January 4, 2010

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)	)	
	)	

* * * * *

Intervenors' Motion for Leave to File Surreply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention

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 Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman and move the Atomic Safety and Licensing Board for leave to file their combined reply to the "NRC Staff Reply to Intervenors' Combined Reply in Support of Supplemental Petition" (hereinafter "Staff Reply to Combined Reply") and "Applicant's Response to NRC Staff Motion for Leave to Reply."

I. History

On November 6, 2009, Petitioners filed a "Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication". The NRC Staff and Detroit Edison(the

Applicant) timely responded to the Supplemental Petition on December 1, 2009 with their "NRC Staff Answer to Supplemental Petition" and "Applicant's Response to Proposed Supplemental Contention," respectively. Petitioners then countered with their filing on December 9, 2009 of a "Resubmitted Intervenors' Combined Reply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication."

On December 19, 2009, the NRC Staff filed a "NRC Staff Motion for Leave to Reply to Intervenors' Combined Reply in Support of Supplemental Petition," alleging that "[t]he Intervenors' Reply includes new arguments and new supporting material not included in the contention as originally filed in the Supplemental Petition." To its Motion, the Staff attached the "NRC Staff Reply to Intervenors' Combined Reply in Support of Supplemental Petition." Petitioners explicitly consented to the filing of this Staff Reply.

By order dated December 23, 2009 (ASLBP No. 09-880-05-COL-BD01), the ASLB granted the Staff's "Motion for Leave to Reply;" accorded DTE until January 11, 2010 to respond to the same items which the Staff had identified as objectionable; and directed that "No additional filings by any party concerning Contention 15 will be permitted."

On December 28, 2009, Petitioners sought DTE's consent to the submission of the "Intervenors' Surreply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication" attached hereto. DTE declined to consent. On December 22, 2009 - the day before the ASLB order forbidding any further reply by Petitioners - the Staff consented to

the Petitioners' filing of a reply.

II. Rationale for Petitioners' Surreply

Petitioners realize that 10 C.F.R. § 2.323 states that "[t]he moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer." However, "[p]ermission may be granted . . . in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply." *Id.*

A cursory reading of the NRC Staff Reply alongside Petitioners' Surreply suggests that there are inconsistencies in the Staff's arguments and a fundamental misunderstanding of the use of information upon which Petitioners' expert declaration relies. Errors and misunderstandings are justifiable reasons to allow further argument on a motion. *Cf. Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 123 n.10 (2006) (though 10 C.F.R. § 2.323(c) states there is no right of reply to an answer to a motion for summary disposition, if such an answer included a plainly and factually incorrect allegation, the moving party could request an opportunity to respond and to correct the record). Petitioners should be permitted the opportunity to have their additional arguments considered; the ASLB is being asked to resolve discrepancies between the Staff's stated concerns vs. the Staff's NOV-expressed concerns vs. attempts by the Staff to attack procedural niceties of Petitioners' QA contention instead of the glaring regulatory cavern which is at the core of the COLA. There is a grave inconsistency between the quality assurance

program alleged in DTE's COLA docket and what quality assurance effort is actually taking shape, outside of NRC regulations.

Moreover, there is a unique controversy over timeliness of Contention No. 15, which Petitioners did not anticipate would be argued by the Staff. The position of the Staff (and DTE) is that every time a quality assurance matter is addressed by an item which newly turns up in the ADAMS system, a new petition for admission of a contention must be filed (should Petitioners believe such an item warrants the attention of the ASLB in the form of a contention). Petitioners argue more completely in their proffered Surreply that as a matter of common sense and efficient regulatory policy, this position is unsupportable. This particular issue of timeliness has not been squarely decided by any ASLB decision researched by Petitioners.

Finally, Petitioners suggest that the ASLB's exercise of discretion to allow or deny their Surreply arguments should take into account the equities of this situation. These equities include the significance and novelty of the issues at stake; the importance of the proffered contention to a fair and just determination of the ultimate issue, *i.e.,* whether Fermi 3 should be licensed; the public interest in adherence to the Commission's regulations; and the safety significance of the issues involved. Petitioners believe that those equities should be resolved in favor of prudently considering all relevant argument on the important issues of this proceeding to ensure a better result. Accordingly, they urge acceptance of the proffered Surreply into the record for consideration by the ASLB.

