a letter delivered to the City of Windsor, Ontario in early March 2009 (Exhibit AA,

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[2] *Envirocare of Utah v. Nuclear Regulatory Comm'n,* 194 F.3d 72, 75-76 (D.C. Cir. 1999).

[3] http://www.all-art.org/world_literature/carroll3a.htm

attached) to counter a public agency presentation of the negative environmental effects of nuclear energy on the Great Lakes, DTE admitted that there is a small threat to public health from power plant radiation emissions resulting from routine daily operations: "People living near a nuclear power plant receive only a tiny amount of radiation, if any, from the facility."

This sounds rather like jam every day.

DTE hopes its faith-based and self-interested belief in the infallibility of the incomplete, never-tested ESBWR reactor design can substitute for a factual discussion of the real threat of injury from Fermi 3's operation. Approval of the ESBWR remains at least one year away; it is a rulemaking determination that hasn't yet been made. DTE wants the Commission to supplant the ESBWR rulemaking with DTE's unverified representations that any unproven safety questions of Fermi 3 are trifling. The outcome of that rulemaking is central to DTE's case on the merits for an operating license, and as such, has no bearing on the issue of whether Petitioners have standing. *Sequoyah Fuels Corp.* (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 15 (2001) (ultimate ruling on the merits has no bearing upon whether one has standing at the outset). The Commission cannot accept a party's wishful speculation *in lieu* of established fact.

B. DTE trivializes the unique standing accorded environmental intervenors for the redress of procedural injury

DTE further argues that *Summers* renders Petitioners' standing for purposes of procedural injury to be a procedural right *in vacuo* "without some concrete interest that is affected by the deprivation." DTE Brief at 6 fn. 9. But the "concrete interest" the *Summers* plaintiffs

lacked was:

> The remaining affidavit submitted in support of standing fails to establish that any member has concrete plans to visit a site where the challenged regulations are being applied in a manner that will harm that member's concrete interests.[4]

The Supreme Court found that standing to challenge the Burnt Ridge sale arose from the affidavit of Earth Island Institute member Ara Marderosian, who:

> [H]ad repeatedly visited the Burnt Ridge site,. . . had imminent plans to do so again, and . . . his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment. The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge.

Summers, __ U.S. __, 07-463, slip op. at 5.

In *Summers*, the plaintiffs' standing was predicated upon procedural injury. Here, the Government, in the form of the NRC Staff, has conceded Petitioners' standing and has not joined DTE in this appeal.

DTE suggests (Brief at 5-6) that "[w]hen a party's "asserted

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[4]From *Summers*, __ U.S. __, 07-463, slip op. at 6-7: "Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members. The only other affidavit relied on was that of Jim Bensman. He asserted, first, that he had suffered injury in the past from development on Forest Service land. That does not suffice for several reasons: because it was not tied to application of the challenged regulations, because it does not identify any particular site, and because it relates to past injury rather than imminent future injury that is sought to be enjoined.

Bensman's affidavit further asserts that he has visited many National Forests and plans to visit several unnamed National Forests in the future. Respondents describe this as a mere failure to "provide the name of each timber sale that affected [Bensman's] interests," Brief for Respondents It is much more (or much less) than that. It is a failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the National Forests. The National Forests occupy more than 190 million acres, an area larger than Texas."

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 — 'standing . . . is ordinarily 'substantially more difficult' to establish'" (emphasis in original), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). DTE left out of the quoted language that "standing is not precluded." *Id.* And Justice Scalia said in *Defenders of Wildlife* that in regulatory cases, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction. . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* That is what Petitioners have proven here: their presence or members' habitation in the 50-mile radius; that construction of a nuclear power plant creates a threat to public health and safety because it would necessarily engage and require continuous usage of lethally dangerous radioactive materials; that the technology is not failsafe; and that denial of an operating license would mean no nuclear power plant and no threat. Moreover, Petitioners raise contentions under the Atomic Energy Act and National Environmental Policy Act. Once they establish standing as residents living near the proposed plant site who have a direct stake in avoiding procedural injury under the pertinent statutes, Petitioners have cannot be considered as mere members of the public with an undifferentiated interest in the licensing process, and they may properly litigate all issues they can identify under NEPA and the

AEA.

Plaintiffs claim Article III standing based upon "procedural," rather than "substantive," injury because they have shown "that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir. 2003) (quoting *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)); *cf. Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (the harm NEPA seeks to prevent is complete when agency makes decision without considering information which NEPA seeks to place before decision-maker and public); *Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448-49 (10th Cir. 1996) ("The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent"). Harm to the environment may be presumed when an agency fails to comply with NEPA procedures, but a plaintiff alleging a procedural injury must also establish "the 'reasonable probability' of the challenged action's threat to [his or her] concrete interest." *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (quoting *Churchill County v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998)); *Citizens for Better Forestry v. U.S. Dep't of Agriculture,* 341 F.3d 961, 969-70 (9th Cir. 2003), the concrete interest test requires "'a geographic nexus between the individual asserting the claim and the location suffering an environmental impact.'" *Citizens for Better Forestry, supra*, 341 F.3d at 971 (quoting *Public Citizen*, 316 F.3d at 1015 (quoting *Cantrell*, 241 F.3d at 679)). "That is,

environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the [agency's] policy." *Citizens for Better Forestry*, 341 F.3d at 971. An environmental plaintiff "need not assert that any specific injury will occur. . . ; rather, "the 'asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes." *Citizens for Better Forestry,* 341 F.3d at 971-72 (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994)). "'Were we to agree with the district court that a NEPA plaintiff's standing depends on 'proof' that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake.'" *Citizens for Better Forestry*, 341 F.3d at 972 (quoting *City of Davis v. Coleman*, 521 F.2d 661, 670-71 (9th Cir. 1975)).

