

December 1, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
THE DETROIT EDISON COMPANY) Docket No. 52-033-COL
(Fermi Nuclear Power Plant, Unit 3))

APPLICANT’S RESPONSE TO PROPOSED SUPPLEMENTAL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Licensing Board Order (Establishing schedule and procedures to govern further proceedings), dated September 11, 2009, the Detroit Edison Company (“Detroit Edison” or “Applicant”) hereby responds to the “Supplemental Petition of [Intervenors] for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication,” dated November 6, 2009 (“Late-Filed Contention”). For the reasons discussed below, the new proposed contention (Contention 15) does not meet the criteria for late-filing and is otherwise inadmissible in this licensing proceeding. Accordingly, the proposed contention should not be admitted.

BACKGROUND

The standards governing the admissibility of late-filed contentions are found in the Commission’s rules of practice in 10 C.F.R. Part 2. Where the issue of an intervenor’s standing already has been resolved, the Board must weigh the following five factors: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor’s interest will be protected; (3) the extent to which the requestor’s interests will be represented by existing parties; (4) the extent to which the requestor’s participation will broaden

the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record.¹ The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling showing" relative to the remaining factors.² A finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information.³

Additionally, contentions must be based on the application when filed. Intervenors may amend those contentions if there are data or conclusions in the Draft or Final Environmental Impact Statement or Draft or Final Safety Evaluation Report that "differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, amended or new contentions may be considered only if: (1) the information upon which the amended or new contentions is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R. § 2.309(f)(2)(i)-(iii). The criteria in section 2.309(f)(2), in effect, codify the test for establishing "good cause." Meeting those criteria is not sufficient to warrant admission of a new contention.⁴ The Intervenors also must address both the § 2.309(c)(1) criteria and the § 2.309(f)(2) criteria.⁵

¹ See 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

² See *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

³ See 10 C.F.R. § 2.309(f)(2); *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

⁴ See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983). The late-filed factors in section 2.309(c)(1) apply fully even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline. Although the Commission has

Finally, any new late-filed contentions also must meet the admissibility standards for all contentions set forth in 10 C.F.R. § 2.309(f)(1). A proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.⁶

DISCUSSION

The Intervenors seek admission of a late-filed contention in this proceeding based on allegedly new information contained in an October 5, 2009 enforcement letter from Richard Rasmussen, NRC, to Jack Davis, The Detroit Edison Company, “NRC Inspection Report 05200033/2009-201 and Notice of Violation to Detroit Edison Company” (ADAMS Accession No. ML0927400640) (“Notice of Violation”). Relying solely on the Notice of Violation, the proposed Contention 15 states:

Detroit Edison has failed to comply with Appendix B to 10 CFR Part 50 to establish and maintain a quality assurance (QA) program since March

ruled that while the first factor — good cause for filing late — is met in such circumstances, the other factors, if implicated, permit the denial of the contention in a given case. *Id.*; see also *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C. Cir. 1990).

⁵ The requirement to apply the factors in 10 C.F.R. § 2.309(c) did not change with the promulgation of the revised 10 C.F.R. Part 2. See “Changes to Adjudicatory Process; Final Rule,” 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (“If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.”).

⁶ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

2007 when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. DTE further has failed to complete any internal audits of QA programmatic areas implemented for Fermi 3 COLA activities performed to date. And DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi 3 project in March 2007.

Late-Filed Contention at 2-3. The Intervenors also request that the Licensing Board suspend the Fermi 3 adjudication, except for the proposed Contention 15, until there is satisfactory proof of a fully-implemented quality assurance program for Fermi 3. *Id.* at 2.

For the reasons discussed below, proposed Contention 15 does not satisfy the criteria for late-filing and otherwise fails to present an admissible contention. Further, there is no sound basis for the Licensing Board to suspend the adjudication.

