

January 8, 2010

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
)
)
(Fermi Nuclear Power Plant, Unit 3))

NRC STAFF ANSWER TO SECOND 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 Second Supplemental Petition for Admission of a Newly-Discovered Contention (Second Supplemental Petition) filed in this proceeding regarding the Fermi Nuclear Power Plant, Unit 3 (Fermi 3) combined license (COL) application by the Intervenors¹ on December 14, 2009. For the reasons set forth below, the proposed contention in the Second Supplemental Petition fails to meet the contention pleading requirements of 10 C.F.R. § 2.309(f) 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,

¹ The Intervenors in this proceeding include Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club, and various individuals.

Michigan.² 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). 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 (GEH) on September 28, 2007. GEH 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, GEH 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 Intervenors filed a Petition for Leave to Intervene in the COLA proceeding (Petition), along with 14 contentions. The Licensing Board found that the Intervenors 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 Environmental Report, and one (5) is a safety contention challenging the Final Safety Analysis Report.

On November 6, 2009, the Intervenors filed a Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (First Supplemental Petition). The First Supplemental Petition set forth proposed Contention 15, which was filed in response to the publication of an NRC Notice of Violation issued to DTE (DTE NOV) on October 5, 2009.³ The NOV was issued as a result of an inspection conducted by the NRC at DTE on August 18-21, 2009, in Detroit, Michigan in order to assess compliance with

² 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.

³ NRC Inspection Report 05200033/2009-201 and Notice of Violation (Oct. 5, 2009), ADAMS Accession No. ML092740064.

regulations governing the implementation of quality assurance (QA) programs. The NOV cited three specific violations related to DTE's QA program, all of which were Severity Level IV violations.⁴ DTE responded to the DTE NOV on November 9, 2009.⁵

On December 1, 2009, the Applicant and NRC Staff filed responses opposing admission of proposed Contention 15.⁶ On December 8, 2009, the Intervenor filed a Reply which introduced new arguments and supporting material, including a series of Staff e-mails dated in June 2009.⁷ The Intervenor argued that these e-mails demonstrated the Staff's belief that DTE's QA violations were ongoing, and therefore provided support for the wide-ranging QA contention that the Intervenor wished to pursue. *Id.* at 3-5. Because this new material was filed for the first time in a reply brief, on December 18, 2009, the NRC Staff moved for leave to respond and simultaneously filed a substantive reply.⁸ The Board Granted the Staff's motion for leave to respond on December 23, 2009.⁹

On December 14, 2009, the Intervenor filed the Second Supplemental Petition and proposed Contention 16.

⁴ Severity Level IV violation are the least significant for which NOVs are issued. 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.*

⁵ Detroit Edison Reply to a Notice of Violation 05200033/2009-201-01, 02, and 03 (Nov. 9, 2009), ADAMS Accession No. ML093160318.

⁶ Applicant's Response to Proposed Supplemental Contention (Dec. 1, 2009); NRC Staff Answer to Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Dec. 1, 2009) (First Staff Answer).

⁷ Intervenor's Combined Reply in Support of Supplemental Petition (Dec. 8, 2009) (Intervenor's Reply).

⁸ NRC Staff Motion for Leave to Reply and Reply (Dec. 18, 2009) (Staff Reply).

⁹ Licensing Board Order (Granting Motion for Leave to Reply) (Dec. 23, 2009).

DISCUSSION

I. LEGAL REQUIREMENTS FOR CONTENTION ADMISSIBILITY AND FOR NEW OR UNTIMELY CONTENTIONS

NRC regulations governing contention pleading, including the requirements for filing new or untimely contentions, are set forth in the First Staff Answer filed in connection with proposed Contention 15 and need not be repeated here. See First Staff Answer at 3-5. The provisions of 10 C.F.R. § 2.309(f)(1) and (2) are relevant to the discussion that follows.