In sum, a cognizable procedural injury exists when a plaintiff alleges that NEPA procedures have not been followed and where the plaintiff has alleged a "concrete" interest - such as her aesthetic or recreational interest - that is threatened by the proposed action. *See Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361 (1972) (aesthetic and recreational harms may amount to concrete injury-in-fact). The Court need not require Plaintiffs to demonstrate that a procedurally proper EIS (for example) will necessarily protect their concrete interest in the licensing of Fermi 3. Rather, a cognizable procedural injury exists for Article III purposes when, because of a failure to

honor a statutorily-required procedure, it is "reasonably probable that the challenged action will threaten [a plaintiff's] concrete interests." *Citizens for Better Forestry*, *supra*, 341 F.3d 969-70. The disregard for mandatory regulations which are essential to the regulatory scheme results in a procedural injury which is tied to a substantive harm to the environment. *Citizens for Better Forestry*, *id.* at 970-71 (noting the "'added risk to the environment that takes place when governmental decision makers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment'") (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)).

"The question in deciding whether a plaintiff's injury is redressable is not whether a favorable decision is likely but whether a favorable decision likely will redress a plaintiff's injury." *Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004). "In deciding whether a plaintiff's injury is redressable, courts assume that a plaintiff's claim has legal merit. [Citation omitted]. Were the rule otherwise, courts would never have jurisdiction to entertain a lawsuit that appeared, at the pleading stage, and before evidence was considered, likely to fail on the merits. Such a rule would be illogical." *Id.*

Environmental plaintiffs who prove Article III standing have been accorded the right to raise challenges about violations of the statute on which suit is brought despite failing to allege any harm to themselves related to some of those challenges. *Sierra Club v. Adams*, 578 F.2d 389, 391-93 (D.C. Cir. 1978) (discussing NEPA):

> In its discussion of standing in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Supreme Court stated that the "fact of . . . injury is what gives a person standing to seek judicial review under the statute (in question), but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." *Id.* at 737, 92 S.Ct. at 1367 (citing, in footnote 12, 3 K. Davis, Administrative Law Treatise §§ 22.05-.07 (1958)); . . . .
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> ***** ***** ***** *****
>
> An interpretation that unnecessarily restricts the ability of plaintiffs properly before the court to challenge additional inadequacies in an environmental impact statement would be patently inconsistent with the unequivocal legislative intent embodied in NEPA that agencies comply with its requirements "to the fullest extent possible." 42 U.S.C. § 4332 (1970); see *Realty Income Trust v. Eckerd*, 183 U.S.App.D.C. 426, 431-32, 564 F.2d 447, 452-53 (1977). Furthermore, because of the statutory and regulatory requirements that the FEIS reflect an 'interdisciplinary' and 'integrated' approach, the issues discussed in the statement will be necessarily interrelated and interdependent. A reviewing court will rarely view one issue in isolation, and its task will be aided by adversarial illumination of all critical portions of the statement. ***We hold, therefore, that, because appellees have established an independent basis for standing to challenge the FEIS, they also have standing to argue the public interest in support of their claim that there is inadequate discussion and consideration of the effect of the construction on the Cuna and Choco Indians***. (Emphasis supplied).

Sierra Club v. Adams, supra, 578 F.2d at 391-93; see also *Iowa Indep. Bankers v. Bd. of Governors*, 511 F.2d 1288, 1293-94 (D.C. Cir. 1975). Environmental plaintiffs may be accorded standing to pursue multiple inadequacies under environmental laws in order to exact the maximum degree of compliance. "Once a genuine case or controversy has been established for standing purposes, nothing in Article III should limit the theories that can be spun out of the 'common nucleus of operative fact.'" 13A Wright & Miller, Federal Practice and Procedure § 3531.16 at 109 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d. 218 (1966)).

"Reliance on procedural harms alters a plaintiff's burden on the last two prongs of the Article III standing test. To establish standing by alleging procedural harm, the {plaintiffs] must show only that they have a procedural right that, if exercised, could protect their concrete interests and that those interests fall within the zone of interests protected by the statute at issue." *Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005). If the causation of harm "is dependent upon the agency's policy," then there is procedural injury and Article III standing. *Id.* See also *Citizens for Better Forestry*, *supra*, 341 F.3d at 970-71 (failure to include the public in rulemaking procedures) ". . . undermines the very purpose of NEPA, which is to 'ensure[] that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public'" (quoting *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000)). Also, see *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n. 14 (9th Cir. 2000) (environmental plaintiff was "surely . . . harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process").

C. The open-ended ESBWR, sabotage and terrorism leave accident probabilities open to conjecture

Anomalously, DTE requires Petitioners to disprove, in order to achieve standing, that which DTE itself has not yet fully provided in order to qualify for an operating license: the frequency of potential power plant core damage which might be expected from the ESBWR design, and all other possible accident scenarios involving lethal and

widespread releases of radiation.