A. Background on Quality Assurance for Fermi 3

Because the Intervenors support the proposed contention exclusively with the Notice of Violation, some context is necessary to address the issues of timeliness and admissibility of the proposed contention. In early 2007, Detroit Edison initiated a project to prepare a combined license application (“COLA”) for a new unit at the Fermi site. In order to reduce the burden on the existing Fermi 2 organization and infrastructure, the Fermi 3 COLA project organization is independent of the organization responsible for operating Fermi 2. Accordingly, the COLA project is also independent of the Fermi 2 Quality Assurance (“QA”) program. The COLA project — that is, the preparation of the COLA, not construction and operation of the plant — was envisioned as essentially a turnkey project, using a primary COLA contractor.

In April 2007, Detroit Edison selected Black & Veatch (“B&V”) as the COLA contractor. B&V had (and still has) in place a QA program to implement 10 C.F.R. Part 50,

Appendix B and ASME NQA-1 requirements. Procurement controls in the COLA contract included organizational responsibilities (reporting and communication methods) and 10 C.F.R. Part 50, Appendix B/NQA-1 requirements. The contract specified that 10 C.F.R. Part 50, Appendix B/NQA-1 would be applicable to FSAR Chapters 2-9, 14-16, 18, and 20, the geotechnical site boring program, radiological analyses, and certain meteorological analyses. The contract also included requirements for reporting and disposition of non-conformances under 10 C.F.R. Part 21.

In May 2007, Detroit Edison submitted a voluntary response to Regulatory Issue Summary 2007-08, *Updated Licensing Review Approach*, notifying the NRC that COLA preparation activities were underway, that B&V would be preparing the COLA, and that B&V's 10 C.F.R. Part 50 Appendix B/NQA-1 QA program was being applied to appropriate aspects of the work scope (including work by B&V subcontractors).⁷ See NRC3-07-0001, "Voluntary Response to RIS 2007-08: Plans for the Submittal of a Combined License Application for the DTE Energy Fermi Site," dated May 31, 2007 (ADAMS Accession No. ML071580347). Detroit Edison separately notified the NRC of the schedule for on-site geotechnical investigation activities and stated that "[t]he Black & Veatch Quality Assurance Program, which meets the requirements of [10 C.F.R. Part 50,] Appendix B and ASME NQA-1, is being applied to the geotechnical investigation work scope." See NRC3-07-0002, "Notification of Combined License Application Geotechnical Investigation Schedule for the DTE Energy Fermi Site," dated May 31, 2007 (ADAMS Accession No. ML071580350).

⁷ See 10 C.F.R. Part 50, Appendix B, Criterion I ("The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the quality assurance program.").

In November 2007, Detroit Edison began to develop the staffing resources necessary to receive, review, and accept the COLA work product from B&V. Detroit Edison drafted the Nuclear Development Quality Assurance Program Description (“ND QAPD”) and implementing procedures for those elements of the ND QAPD associated with activities planned to be performed by Detroit Edison (*e.g.*, review B&V COLA work products). In February 2008, Detroit Edison approved the ND QAPD for use. Although Detroit Edison used the ND QAPD to review B&V work product, Detroit Edison continued to delegate quality and safety-related services for COLA development to B&V.

On September 18, 2008, Detroit Edison submitted the COLA to the NRC. In FSAR Section 17.5, Detroit Edison states that it provided oversight of the contracted B&V activities by way of procurement control, control of purchased services, and oversight/surveillances of those activities and services. Detroit Edison also notes that the B&V QA program had been audited and found acceptable by other US nuclear utilities. According to the FSAR, Detroit Edison developed and implemented the ND QAPD, which invokes the B&V QA program for COLA activities, *subsequent to contracting with B&V. Id.* With the submission of the Fermi 3 COLA, the Fermi 3 Quality Assurance Program Description (“Fermi 3 QAPD”), which can be found in FSAR Chapter 17, Appendix 17AA, superseded the ND QAPD. However, Detroit Edison continued to delegate quality and safety-related services associated the COLA review to B&V under the Fermi 3 QAPD.