II. PROPOSED CONTENTION 16

Proposed Contention 16 states the following:

General Electric-Hitachi Nuclear Energy (“GEH”), the partnership which is designing the Economic Simplified Boiling Water Reactor (“ESBWR”) (the planned reactor design for Fermi 3) is alleged to have violated NRC quality assurance requirements. If proven, these violations would have implications for the Design Control Document (“DCD”) for the ESBWR which is incorporated by reference into the Combined Operating License Application (“COLA”) for Fermi 3.

The GEH quality assurance violations and any remedy which might be ordered will have to be addressed and encompasses not only by GEH, but ultimately by the Quality Assurance Program which is mandated for Fermi 3’s owner, Detroit Edison (“DTE”), the Applicant, to establish. The NRC Staff determined in mid-2009 that the quality assurance oversight of Fermi 3 planning was not governed by a DTE program meeting the requirements [sic] 10 C.F.R. Part 50, Appendix B and that those staff concerns brought into question the quality of the overall Fermi 3 COLA. DTE will have to see that the quality assurance specifications set by GEH are followed in the planning and construction of Fermi 3.

A recent NRC Office of the Inspector-General (“OIG”) report has identified inadequacies in the quality assurance-related management and oversight, and potentially-inadequate translations of foreign-language engineering reports and communications into English for use in the NRC Staff’s new reactor program. Consequently, the OIG believes that “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.”

Quality assurance problems, some of them major, are cropping up in this array of manufacturer, utility and regulator around the ESBWR reactor design. Consequently, Petitioners request and move the ASLB and Commission to suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved, the quality assurance program design problems at DTE have been corrected, and the NRC Staff Office of New Reactors staff charged with review and approval of new COLAs have been certified by an objective overseer to having improved quality assurance review of COLAs to the

expectations of the OIG and NRC regulations, namely 10 CFR Part 50, Appendix B.

Second Supplemental Petition at 2-3. The Intervenors claim that this new contention is based on a second NOV issued to GEH (GEH NOV) on November 12, 2009.¹⁰ This NOV alleged three QA violations, all of which were Severity Level IV. GEH NOV, Enclosure 1 at 1-3. In proposed Contention 16, the Intervenors argue for admission of a wide-ranging QA contention that extends to the ESBWR design,¹¹ which is incorporated by reference into the Fermi 3 COLA. Second Supplemental Petition at 14-15.

In their discussion of proposed Contention 16, the Intervenors summarize the three violations cited in the GEH NOV. *Id.* at 3-4. According to the Intervenors, the first of these violations is that “the GEH QA program has failed to provide procedural guidance for managing its centralized computer database” and “GEH is currently using multiple databases for which no management procedure exists.” *Id.* at 3. The Intervenors omit from their summary the information that the databases in question are those that track employee training, not all computer databases related to the ESBWR design. See GEH NOV, Enclosure 1 at 1. The Intervenors’ summaries of the other two violations, one related to procedures for receipt of calculations from suppliers and one related to proper classification of a corrective action request (CAR), are more accurate reflections of the violations actually cited in the GEH NOV. See Second Supplemental Petition at 3-4; GEH NOV, Enclosure 1 at 2-3.

The Intervenors argue that these three violations are significant because GEH has a history of prior QA problems, and they cite to a prior NOV, sent to GEH on March 25, 2009, in support of this claim. Second Supplemental Petition at 4-5. This earlier NOV included six QA-

¹⁰ NRC Inspection Report 05200010/2009-201 and Notice of Violation (Nov. 12, 2009), ADAMS Accession No. ML0930904400.

¹¹ The Intervenors also challenged the ESBWR design in proposed Contention 15. See First Supplemental Petition at 7-8. The NRC Staff opposed this portion of proposed Contention 15 because it was unsupported by the DTE NOV. First Staff Answer at 17-18.

related violations, all of which were Severity Level IV violations.¹² The Intervenors acknowledge that all of these violations have since been resolved. Second Supplemental Petition at 5.

