

December 1, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO SUPPLEMENTAL PETITION FOR ADMISSION OF A NEWLY-
DISCOVERED CONTENTION, AND FOR PARTIAL SUSPENSION OF COLA ADJUDICATION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC) hereby answers the Supplemental Petition for Admission of a Newly-Discovered Contention (Supplemental Petition) that was filed in this proceeding regarding the Fermi Nuclear Power Plant, Unit 3 (Fermi 3) combined license (COL) application by the organizations Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club, and various individuals (collectively, Intervenors) on November 6, 2009. For the reasons set forth below, the proposed contention in the Supplemental Petition fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1) and should be rejected. The Intervenors' request for partial suspension of the COLA proceeding lacks any regulatory basis or factual support and should also be rejected.

BACKGROUND

By letter dated September 18, 2008, Detroit Edison Co. (DTE or Applicant) submitted a COL application (Application or COLA) for one ESBWR advanced boiling water reactor to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2 in Monroe County, Michigan. Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a

Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008), ADAMS Accession No. ML082730763. The *Federal Register* notice of docketing was published on December 2, 2008 (73 Fed. Reg. 73,350), and the *Federal Register* notice of hearing was published on January 8, 2009 (74 Fed. Reg. 836).

Two important parts of the Fermi 3 COL Application that will be discussed below are the Fermi 3 COL Final Safety Analysis Report (FSAR), which is Part 2 of the COLA, and the Fermi 3 COL Environmental Report (ER), which is Part 3 of the COLA. The original submission of the Fermi 3 COLA incorporated by reference Revision 4 of the ESBWR design control document (DCD), which was submitted to the NRC by GE-Hitachi Nuclear Energy Americas LLC (GE-Hitachi) on September 28, 2007. GE-Hitachi submitted Revision 5 to the ESBWR DCD on June 1, 2008. On March 25, 2009, DTE submitted COLA Revision 1, which incorporates Revision 5 of the ESBWR DCD. On August 31, 2009, GE-Hitachi submitted Revision 6 to the ESBWR DCD. The ESBWR design is the subject of an NRC rulemaking under Docket No. 52-010.

On March 9, 2009, the Intervenor filed a Petition for Leave to Intervene in the COLA proceeding, along with 14 contentions. The Licensing Board held oral argument on these contentions in Monroe, Michigan, on May 15, 2009. Following oral argument, the Licensing Board found that the Intervenor had standing in this proceeding and had filed four contentions that were admissible in part. *Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)*, LBP-09-16, 70 NRC ___ (slip op.) (July 31, 2009). Three of these contentions (3, 6, and 8) are environmental contentions challenging the Applicant's ER, and one (5) is a safety contention challenging the FSAR.

On September 11, 2009, the Licensing Board issued an unpublished order setting the schedule for the remainder of this hearing. Licensing Board Order (Establishing schedule and procedures to govern further proceedings) (July 31, 2009) (Scheduling Order). This order set a schedule for the major filings in this proceeding that depends on the publication dates for the

Staff's two primary review documents, the Final Safety Evaluation Report (FSER) and the Final Environmental Impact Statement (FEIS). *Id.* at 3-4. The Board also established that "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." *Id.* at 2.

On August 18-21, 2009, the NRC Staff conducted an inspection at DTE in Detroit, Michigan in order to assess compliance with regulations governing the implementation of quality assurance (QA) programs. On October 5, 2009, the NRC Staff issued a Notice of Violation (NOV) to DTE citing three specific violations related to the Applicant's QA program. NRC Inspection Report 05200033/2009-201 and Notice of Violation (Oct. 5, 2009), ADAMS Accession No. ML092740064. All three were Severity Level IV violations, the least significant type of violation for which NOVs are issued.¹ On November 6, 2009, the Intervenors filed the Supplemental Petition and proposed Contention 15, which is based entirely on the NOV. On November 9, 2009, DTE filed a response to the NOV which denies all three violations and describes additional QA activities undertaken since the NRC inspection. Detroit Edison Reply to a Notice of Violation 05200033/2009-201-01, 02, and 03 (Nov. 9, 2009), ADAMS Accession No. ML093160318 (Reply to NOV).