As part of its review of the Fermi 3 COLA, the NRC Staff identified a possible concern with the QA approach used by Detroit Edison. *See* Memorandum from John Nakoski, NRC, to Jeffrey Cruz, NRC, “Fermi 3 Application Quality Assurance (QA) Program,” dated June 23, 2009 (ADAMS Accession No. ML091671550). The memorandum acknowledged that

Detroit Edison may delegate QA programs to other organizations (for example, B&V), but also questioned whether Detroit Edison itself had in place an Appendix B QA program. The concern raised in this June 23rd memorandum forms the basis for the NRC's October 5th Notice of Violation now relied upon by the Intervenors.

The NRC Staff subsequently issued Requests for Additional Information ("RAIs") from Detroit Edison regarding the evolution of its QA program. *See* Letter from Jerry Hale, NRC, to Jack Davis, Detroit Edison Company, "Request for Additional Information Letter No. 10 Related to the SRP Sections 2.4.2, 2.4.3, 2.4.4, 2.4.5, 2.4.9, 2.4.12, and 17.5 for the Fermi 3 Combined License Application," dated August 12, 2009 (ADAMS Accession No. ML092240285). RAI Nos. 3302, 3341, 3343, 3344, 3346, 3347, and 3349 sought additional information regarding the history of Detroit Edison's QA program. The RAIs requested information to address the NRC's concerns identified in the June 23, 2009 internal memorandum.

On September 30, 2009, Detroit Edison responded to the NRC's requests for additional information. *See* "Detroit Edison Company Response to NRC Request for Additional Information Letter No. 10" (ADAMS Accession No. ML092790561). In the responses to the NRC's RAIs, Detroit Edison provided detailed information regarding the delegation of QA functions to B&V and the development of its own QA program.

On October 5, 2009, the NRC sent the Notice of Violation to Detroit Edison identifying three Severity Level IV violations. The Notice of Violation alleges first that Detroit Edison failed to establish and implement a Fermi 3 QA program between March 2007, when the initial contract was placed with B&V, and February 2008, when Detroit Edison implemented the ND QAPD. The second violation asserts that Detroit Edison did not complete internal audits of

QA programmatic areas for Fermi 3 COL application activities. The third violation alleges that Detroit Edison did not document trending of corrective actions to identify recurring conditions. According to the NRC's Enforcement Policy, violations at Severity Level IV — the least significant of the four severity levels — involve non-compliances with NRC requirements for which the associated risks are not significant.

On November 9, 2009, Detroit Edison responded to the Notice of Violation. *See* NRC3-09-0041, “Detroit Edison Reply to Notice of Violation 05200033/2009-201-01, 02, and 03” (ADAMS Accession No. ML093160318). In its response, Detroit Edison contested all three violations. Citing NRC regulations, guidance documents, and inspection procedures, Detroit Edison concludes that there was no regulatory requirement that it have in place a QA program satisfying 10 C.F.R. Part 50, Appendix B, between March 2007 and February 2008, and that under the regulations it could delegate the QA function for COLA preparation to its contractor with an approved Appendix B program. *Id.* at Attachment 1. Detroit Edison also states that it is not required by regulation to conduct audits as alleged by the NRC. *Id.* at Attachment 2. Nevertheless, Detroit Edison notes that it has conducted an internal audit. *Id.* Finally, Detroit Edison explains that Criterion XVI, “Corrective Action,” of 10 C.F.R. Part 50, Appendix B, does not require trending, nor is trending required by the ND QAPD. *Id.* at Attachment 3. Detroit Edison also notes that, even in the absence of a requirement, it did perform corrective action trending but did not identify any trends adverse to quality. *Id.*

B. Proposed Contention 15 Is Untimely

The finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information.⁸ Similarly, a new contention must be based on new

⁸ *See* 10 C.F.R. § 2.309(f)(2); *Limerick*, LBP-83-39, 18 NRC at 69.

information that is materially different from information previously available. Here, the information that forms the basis for the contention — as well as the basis for the Notice of Violation on which the contention is based — was available before October 5, 2009. The information in the October 5th Notice of Violation is the same as that available previously.