"Core damage frequency" refers to the likelihood of a severe reactor accident that causes damage to the reactor core and subsequent release of radioactive materials to the environment. DTE has neither finalized computations of this frequency, nor has it quantified other risk elements of events and accidents that could cause a large release of radioactive materials to the environment, such as sabotage and acts of terrorism. Fermi 3 would be situated on the shores of the largest freshwater complex in the world, and within 50 miles of millions of people. Fermi 1's core meltdown, something that was beyond the pale of credible accident scenarios, illustrates the folly of not properly analyzing the realistic scenarios which are possibe. Undoubtedly, DTE must, and will, take steps to attempt to minimize these risks. But it remains that a risk of terror attack and/or sabotage exist, and that such acts could cause a release of radioactivity. Petitioners suggest that these risks should be seen as orders of magnitude larger than the risk of a more "normal" catastrophic accident.

Currently, DTE's stated core damage frequency is simply an assertion, not a statement of accepted fact, and cannot be relied upon for standing purposes in this case. DTE has produced a work-in-progress design control document and its Environmental Report in support of any assertions of core damage frequency. The ESBWR design remains uncertified by the NRC, and is not expected to clear staff review before fall 2010. Until the 2011 issuance of a Final Safety Evaluation Report and certification of the ESBWR design, the NRC cannot attest to DTE's core damage frequency estimates.

Nor can Applicants base their core damage frequency estimate on actual experience. No ESBWR has ever been built or operated and none is under actual construction. Hence there exists no actual experience to justify DTE's core damage frequency estimate. There is a gulf of difference between a conceptual core damage frequency and an as-built reactor's core damage frequency. As NRC licensing boards well know, during the first generation of reactor construction in the United States, numerous substantiated allegations arose of ineffective and deficient Quality Control/Quality Assurance (QC/QA) programs at nuclear utilities building nuclear reactors. While some utilities engaged in substantial and expensive rework to address such deficiencies, it is by no means clear that all reactors are built strictly to specifications, and a reactor not built strictly to specifications may not attain the conceptual core damage frequency of a more pristine Design Control Document which assumes everything is built and works perfectly.

There is currently no means of assurance that everything at Fermi 3 will be built perfectly, either: ***there is no Appendix B-approvable quality assurance program in place for Fermi 3.*** As of June 23, 2009, the NRC staff could find in the Fermi 3 FSAR no QA program for design certification which could meet the requirements of Appendix B of 10 C.F.R. part 50:

> On the surface, the DTE approach appeared consistent with the practice used during the development of other COL applications. However, based on our continued review, the staff determined that the oversight provided by DTE was not governed by a DTE QA program meeting the requirements of Appendix B.

See Exhibit BB attached hereto, June 23, 2009 memo[5] to Jeffrey Cruz, ESBWR/ABWR Projects Branch 1, Division of New Reactor Licensing, Office of New Reactors, from John A. Nakoski, Chief, Quality and Vendor Branch 2, Division of Construction Inspection & Operational Programs, Office of New Reactors. Without a functioning QA program, DTE is in no position at this early juncture to trivialize the potential for a catastrophic radiation accident when it cannot even guarantee the best construction practices will be followed.

But even assuming low core damage frequency, the consequences of a reactor accident, or act of terror or sabotage at the reactor itself, or related waste storage and transportation events, are extremely high - unlike most other types of industrial or environmental releases or accidents. For example, the Fermi 3 reactor would produce large quantities of lethal high-level radioactive waste. This waste would initially be placed in a cooling pool at the reactor site. Accidents at cooling pools resulting in large radiation release can occur, as can acts of terror or sabotage. DTE has not quantified the risks of an accident or outside event resulting in such release at Fermi 3. Petitioners submit that the risk of an accident or outside event affecting the cooling pool is orders of magnitude larger than the risk of an accidental core damage event.

The current Fermi 2, alongside which Fermi 3 would be built, is about to move some of its high-level waste, after some years of cooling, to dry cask storage outside containment. These air-cooled casks, while built to be robust, are themselves subject to potential

[5]ADAMS No. ML091671550.

accidents, acts of terror or sabotage that could release large quantities of radioactivity. DTE has not attempted to quantify the risks of accidents, acts of terror or sabotage resulting in radioactive release affecting the dry casks. Petitioners suggest that the risk of an accident or outside event affecting the dry casks is orders of magnitude larger than the risk of an accidental core damage event.

The U.S. Government and the nuclear power industry plan at some point, presumably during the 60-year or longer projected lifetime of Fermi 3, to move high-level waste generated by Fermi 3 from the reactor site to an interim and/or permanent disposal site for high-level radioactive waste. In the case of Fermi 3, this waste presumably will travel on roads and/or rails near the homes and businesses of Petitioners. Obviously, the risk of a traffic accident or rail accident is far larger than whatever core damage frequency DTE calculates. But DTE nas not quantified the risks of a traffic or rail accident resulting in radiation release. The risks of a traffic or rail accident or act of terror or sabotage on waste transport casks is many orders of magnitude larger than the risk of an accidental core damage event, as is the risk of release from those casks in the event of such an accident.

All of these potential events can affect the health, safety and livelihoods of the members of the organizational Petitioners and the individually-named Petitioners.

