December 8, 2009

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

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

* * * * *

RESUBMITTED Intervenors' Combined Reply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication

Now come Petitioners Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman and make their combined reply to the "NRC Staff Answer to Supplemental Petition" and "Applicant's Response to Proposed Supplemental Contention." The NRC Staff's filing will be referred to as "Staff Answer", and the Applicant's as "DTE Response".

There was no 'misstatement' or 'mistake' about the continuing nature of the quality assurance omissions of DTE

The Staff considers the Supplemental Petition to comprise a misstatement[1] of the NRC's Notice of Violation, claiming that the NRC

[1]See Staff Answer at 7: "As paraphrased in the Intervenors' statement of their contention, the ending date of February 2008 is omitted."

cited Detroit Edison only for lack of a quality assurance program through February 2008, and that somehow, Intervenors have taken poetic license with the notice of violation ("NOV"). This is incorrect; the Intervenors have appropriately asserted their position that the lack of a meaningful, DTE-run quality assurance program continues right down to the present. In the very first sentence following the recitation of the NOV in their Supplemental Petition, Intervenors allege:

> The issues raised by the Notice of Violation ***remain pending and unresolved as of the date of this submission.*** (Emphasis supplied)

The plain meaning of that allegation, deliberately set proximately to the NOV, is that the claimed quality assurance violations are continuing in nature. This assertion is supported, moreover, by other averments. At Supplement Petition p. 7, for example, Intervenors state:

> At present, DTE cannot assure regulators or the public that it acknowledges the existence of the regulation imposing halogen restrictions. Likewise, DTE cannot provide assurance that thousands of other critical maintenance requirements will be performed in the course of building and operating Fermi 3.

At Supplemental Petition pp. 8-9, Intervenors urge another current, ongoing aspect of violation:

> There are literally hundreds of open items which are currently the subject of NRC staff requests for additional information (RAIs). The Design Control Document (DCD) and the FSAR for Fermi have already seen one set of revisions. 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.
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> **** **** **** ****
>
> The ESBWR rulemaking will certainly result in further plant design changes which will themselves bear serious Quality Assurance implications. Absent the problem-solving orientation

> of a QA program which is amenable to NRC oversight and public scrutiny, DTE cannot assure the safety, much less the operability, of Fermi 3.

At Staff Answer p. 8, NRC's counsel chides Intervenors for their "apparent belief that no QA program for the Fermi 3 project currently exists. . . ." Perhaps counsel for the NRC does not hold this belief, but the actual NRC Staff "apparently" does agree with Intervenors. Arnold Gundersen, a nuclear engineer consulted by Intervenors to assist in identifying regulatory omissions and noncompliance, points out in his "Declaration of Arnold Gundersen" ("Gundersen Declaration") (attached), which Intervenors incorporate fully herein by reference and reallege in support of their reply, sundry contemporary NRC QA staff concerns which should give this Licensing Board pause.

At ¶ 19 of the Declaration, Gundersen cites the NRC QA Staff opinion that "[at] this time [June 4, 2009], the application is not providing an applicant's QA program for these activities as required by 52.79(a)(25)." Aida Rivera-Verona email, ML092050293.

On June 8, 2009, the same staffer noted: "The application is not providing an applicant's QA program for design activities in support of the application as required by 52.79(a)(25). This issue puts into question the quality of the overall application." Gundersen Declaration ¶ 27, citing ML092210051.

Then, on June 10, 2009, as Mr. Gundersen relates, NRC reactor operation engineer Mark Tonacci observed that DTE had no quality assurance program in place for design and engineering: "They do not have a Fermi QA program for design – that is why they did not send it to you. They decide if the work is safety related and if it is send it

to Black and Veatch and use the B&V program." *Id.* ¶ 25, citing ML092210050. And the very next day, QA staffer Rivera-Verona argued that:

> However, the Reg Guide 1.206 is very clear that the FSAR should also clearly delineate those QA functions that are implemented within the applicant's QA organization and those that are delegated to other organizations. In addition, the Reg guide states that the FSAR should describe how the applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations. *Based on the application and the phone calls we have done with DTE, there is no description of how they are maintaining this responsibility and under which program.* The Reg Guide clearly states that the FSAR should identify the responsible organization and the process for verifying that delegated QA functions are effectively implemented. *Also, based on the calls we have had, DTE has to rely on others for verification of implementation*. (Emphasis supplied)

Gundersen Declaration ¶ 28, citing ML092210049.

