

RAS T-4

Official Transcript of Proceedings

**NUCLEAR REGULATORY COMMISSION**

Title: Fermi Nuclear Power Plant, Unit 3  
Pre-hearing Conference

Docket Number: 52-033-COL  
ASLBP Number: 09-880-05-COL-BD01

DOCKETED  
USNRC

September 14, 2009 (4:26pm)

Location: (telephone conference)

OFFICE OF SECRETARY  
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Date: Wednesday, September 9, 2009

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1 UNITED STATES OF AMERICA

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3 NUCLEAR REGULATORY COMMISSION

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 PRE-HEARING CONFERENCE

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8 In the Matter of: :

9 : Docket No. 52-033-COL

10 DETROIT EDISON :

11 Fermi Nuclear Power : ASLBP No.

12 Plant, Unit 3 : 09-880-05-COL-BD01

13 \_\_\_\_\_:

14 Tuesday, September 9, 2009

15

16 The above-entitled conference convened

17 telephonically, pursuant to notice, at 11:00 a.m.

18 Eastern Time.

19 BEFORE:

20 THE HONORABLE RONALD SPRITZER,

21 Administrative Judge (Chair)

22 THE HONORABLE MICHAEL KENNEDY,

23 Administrative Judge

24 THE HONORABLE RANDALL CHARBENEAU,

25 Administrative Judge

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ALSO PRESENT:

KEVIN KAMPS, Beyond Nuclear

MICHAEL KEEGAN, Don't Waste Michigan

## P R O C E E D I N G S

(11:03:00 a.m.)

1  
2  
3 JUDGE SPRITZER: Let's go on the record.  
4 This is Judge Ron Spritzer. With me is Judge Michael  
5 Kennedy, Judge Charbeneau is with us by telephone.  
6 And let's go around and do the identifications one  
7 more time on the record, if you don't mind. Why don't  
8 we start with the Petitioners.

9 MR. KEEGAN: Michael Keegan, Don't Waste  
10 Michigan.

11 MR. LODGE: Terry Lodge, counsel for Don't  
12 Waste Michigan, and Beyond Nuclear, and the other  
13 Interveners.

14 MR. KAMPS: This is Kevin Kamps with  
15 Beyond Nuclear.

16 JUDGE SPRITZER: All right. And for the  
17 Applicant, Detroit Edison?

18 MR. REPKA: Yes. This is David Repka,  
19 counsel for Detroit Edison. And on a separate line  
20 from a separation location is Tyson Smith.

21 JUDGE SPRITZER: And for the NRC Staff?

22 MS. CARPENTIER: This is Marcia Carpentier  
23 for the NRC Staff, and with me is Robert Weisman, also  
24 for the NRC Staff.

25 JUDGE SPRITZER: Okay. This is Judge

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1 Spritzer, again. Fortunately, we seem to have  
2 resolved, you all seem to have -- the parties seemed  
3 to have resolved among themselves just about  
4 everything that seems of consequence, the one  
5 exception being the question of when any newer amended  
6 contentions, the deadline for filing timely newer  
7 amended contentions, whether it should be 30 or 60  
8 days. Petitioners, do you have anything to add to  
9 what's in your letter as to why you think we ought to  
10 deem contentions filed up to 60 days timely?

11 MR. LODGE: Only, Your Honor -- this is  
12 Terry Lodge. Only that I -- I attempted with futility  
13 to find the order from the Levy County proceeding that  
14 I was referring to in my letter yesterday, that being  
15 one that I understand that the ASLB in that case  
16 granted the Petitioner Interveners there a 60-day  
17 period instead of the, I guess, proposed 30. But I  
18 understand from counsel for the NRC Staff that that  
19 is, indeed, the situation in the Levy case.

20 We believe that, as I've indicated, that  
21 we are grassroots Interveners, purely volunteer, and,  
22 essentially we don't believe that an additional 30  
23 days should greatly inconvenience the parties, nor  
24 will it particularly slow down the progress of the  
25 proceedings.

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1           We are committed, as I indicated, to  
2 meeting the other time tables. And as the Board might  
3 imagine, that, too, will occasion some strain and  
4 stress.

5           JUDGE SPRITZER: Well, so we're clear,  
6 whatever deadline we would provide, whether it would  
7 be 30 or 60 days, that would be the distinction  
8 between a timely contention that we would include --  
9 that we would deem to meet the criteria of 309(f)(2).  
10 I believe it's little 3(i).