D. The uncalculated potential for substandard and/or counterfeit parts

A problem that has plagued the entire nuclear power industry is that of substandard and/or counterfeit parts. Numerous NRC Information

Bulletins have been issued on this subject. In these cases, not necessarily through any fault of their own, nuclear constructors have used substandard and/or counterfeit parts obtained through contractors and subcontractors. When a substandard or counterfeit part is used on a vital reactor component, an increase in core damage frequency can be expected since the frequency is based upon adherence to exact construction specifications. The problem is widespread, with violations routine, as in the August 5, 2009 NRC "Integrated Inspection Report"[6] at Fermi 2, the sister to Fermi 3. Since Fermi 3 is not under construction, there can be no serious allegation that substandard and/or counterfeit parts would be used in that construction. However, this is a persistent problem in the nuclear industry, to the detriment of the nuclear utilities/constructors and public alike. Inadvertent use of such parts cannot yet be ruled out at Fermi 3, nor can the potential effect of such parts on core damage frequency be calculated, especially absent a regulatorily-compliant Quality Assurance program.

Even if the core damage frequency were as low as DTE states, which should not be accepted for the reasons above, NRC regulations do not recognize a low core damage frequency as a rationale for such critical requirements as a 10-mile Emergency Planning Zone and a 50-mile Ingestion Pathway as essential accident mitigation measures due to the reality that considerable consequences to people and the environment can occur in these zones.

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[6]For example, see ADAMS No. ML092170697, reporting installation of improper stem and locknut on a valve, causing malfunction of that valve, owing to licensee's failure to "ensure the correct stem and locknut were supplied in a valve rebuild kit that was used to rebuild a shuttle valve on the Division 2 NIAS air dryer."

All of Petitioners' declarants and organizations are within the 50-mile Ingestion Pathway. Some of the declarants are inside the 10-mile Emergency Planning Zone. NRC regulations established these zones precisely because a reactor accident can cause adverse effects within these zones. The NRC has not reduced these zones for Fermi 3, nor for any other reactor which claims a low core damage frequency, thus it can be presumed that there is insufficient rationale to reduce the level of protection required by federal regulation. Conversely, the presumption must be that persons living and working within these geographical proximities can be affected by accidents at this reactor, and have standing to participate in proceedings, like this one, on this reactor.

CONCLUSION

A reactor meltdown or irradiated fuel pool accident, transport accident, or act of terror or sabotage of any of those, is a classic low-frequency, high-consequence event. And because the consequences are so high, and can affect people and the environment many miles from the accident site, it is imperative that members of the public, including the Petition-ers, have the opportunity to participate in proceedings related to construction and operation of a nuclear reactor. For all of the above reasons, DTE's objections to the organi-zations' and individuals' standing to intervene should be overruled.

/s/ Terry J. Lodge
Terry J. Lodge, Esq.
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Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-8582
tjlodge50@yahoo.com

Counsel for Petitioners

August 20, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

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

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Reply of Petitioners To DTE's Appeal From LBP-09-16" has been served on the following persons via Electronic Information Exchange this 20th day of August, 2009:

Ronald M. Spritzer, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
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E-mail: Ronald.Spritzer@nrc.gov

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Item No. 1

THE CORPORATION OF THE CITY OF WINDSOR
Public Works – Environmental Services

MISSION STATEMENT:
"The City of Windsor, with the involvement of its citizens, will deliver effective and responsive municipal services, and will mobilize innovative community partnerships"

LiveLink Report Number: 13959 EI2009	**Report Date: February 12, 2009** (2599/cl/cs-02/17/09)
Author's Name: Karina Richters, P. Eng.	**Date to Council: March 9, 2009**
Author's Phone: 519-253-7111 ext 226	**Classification #:**
Author's email: krichters@city.windsor.on.ca	

To: **Mayor and Members of City Council**

Subject: **Earth Hour 2009**

Exhibit AA

1. RECOMMENDATION: City Wide: X Ward(s): __

I. That City Council ENDORSE the participation of the City of Windsor in Earth Hour and encourage all City of Windsor facilities to turn off all non-essential lighting during Earth Hour, and further;

II. To demonstrate the City's long term commitment to energy conservation that City Council DIRECT administration to instruct municipal staff to turn off all non essential lighting, computers not in use and other ancillary electrical devices and that the installation and use of motion detector light switches in areas deemed practical and appropriate for their use be investigated.

EXECUTIVE SUMMARY: N/A

2. BACKGROUND:

Earth Hour is an international "lights out" event that will take place on Saturday March 28, 2009 at 8:30 pm. The goal is to have as many world-wide individuals and businesses as possible to turn off their lights for one hour at 8:30 pm to raise awareness about climate change and to reduce greenhouse gas emissions.

Earth Hour is a global initiative begun by the World Wildlife Fund (WWF), which initially started in Sydney Australia on March 31, 2007, where reportedly over 2.3 million businesses and households turned off their lights for one hour. The underlining purpose of "Earth Hour" is to send a powerful national and global message that it's possible to take action on global warming.

Last year 50 million people in 370 cities and tours in more than 35 countries worldwide switched off their lights for Earth Hour. Canada was a global leader with more than 150 communities participating involving 49% of the country's population.

3. DISCUSSION:

The Earth Hour initiative is a demonstration that collectively individual actions however small can make a difference toward climate change. Lighting uses about five to fifteen percent of electricity in the residential sector and over one third of electricity in offices. If people turn off their lights for one hour on March 28, they will see how easy it is to make changes to their everyday behaviour to reduce their greenhouse gas emissions and help fight climate change.

In 2008, local business participated in Earth Hour 2008 by offering candlelight atmospheres in restaurants and yoga studios. While other business ensured all non-essential lighting was turned off.