First, Detroit Edison's reliance on the B&V QA program has been a matter of public record at least since May 31, 2007. In two separate docketed submittals on that date, Detroit Edison indicated that the B&V QA program, which meets the requirements of Appendix B and ASME NQA-1, is being applied to appropriate aspects of the work scope. The response to the RIS also notes that Black & Veatch has overall responsibility for preparation of the Fermi COLA and that B&V and its principal subcontractors will be governed by Black & Veatch QA requirements. Moreover, in the Section 17.5 of the FSAR, which was filed on September 18, 2008, Detroit Edison indicated that it relied exclusively on the B&V Appendix B program until it developed its ND QAPD in February 2008.

Second, the specific circumstances that form the basis for the Notice of Violation are outlined in an internal NRC memo dated June 23, 2009. That memorandum, which became publicly-available in ADAMS on June 24, 2009, highlighted the precise issues that are the basis for the Notice of Violation. Specifically, the memorandum noted that the oversight provided by Detroit Edison was not governed by a Detroit Edison QA program meeting the requirements of Appendix B (as opposed to the B&V QA program that meets Appendix B). This memorandum therefore first outlined the NRC's regulatory interpretation that is the basis for the NOV.

More recently, RAI Letter No. 10, dated August 12, 2009, requested additional information from Detroit Edison on the timing and evolution of Detroit Edison's QA program. Many of the RAIs touch on scope of Detroit Edison's QA program and its oversight of the B&V

program. For example, RAI No. 3341 stated that Detroit Edison must have an Appendix B QA program in place for design, fabrication and construction activities. The NRC then asked Detroit Edison to explain how it retains responsibility and maintains control over those portions of the QA program that have been delegated to B&V, and how Detroit Edison verifies that delegated QA functions have been effectively implemented.⁹ Again, the NRC clearly articulated its regulatory basis for the subsequent Notice of Violation and sought information to confirm its view from Detroit Edison long before the October 5th Notice of Violation.

It is long established in NRC adjudication that a petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added). In this light, the Intervenors' proposed Contention 15 is simply late, and they have offered no good reason for their tardiness.

The Appeal Board in *Catawba* emphasized the availability of "abundant" information about a nuclear facility (including at least the safety analysis report and environmental reports) when an application is filed that could be the source of information for a contention. *Catawba*, ALAB-687, 16 NRC at 467-68. On review, the Commission in *Catawba* went even further. The Commission emphasized that "an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material." *Catawba*, CLI-83-19, 17 NRC at 1048. It further found that even the

⁹ Also, on September 30, 2009, Detroit Edison responded to the NRC's requests for additional information. In the responses to the NRC's RAIs, Detroit Edison provided detailed information regarding the delegation of QA functions to B&V and the development of its QA program.

“institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.”¹⁰ *Id.*

Here, after failing to examine the available material on the public docket with sufficient care to detect possible bases for a contention, the Intervenor is attempting to “piggyback” on an ongoing enforcement action initiated by the NRC Staff. But, there is nothing “new” about the QA issue in the Notice of Violation that could not have been raised earlier by the Intervenor, independently of the NRC Staff. The Intervenor cannot justify late-filing on the basis that the NRC had not yet issued a Notice of Violation.¹¹ Both the factual circumstances and the regulatory interpretation that form the basis for the Notice of Violation have been a matter of the public record for some time. It is the Intervenor’s obligation to examine the material, form an opinion, and timely file a proposed contention with sufficient basis to demonstrate a genuine dispute.¹²

At bottom, it is the Intervenor’s responsibility to review the application and supporting filings to find a basis to challenge the application. The Intervenor must exercise the care that is necessary and sufficient under the circumstances to support a proposed contention in timely manner. There can be no excuse for tardiness where, as here, the information that forms

¹⁰ The Commission also found that, even if the unavailability of a licensing document supported a finding of “good cause” for late-filing, the remaining late-filing criteria of 10 C.F.R. § 2.714(a) must still be applied. *Id.* at 1046.