The Intervenors continue with arguments apparently intended to link the GEH NOV with proposed Contention 15, which has already been briefed fully in this proceeding. The Intervenors make extensive reference to the arguments and documents they submitted in support of that contention, and they reaffirm the arguments they presented in the Intervenors' Reply, which was based in large part on the Staff's June 2009 e-mails. Second Supplemental Petition at 5-9. The Intervenors also repeat arguments related to an NRC Office of Inspector General (OIG) report that they mentioned in their Contention 15 Reply. *Id.* at 9-10.

The Intervenors argue that proposed Contention 16 should be admitted and held in abeyance pending resolution of the ESBWR rulemaking. *Id.* at 13-15. In the alternative, the Intervenors argue that proposed Contention 16 should be admitted for litigation in this licensing proceeding on the Fermi 3 COLA. *Id.* at 15-19. According to the Intervenors, the Commission's policy of dismissing contentions that are or are about to become the subject of rulemaking does not apply to design certification rulemakings, and the Board may therefore proceed with the litigation of this contention. *Id.* at 17-19.

III. STAFF RESPONSE TO PROPOSED CONTENTION 16

Proposed Contention 16 and the Intervenors' arguments in support of that contention include a significant amount of information that simply repeats material already submitted as part of proposed Contention 15. See Second Supplemental Petition at 5-11; Intervenors' Reply at 3-5, 6-7. The Intervenors claim to base proposed Contention 16 on the issuance of the GEH NOV on November 12, 2009; however, they fail to show how arguments they have already advanced in support of their Contention 15 are related to any specific issue that may be

¹² Nuclear Regulatory Commission Inspection Report 05200010/2008-201, Notice of Violation to General Electric-Hitachi Nuclear Energy (Mar. 25, 2009), ADAMS Accession No. ML0907904730.

supported by the GEH NOV. To the extent that the Intervenors intend arguments originally submitted in support of Contention 15 to also provide support for the admission of Contention 16, the Staff has provided its substantive response to this material as part of its pleadings related to proposed Contention 15 and refers the Board to those documents for a full discussion. See First Staff Answer at 7-19; Staff Reply at 2-12.

Briefly, the Staff argued that proposed Contention 15 as originally pled was inadmissible because the Intervenors misstated the nature of the violations actually cited in the DTE NOV and therefore proceeded to raise a number of issues that the document did not support and/or that were outside the scope of this proceeding. See First Staff Answer at 9. Proposed contention 15 as originally pled therefore failed to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1). *Id.* at 16. The Staff also argued that proposed Contention 15 as modified in the Intervenors' Reply suffered from the same pleading defects as the original contention, was an untimely attempt to file a new or amended contention based on information other than the NOV, was based on predecisional documents that do not represent the current NRC Staff position, and was an impermissible challenge to the Staff's review. Staff Reply at 4-11.

Because these issues have already been discussed extensively, this response to proposed Contention 16 focuses on those portions of proposed Contention 16 that are new, specifically those related to the GEH NOV and the ESBWR design. These portions of proposed Contention 16 are inadmissible because they are an attempt to resurrect a previously rejected contention, because they fail to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1), and because the relief the Intervenors request is outside the scope of this licensing proceeding. For these reasons, proposed Contention 16 must be rejected.

1. *Portions of Contention 16 That Request Immediate Adjudication of Contention 16 Represent an Attempt to Relitigate Contention 4, Which Was Rejected*

A portion of proposed Contention 16 argues for immediate adjudication of a QA contention challenging the ESBWR design. Second Supplemental Petition at 15-19. According

to the Intervenor, it is improper to proceed with a licensing proceeding on a COLA in the absence of a final rulemaking which certifies the referenced design. *Id.* at 17,19. The Intervenor argues that “an application containing reference to an in-progress reactor design scheme cannot by any definition be considered ‘complete’ so long as there is no reactor design certification rule” and “[t]o permit the COLA adjudication to proceed in light of this lack of completion mocks the NRC’s requirements.” *Id.* at 17. The Intervenor requests that the COLA be subject to a hearing on all issues, including those related to the ESBWR design, or that the COLA adjudication be suspended until the ESBWR rulemaking is complete. *Id.*