As a corporation, administration is encouraging all City of Windsor facilities to turn off all non-essential lighting in support of Earth Hour, a practice that should continue year-round.

The World Wildlife Fund will measure the success of the event by the number of online participants and by darkness during Earth Hour. Hydro companies around the world will also be participating by measuring the reduction in electricity usage.

At the time of preparing this report, World Wildlife Fund has already received commitment from 377 cities around the globe, doubling the number of countries that committed in 2008. In Canada, the Cities of Toronto, Vancouver, Edmonton, Halifax and Montreal have signed on to participate in 2009.

Initiatives such as Earth Hour and every day energy conservation actions support Goal D: Use Resources Efficiently of the Environmental Master Plan (EMP). The short-term goal of the EMP is to reduce the amount of energy the City of Windsor uses for its operations by 15% by 2011.

4. FINANCIAL MATTERS: N/A

5. CONSULTATIONS:

Paul Drca, Manager Environmental Quality

6. CONCLUSION:

Support and participation in such energy related initiatives like Earth Hour not only serve to focus attention on the perils of global warming but also the need to reinforce the importance of developing a culture of conservation in our community.

Karina Richters, P. Eng.
Environmental Coordinator

John Guidolin, P. Eng.
Interim Director of Pollution Control

Sergio Grando
Executive Director of Facilities Planning

Dev Tyagi, P. Eng.
General Manager of Public Works

APPENDICES:

DEPARTMENTS/OTHERS CONSULTED:

NOTIFICATION:				
Name	**Address**	**Email Address**	**Telephone**	**FAX**

E12009

CITY OF WINDSOR
COUNCIL SERVICES

FEB 2 6 2009

RECEIVED

ADDITIONAL INFORMATION ITEM NO. 4

MAR 0 2 2009

cc: GM P.W.
CITY ENGINEER
E.D. ENVIRONMENTAL

The Honorable Valerie Critchley, Clerk

City of Windsor

350 City Hall Sq. W.

Windsor, ON

N9Y 651

Dear Ms. Critchley:

On behalf of DTE Energy's Nuclear Development Group, I wanted to ***extend an offer to address any questions Windsor Council might have on the matter or to make a presentation available on the Combined License Application (COLA) process around Fermi 3. This relates to report No. 44 made to the Windsor-Essex County Environment Committee (WECEC).***

Exhibit A

While Detroit Edison has not made a commitment to build another nuclear plant, we have committed to pursue a license for a new unit at the Fermi site. This allows us the opportunity to have this option available to Detroit Edison as it plans for long-term energy needs for the region. Detroit Edison filed a Combined License Application in September, 2008 with the Nuclear Regulatory Commission (NRC). Prior to filing, the NRC held local public meetings in August, 2008 to explain and answer questions regarding the licensing and application review process. The NRC recently held two additional local public meetings to explain and answer questions regarding public input to the environmental review portion of the application review. The NRC's licensing and application review process is a very open and transparent with many opportunities for public input. It is expected that the entire review will take three - four years.

Phil Berthiaume, Emergency Measures Planner, County of Essex; and Richard Murray, Fire Chief for Town of Amherstburg, attended two Government to Government meetings held by the NRC – one in August, 2008 to announce the COLA filing process, and one in January, 2009 to discuss the Environmental Scoping process. Mr. Berthiaume and Chief Murray also attended both NRC public outreach meetings in August and January in response to direct contact from the NRC. Additionally, as Regional Manager of Government and Community Affairs for the region, I have reached out to both to provide background on our COLA filing and continue to keep them abreast of the filing process. They are both on my external communication distribution list for nuclear news-related updates.

Detroit Edison would be pleased to host Windsor Council members at our Detroit Headquarters for a COLA update presentation, or offer a presentation with a tour at our Fermi 2 Nuclear

Plant. We would also be willing to set-up a videoconference to make a presentation to Council or staff members. We are currently gearing up for a Fermi 2 Refueling Outage in April and are in-processing thousands of workers. As such we would prefer to *schedule any tour opportunity at the Fermi 2 Plant in May after the Refueling Outage is complete.*

I am attaching for reference a Nuclear Fact Sheet, a document shared with Mr. Berthiaume and Chief Murray as well as many other groups over the past few months. In addition, I am attaching an issues backgrounder for nuclear energy.

We hope that the *Windsor* ***Council will table the motion up for consideration next Wednesday, which would allow Detroit Edison the opportunity to present on this topic so that all perspectives on the matter can be shared and Council questions addressed. This would allow the Council of Windsor an opportunity to make an informed decision on the matter, if Council so chooses.*** We welcome the opportunity to provide a presentation to address Council on this matter, and look forward to hearing from you.

Sincerely,

Molly Luempert-Coy

Regional Manager

DTE Energy

Attachments

CC: George Costeras

Dennis Moore

Phil Berthiaume

Rick Murray

Dave Harwood

Water issues

- If Detroit Edison were to build and operate a new nuclear power plant, it would have minimal impact on water quality or volume. Because of the use of a cooling tower, thermal impact would be limited in both the degree of temperature change and the area affected. Evaporative losses would be too small to have any measurable impact on Lake Erie water levels.

- Maximum evaporative loses are estimated to be about 17,000 gallons a minute. While that number may sound large, it is inconsequential when compared with the natural evaporative loses from the surface of Lake Erie – about 11.5 million gallons per minute which is by far exceeded by annual precipitation.