WHEREFORE, Petitioners pray the Licensing Board allow their Surreply to be allowed to stand in the record of this proceeding.

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Intervenors' Surreply 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 Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman and make their combined reply to the "NRC Staff Reply to Intervenors' Combined Reply in Support of Supplemental Petition" (hereinafter "Staff Reply to Combined Reply") and "Applicant's Response to NRC Staff Motion for Leave to Reply."

There is no genuine issue of timeliness in Petitioners' revelations of evidence concerning quality assurance failings. The evidence of Staff concerns indicates pellucidly that contrary to 10 CFR Part 52, no QA program in fact exists for the DTE Fermi 3 COLA project. The Staff maintained in its "Answer to Supplemental

Petition" that "[b]ecause 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." Staff Answer p. 8. Petitioners' contention is not that a specific part of the COLA is objectionable, but instead, that no *bona fide* QA program exists for the DTE proposed Fermi 3 COLA despite the mandates of federal law - a conclusion wholly supported by NRC missives and the COLA itself. The Staff insistence that form should triumph over substance should give the ASLB pause. Petitioners have identified an ongoing weakness when the COLA is compared with the Fermi 3 preconstruction planning.

Petitioners used the Staff emails to buttress the previously-alleged point of Contention No. 15: that there is presently no functioning Quality Assurance program being implemented by DTE, as putative licensee for Fermi 3. The Staff maintains that its concerns were vitiated with the August 2009 inspection and filing of the Notice of Violation, which bounds the period of violation at February 2008. That does not erase from the record the contemporary concerns expressed by NRC professionals in the spring and summer of 2009 as they reviewed the quality assurance plans and actual efforts at QA made by DTE. The staff professionals explicitly stated that the Applicant had no QA program under implementation by DTE after February 2008, *i.e.*, in 2009.

It is the NOV which scratches at the surface of the problem that was brewing in the Staff emails, not the other way around. DTE followed a "cookbook" QA template created by the Nuclear Energy Insti-

tute when the utility wrote its COLA QAPD. But when DTE did so, it downgraded the NEI's delineated "Quality Assurance Program Manager", who would be assigned to take the lead on behalf of DTE over contractors such as Black & Veatch, to a far weaker "Plant Oversight Manager" who would have reduced control and/or authority over B&V. Gundersen Declaration ¶¶ 39, 57-62. When in the COLA DTE made this *ad hoc* downgrade of the significance of Quality Assurance ***management*** to mere QA ***oversight***, Detroit Edison deviated sharply from industry-wide protocols and obligatory compliance with 10 CFR Part 52. Moreover, the emails cited show that this error was evident to NRC staff, and that their concern grew overtime while DTE neglected to follow regulatory practice. This deviation was, or should have been, evident to the NRC Staff from the moment the COLA was submitted in September 2008; after all, the Staff knew that B&V had been sole implementer for QA since 2007.

It is obvious that NRC staff expressed appropriate regulatory concerns. However, once NRC management and NRC attorneys, perhaps overly concerned with the industry's desire to build new nuclear power plants within a tightened timeframe, became involved in the charging process, the resulting NOV was significantly less comprehensive than the facts suggest. So it is that the NOV does not go far enough, given the unmistakable Staff concerns expressed in the emails. Petitioners' concern here is that lower-level staff appear to have been overruled in the charging decision; how else to reconcile the contrast between the staff concerns relating to the lack of a current, 2009 QA program, versus the sheer pretense in the citation, which is phrased so as to

appear that the violation has ended? It was the act of superior staff at the NRC overruling lower-level staff which allowed Davis-Besse Nuclear Power Station to operate dangerously close to a reactor head rupture in 2002. It is sheer pretense for the NOV to imply that the lack of QA oversight by DTE "ended" in February 2008. Petitioners certainly could not have anticipated that would be the Staff's position until the NOV's issuance in October 2009. Once they learned of that glaring shortcoming, Petitioners moved to admit Contention #15 to this proceeding.

Accordingly, the Staff and DTE arguments concerning untimeliness of the contention are diversionary. The issue is not one of timeliness, but a factual issue of substance. To maintain that Petitioners must file a new contention every time a new email is loaded into the Fermi 3 ADAMS file is absurd. As the Staff and NRC concede, there is an irregular and unpredictable time lag between many items (RAIs, correspondence, utility company responses) being generated, and their finally being made publicly available through the ADAMS system. Petitioners expressly complained about this problem in the September 9, 2009 phone conference with the ASLB in this proceeding.[1] Petitioners also told the ASLB in that conference about the recurring fact that DTE or its contractors have withheld document disclosures from ADAMS because of pending contentions.[2] Additionally, the internal NRC

[1]Transcript, ADAMS #ML092580263, pp. 205-208.