DISCUSSION

I. LEGAL REQUIREMENTS FOR NEW OR UNTIMELY CONTENTIONS

NRC regulations require that petitioners base contentions on documents available at the time the initial petition is filed. See 10 C.F.R. § 2.309(f)(2). However, petitioners may amend contentions or submit new contentions after the submission of an initial petition when the

¹ Nuclear Regulatory Commission Enforcement Manual, Rev. 6 (Dec. 22, 2008) at I-2 to I-3, available at <http://www.nrc.gov/reading-rm/basic-ref/enf-man/manual.pdf>. Factors considered when determining the Severity Level of a violation are actual safety consequences, potential safety consequences, potential for impacting the NRC's ability to perform its regulatory function, and, any willful aspects of the violation. *Id.*

petitioners can show that they meet the standards in 10 C.F.R. § 2.309(f)(2)(i-iii) as follows:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i-iii). The Commission has emphasized that standards for filing new or amended contentions under 10 C.F.R. § 2.309(f)(2) are “stringent,” and that even contentions that satisfy these requirements must still meet the strict standards for contention admissibility under § 2.309(f)(1). *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260-61 (2009) (internal citations omitted).

Nontimely filings must meet the requirements of 10 C.F.R. § 2.309(c), which establishes an eight-part balancing test for admissibility. 10 C.F.R. § 2.309(c)(i)-(viii). Of the eight factors set forth in 10 C.F.R. § 2.309(c), the first – good cause, if any, for the failure to file on time – is normally considered to be the most important. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 58 NRC 31, 44 (2004); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

II. LEGAL REQUIREMENTS FOR CONTENTION ADMISSIBILITY

In addition to satisfying the requirements described above, proposed Contention 15 must also satisfy the admissibility requirements governing all contentions submitted in NRC proceedings. The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f)(1) of the Commission’s Rules of Practice.

These requirements may be summarized as follows. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within

the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

The purpose of these requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3)*, CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co. et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, 64 NRC 111, 119 (2006).

III. PROPOSED CONTENTION 15

Proposed Contention 15 states the following:

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 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.

Supplemental Petition at 2-3. In support of this contention, the Intervenor offer a block quotation of the substantive portions of the NRC's NOV. *Id.* at 4-5. No other substantive support is offered, and the Intervenor assert that the issues raised in the NOV "remain pending and unresolved as of the date of this submission." *Id.* at 5.

The Intervenor do not address the requirements for new or amended contentions under 10 C.F.R. § 2.309(f)(2). However, they do address the requirements for nontimely filings under 10 C.F.R. § 2.309(c). The Supplemental Petition does not address the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) explicitly, but some portion of the document appear to be intended as the basis and supporting information for the contention.

As a regulatory basis for Contention 15, the Intervenor cite the 10 C.F.R. § 52.79(a)(25) requirement that a COL applicant submit an FSAR that includes "a description of the quality assurance program, applied to the design, and to be applied to the fabrication, construction, and testing, of the structures, systems, and components of the facility. *Id.* (citing 10 C.F.R. § 52.79(a)(25)). The Intervenor also note that QA requirements are set forth in Appendix B to 10 C.F.R. Part 50, and that General Design Criterion 1 in Appendix A of that part also includes a quality assurance requirement. *Id.* at 6.

The Intervenors claim that proposed Contention 15 is a contention of omission, *id.* at 12, but they do not point to any specific portion of the COLA that they allege to be deficient. They do not find specific faults with the QA program description that DTE has submitted in the COLA, nor do they allege that any other specific portion of the COLA is incorrect because of the events described in the NOV. Rather, they raise a number of issues related to the ESBWR design and to “building and operating Fermi 3.” *Id.* at 7; *see also id.* at 11.

The Intervenors further request that this licensing proceeding be suspended immediately “pending a thorough reworking and proven implementation of quality assurance management by DTE over its contractor, B&V which integrates all previous and contemplated QA revisions.” *Id.* at 13.