- Because of the design of water intake systems, no significant impact on fish populations would be expected.

Base load vs. renewables

- Our near-term priority is to develop renewable energy resources and energy efficiency programs to maximize our energy supply portfolio. It is our responsibility to evaluate longer term alternatives for cost effective, environmentally friendly, and reliable sources of base-load power to serve our customers. Base-load power plants are necessary to maintain the stability of the electrical system and to provide the volume of reliable, consistent generation required by business, industry and households. We have an obligation to supply power to meet customer demand at all times, even when the wind does not blow and the sun doesn't shine. This will require a mix of all generation technologies; both renewable and conventional base load sources. The generation output from an ESBWR would offset 7.4 million tons of greenhouse gases each year.

  Some studies indicate that renewable energy development can create more jobs than the construction and operation of conventional power plants. Whether or not that projection is accurate, it doesn't mean we have to – or can – choose one path over the other. Base-load power plants are necessary to support a modern society and economy. Renewable energy and energy efficiency are necessary to help us meet our energy and environmental goals. We believe our development of Michigan-based renewable energy resources will produce jobs for Michigan workers. But because windmill components and other renewable energy equipment can be built elsewhere and shipped here, there is some uncertainty about where those manufacturing jobs will be located. Building and operating base-load power plants guarantees the location of the jobs.

Health and cancer risk

- People living near a nuclear power plant receive only a tiny amount of radiation, if any, from the facility. Less than 1 percent of the average person's total exposure comes from nuclear power plants. An average individual receives about 360 millirem per year, 80 percent of which comes from natural background sources. The remaining 20 percent results from exposure to artificial sources such as

medical and dental x-rays, industrial sources such as smoke detectors, and a small amount from nuclear weapons testing, with less than 1 percent from nuclear power plants. A 2005 study by the International Agency for Research on Cancer (IARC) found that the risk of health effects from exposure to low levels of radiation is small. IARC also concluded that current radiation protection standards for workers and the public remain valid.

- The National Cancer Institute (NCI) tracks cancer incidence rates for all parts of the country and its statistics show that Monroe County cancer rates are among the lowest in Michigan. For the period 1999-2001, the NCI Monroe County Cancer Incidence Rate for all ages, all cancers, and both sexes was the lowest of Michigan's 83 counties at 341.0 cases per 100,000 population. For the next reporting period, 2001-2004, the rate dropped to 340.4 cases per 100,000, which was the second-lowest rate in the state.

- NCI statistics also show that deaths from cancer in Monroe County, including leukemia, are stable and similar to national rates for the period 1981-2005.

- A 1990 study by the National Cancer Institute found no increased incidence of cancer mortality for people living near 62 nuclear installations in the United States. The research also showed no increase in the incidence of childhood leukemia mortality in the study of surrounding counties after start-up of the nuclear facilities.

Tooth fairy Project

- For several decades, a small group of activists has tried to instill fear in the public that a substance called strontium-90 is evidence that low levels of radiation released from nuclear power plants causes cancer and other health problems in nearby residents. Since the claims first surfaced some 30 years ago, they continuously have been dismissed by mainstream scientists as scare tactics and "junk science," contributing nothing to finding the real causes of cancer. They are instead manipulations of the public by these groups without any basis in science. These studies are known as the "tooth fairy project."

- There are three sources of strontium-90 in the environment: fallout from nuclear weapons testing, releases from the Chernobyl accident in the Ukraine and minute releases from nuclear power reactors. Even today, strontium-90 from weapons testing fallout is by far the largest source.

- Dr. Joshua Lipsman, the health commissioner in Westchester County, N.Y., evaluated the Tooth Fairy Project findings for his community. He said, "What they do is what's popularly referred to as 'junk science.' We found a number of scientific errors, both in measurement and process, in their proposals."

- The NRC, in its 2002 impact statement for Turkey Point nuclear power plant in Florida, determined that the RPHP study does not present any new information

not already dismissed in numerous earlier strontium-90 studies released by the group. The staff also determined that strontium-90 found in deciduous teeth in the vicinity did not result from releases from Turkey Point and that there is no increased incidence of cancer in the area due to Turkey Point operation.

- In 2001, the American Cancer Society concluded that although reports about cancer case "clusters" in some communities have raised public concern, studies have shown that clusters do not occur more often near nuclear plants than they do by chance elsewhere in the population. Likewise, there is no new evidence that links strontium-90 with increases in breast cancer, prostate cancer or childhood cancer rates.

Cost and cost recovery

- It is too early to provide a detailed cost estimate for a potential new plant at the Fermi 2 site. However, based on current costs for financing, labor, construction materials and current estimates for major plant components, new-plants costs are expected to be in the range of $8 to $12 billion. If or when Detroit Edison decides to pursue development of a new nuclear plant, , we will provide detailed cost estimates to the Michigan Public Service Commission (MPSC) under the state's new "certificate of necessity" process. In that process, we must demonstrate the need for the generating capacity and that the proposed plant is the most economical option for our customers.

- Comparing the cost of electricity production by various technologies is complex and requires researchers to make numerous assumptions. Consequently, one cannot properly interpret the findings of one study – or compare one study to another – without fully understanding the underlying assumptions.

