January 11, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S RESPONSE TO INTERVENORS' REPLY

INTRODUCTION

Pursuant to the Licensing Board Order (Granting Motion for Leave To Reply), dated December 23, 2009, the Detroit Edison Company hereby responds to those portions of the Intervenors' Reply[1] that include new arguments and new supporting information not included in the original submittal for proposed Contention 15.

DISCUSSION

In a response to the "NRC Staff Motion For Leave To Reply To Intervenors' Combined Reply in Support of Supplemental Petition," dated December 18, 2009 ("NRC Motion"), Detroit Edison explained that the new arguments and new supporting documents included in the Intervenors' Reply, including the e-mails among members of the NRC Staff, were untimely. Detroit Edison further noted that the Commission's regulations do not allow the use of reply briefs to provide, for the first time, the necessary threshold support for contentions.

[1] *See* "Intervenors' Combined Reply in Support of Supplemental Petition For Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication," dated December 8, 2009 ("Intervenor' Reply"); "Declaration of Arnold Gundersen Supporting Supplemental Petition of Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program," dated December 8, 2009 ("Gundersen Decl.").

We do not repeat those arguments here. Instead, we focus on the failure of the new information in the Intervenors' Reply and the Mr. Gundersen's declaration to support the admissibility of Contention 15.

First, Mr. Gundersen argues that various e-mails among the NRC Staff call into question the completeness and quality of the overall application. *See* Gundersen Decl. at ¶13-¶28. However, the e-mails simply describe ongoing NRC Staff efforts to ascertain the status of the Fermi 3 QA program. Neither the NRC Staff e-mails, the Notice of Violation, nor Mr. Gundersen provide any information to call into question the overall quality of the COL application. The Intervenors' concerns relate to the potential for future, unspecified problems, but the Intervenors do not identify any particular inadequacy or problem in the application itself. Speculation cannot form the basis for an admissible contention. *Cf. Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002).

The Intervenors also argue that e-mails demonstrate the violation is continuing. Intervenor Reply at 2-5; Gundersen Decl. at ¶28. However, neither the Notice of Violation (the sole initial basis for Contention 15) nor the NRC Staff e-mails (the new basis for Contention 15) support this conclusion. The e-mails among NRC Staff reflect preliminary views based on the information available to the NRC at the time. The NRC Staff ultimately concluded that the violation was limited to the period of time from March 2007, when the initial contract was placed with Black & Veatch ("B&V") for the conduct of COL activities, until February 2008, when Detroit Edison began using the Fermi 3 Nuclear Development Quality Assurance Program

Description ("ND QAPD") and implementing procedures.[2] Thus, the NRC Staff — which identified the violation — concluded that the violation occurred wholly in the past. There is no support for an ongoing dispute on the compliance issues, just as there is no support for a dispute with the COL application. In sum, there is no admissible issue to litigate.

Further, by insisting, without supporting evidence, that the violation is ongoing (*see* Intervenors' Reply at 4-5), the Intervenors are attempting to expand Contention 15 to include the adequacy of the NRC Staff's inspection and oversight activities. Enforcement issues, however, are outside the scope of this COL proceeding. The adequacy of the license application, not the adequacy of NRC Staff inspection and oversight, is the safety issue in any licensing proceeding. *Cf*. 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). NRC Staff activities, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of NRC Staff management and the Commission itself, not Licensing Boards. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004). Licensing proceedings are not the forum to monitor licensee performance or to supervise, direct, or second-guess NRC Staff inspections and enforcement activity. The Licensing Boards' role is to consider safety, environmental, or legal issues raised by the license application. *Id*. The proper forum for raising concerns with the adequacy of NRC Staff enforcement is a petition under 10 C.F.R. § 2.206. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 77-78 (1992).

In his declaration, Mr. Gundersen also introduces, for the first time, arguments relating to Nuclear Energy Institute ("NEI") guidance on Quality Assurance Programs.

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[2] *See* Letter from Richard Rasmussen, NRC, to Jack Davis, The Detroit Edison Company, "NRC Inspection Report 05200033/2009-201 and Notice of Violation to Detroit Edison Company," dated October 5, 2009 (ADAMS Accession No. ML0927400640) ("Notice of Violation").

Gundersen Decl. at ¶39-¶60. Mr. Gundersen acknowledges that the NEI QAPD template allows applicants to use vendor QA programs, but implies that Detroit Edison cannot rely on information developed by its COL contractor (B&V). *Id*. at ¶58. However, Mr. Gundersen does not provide any examples of allegedly deficient work or demonstrate a concrete safety issue in the Fermi 3 COL application. A contention must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment to be admissible.[3] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004). Mr. Gundersen's declaration does not demonstrate a basis for any relief in the proceeding and therefore does not support the admissibility of Contention 15.

Mr. Gundersen also argues that there are differences between the NEI QA Program Description (and the role of the Quality Assurance Program Manager) and the Fermi 3 New Plant Oversight Manager. Gundersen Decl. at ¶59-¶62. Beyond the fact that there is no regulatory requirement that DTE follow the NEI template (much less follow it verbatim), Mr. Gundersen is highlighting a distinction without a difference in the context of the COL application. The NEI template identifies two QA positions — the Quality Assurance Manager and the Nuclear Development Quality Assurance Program Manager — while the Fermi 3 QAPD identifies a single QA position (the New Plant Oversight Manager). *Compare* NEI-06-14, Rev. 7, at 6 (Section 1.5.2) and Fermi 3 Quality Assurance Program Description at 9 (Section 1.4.1). Both the NEI template and the Fermi 3 QAPD explain that QA personnel are "responsible for developing and maintaining the [ ] QAPD, evaluating compliance to the programs, and managing

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

QA resources." And, in both the NEI template and the Fermi QAPD, QA personnel report to senior licensee management — the Senior Nuclear Development Officer in the NEI template and "the executive in charge of the major enterprise projects (MEP) organization" for Fermi 3. Mr. Gundersen's declaration simply fails to identify a genuine, litigable dispute with the application on a material issue.

At bottom, the Intervenors have not identified any apparent, tangible impacts on the quality of the Fermi 3 COL application or raised any issues that relate to the overall licensing decision before the Licensing Board. In the absence of a dispute with the COL application with respect to either compliance with a specific licensing requirement or an alleged safety issue, there is no issue to litigate and no relief that the Licensing Board could provide.

CONCLUSION

For the above reasons, the Intervenors' proposed supplemental Contention 15 should not be admitted for hearing.

Respectfully submitted,

/s/ signed electronically by

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Dated at Washington, District of Columbia
this 11th day of January 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO INTERVENORS' REPLY" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 11th day of January 2010, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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