IV. STAFF RESPONSE TO PROPOSED CONTENTION 15

Proposed Contention 15 includes three elements that approximately correspond to the three violations cited in the NOV. Specifically, the Intervenors alleged that DTE (1) “failed to . . . establish and maintain a quality assurance (QA) program since March 2007,” (2) “failed to complete any internal audits of QA programmatic areas,” and (3) “failed to document trending of corrective actions to identify recurring conditions adverse to quality.” Supplemental Petition at 2-3. However, it is important to note at the outset that the Intervenors have misstated the nature of the first of these violations. As stated in the NOV, the first cited violation reflects the Applicant’s failure “to establish and implement a Fermi Unit 3 quality assurance (QA) program between March 2007, when the initial contract was placed with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) activities, *until February 2008 . . .*” NOV at 1 (emphasis added). As paraphrased in the Intervenors’ statement of their contention, the ending date of February 2008 is omitted. However, the block quotation of the NOV that the Intervenors offer in support of their contention clearly includes the February 2008 ending

date. See Supplemental Petition at 4. This misstatement is important because the inferences the Intervenors draw from the NOV, and the issues that appear to concern them, seem to be based on the incorrect assumption that no Fermi 3 QA program is currently in place.

The consequences of this oversight ultimately render the contention inadmissible. Because of their apparent belief that no QA program for the Fermi 3 project currently exists, the Intervenors do not take issue with any specific portion of the Application under consideration. This includes Chapter 17 of the FSAR and the associated appendix, which include a lengthy description of the Fermi 3 QA program that was in place at the time the Application was submitted. Rather than raise specific challenges to this material, the Intervenors claim that their contention is one of “omission.” Supplemental Petition at 12. Because this material is not, in fact, omitted from the Application, Contention 15 fails to state a specific issue of law or fact to be controverted, as required by the pleading standard of 10 C.F.R. § 2.309(f)(1)(i), or to demonstrate that a genuine dispute with the Applicant exists on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Moreover, the Intervenors provide no support for their contention other than the Staff’s NOV, and they do not make arguments of their own linking that document to any issue that meets the pleading standards of 10 C.F.R. § 2.309(f)(1). Because the NOV does not say what the Intervenors claims it says, it does not provide adequate support for any of the issues raised in the contention. See 10 C.F.R. 2.309(f)(1)(v).

Instead of challenging the Application, the Intervenors raise a wide range of other issues that are either unrelated to the Staff’s NOV or outside the scope of this proceeding. These issues are described below. Because no factual information or expert opinion other than the NOV is included in the Supplemental Petition, and because the NOV does not provide the support that 10 C.F.R. § 2.309(f)(1)(v) requires for the

topics the Intervenor do raise, these issues cannot be part of an admissible contention. Issues outside the scope of this licensing proceeding and/or immaterial to the findings the NRC must make on the Fermi 3 COLA are similarly excluded by the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

The Intervenor also request that the COL proceeding be suspended because of “potentially large revisions” to the Application that may be necessary. Supplemental Petition at 16. The Intervenor do not indicate what these revisions might be, and they include no factual information or expert opinion to support a case for any specific changes. In addition, they do not cite any regulatory provision under which such a suspension might be granted. For these reasons, this request should also be denied.

A. Proposed Contention 15 is Timely, As Defined by the Board

Proposed Contention 15 is timely, as defined by the Licensing Board in the Scheduling Order. The NOV was dated on October 5, 2009, and entered into ADAMS two days later. The Intervenor filed the Supplemental Petition on November 6, exactly 30 days later. Although the Intervenor do not address the requirements for new contentions set forth in 10 C.F.R. § 2.309(f)(2), their argument addressing the “good cause” element in the eight-part balancing test of 10 C.F.R. § 2.309(c) includes a statement that their contention is based on new information that differs significantly from information that was previously available. Supplemental Petition at 9. The Staff therefore has no objection related to the timeliness of proposed Contention 15, and agrees that it meets the timeliness requirements set forth by the Board in the Scheduling Order.

B. Proposed Contention 15 Fails to Challenge the Application

Proposed Contention 15 and the accompanying discussion in the Supplemental Petition fail to raise any specific challenge to the Fermi 3 COLA and therefore cannot be admitted in a licensing proceeding on that COLA. See 10 C.F.R. § 2.309(f)(1)(i), (v), and

(vi). It is unclear from the language of the Supplemental Petition which portions of the Application the Intervenors consider inadequate: whether it is the description of the QA program itself, which can be found in Chapter 17 of the FSAR and the associated Appendix, or whether they wish to challenge any particular subject matter in the FSAR, the ER, or some other portion of the COLA. The Petitioners themselves do not purport to challenge any portion of the Application, arguing instead that their contention is one of “omission.” However, the nature of the alleged omission is never described, and the part of the Application that is affected by the alleged omission is never identified.