11           MR. LODGE: Right.

12           JUDGE SPRITZER: Versus a contention that  
13 you would have to show -- that you would have to meet  
14 the criteria of 309(c) for untimely contentions. So,  
15 you wouldn't be totally foreclosed after 30 days, you  
16 would simply have to meet a different set, a somewhat  
17 more demanding set of criteria, but you wouldn't be  
18 completely shut out from filing a newer amended  
19 contention, even if you could only get it on day 45,  
20 instead of day 30, or something like that. Was that  
21 clear to you?

22           MR. LODGE: Yes. I understand that. And  
23 it's our position, having reviewed a lot of the case  
24 law on late filed contentions, that the standard is  
25 pretty rigorous, and we would prefer if we could have

1 the opportunity to make timely submissions, simply  
2 because of having to go to combat over the very  
3 threshold issue of whether we even meet the criteria  
4 of 309, I think C.

5 JUDGE SPRITZER: Right. As between 30 or  
6 60 days, there are arguments for either one, I  
7 suppose. But we do have the milestones which say 30.  
8 I'm not sure what there is in your particular  
9 situation, I mean, your situation. While I certainly  
10 appreciate the factors you've pointed to, they don't  
11 seem to me to be particularly different from any other  
12 ones -- the limitations faced by any Petitioner  
13 organization in this, or any other case, but maybe I'm  
14 missing something. Is there any factor that would  
15 really differentiate this situation from a typical -

16 COURT REPORTER: Excuse me. This is the  
17 court reporter. Who was just speaking?

18 JUDGE SPRITZER: Judge Spritzer. Do you  
19 want me to repeat any of that, or was that -

20 COURT REPORTER: No, that's fine.

21 JUDGE SPRITZER: Why don't we go ahead.  
22 Mr. Lodge, did you understand the question I was  
23 asking?

24 MR. LODGE: I believe I understood the  
25 question. I'm not aware of the size or scale of what

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1 other grassroots Interveners are doing by way of  
2 pursuing interventions. I was making our position  
3 based upon what I know by way of people availability,  
4 and numbers in our situation.

5 JUDGE SPRITZER: Okay.

6 MR. LODGE: And I also, of course, as Your  
7 Honor knows, that is, perhaps, a model set of  
8 milestones, but I don't think it is an immutable  
9 monolithic time table. And, as I say, we're talking  
10 about circumstances where I don't think that there's  
11 going to be any undue delay or inconvenience really  
12 caused to parties.

13 JUDGE SPRITZER: This is Judge Spritzer.  
14 Let's hear from the Applicant, if they have anything  
15 to add on this issue, beyond what's in your letter.

16 MR. REPKA: This is Mr. Repka. I will let  
17 Mr. Smith speak to scheduling issues.

18 MR. SMITH: Well, I don't think we have  
19 very much to add. As you pointed out, the 30 days  
20 really are in the model milestones. I think at the  
21 point in time where we're looking at the NRC Staff  
22 documents, Interveners are going to know -- should  
23 already know what the issues are that they're focusing  
24 on, the focus of already admitted contentions, or any  
25 new issues. It seems to us that a longer period

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1 shouldn't be necessary at that point, given that we're  
2 really going to be focused in on particular issues by  
3 the time we get to the specific staff review  
4 documents.

5 JUDGE SPRITZER: Very well. This is Judge  
6 Spritzer, again. The NRC Staff, did you have anything  
7 to add?

8 MS. CARPENTIER: Not really. It is in the  
9 model milestones, and it is the most common practice,  
10 but when we reach that stage, it isn't really our  
11 issue at that stage. So, our point of departure is  
12 always the 30 days, but there's limited precedent for  
13 other options.

14 JUDGE SPRITZER: This is Judge Spritzer.  
15 What's your understanding of the Levy County order.  
16 The copy I saw that gave -- allowed 30 days after --  
17 it was a general period after any relevant new  
18 information became available, not geared to any  
19 particular document like a draft or final  
20 Environmental Impact Statement. Have you seen the  
21 Levy County order?