¹¹ As will be discussed in greater detail below, the NRC’s enforcement responsibilities are exercised separately and apart from its licensing responsibilities.

¹² *See, e.g., Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984) (declining to accept a petitioner’s claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner).

the basis for the contention has been publicly available on the NRC docket for months, if not years.

C. Intervenors Have Not Made a Compelling Showing on the Other Late-Filed Factors

As discussed above, the new contention is not timely under 10 C.F.R. § 2.309(f)(2). Non-timely contentions cannot be admitted except upon a balancing of the factors in 10 C.F.R. § 2.309(c)(1). The first factor, good cause for lateness, is the most important. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). Here, the Intervenors have provided no excuse for their failure to file the new contention within 30 days of the factual and regulatory basis for the contention first becoming available.¹³ This lack of good cause for late-filing requires the petitioner to make a “compelling showing” relative to the remaining factors. *New Jersey*, CLI-93-25, 38 at 296. The Intervenors have not made such a showing here.

First, there are other means whereby the Intervenors’ interests are protected. While DTE contends that there were no regulatory violations, to the extent that any are found to have occurred they will be addressed and remedied (if they haven’t already) as part of the enforcement process. Moreover, anyone who seeks to influence enforcement action should not file a contention, but, instead, must file a petition under 10 C.F.R. § 2.206 requesting that the Commission initiate enforcement action pursuant to 10 C.F.R. § 2.202. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992).

¹³ According to the Licensing Board’s Order, dated September 11, 2009, “a proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available.”

Proposed Contention 15 will, if admitted, also broaden the issues in the proceeding. The Notice of Violation raises matters of compliance, but does not go to the adequacy of the application that is the subject of the COLA proceeding. As will be discussed further below, the Intervenors have not pointed to any COLA preparation work that is inadequate or any aspect of the COLA affected by the alleged violations. Admitting the contention therefore would expand the proceeding beyond the adequacy of the Fermi 3 license application to encompass routine compliance matters. Moreover, as evidenced by the request to suspend the adjudication, the Intervenors are expressly seeking to delay the proceeding. Late-Filed Pet. at 2.

Finally, the Intervenors have not provided any information to suggest that they may reasonably be expected to assist in developing a sound record on proposed Contention 15. The proposed contention simply regurgitates the NRC's Notice of Violation. The Intervenors do not identify any QA experts, do not present any new evidence, and do not contribute any unique perspectives in the area of QA. The only basis for the contention is the NRC Notice of Violation, which the NRC Staff is well-equipped to handle in the enforcement context under the agency's enforcement procedures.

In sum, there is no good cause for late-filing, and there has been no compelling showing with respect to the other criteria for late-filed contentions. Accordingly, the Licensing Board should decline to further consider the admissibility of proposed Contention 15.

D. Proposed Contention 15 Is Not Admissible

The proposed contention also fails to satisfy the criteria for an admissible contention. Proposed Contention 15 does not identify any dispute with the applicant or the license application that would affect the licensing questions at issue in this proceeding.

In support of a contention, a petitioner must provide “a specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.309(f)(1)(i). An admissible contention must also challenge a specific portion of the application. 10 C.F.R. § 2.309(f)(vi). Here, however, the proposed Contention does not cite any aspect of the application that is alleged to be deficient (*e.g.*, FSAR Chapter 17, Fermi 3 QAPD). A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Intervenors have therefore failed to demonstrate a genuine dispute *with the application* on a material issue.