Accordingly, proposed Contention 15 fails to “[p]rovide a specific statement of the issue of law or fact to be raised or controverted,” “[p]rovide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position,” or “show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” and it should therefore be rejected. 10 C.F.R. §2.309(f)(1)(i), (v), and (vi).

Boards in other cases have noted that specificity is of particular importance with respect to contentions raising QA issues, which have the potential to become broad and unfocused if not defined clearly. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 634 (1985), *rev’d and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983). The Intervenors have not defined any specific QA issues related to the Application that are susceptible to resolution in an adjudicatory proceeding. Rather, they appear to be arguing for an extremely broad contention that would potentially permit litigation of any issue related to any portion of the COLA – and even issues not related to the COLA at all. As discussed in Section IV.D below, the NOV cannot be read as supporting such a wide-ranging and unfocused inquiry.

In large part, these flaws in the contention stem from the aforementioned misstatement of the NOV that the Intervenor offer as their only factual support. The NOV, when quoted accurately, is much more limited than the wide-ranging inquiry proposed in the Supplemental Petition, and it therefore does not support the inferences that the Intervenor attempt to draw from it. A document submitted in support of a contention in an NRC proceeding is “subject to scrutiny both for what it does and does not show.” *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Moreover, it is not the responsibility of the Board or the other parties to provide the support for a contention that its proponents neglect to supply. See *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006). Because the NOV does not actually support the contention that the Intervenor have argued, and because no other factual or expert support is provided, proposed Contention 15 does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

Claiming that the contention is one of “omission” does not cure these problems. The text of 10 C.F.R. § 2.309(f)(1)(vi) states clearly that a petitioner arguing that an application omits required information must include an “identification of each failure and the supporting reasons for the petitioner’s belief.” Where “contentions of omission” have been found to be admissible, the alleged omission has been clearly defined and the text of the regulatory requirement to supply that information has been specific and has not required interpretation. See, e.g., *Pa’ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC 403, 414 (2006). In these cases alone, identifying the alleged omission and citing the regulation that requires that information can be sufficient to meet all the contention pleading standards of 10 C.F.R. § 2.309(f)(1). Not every contention alleging that material has been omitted from the Application meets these tests. In many cases, the alleged omission is much more general, or the regulatory requirements

involved are not sufficiently prescriptive to demonstrate without further argument that the alleged omission is actually required. In such cases, as in all cases involving contentions that challenge the adequacy of material in an application, the pleading requirements of 10 C.F.R. § 2.309(f)(1) must be complied with in their entirety. This includes the demonstrations regarding scope and materiality that 10 C.F.R. § 2.309(f)(1)(iii) and (iv) require, the support requirement of 10 C.F.R. § 2.309(f)(1)(v), and the genuine dispute requirement of 10 C.F.R. § 2.309(f)(1)(vi). Here, the Intervenors do not address these requirements, and instead simply claim that proposed Contention 15 is one of omission. However, neither the contention itself nor the alleged regulatory basis for it is sufficiently specific for the “contention of omission” approach discussed in *Pa’ina* to apply. Furthermore, as noted above, the material alleged to be omitted is actually discussed at length in the Application. The Intervenors are therefore required to address the pleading requirements of 10 C.F.R. § 2.309(f)(1) in full, something they have failed to do.

C. Citation of Documents Generated During a Staff Review Insufficient to Support Contention

The only support the Intervenors offer in support of their proposed Contention 15 is a reference to the Staff’s NOV. As noted above, the Intervenors mischaracterize this NOV in a significant way. Even if the reference to the NOV had been accurate, however, citation to documents produced by the Staff in the course of its ordinary regulatory responsibilities is generally, without more, insufficient to specify an issue suitable for litigation. In the case of Requests for Additional Information (RAIs), the Commission has made this position clear. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999). As the Commission has explained, “RAIs are a standard and ongoing part of NRC license reviews,” *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and “a routine means for [the NRC] staff to request clarification or further discussion of particular items in the application.” *Oconee*, CLI-99-11, 49

NRC at 336. Therefore, a petitioner must generally do more than simply quote from an RAI or a response to an RAI to justify admission of a contention, but rather must provide “analysis, discussion, or information *of their own* on . . . the issues raised in the RAIs.” *Id.* at 337 (emphasis added). Furthermore, “[t]o show a genuine dispute with the applicant, petitioners must use the RAI to make the issue of concern their own” by developing “a fact-based argument that actually and specifically challenges the application.” *Id.* at 341.