22 MS. CARPENTIER: Is that a question for  
23 the NRC Staff?

24 JUDGE SPRITZER: Yes. I thought Mr. Lodge  
25 said that he had talked -

1 MS. CARPENTIER: What happened in Levy  
2 County is the initial order granted 30 days, and a  
3 subsequent order that was issued very early in this  
4 month, I think maybe September 2<sup>nd</sup> or 3<sup>rd</sup>, extended  
5 that to 60 days for the draft EIS, and the advanced  
6 SER with no open items.

7 JUDGE SPRITZER: Okay. This is Judge  
8 Spritzer, again. Does the Staff still -- at one  
9 point, you were issuing, if I recall, SERs with open  
10 items. But does that animal still exist, or has that  
11 been replaced by -- or done away with?

12 MS. CARPENTIER: The SER with open items  
13 is a step in the review for the reference COLs for  
14 each design, so that would be North Anna for the  
15 ESBWR. And there will be one of those in North Anna,  
16 but there will be not be in FERMI.

17 JUDGE SPRITZER: Okay. Very well. This  
18 is Judge Spritzer, again. All right. Well, we'll  
19 come up with some resolution of the timing issue. Is  
20 there anything else? You all seem to have reached  
21 agreement on everything else, and I don't think the  
22 Judges had any issues with -- we talked some before  
23 this conference, and we don't have any problems with  
24 any of the dates you all have agreed on. Is there  
25 anything else that needs to be -

1 MR. LODGE: Yes, Your Honor. This is  
2 Terry Lodge. There are a couple of issues that I  
3 don't know if the Licensing Board exactly has power to  
4 resolve them, but I think, perhaps, we need to, at  
5 least, make these a matter of record at this point.  
6 In our -- we do pretty ongoing, pretty much daily,  
7 scan of the ADAMS system for new filings related to  
8 FERMI, and just in the last couple of weeks, there was  
9 a large, what I would call for want of a better term,  
10 document dump of a good many things related to the  
11 certification of the design, and other matters. And  
12 I believe DEIS of documents that actually date back as  
13 far as February and March, but they are just appearing  
14 in the electric online system in August.

15 Moreover, we have seen a couple of  
16 instances, and I'll be happy to provide them to the  
17 Board, and the parties, seen a couple of instances  
18 where there are internal NRC discussions of the fact  
19 that the utility has apparently stated that it wanted  
20 to withhold documents until -- because there were  
21 contentions pending. And we assume that that is a  
22 reference to the Petitioner's contentions. And I  
23 think before we get too much further into the whole  
24 discovery phase, there needs to be some clarification  
25 as to how much of a time delay is acceptable in these

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1 circumstances between the generation of internal memos  
2 and discussion-types of items, as well as whether or  
3 not there actually have been some attempts by the  
4 utility to not disclose things, such that the  
5 intentions are somewhat muted, and a little more  
6 difficult to prepare.

7 JUDGE SPRITZER: This is Judge Spritzer.  
8 Either the Applicant or the Staff want to respond to  
9 this?

10 MR. REPKA: This is Mr. Repka for Detroit  
11 Edison. I'm not familiar with the discussions or  
12 references that Mr. Lodge is referring to, so I can't  
13 respond to the specifics of the issue. But,  
14 certainly, I think that our expectation would be that  
15 the Staff would follow its established procedures for  
16 putting documents on the docket, would comply with its  
17 obligations with respect to the hearing file going  
18 forward, and we'll do the same in accordance with the  
19 rules and the protocol on mandatory disclosure. So,  
20 perhaps there was some misunderstanding, or  
21 differences of opinion. I don't know the details on  
22 that, but we certainly would expect all parties to  
23 just follow the rules and the protocol laid out.

24 MR. LODGE: This is Terry Lodge. I'm  
25 sorry. I don't mean to get ahead of the Staff.

1 JUDGE SPRITZER: This is Judge Spritzer.

2 MS. CARPENTIER: I was just going to  
3 remark that I know that our paralegal and technical  
4 staff have done a lot of work in August getting ready  
5 for the initial disclosure that we'll be making  
6 according to the schedule that the parties have agreed  
7 on. Before we agreed on that schedule, there was some  
8 chance that we would have to file on the last day of  
9 August. And I think they did a lot of housekeeping in  
10 preparation for that filing. Once the initial filing  
11 is done, however, things continue to be updated on a  
12 monthly schedule, and everything added as you go.