  However, a 2008 study by prepared for the National Association of Regulatory Utility Commissioners (NARUC) employs a method that levelizes the impact of the pertinent variables, providing realistic and reliable cost comparisons. According to this study, nuclear costs range from $98 to $126 per megawatt hour (MWh), while wind costs range from $44 to $91 per MWh and solar costs range from $90 to $154 per MWh. While wind and solar can be competitive with nuclear, neither can provide 24-hour, year-round, large-scale baseload power, which is necessary for a modern society and industrial economy.

  We do not believe that our customers and the State of Michigan need to choose between renewables and nuclear. We believe our customers and our state are best served by both. Our immediate focus is development of a major wind farm in the Thumb region. In the long-term, however, new baseload capacity will be needed and that choice is between coal and nuclear. The NARUC study finds that the levelized cost of nuclear power generation is competitive with coal, even before the impact of expected limits or taxes on carbon emissions. Those measures would make the cost of nuclear even more favorable.

- Should we decide to proceed with construction and receive a certificate of necessity for a new plant, interest costs related to construction would be included in our rate case filings during the construction period and those costs could be recovered in rates, if approved by the MPSC. However, Detroit Edison would receive no "return of investment" until the plant is operational.

- It is too early to speculate on the manner in which a new plant would be financed, should we decide to build and receive a certificate of necessity. A limited number of federal loan guarantees were made available for some of the plants that will be among the first to be built. Because we will not be among those early projects, Detroit Edison is not participating in the program. Also, because Detroit Edison is a regulated utility, we are confident that favorable financing terms will be available to us without the federal guarantees.

Spent fuel

- Used nuclear fuel cannot explode and does not burn. The U.S. Department of Energy (DOE) has overall responsibility for the disposal of used nuclear fuel. In September 2007, the DOE licensing application for a long-term repository at Yucca Mountain, NV, was docketed by the Nuclear Regulatory Commission. At a national and international level research is also under way to develop fuel reprocessing technology that would significantly reduce the amount of fuel waste.

- In the interim, used nuclear fuel is stored on site at U.S. plants in wet storage pools and dry fuel storage facilities. Our Fermi 2 plant currently uses a wet storage pool and will begin building dry cask storage units in 2010. On-site dry fuel storage will be used until spent fuel can be shipped to the federal repository. More than 900 dry storage spent fuel containers currently are in use at 46 U.S. nuclear power plant sites. No radioactive material ever has been released to the environment from dry storage containers.

Detroit Edison, a subsidiary of DTE Energy, is considering the possible construction of a new nuclear power plant on its Fermi 2 site in Newport, MI. In considering a new power plant now, Detroit Edison is acting in the best interests of our customers by making sure it is prepared to meet the state's future energy needs.

It is estimated that by the year 2030, the average U.S. household will consume about 11 percent more electricity than it does today, due in large measure to the advent of digital technologies, according to the Nuclear Energy Institute (NEI)*.

At the same time, increased concerns about the state of the environment have caused industry to find ways to supply clean and reliable power to its customers. Nuclear power currently provides 75% of the emission free clean energy generated in the United States

Detroit Edison plans to file a Combined Operating License Application (COLA) with the U.S. Nuclear Regulatory Commission (NRC) in mid-September.

Detroit Edison hasn't committed to building a new plant. But by filing an application in 2008, the company remains eligible to receive a portion of the $6 billion in federal production tax credits on behalf of its customers.

Detroit Edison believes that nuclear power is an important piece to address growing energy concerns in Michigan and the United States.

GENERAL FACTS

- There are 104 licensed nuclear reactors in operation at 65 sites in 31 states across the United States, providing 20% of the country's electricity.
- According to Michigan's 21st Century Energy Plan, Michigan will need at least one new base load power plant in the next decade to meet growing power demand.
- No new load-based power generating plants have been built in Michigan since the mid-1980's.
- The Nuclear Energy Institute estimates that a new nuclear power plant would create up to 2,400 temporary construction jobs and up to 700 permanent plant jobs in the local community.
- The Economic Simplified Boiling Water Reactor (ESBWR), the technology Detroit Edison references in its application, is among the safest systems in a new generation of reactors.
- The ESBWR design further improves on the high level of planned safety by incorporating passive safety features that rely on natural forces of gravity and natural circulation to perform safety functions, without reliance on electrical power and pumps.
- A May 2008 pubic opinion survey shows that 67% of Americans support the construction of nuclear plants.

ECONOMIC BENEFITS

- Analysis shows that for every dollar spent by the average nuclear plant results in an additional $1.07 being generated in the local community.
- The average nuclear plant generates state and local tax revenue totaling nearly $20M each year.
- A new nuclear power plant represents a multi-billion dollar investment.
- Nuclear power is the lowest cost producer of base-load electricity in the United States today when compared to coal, natural gas, or oil.
- A new nuclear facility could spur as much as $430 million in the sale of goods and services for a local economy.

ENVIRONMENTAL BENEFITS

- Nuclear power plants are the only large-scale power sources that do not emit any greenhouse gases.
- According to General Electric, output from an ESBWR, the technology that Detroit Edison is referencing in its application, would offset the emission of 7.4 million tons of greenhouse gases and the combustion of 5.1 million tons of coal every year.
- Nuclear power plants do not emit nitrogen oxides (NOx) or sulfur dioxide (SO2) gases into the atmosphere. This leads to the reduction of approximately 10,000 tons of NOx and 32,000 tons of SO2 each year.