There is no specific case law regarding the use of NOV's to support a contention of this type. In one sense, an NOV might be seen as providing stronger support for a contention than an RAI, because an NOV is a stronger indication than a problem exists or existed at one time. However, in another sense the *Oconee* rule applicable to RAIs is just as applicable in the case of NOV's. A petitioner who uses an NOV in support of a contention must explain how the violations cited in the NOV raise questions about the application under consideration and how the Staff's NOV is related to the issues the petitioner wishes to litigate. To the extent that the contention raises issues that the NOV does not, a petitioner must also supply additional factual or expert support for the contention. This requires a full discussion of how the contention meets the admissibility standards of 10 C.F.R. § 2.309(f)(1). An NOV can be part of this discussion, but normally cannot be the whole of it.²

Block quoting the NOV, by itself, is therefore insufficient. Merely providing information, without explaining its significance, is insufficient to support admission of a

² The exception is when a petitioner alleges that a pattern of violations over time raises questions about management integrity or competence that may be material to the licensing decision the NRC must make. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 120-21 (1995). However, contentions of this type must allege an “ongoing pattern of violations or disregard for regulations that might be expected to occur in the future.” *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 465 (2006). The Commission has rejected such contentions when they are based on single, or even multiple, historical violations. See *Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, CLI-09-9, 69 NRC 331, 355 (2009); see also *USEC, CLI-06-10*, 63 NRC at 464-65. In any event, the Intervenor's have not presented an argument of this type here, and the NOV offers no support for such a claim.

contention in an NRC proceeding. See *USEC, Inc. (American Centrifuge Plant)*, LBP-05-28, 62 NRC 585, 597 (2005), *aff'd* CLI-06-10, 63 NRC 451 (2006). It is the responsibility of the Intervenor to define the issues they wish to litigate and to craft arguments to explain how an RAI, NOV, or any other information they present relates to those issues.

In their discussion of proposed Contention 15, the Intervenor do attempt to explain the significance of the violations cited in the NOV and to link them to issues they wish to litigate in this proceeding. However, again because of their misstatement of the NOV's content, the attempted explanation leads the Intervenor into issues that are outside the subject matter covered by the NOV, and in some cases even into issues that are outside the scope of this licensing proceeding. The following section addresses these issues in detail and examines their admissibility under 10 C.F.R. § 2.309(f)(1).

D. Issues Raised in the NOV Itself Do Not Support a Broad QA Contention

The NOV itself is much more limited than the extremely broad range of QA issues that the Intervenor wish to raise. Even if citation to an NOV were sufficient, without anything more, to support an admissible contention, the NOV by its terms does not support the admission of such a broad QA contention. It is therefore important to look at the content of the NOV in order to determine what support it does – and does not – provide for the contention. Any issues unsupported by the text of the NOV, cited accurately, fail to meet the requirement of 10 C.F.R. § 2.309(f)(1)(v) and cannot be considered part of an admissible contention.

1. *Date of Establishment of DTE's QA Program*

The first violation cited in the NOV is that DTE “failed to establish and implement a Fermi Unit 3 [QA] program between March 2007, when the initial contract was placed with [B&V] . . . until February 2008, and retain control of safety-related activities performed by B&V.” NOV at 1. The Staff has cited Criterion II, “Quality Assurance Program,” Criterion IV, “Procurement Document Control,” and Criterion VII, “Control of

Purchased Material, Equipment, and Services” of Appendix B to 10 C.F.R. Part 50 as the legal bases for this violation. *Id.* As discussed above, this violation is misstated in the text of proposed Contention 15 in a manner that leaves the impression that no Fermi 3 QA program currently exists. See Supplemental Petition at 2.