13 JUDGE SPRITZER: All right. This is Judge  
14 Spritzer. Mr. Lodge, does that satisfy you, to -

15 MR. LODGE: That helps. If it would aid  
16 in the discussion, I would be happy to follow whatever  
17 recommendations you have as to my forwarding the items  
18 that I've seen that have concerned us, because it does  
19 appear that there may have been items that were  
20 withheld in the past, at least the timing was adjusted  
21 because of the fact of an intervention.

22 JUDGE SPRITZER: Well, this is Judge  
23 Spritzer. First, as far as it affecting your ability  
24 to file contentions, of course, if information hasn't  
25 been made available to you, when it does become

1 available, that's your trigger for filing an  
2 additional new, or amended contention based on that  
3 new information. Of course, if you haven't seen it  
4 before, then that's going to be relevant to the  
5 determination whether your contention is timely, or  
6 whether it should be allowed in as an untimely  
7 contention, whatever the relevant provision happens to  
8 be. So, to some extent, you're protected there by the  
9 fact that the trigger for filing new or amended  
10 contentions is obviously when the information becomes  
11 available to you.

12 As far as any -- right now, we don't have  
13 any kind of motion, or issue related to any specific  
14 failure to meet a particular regulatory requirement.  
15 I can only say that if you feel that that happens  
16 somewhere down the road, then, of course, your remedy  
17 would be to file an appropriate motion with the Board,  
18 and we'll take it up with a specific set of factual  
19 circumstances.

20 MR. LODGE: Okay. Very good.

21 MR. REPKA: This is Mr. Repka. And I  
22 would add that I would certainly be open to, if Mr.  
23 Lodge has some communication he's concerned about,  
24 sharing it with us, and we'll look at it, and do  
25 whatever we think is appropriate offline.

1 MR. LODGE: This is Terry Lodge. Thank  
2 you. I will be doing that, Mr. Repka.

3 MR. REPKA: Okay.

4 JUDGE SPRITZER: And, in fact, our rule --  
5 this is Judge Spritzer. Our rules generally require  
6 before bringing any kind of motion like that to the  
7 Board's attention, that you engage in some sort of  
8 discussion with the other parties in the case.

9 Okay. This is Judge Spritzer, again.  
10 Anything else we need to talk about today?

11 MS. CARPENTIER: This is Marcia  
12 Carpentier. There's one issue that you did not  
13 specifically ask us to address, and that we haven't  
14 discussed among ourselves, but it's come up in other  
15 cases in the past, and I wanted to put it out there;  
16 and that is consolidated briefing for additional  
17 contentions. Sometimes there's a question about  
18 whether to follow a motion schedule, a motion to file  
19 a new contention versus the contention schedule in  
20 2.309. And in many cases, the scheduling order has  
21 specified that those two steps get consolidated into  
22 one, and follow the 2.309 schedule, where contentions  
23 are filed at whatever interval you specify, and then  
24 25 days to answer, and seven days to reply. Is there  
25 any consideration of doing that in this case, as well?

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1 JUDGE SPRITZER: Yes, this is Judge  
2 Spritzer. Yes, that -- I think the Levy County order  
3 that I saw did something similar to that. To me, it  
4 makes more sense to follow the schedule for  
5 contentions, rather than motions, and have the  
6 briefing be consolidated; although, I'm open to, if  
7 anybody disagrees with that, I'm open to -- we're open  
8 to considering your views, as far as -

9 MR. REPKA: This is Mr. Repka. I agree  
10 with that, that following the contention schedule  
11 would be appropriate.

12 JUDGE SPRITZER: Okay. Mr. Lodge, do you  
13 have any view on that?

14 MR. LODGE: I think that would be fine.

15 JUDGE SPRITZER: All right. This is Judge  
16 Spritzer, again. Ms. Carpentier, do you favor one  
17 approach over the other?

18 MS. CARPENTIER: We favor the consolidated  
19 briefing. It removes the step, and just creates more  
20 efficient paperwork all around.

21 JUDGE SPRITZER: Okay. Well, I'm glad to  
22 hear we're in agreement on that. All right. Anything  
23 else? Going once, going twice. All right. Well,  
24 thank you for joining us today. We plan to get an  
25 order out by the end of this week memorializing your

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1 agreements, and taking care of the open issues, and  
2 we'll take it from there. Thanks very much. We'll go  
3 off the record now.

4 (Whereupon, the proceedings went off the  
5 record at 11:19 a.m.)  
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