A contention must also establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.¹⁴ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004). Although Detroit Edison disputes that any of the violations occurred as alleged in the Notice of Violation, the underlying issues identified in the Notice of Violation in any event do not indicate any continuing non-compliance or suggest a significant safety issue. The Notice of Violation that is the basis for the contention identified only Severity Level IV violations. Severity Level IV violations are the least significant of the four severity levels and involve non-compliances with NRC requirements for which the associated risks are not significant. Moreover, the alleged violations all occurred in the past and the underlying issues have been resolved or corrected.

¹⁴ *See Union Elec. Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983) (“[I]n examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation.”).

In sometimes hyperbolic prose, the Intervenors attempt to make more out of the Notice of Violation than what it is on its face. For example, although the supplemental petition states that “DTE can show zero QA compliance” (Late-Filed Pet. at 8), the alleged QA violation is actually limited to the time between March 2007 and February 2008 — that is, from the time B&V was selected as the COLA preparation contractor until Detroit Edison began implementing its ND QAPD. Notice of Violation, Enclosure 1, at 1. All of the work performed by B&V during that period was subject to Appendix B and NQA-1 requirements under the B&V program. Also during that same period, the NRC reviewed B&V quality assurance measures as part of a July 9-11, 2007 audit of pre-application subsurface investigation activities and concluded that the work was done in an appropriately controlled manner. Notice of Violation, Enclosure 2, at 8. And, according to the NRC inspectors, since February 2008 Detroit Edison has in place an established QA program that is consistent with Appendix B requirements. Notice of Violation, Enclosure 2, at 11. The NRC Notice of Violation in fact does not contend that Detroit Edison is currently violating Appendix B requirements or that any work performed by B&V under its scope of work was inadequate.

Similarly, to the extent that the Notice of Violation is based on a failure to conduct an annual audit, Detroit Edison conducted, as previously scheduled, an internal audit during the week of October 26, 2009. NRC3-09-0041, Attachment 2, at 3. An audit team from Detroit Edison also performed an audit of B&V’s Appendix B/NQA-1 QA processes according to Fermi 3 QAPD implementing procedures in July 2009.¹⁵ Response to RAI No. 10, Attachment 3, at 7. Even assuming a violation had occurred (a point that Detroit Edison disputes

¹⁵ The B&V QA program was assessed as effectively implementing the requirements of 10 CFR 50, Appendix B/NQA-1 for Fermi 3, quality related, COLA activities. Response to RAI No. 10, Attachment 3, at 7.

in its response to the Notice of Violation), there is no issue left to litigate. Absent any effect on work performed to date, and given the corrective actions already taken, this issue cannot affect the outcome of the licensing proceeding.

With respect to trending of corrective actions to identify adverse trends, the Notice of Violation asserts only that the trending was not documented. Notice of Violation, Enclosure 1, at 3; *id.*, Enclosure 2, at 13-14. In fact, Detroit Edison had conducted corrective action trending during weekly meetings. *Id.*, Enclosure 2, at 14. Although trending was not formally documented, Detroit Edison did not identify any trends adverse to quality. *Id.*

At bottom, even if Detroit Edison's approach to COLA preparation QA is found to have involved a regulatory violation, there is no ongoing non-compliance or meaningful consequence that would justify admitting a contention. Despite dressing up the proposed contention with various excerpts from the Notice of Violation, the contention remains — substantively — nothing more than a reference to a Notice of Violation accompanied by unfounded and unsupported speculation as to the implications of hypothetical, yet-to-occur QA violations (*e.g.*, violations in GEH's ESBWR design process or during construction).¹⁶ The Intervenor has not alleged any deficiency in the COLA application, any safety-significant defect, or any failure to comply with regulatory requirements beyond those raised in the Notice of Violation. There is simply no dispute remaining that would justify admitting a contention.