There are no factual disputes between the Applicant and the Staff related to the circumstances surrounding this issue. Both agree that DTE put its Fermi 3 QA program into place in February 2008 and issued implementing procedures at that time. NOV at 4-5; Reply to NOV, Attachment 1 at 6-7. Both also recognize that Chapter 17 of the FSAR, and its associated appendix, describe the Fermi 3 QA program that will be reviewed by the Staff in the FSER. See FSAR Chapter 17 and associated appendix. The Intervenor’s assertion that there is no QA program currently in place is simply incorrect.³

The Intervenor’s raise a number of issues that they attempt to link to this portion of the NOV, including procurement of parts and materials, construction of the plant, and maintenance throughout the plant’s useful life. Supplemental Petition at 11. According to the Intervenor’s, “[i]f the NRC de-emphasizes quality concerns in plant design or construction, the margin of public safety . . . will be directly affected.” *Id.* These concerns, while important, are not supported by the NOV as it was actually issued. All activities related to procurement of parts and materials, construction of the plant, and maintenance are due to occur in the future, if at all, and they will therefore be carried out under the QA program described in the COLA. For this reason, concerns related to these topics do not provide a basis for a contention based on the NOV.

The Intervenor’s provide no information that raises a substantive challenge to any of the pre-application work that was done between March 2007 and February 2008. They do not claim that any of the work B&V performed for DTE fails to meet Appendix B

³ The COL Application was submitted in September 2008, after this program was in place.

requirements, and they do not challenge any portion of the Application that relies on this work. For this reason, such issues cannot properly be considered part of proposed Contention 15. Furthermore, the NOV itself does not provide support for any such challenge even if the Intervenors had raised it. To the contrary, it states that DTE's QA personnel audited B&V's COLA development work in August 2009. NOV at 11. The NRC Staff also performed its own audit of B&V's work in July 2007 and determined that activities in the field were being conducted under appropriate QA oversight.⁴

For these reasons, the Intervenors have not raised any issue related to the first violation cited in the NOV that meets the pleading standards of 10 C.F.R. § 2.309(f)(1). A Fermi 3 QA program covering future activities was put into place before the Application was submitted, and the Intervenors have not raised any specific challenge to the Application based on past activities. The first violation cited in the NOV therefore fails to provide any support for the issues the Intervenors have raised.

2. *Internal Audits and Trending of Corrective Actions*

The second and third violations cited in the NOV concern internal audits and trending of corrective actions. Criterion XVIII, "Audits," of Appendix B to 10 C.F.R. Part 50 requires applicants to conduct periodic internal audits to verify QA compliance and the effectiveness of the QA program. Criterion VXI, "Corrective Action," of Appendix B to 10 C.F.R. Part 50 requires applicants to establish measures "to assure that conditions adverse to quality . . . are promptly identified and corrected."

⁴ Letter from Mark S. Lesser, Division of Construction Inspection, NRC, to Douglas R. Gipson, DTE, Audit of Combined License Pre-Application Subsurface Investigation Activities at Fermi (Project No. 757) (Aug. 8, 2007), ADAMS Accession No. ML072210911. As the title of the audit report indicates, the work in question involved subsurface investigations carried out to support the site characterization discussion in the Fermi 3 FSAR. The Staff reviewed B&V's QA program at the time of the audit and determined that "[d]rilling and field testing activities were controlled by adequate procedures and standards with an appropriate level of supervisory and quality assurance oversight." *Id.* at 3-4.

Although the Intervenor refers to the second and third violations cited in the NOV in their contention text and in the block quotation of the NOV that follows, they do not appear to link either of these violations to any substantive topic related to the Application. As noted previously, merely providing information, without explaining its significance, is insufficient to support admission of a contention in an NRC proceeding. See *USEC*, LBP-05-28, 62 NRC at 597. For this reason, these parts of the NOV do not provide the support required by 10 C.F.R. § 2.309(f)(1)(v) for any of the various substantive issues the Intervenor discusses.

3. *Issues Unrelated to the NOV*

In the discussion accompanying proposed Contention 15, the Intervenor raises two other categories of issues that go significantly beyond the three violations cited in the NOV. As described above, the text of the contention corresponds roughly (except for the misstatement already mentioned) to the text of the NOV, and the existence of the NOV is the only factual support the Intervenor offers for their contention. Therefore, the other issues that the Intervenor discusses in connection with their contention are not supported by fact or expert opinion, and thus cannot be considered part of an admissible contention. See 10 C.F.R. § 2.309(f)(1)(v).