[2]For example, this statement from an August 11, 2009 email by Steven Lemont, Ph.D., Environmental Project Manager, NRC Office of New Reactors: "Where references are being withheld from docketing because they relate to admitted contentions, we will still need those docketed (all or in part, to be determined) because the issues in the admitted contentions must be fully addressed in the EIS." ADAMS #ML092230558.

discussions which are at the heart of this discussion, from June 2009, were not docketed in ADAMS for 2.5 months - until August 24, 2009. *See* ADAMS Nos. ML092210049, ML092210050, and ML092050293. They are part of a record which now exceeds 1000 items - many of which are hundreds or thousands of pages in length and are "hidden in plain sight", obscured both by their unhelpful, often arbitrary technical descriptors as well as by the untimeliness of their filing and that they are dumped into the record in non-chronological order. It is not enough to require quick filing by Petitioners upon the appearance of items in the docket, when those items do not get docketed in the order in which they are produced, and often months after they have been generated. By the time the June 2009 Staff QA concern emails appeared in ADAMS, the vaunted late-August inspection by the had been completed but the results were not yet in the record. It was not sensible to file a QA contention without knowing the results of the inspection; and the results were not posted until October along with the NOV.

The Petitioners' decision to file only after the NOV was lodged in early October, then, was quite prudent; only then could the Petitioners learn, for the very first time, that the NRC had limited its QA enforcement to the time period February 2008 and before. Once they understood the limitations of the NOV, Petitioners moved for admission of a contention with a larger time frame, alleging that there was no effective QA program throughout that period. When the Staff and DTE claimed there was no evidence, Petitioners pointed out the Staff emails and the QA "oversight" downgrade to emphasize that the core problem in DTE's QA program was not addressed by the NOV because the

deficiencies were of a continuing nature.

The Petitioners tracked the Staff email discussions, which became available in the ADAMS system only days before an August 2009 Staff inspection of DTE. Rather than stepping in prematurely, Petitioners deferred to the Staff, waiting to ascertain what action would be taken, and then became involved via a new contention filing, but only after first respecting the role of the regulators.

The Staff professionals' 2009 concerns about ongoing QA violations sufficient to nullify the COLA mysteriously became "non-facts" for purposes of the NRC decision to issue a Notice of Violation. Hence the evidence shows that Petitioners raise a factual issue, not one of enforcement. Petitioners differ with the enforcement effort's scope respecting the period during which there has been no QA program overseen, implemented and enforced by DTE and in support of that difference, point to the NRC Staff's own assessments. Staff communications that report on the status of a matter are considered to be matters of unprivileged fact. *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-3, 63 NRC 85, 93 (2006) (citing *EPA v. Mink*, 410 U.S. 73, 87-88 (1973)). Moreover, facts do not cease to be facts merely because an enforcement citation is issued which is narrower in scope than the facts suggest. The NRC staff's criticisms that "question the quality of the overall application,"[3] not the enforcement action initiated as a result of them, are the focus of the Contention

[3]Email of NRC's John Nakoski, Chief of the Quality and Vendor Branch 2, Division of Construction Inspection & Operational Programs, Office of New Reactors, ADAMS #ML091671550.

#15.

The Staff further misdirects the controversy by asserting (Staff Reply to Combined Reply, p. 8) that the "important" "common theme in all of the e-mails cited is the need to obtain more information from the Applicant." To the contrary, the common theme of the NRC emails is that there is no QA within the entire Fermi part of DTE's organization. The NRC took many months, until June 2009, to address a major QA problem that was developing, and then took months more before issuing a NOV that missed the crux of the QA problem. The Black & Veatch QA program is not transparent for the public to see or assess for performance reliability, because B&V is not the licensee. DTE decides if work is safety-related or not, and despite having no Quality Assurance program itself, sends the work to B&V to add to its QA program.[4] It is essentially impossible to understand how the decision to address something as a Quality Assurance matter is being made, and to imagine how safety considerations within the Fermi 3 planning process are being identified so that QA work delegation can be accomplished.