Proposed Contention 15 also raises issues that are outside the scope of the COLA proceeding in two respects. First, proposed Contention 15 focuses, in large part, on the ESBWR

¹⁶ In this regard, the circumstances are analogous to a contention based on an RAI. According to the Commission, petitioners must do more than “rest on [t]he mere existence” of RAIs as a basis for their contention. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999). Similarly, the Intervenor here cannot rely on the Notice of Violation alone to establish a genuine dispute with the application on a material issue.

design and QA programs, not Detroit Edison's QA program in the FSAR.¹⁷ The ESBWR is the subject of an ongoing design certification review. Any challenges to the adequacy of the ESBWR design or the QA controls related to the ESBWR design are outside the scope of the Fermi 3 proceeding, would need to be directed to the design certification applicant, and, in any event, are not adequately supported. The proposed Contention 15 is therefore, on its face, overbroad and unfounded.

Second, the proposed contention is raising an enforcement issue, not a licensing issue. An "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Millstone*, CLI-01-24, 54 NRC at 359-60. The Intervenor do not allege that the application is incomplete or inadequate under NRC regulations. The Intervenor's concern is one of performance, which is an enforcement issue, rather than the adequacy of the application, which is the licensing issue (and the subject of this proceeding). To the extent that the Intervenor believe that there have been or will be regulatory violations, the proper forum for raising such concerns is a petition under 10 C.F.R. § 2.206 requesting that the Commission initiate enforcement action pursuant to 10 C.F.R. § 2.202. *Comanche Peak*, CLI-92-12, 36 NRC at 77-78.

For all of these reasons, proposed Contention 15 is inadmissible.

¹⁷ *See, e.g.*, Late-Filed Pet. at 7-8 ("There are uncertainties associated with these novel and largely untested safety features, and so many questions remain concerning the safety of the ESBWR design. . . . Given the extensive list of staff open items on the ESBWR design certification application, it is likely that the ESBWR design will undergo several further iterations before the design certification rulemaking is finalized. If the norm is that many reactor and component design decisions are preliminary until financing is assured, that constitutes an even more compelling reason to have a functioning QA program at the earliest stages.").

E. The COLA Proceeding Should Not Be Suspended

The Commission's general policy is to expedite adjudicatory proceedings. *See generally Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334 (2002). The Commission sees suspension of licensing proceedings as a "drastic" action that is only warranted in the event of "immediate threats to public health and safety."¹⁸ Even in the wake of the September 11 terrorist attacks, the Commission ultimately rejected requests for suspension or abeyance of proceedings pending the Commission's review of anti-terrorist measures at licensed facilities.¹⁹ Such drastic action is likewise not warranted here.

The alleged non-compliances are being addressed through the NRC's enforcement process. As noted above, to the extent that there are any regulatory violations, the violations have been or will be corrected. The Intervenors have provided no information to suggest any significant or ongoing public health and safety issues. And, the Intervenors have not attempted to explain why a suspension is warranted at this juncture. The NRC Staff's environmental and safety reviews of the application are ongoing. Suspending the proceeding now would create unnecessary delay in the licensing review and would not produce any benefits in terms of efficiency or the orderly resolution of the previously-admitted contentions.

¹⁸ *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing request to suspend license transfer proceedings while the Commission examined the effects of limited liability companies' ownership).

¹⁹ *See Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001); *see also Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-23, 56 NRC 230 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001).

Accordingly, the Licensing Board should deny the request to suspend the adjudicatory proceeding.

CONCLUSION

For the above reasons, the Intervenors' proposed supplemental contention should not be admitted for hearing. In addition, the Intervenors request to suspend the adjudication of previously-admitted contentions should be denied.

Respectfully submitted,

/s/ signed electronically by
David A. Repka
Tyson R. Smith
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

Bruce R. Maters
The Detroit Edison Co.
One Energy Plaza
Detroit, Michigan 48226

COUNSEL FOR THE DETROIT
EDISON CO.

Dated at Washington, District of Columbia
this 1st day of December 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
THE DETROIT EDISON COMPANY) Docket No. 52-033-COL
)
(Fermi Nuclear Power Plant, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PROPOSED SUPPLEMENTAL CONTENTION” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 1st day of December 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.

/s/ signed electronically by _____
David A. Repka
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR THE DETROIT
EDISON CO.