The first of these categories includes issues related to the ESBWR Design Control Document (DCD). The Intervenor appears to allege that the events described in the NOV raise questions about the safety of the ESBWR design itself. Supplemental Petition at 7-8. This argument is problematic on its face. DTE and its contractor are not involved in preparing the ESBWR DCD or any revision to it. The ESBWR design was submitted to the NRC by GE-Hitachi and is the subject of an NRC rulemaking under Docket No. 52-010. The Intervenor has not explained how the NOV issued to DTE is related to a design prepared by a completely different corporate entity. Nor have they

raised any issue related to the ESBWR design itself that would be admissible in this proceeding.⁵

The second category of issue concerns events at other facilities. Supplemental Petition at 13-16. None of the events listed by the Intervenors are related to the Application at issue in this proceeding. The Intervenors provide no explanation for how the items set forth in the NOV relate to any of the types of event that they describe, and they provide no specific challenge to the Application that can be supported by the events listed. These events therefore do not provide any basis or support for proposed Contention 15.

These two categories of issues raised in the discussion of proposed Contention 15 do not raise a genuine dispute on a material issue of law or fact that is susceptible to resolution in a hearing on the COLA, supply a basis for such an issue, or demonstrate that any such issue is within the scope of the proceeding and material to the licensing decision that the NRC must make. These portions of the Supplemental Petition therefore fail to either affect the admissibility of Contention 15, as it is stated by the Intervenors, or to satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1) as separate issues.

E. The Intervenors Provide No Justification for Suspending the Proceeding

The Supplemental Petition also requests that the Licensing Board suspend adjudication of the contentions previously admitted in this proceeding until proposed Contention 15 is resolved.⁶ The Intervenors assert that such action is necessary

⁵ Commission policy does not bar contentions challenging a DCD for which a rulemaking is not yet complete from admission in a proceeding on a COLA that references that DCD. Such contentions may be admitted, provided they meet all pleading requirements, and held in abeyance until the design certification rulemaking is complete. See 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). However, this policy applies only when a contention is otherwise admissible. See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-9-8, 69 NRC 317, 324 (2009). The Intervenors have not submitted such a contention here.

⁶ Supplemental Petition at 2. Elsewhere in the submittal, the Intervenors also ask for a

“because of the potentially large revisions to [the COLA] which might become necessary.” Supplemental Petition at 16. However, the Intervenors have not submitted any information indicating that any particular changes to the Application are needed, or supported any claim that such changes are large enough to affect the review schedule for the Application or subsequent litigation of the contentions that have been admitted. Furthermore, the Intervenors have not cited any regulatory authority for granting the stay they request. Therefore, this request should be denied.

The issues raised in the NOV are unlikely to affect the anticipated publication dates of the Staff’s primary review documents, the FSER and the FEIS. However, if the Staff’s resolution of this or any other issue were to require more time than is currently contemplated, a provision to delay litigation of the admitted contentions it is already built into the schedule that the Board has established to govern this proceeding. NRC regulations state that the Board has the authority to “[s]et reasonable schedules for the conduct of the proceeding” 10 C.F.R. § 2.319(k). The Board has done so in this case by setting a litigation timeline relative to the publication dates of the FSER and the FEIS. Scheduling Order at 3-4. If the publication dates for these documents change for any reason, the litigation schedule can easily be adjusted accordingly.

“halt to COLA processing,” which could be interpreted as request for suspension of the Staff’s technical review as well. If the Intervenors intend this interpretation, they have provided no legal basis or factual support for such a request.

CONCLUSION

For the reasons set forth above, proposed Contention 15 fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1). It is therefore inadmissible. The Intervenor's request to suspend adjudication of previously admitted contentions is not supported by facts or legal analysis, and is unnecessary given the schedule already established for this proceeding. It should therefore be denied.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 1st day of December, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff letter dated December 1, 2009, providing notice of the availability of the hearing file created pursuant to 10 C.F.R. § 2.1203 and the initial disclosures made pursuant to 10 C.F.R. § 2.336(d), with attachments, together with the affidavit of Thomas A. Kevern, have been served upon the following persons by Electronic Information Exchange and electronic mail this 1st day of December, 2009:

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