Indeed, the fate of the Fermi 3 application was the subject of NRC Staff speculation in light of the glaring QA defects. On June 23, 2009, John A. Nakoski, Chief of the Quality and Vendor Branch 2, Division of Construction Inspection & Operational Programs, Office of New Reactors, circulated a lengthy discussion in which he concluded that:

> [I]t is not evident that the FSAR provides for a QA program that governs the design activities performed in support of the FSAR.. . . . the staff determined that the oversight provided by DTE was not governed by a DTE QA program meeting the requirements of Appendix B. . . . These concerns will be assessed during an inspection, but in any case, are of sufficient concern at this time that they might question the quality of the overall application.

Gundersen Declaration ¶ 31, citing ML091671550.

The Staff making these strident comments describe then-existing QA deficiencies ***as of mid-2009 in the present tense***. They are obviously seen by professional regulators as continuing, 2009, regulation violations. While DTE confined its response in opposition to the

Supplemental Petition to denying there are ***any*** QA problems (DTE Response, ML093160318) analogously to its denial of the NOV averments,[2] it remains that there is strong *prima facie* evidence of ongoing, 2009, defects of quality assurance management by DTE.

Intervenors have made the requisite showing for admission of this contention. Whether or not a contention is true is left to litigation on the merits in the licensing proceeding. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411 (1991), appeal denied, CLI-91-12, 34 NRC 149 (1991). The factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). The Intervenors' Supplemental Petition certainly has achieved that "minimal showing."

The Staff incorrectly claims that Intervenors raised no "specific" challenge to the COLA in their Supplemental Petition. Staff Answer pp. 9-10. To get to this conclusion, the Staff had to ignore

[2]ML093160318 (11/9/09).

the assertion that defects were alleged to the Final Safety Analysis Report (FSAR), and had to undertake an odd word game to disregard the fact that the substance of the NRC's own Notice of Violation was re-alleged within the Supplemental Petition, including references to the COLA. Supplemental Petition pp. 4-6. Then, in seeming direct contradiction of its accusations, the Staff offers a stunning concession:

> [T]he Intervenors ***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 Intervenors 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. (Emphasis supplied).

Staff Answer p. 14. Hence it follows that if the "misstatement" attributed to the Intervenors is not really a "misstatement," the NRC Staff's tautological objection that there is no explanation of significance disappears.

Notably, the veracity of the NRC Staff's regulatory involvement on matters of quality assurance in new plant licensing is under fire. The NRC's Office of Inspector-General on November 16, 2009, issued an Audit Report entitled *Audit of NRC's Quality Assurance Planning for New Reactors* that was highly critical of the NRC's QA staff. The OIG report stated:

> The coordination among NRO branches of QA reviews during the combined license application review process, when it occurs, is informal. Sections of the standard review plan specify that the responsible technical reviewer will coordinate the applicable QA reviews with the NRO's QA branches. However, this coordination is not clearly defined and there is no process in place to ensure that it occurs. Consequently, there is no way to verify that the QA review coordination has occurred, nor that all the QA portions of the standard review plan technical chapters have been fully satisfied.

After reviewing the OIG audit and numerous items related to quality assurance in the Fermi 3 COLA process, nuclear engineer Gundersen concluded in his Declaration (¶ 65) that:

> . . . Detroit Edison's laxity in organizational reporting relationships and the reduced role of QA at DTE Unit 3 compared to the industry standard articulated by NEI are areas that the NRC should have reviewed according to federal statute as delineated in the Code of Federal Regulations. Apparently, breakdowns within the NRC's review staff may have also contributed to the existing QA problems on the DTE Fermi Unit 3 docket.

Thus even though there was some significant regulatory interest on the part of the Staff, the NRC may have enabled DTE to become a scofflaw, which as Gundersen narrates, is a longtime problem in quality assurance management in the nuclear industry. See Gundersen Declaration ¶¶ 66-71.