CONSTRUCTION INFORMATION

- Construction of a new nuclear power plant will provide a substantial economic boost to suppliers of commodities used to build a plant. For example, in a typical scenario, the construction of a single new nuclear plant might require:
  - 400,000 cubic yards of concrete – as much concrete as was used to build the Pentagon
  - 66,000 tons of steel – the same amount used to build the Empire State Building
  - 300 miles of electric wiring – enough to stretch from Boston to Philadelphia
  - 44 Miles of piping – enough to stretch from Detroit to the Ohio border
  - 130,000 electrical components

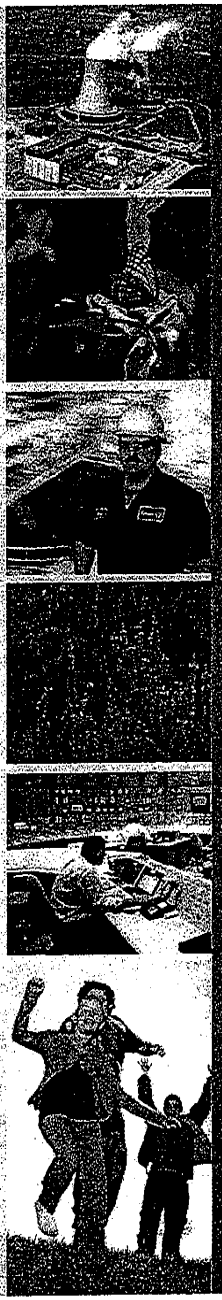
THE PROCESS TO BUILD A NEW NUCLEAR POWER PLANT

- The NRC has indicated that the license review process could take approximately 42 months. This would result in a Combined License award in early 2012.
- If DTE decides to build a new nuclear power plant, it will be located on the same 1,100-acre property that is home to Fermi 2.
- The total licensing and construction process for a new nuclear power plant could take as many as 11 years to complete.

If you have further questions on the development of the Fermi 3 nuclear power plant please send an e-mail to Fermi_info@dteenergy.com. Our staff will do its best to get back to you in a timely manner.

DTE Energy

* The source for all statistical data noted in this document is the Nuclear Energy Institute, unless otherwise indicated.



NEW NUCLEAR FACT SHEET

rmurray@amherstburg.ca; David B Harwood
Subject: Letter on behalf of DTE Energy to Windsor Council
Importance: High

The Honorable Clerk
City of Windsor
Valerie Critchley,

Please see the attached letter from DTE Energy to the Council of Windsor. I will be mailing a hardcopy to you. Additionally, please find attached a nuclear fact sheet and an issues backgrounder that addresses some additional nuclear energy issues.

We would very much like to **request the opportunity to address the Council with a presentation on the COLA filing. Please extend this invitation to Council, I will look forward to hearing from you concerning this opportunity.**

Sincerely,

Molly L. Coy
Regional Manager
DTE Energy
LL 114, 425 South Main
Ann Arbor, MI 48104

Office 734-332-8155
cell 313-820-3881
pager 313-276-5996

June 23, 2009

MEMORANDUM TO: Jeffrey Cruz
ESBWR/ABWR Projects Branch 1
Division of New Reactor Licensing
Office of New Reactors

FROM: John A. Nakoski, Chief ***/RA/***
Quality and Vendor Branch 2
Division of Construction Inspection
& Operational Programs
Office of New Reactors

SUBJECT: FERMI 3 APPLICATION QUALITY ASSURANCE (QA) PROGRAM

The purpose of this memorandum is to document a concern with the Fermi 3 COL application. No response to this memorandum is required. As the result of my staff's review of the Fermi 3 Combined License Application, Part 2: Final Safety Analysis Report (FSAR), Section 17.5, "Quality Assurance Program Description - Design Certification, Early Site Permits, and New License Applicants," it is not evident that the FSAR provides for a QA program that governs the design activities performed in support of the FSAR. Specfically, CQVB staff needs to understand how DTE is meeting the requirements of 52.79(a)(25), which requires the applicant to provide a QA program consistent with Appendix B to 10 CFR Part 50 (Appendix B) for design, fabrication and construction activities. DTE needs to clarify which DTE QA programs were used for all safety-related design activities performed in support of the FSAR (e.g. site characterization, geotechnical, departures from the DCD).

Section 17.5 of the FSAR states that the COL Application Project has been performed under a DTE contract issued to Black and Veatch, which included safety-related activities in support of the application. It also states that DTE provided oversight of the contracted activities by way of procurement control and oversight / surveillances. Within the context of our acceptance review this was sufficient information to conclude that the application was adequate for us to continue our review. On the surface, the DTE approach appeared consistent with the practice used during the development of other COL applications. However, based on our continued review, the staff determined that the oversight provided by DTE was not governed by a DTE QA program meeting the requirements of Appendix B.

Even though the requirements for Appendix B allows for the delegation of QA programs to other organizations, the guidance of Regulatory Guide 1.206 states that the FSAR should describe how the applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations. The guidance also states that the FSAR should identify the responsible organization and the process for verifying that delegated QA functions are effectively implemented. After a review of their submission and subsequent discussions during conference calls, it is not clear how DTE has met these requirements.

These concerns will be assessed during an inspection, but in any case, are of sufficient concern at this time that they might question the quality of the overall application.

CONTACT: George Lipscomb, DCIP/CQVB
301-415-6838

Exhibit BB

ERROR: undefinedresource
OFFENDING COMMAND: findresource

STACK:

/0
/CSA
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/CSA
-mark-