At p. 5 of the Staff Reply to Combined Reply, the NRC Staff further miscasts the debate by calling Contention #15 "a request that the NRC Staff reverse its decision to docket the Fermi 3 COLA and to discontinue technical review." Petitioners do not question the decision to docket the Fermi 3 COLA, but instead, question the quality of all the material on the docket and its technical validity, given that

[4]Email of NRC reactor operation engineer Mark Tonacci, ADAMS #ML092210050.

there has been no QA manager. Petitioners seek, not that the COLA be stopped, but that DTE comply with statutory federal regulations and implement a QA program. It could mean that the COLA would be on hold while DTE returns to the beginning of the process to establish a QA program and then redoes all work to date under the strict requirements of an overall QA program. However, there is very good reason to assign no reliability to Black & Veatch's QA activities. B&V was recently criticized by the U.S. Agency for International Development for lacking ***any*** on-site quality assurance management, identified as one of the factors which doomed completion of a major power plant in Afghanistan following the expenditure of hundreds of millions of U.S. tax dollars.[5] Petitioners have a legal responsibility to alert NRC of any fiduciary malfeasance by DTE that would neglect to protect the ratepayers of DTE, and federal taxpayers, from ending up with a nuclear power plant which will not operate properly.

The arguments by DTE and the NRC Staff that Petitioners have not discharged their obligation to expose application defects is an attempt to prompt the ASLB to ignore the forest by focusing on selected trees. While the Commission expects exacting pleading, it is indisputable that the Atomic Energy Act is a remedial statute. *Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 312-313 (1994), *aff'd, Advanced Medical Systems, Inc. v. NRC,* 61 F.3d 903 (6th Cir. 1995) (NRC may take remedial action to protect public health and safety); 42 U.S.C. §§ 2236, 2280, 2282; 10 CFR § 50.100; *Carolina Power & Light*

[5]*See* U.S. Agency for International Development Inspector-General's report at http://www.usaid.gov/oig/public/fy10rpts/5-306-10-002-p.pdf.

Co. (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-577, 11 NRC 18, 29 (1980), modified, CLI-80-12, 11 NRC 514 (1980) (ASLBs delegated authority to prescribe remedial actions within the bounds of their general powers). Federal courts customarily hesitate to construe remedial statutes in a "hypertechnical manner" so as to defeat their legislative purpose. *See Stearns v. Consolidated Management, Inc.,* 747 F.2d 1105, 1112 (7th Cir. 1984) (construing Age Discrimination in Employment Act). Courts scrutinize the circumstances under which a document is submitted so as not to let the title of the form triumph over substance. See, e.g., *Price v. Southwestern Bell Telephone Co.,* 687 F.2d 74, 79 (5th Cir. 1982) (intake questionnaire is not "necessarily legally insufficient" to constitute a charge); *Rabzak v. County of Berks*, 815 F.2d 17 (3d Cir. 1987) (letter seeking assistance treated as a charge); *Waiters v. Robert Bosch Corp.*, 683 F.2d 89 (4th Cir. 1982) (mailed affidavit treated as a charge).

Certainly, the core absence of DTE oversight in Quality Assurance has been demonstrated and must be remedied and the ASLB must resist the easy procedural outs offered up by the Staff and DTE.

A significant measure of the overall competence and character of an applicant is the extent to which company management is willing to implement its quality assurance program. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 15 n. 5 (1985), citing *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973). An ASLB may properly take into account a company's efforts to remedy QA deficiencies; ignoring such remedial efforts would discourage companies from promptly undertaking

such corrective measures. *Waterford, supra*, 22 NRC at 15, 53 n. 64, citing, *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 371-74 (1985).

A showing that a design quality assurance program breakdown raises legitimate doubt as to whether the plant can be operated safely is litigable. *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) (motion to reopen record sustained).

As a trier of fact, the ASLB has the statutory responsibility to hear all the facts prior to adjudication. As Chairman Jaczko has so patiently reminded NRC inspectors and management teams, the NRC's first priority is protecting public health and safety. Therefore thorough review of alleged rule-breaking by DTE in the form of grossly neglecting basic nuclear quality assurance cannot be taken lightly or discarded without adjudication.

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* * * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Intervenors' Motion for Leave to File Surreply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention" and its attached "Petitioners-Intervenors' Surreply 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 4th day of January, 2010:

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