Intervenors have articulated evidence that there has been a breakdown of DTE's QA program for Fermi 3 "sufficient to raise legitimate doubt as to whether the plant can be operated safely." *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983) (ruling on motion to reopen the record), citing *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 (1985). This standard also applies to an applicant's design quality assurance program. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F.2d 26 (1986). The NOV allegations identify a set of core QA regulatory violations which

permeate the Fermi 3 COLA and can comprise the basis for a suspension of COLA processing. This ASLB previously admitted Intervenors' hydrology contention (Contention No. 5) for adjudication based upon Requests for Additional Information (RAIs). As even the Staff admits (Staff Answer at 13), "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." It certainly is, and as an open regulatory item which is being challenged by the utility, the NOVs are the gateway indictment of DTE's quality assurance non-assurance.

Reply to Staff and DTE arguments concerning timeliness and vitiation

The Staff contends that the proposed Contention No. 15 should be dismissed because the Intervenors supposedly make no direct challenge to the quality of the contractor Black and Veatch's work. Gratuitiously, the Staff urges "it [the NOV] states that DTE's QA personnel audited B&V's COLA development work in August 2009." That audit occurred fully five months after the closing date for the original petition to intervene to raise QA contentions, and it as only ***after the audit*** that the NRC staff determined to formally cite Detroit Edison with NOVs. This all avoids Intervenors' argument that DTE does not itself have a quality assurance program to oversee the activities of its contractor. Supplemental Petition, pp. 6-7; Gundersen Declaration ¶¶ 57-61.

Detroit Edison urges that "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" and that “[t]he information in the October 5th Notice of Violation is the same as that available previously.” That is not accurate. While Intervenors agree that there were Staff concerns being expressed in spring and summer 2009, discussed *infra*, it appeared that the Staff was exerting its regulatory role, first by attempting to get questions answered and proceeding in a conciliatory fashion, but when those attempts failed, by conducting and inspection and audit in late August 2009, followed on October 5, 2009 by formal NOV citations. Intervenors did not and could not have known of the August 23, 2009 inspection/audit until it appeared on ADAMS on October 6, 2009. The emails discussed by Intervenors, *infra,* did not appear until August 2009. And while those Staff communications contain conclusory statements about QA failings of DTE, they were not all clear expressions of explicit regulatory violations in the internal email dialogue. Moreover, presumably the formal NOVs were focused upon the inspection/audit results from late August - again, information not available to Intervenors prior to October 6, 2009.

From the standpoint of conserving Intervenors’ resources and out of consideration for the judicial economy of the ASLB, when Intervenors noticed the Staff QA critiques and the attempts the NRC was making to conciliate matters, they prudently waylaid any plans of a formal filing to ascertain what the outcome of the regulatory involvement by the Staff would be. Intervenors, as members of the public, have a legitimate right to expect that their expensive, tax-supported regulatory apparatus will function according to the mandates of the Atomic Energy Act to protect public health and safety, after

all. If anything, it is incongruent for DTE to maintain that Intervenors should have stepped up as co-regulators before their timely November Supplemental Petition filing.[3] If anything, one might expect DTE to contend that Intervenors have filed *prematurely* for not awaiting the outcome of the NOVs based on all that old information which had been previously available.

Instead, DTE undertakes to remind the Intervenors that it has [unlawfully?] "relied" on the Black & Veatch quality assurance management since 2007.[4] And Applicant urges that the genesis of its regulatory wrongdoing commenced with an internal NRC memo dated June 23, 2009 and posted publicly on June 24, 2009 which "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)." DTE provides no proof to substantiate that the B&V program complies with Appendix B apart from the representations of counsel. Then, DTE wishes for Intervenors to respect the RAI responses it tendered to the NRC at the end of September 2009 which were not posted to ADAMS until after the October 5, 2009 NOVs. From this narrative, DTE hopes that the Intervenors' filing will be accursed for being untimely.

The "ironclad" burden placed on petitioners by the decision of

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[3]Which, be it remembered, the NRC staff agreed was timely.

[4]DTE asserted in its November 9, 2009 denial of liability for the NOVs by asserting it had selected a Black & Veatch because "B&V was leading the development of the Entergy River Bend COLA" and that "B&V had been secured to support the preparation of the COLA and was performing similar work for the Entergy River Bend COLA." Unfortunately, Entergy suspended River Bend ESBWR planning in January 2009, which undermines the currency of B&V's quality assurance capabilities.