This portion of proposed Contention 16 repeats issues and arguments raised in pleadings related to Contention 4, a contention that was submitted by the Intervenor along with their initial Petition and subsequently rejected by the Board. *See Fermi*, LBP-09-16, 70 NRC at ___ (slip op. at 39-40). The NRC Staff’s arguments related to these issues were presented in its response to Contention 4.¹³ The NRC Staff opposed admission of Contention 4 because it challenged NRC regulations that allow a COL applicant to reference a design for which a design certification rulemaking is in progress and because it violated Commission policy and case law. *Id.*

Here, the Intervenor argues that NRC’s policy of not accepting contentions that are or are about to become the subject of general rulemaking should not apply to design certification rulemakings. Second Supplemental Petition at 17-18. According to the Intervenor, the case law barring contentions that are subject to pending rulemakings involved subject matter other than design certifications and cannot be extended to cover design certifications. *Id.* For this reason, the Intervenor argues that only contentions that challenge a final design certification rule can be barred in an adjudicatory proceeding. *Id.* at 18.

¹³ NRC Staff Answer to Petition for Leave to Intervene in Combined Operating License Proceeding and Request for Adjudication Hearing (Apr. 3, 2009) at 38-46.

However, both Commission policy and recent case law contradict the Intervenor's position.¹⁴ In setting out Commission policy on the very issue the Intervenor raises here – how to handle contentions in a hearing on a COLA referencing a DCD for which a design certification rulemaking is in progress – the Commission clearly stated that such contentions, if otherwise admissible, should be referred for resolution in the design certification rulemaking and held in abeyance in the COLA licensing proceeding until the design certification rulemaking is complete. 73 Fed. Reg. at 20,972. In so stating, the Commission explicitly applied prior case law on contentions challenging ongoing rulemakings to design certifications. *Id.* The Commission has affirmed this policy in a number of orders related to COL proceedings, including the first Commission order issued in January 2010. *Summer*, CLI-10-01, 71 NRC ___ (slip op. at 10-11 & nn.43-45). The Intervenor provides no argument or authority explaining why their reading of the earlier case law is correct. Because the arguments the Intervenor makes here have been rejected both by the Commission and by the Licensing Board in this proceeding, this portion of proposed Contention 16 must be rejected.

2. *Proposed Contention 16 Does Not Meet the Pleading Requirements of 10 C.F.R. § 2.309(f)(1) and Therefore Must Be Rejected, Not Held in Abeyance*

As an alternative to immediate adjudication of proposed Contention 16, the Intervenor proposes admitting the contention and holding it in abeyance pending resolution of the ESBWR rulemaking. Second Supplemental Petition at 13-15. Under Commission policy, this would be the correct procedure for a contention challenging the ESBWR DCD that is otherwise admissible under the contention pleading rules of 10 C.F.R. § 2.309(f)(1). 73 Fed. Reg. at

¹⁴ See Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963 (Apr. 17, 2008); *South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3)*, CLI-10-01, 71 NRC ___ (slip op. at 10-11) (Jan. 7, 2010); *Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 1 and 2)*, CLI-08-15, 68 NRC 1, 4 (2008);

20,972. However, proposed Contention 16 fails to meet these pleading requirements and therefore must be rejected outright rather than held in abeyance.

Proposed Contention 16 includes no specific challenge to the ESBWR DCD and raises no material issue that is susceptible to resolution at an evidentiary hearing.¹⁵ The Intervenors summarize the violations cited in the GEH NOV, although they mischaracterize the first of these as noted above, but nowhere do they state any specific issue they wish to litigate in this proceeding. By failing to do so, the Intervenors violate the first of the contention pleading rules in 10 C.F.R. § 2.309(f)(1), the requirement for “a specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.309(f)(1)(i). Because no issue susceptible to resolution at hearing is specified, it cannot be determined whether the issues of interest to the Intervenors are within the scope of the proceeding or material to the findings the NRC must make to support any licensing decision, or whether they represent a genuine dispute with the Applicant on a material issue. Proposed Contention 16 therefore fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

The Intervenors appear to be using the GEH NOV as the supporting material for proposed Contention 16. See 10 C.F.R. § 2.309(f)(1)(v). As the NRC Staff discussed in its Answer to proposed Contention 15, the use of Staff documents such as Requests for Additional Information (RAIs) and NOV's in contention pleading may be appropriate in some circumstances. First Staff Answer at 12-13. Citation to an NOV is not improper, provided a petitioner who uses an NOV in support of a contention explains how the violations cited in the NOV raise questions *about the application under consideration* and how the Staff's NOV is related to the specific issues the petitioner wishes to litigate. *Id.* at 13. Petitioners must “make

¹⁵ Because proposed Contention 16 blends issues related to the ESBWR design and issues related to the Fermi 3 COLA, it is not always clear which document the Intervenors intend to challenge. However, holding contentions in abeyance is the procedure applicable to admissible contentions related to ongoing design certifications and not to contentions challenging COLAs. This discussion is therefore limited to the former.

the issue of concern their own” by developing “a fact-based argument that actually and specifically challenges the application.”¹⁶ The Intervenor has included no such argument here, and proposed Contention 16 therefore fails to meet the contention support requirement of 10 C.F.R. § 2.309(f)(1)(v).

For all of these reasons, proposed Contention 16 does not meet the contention pleading requirements of 10 C.F.R. § 2.309(f)(1) and is inadmissible. Because it is not admissible, holding it in abeyance would be improper, and the contention should be rejected outright.

3. *The Relief Requested by the Intervenor is Unavailable in this Proceeding*

Rather than using the GEH NOV to support a contention challenging the ESBWR DCD, the Intervenor

request and move the ASLB and Commission to suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved, the quality assurance program design problems at DTE have been corrected, and the NRC Staff Office of New Reactors staff charged with review and approval of new COLAs have been certified by an objective overseer to having improved quality assurance review of COLAs to the expectations of the OIG and NRC regulations, namely 10 CFR Part 50, Appendix B.

Second Supplemental Petition at 3.

In their Reply to proposed Contention 15, the Intervenor requested similar relief from the Board. Intervenor's Reply at 14. In its response to that pleading, the Staff noted that the nature of this request is not entirely clear in the context of a licensing proceeding. Staff Reply at 5. To the extent that it is a request for the NRC to terminate review of the Fermi 3 COLA currently under consideration and to require DTE to resubmit a different application, the Intervenor's requested relief is not available in this proceeding. *Id.* In effect, this would be a request to reverse the Staff's decision to docket the application, and the Commission has stated that the Staff's decision to docket an application and commence technical review is not

¹⁶ *Id.*, citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341 (1999).

challengeable in an adjudicatory proceeding.¹⁷ Requests of this nature are therefore outside the scope of this proceeding, and should not be considered by the Board.

Introduction of the ESBWR design work currently being conducted by GEH raises another possible interpretation, namely that the Intervenors are also requesting that design work by GEH also be suspended pending resolution of any QA issues. The ESBWR design is not currently before the Board, and any such request – to the extent one is intended – would also be outside the scope of this proceeding.