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) to examine the publicly available documentary material with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention does not reach as far as DTE would have the Licensing Board go. *Catawba* responsibility does not extend to an intervenor's having to include in its contention a critical analysis or response to applicant or Staff positions on the issues raised by the contentions which might be present in the publicly available material. Such detailed answers to the positions of other parties go, not to the admissibility of contentions, but to the actual merits of the contentions. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 62931 (1988). The "ironclad obligation" of a petitioner applies *only to information in support of a contention*. A requirement also to examine contrary publicly available evidence would unduly exacerbate the considerable threshold that a petitioner must already meet under the current revised contention rules. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 22 n.29 (1993). The Intervenors' obligation remains to articulate "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994).

The asserted alternative means of protecting Intervenors' interests are ineffectual

Although DTE understandably wishes that Intervenors would take

their enforcement “piggyback” elsewhere and file a petition under 10 CFR § 2.206 for a show cause proceeding, the Commission has held that § 2.206 petitions are not an adequate alternative means of protecting a late petitioner's interests. The § 2.206 remedy cannot substitute for the petitioner's participation in an adjudicatory proceeding concerned with the grant or denial *ab initio* of an application for an operating license. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-1176 (1983). *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 81 (1990), aff'd, ALAB-950, 33 NRC 492, 495-96 (1991). After all, despite the long history of §2.206, the number of sucessful petitions brought under that section is extremely small. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 67 (2005). The availability of nonadjudicatory Staff review outside the hearing process generally does not constitute adequate protection of a private party's rights when considering 10 CFR § 2.309(c) (formerly 2.714(a)). *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 384 n.108 (1985).

And contrary to DTE’s assertion (DTE Response p. 13), broadening of the QA issue was the explicit point of Intervenor’s Supplemental Petition. Nuclear engineer Arnold Gunderson establishes in his Declaration, as Intervenors raised in their Supplemental Petition, that quality assurance means more than mere oversight of a contractor. Even as DTE followed a “cookbook” QA template created by the Nuclear Energy Institute in developing its COLA QAPD, it downgraded the NEI’s

contemplated “Quality Assurance Program Manager”, who is supposed to take the lead on behalf of DTE over contractors such as Black & Veatch, to a far weaker “new plant oversight manager” with less control and authority over B&V. Gundersen Declaration ¶¶ 39, 57-62 (*see* ¶ 61: “Simply put, Quality Assurance is not the same as minimal oversight, and Detroit Edison is scoffing at industry-wide protocols by applying for this position in its COLA”).

Intervenors have identified a dispute with the applicant and DTE’s application

It is fatuous for DTE to argue (Response p. 14) that “the proposed Contention does not cite any aspect of the application that is alleged to be deficient.” The *very first sentence* of 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 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.

And at pp. 6-7 of the Supplemental Petition, Intervenors point out that:

> The hallmark of any nuclear power plant construction process is its Nuclear Quality Assurance. Nuclear Quality Assurance is codified in numerous places within 10 CFR part 50. The single most important reference to Nuclear Quality Assurance is within the General Design Criteria (GDC) in 10 CFR part 50, Appendix A. Criterion 1 of the GDC demands Quality Assurance. Significantly, of the 64 General Design Criteria, regulators deliberately chose Nuclear Quality Assurance to be the first Criterion. Without Criterion 1 - without nuclear grade quality, in other words - there can be no nuclear construction. Moreover, Criterion 1 demands that "Appropriate records. . . shall be maintained by or under the control of the nuclear power unit licensee throughout the life of the unit."

Intervenors proceed to point out that “[a]ccording to 10 CFR part

50, Appendix B, Criterion 1, ‘The applicant shall be responsible for the establishment and execution of the quality assurance program.’" *Id.* And so DTE employs a reversal of its customary *modus operandi*, trying to argue away that which really is in plain sight (Intervenors’ pleadings), even as applicant berates Intervenors for not penetrating mountains of documents to find contentions which, with amazing disdain, it assures the ASLB are always plainly visible, if routinely out of time.

Neither the Staff nor DTE have demonstrated any sufficient ground to prevent Contention No. 15 from being admitted for adjudication.

WHEREFORE, Petitioners pray the Atomic Safety and Licensing Board admit the proffered quality assurance contention into these proceedings. Further, Petitioners pray the ASLB partially suspend adjudication of the Fermi 3 COLA until the applicant, DTE, provides satisfactory proof positive of a fully-implemented quality assurance program which integrates all previous and contemplated QA revisions.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the "**Intervenors' Combined Reply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention**, and for Partial Suspension of COLA Adjudication" has been served on the following persons via Electronic Information Exchange this 8th day of December, 2009:

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