The Intervenors also request that design work be suspended until “the NRC Staff Office of New Reactors staff charged with review and approval of new COLAs have been certified by an objective overseer to having improved quality assurance review of COLAs” Second Supplemental Petition at 3. Where safety-related matters are concerned, challenges to the NRC’s review process are outside the scope of NRC licensing proceedings.¹⁸ Intervenors must show that their contentions “show that a genuine dispute exists *with the applicant/licensee* on a material issue of law or fact,” 10 C.F.R. § 2.309(f)(vi) (emphasis added), and contentions challenging the Staff’s review are generally inadmissible for this reason alone.¹⁹ For this reason, portions of proposed Contention 16 urging “objective” supervision of the ongoing Staff review of the Fermi 3 COLA (and/or ESBWR design) are outside the scope of this proceeding as well.

If, rather than a suspension of work by DTE, GEH, or the Staff, the Intervenors are instead arguing for specific changes to the Fermi 3 COLA or the ESBWR DCD, they have failed

¹⁷ *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998). See also *Shearon Harris*, CLI-08-15, 68 NRC at 3-4.

¹⁸ See Staff Reply at 4, citing *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476-77 (2008); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22 (1995). See also *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

¹⁹ *Oyster Creek*, CLI-08-23, 68 NRC at 477; *Diablo Canyon*, LBP-03-11, 58 NRC at 66 & n.10. See also *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983).

to specify what those changes are or why the GEH NOV supports their claims. As discussed in Section III.2 above, this failure renders proposed Contention 16 inadmissible under 10 C.F.R. § 2.309(f)(1).

4. *Because No Issue Supported by the GEH NOV is Specified, Proposed Contention 16 is Untimely*

The Licensing Board has previously specified that new contentions filed within 30 days of the availability of new information are to be considered timely under 10 C.F.R.

§ 2.309(f)(2)(iii), provided the information is materially different from information that was previously available.²⁰ The Intervenors argue that proposed Contention 16 is timely because it was filed within 30 days of the publication of the GEH NOV. Second Supplemental Petition at 11-12.

Although the GEH NOV itself is new, as discussed above, the Intervenors have not raised any specific challenge to either the ESBWR design or the Fermi 3 COLA that they allege is supported by the GEH NOV. Rather, they have simply used the publication of the GEH NOV as an opportunity to add additional material to their previous pleadings related to proposed Contention 15, and to attempt to revisit a contention that the Board rejected at an earlier stage of this proceeding. Thus, proposed Contention 16 should also be rejected as failing to meet the requirements for a new or amended contention.

For a contention to satisfy the new or amended contention requirements of 10 C.F.R. § 2.309(f)(2), that contention must be based on information that was not previously available and that is materially different from information that was previously available. See 10 C.F.R. § 2.309(f)(2)(i)-(ii). Other Licensing Boards have stated that “a central element” in any decision on the admissibility of a new contention under 10 C.F.R. § 2.309(f)(2) “is a determination whether the information provided in support of the contention was, in fact, the appropriate

²⁰ Licensing Board Order (Establishing schedule and procedures to govern further proceedings) (July 31, 2009) (Scheduling Order).

'trigger' for the contention."²¹ In filing proposed Contention 16, the Intervenor's have not linked the GEH NOV to any new issue suitable for resolution in this licensing proceeding, but have instead used the occasion of its issuance to revisit other contentions and expand on arguments previously submitted. For this reason, issuance of the GEH NOV is not an appropriate "trigger" for this contention as pled, and proposed Contention 16 is not timely.

CONCLUSION

For the reasons set forth above, proposed Contention 16 fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1) and (2). It is therefore inadmissible. The Intervenor's request to suspend design work related to the ESBWR is unsupported and beyond the scope of this licensing proceeding. It should therefore be denied.

Respectfully Submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 8th day of January, 2010

²¹ *Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), Memorandum and Order (Ruling on Request to Admit New Contention) (Apr. 29, 2009) at 6 (unpublished).

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO SECOND SUPPLEMENTAL PETITION FOR ADMISSION OF A NEWLY-DISCOVERED CONTENTION, AND FOR PARTIAL SUSPENSION OF COLA ADJUDICATION, have been served upon the following persons by Electronic Information Exchange and electronic mail this 8th day of January, 2010:

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