January 15, 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' MOTION FOR LEAVE TO FILE SURREPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Detroit Edison Company hereby responds to "Intervenors' Motion for Leave to File Surreply in Support of Supplemental Petition for Admission of Newly-Discovered Contention," dated January 4, 2010 ("Motion for Surreply").[1] For the reasons discussed below, Detroit Edison opposes the motion.

BACKGROUND

On November 6, 2009, the Intervenors filed a "Supplemental Petition of [Intervenors] for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication" ("Late-Filed Contention"). Both the NRC Staff and Detroit Edison responded, opposing admission of the Late-Filed Contention (Contention 15). *See* "NRC Staff Answer to Supplemental Petition for Admission of a Newly-Discovered Contention, and For Partial Suspension of COLA Adjudication," dated December 2, 2009, and "Applicant's Response to Proposed Supplemental Contention," dated December 1, 2009. The Intervenors

[1] The Intervenors also attached their surreply. *See* "Intervenors' Surrreply in Support of Supplemental Petition for Admission of a Newly-Discovered Contention and for Partial Suspension of COLA Adjudication," dated January 4, 2010 ("Intervenors' Surreply").

replied to the Detroit Edison and NRC Staff responses on December 8, 2009. *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 ("Intervenors' 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.").

Ordinarily, no further reply would be allowed. *See* 10 C.F.R. § 2.309(h)(3). However, on December 18, 2009, the NRC Staff filed a motion requesting an opportunity to reply to the Intervenors' December 8, 2009 reply. "NRC Staff Motion For Leave To Reply To Intervenors' Combined Reply in Support of Supplemental Petition," dated December 18, 2009 ("NRC Motion"); "NRC Staff Reply to Intervenors' Combined Reply In Support of Supplemental Petition," dated December 18, 2009 ("NRC Reply"). The Licensing Board granted the NRC Staff motion in an Order (Granting Motion for Leave To Reply), dated December 23, 2009. As also permitted in the Order, Detroit Edison filed a response. *See* "Applicant's Response to Intervenors' Reply," dated January 11, 2010. The Intervenors filed their Motion for Surreply on January 4, 2010.

DISCUSSION

For the reasons discussed below, the Intervenors motion for leave to file a surreply should be denied.

First, the Board, in its December 23, 2009 Order, already decided that, beyond the limited reply opportunity granted to Detroit Edison, "[n]o additional filings by any party concerning Contention 15 will be permitted." Order at 2. The Intervenors' motion is directly contrary to explicit Licensing Board direction. Moreover, to the extent that the Intervenors'

motion could be considered a motion for reconsideration of the Licensing Board's December 23, 2009 Order, the Intervenors have not made (or even attempted to make) the necessary showing. *See* 10 C.F.R. § 2.323(e) (requiring a "showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.").

Second, the Intervenors assert as a primary argument in support of their motion that there is a "grave inconsistency" between the quality assurance program described in the application and Detroit Edison's implementation of the quality assurance program (*i.e.*, a violation). Motion for Surreply at 3-4. But, this is not a new argument. The Notice of Violation ("NOV") has always been the purported basis for the proposed contention. The Intervenors have argued since the proposed contention that the NOV supports their assertion, while the NRC Staff (and Detroit Edison) have noted that the NOV on its face does not support that proposition. Thus, this is not a new issue that would warrant further pleadings.

Third, the Intervenors assert, as a basis for the motion, that there is "unique controversy over [the] timeliness of Contention 15" that Petitioners did not anticipate would be argued by the NRC Staff. Motion for Surreply at 4. However, the untimeliness of proposed Contention 15 was addressed by both the NRC Staff and Detroit Edison in their answers to the proposed Contention, dated December 2 and December 1, 2009, respectively. And, more importantly, the Intervenors previously responded to the NRC Staff and Applicant on the very issue of timeliness. *See* Intervenors' Reply at 8-11. Intervenors are not entitled to unlimited opportunities to respond to subsequent arguments particularly where, as here, the NRC Staff Reply was necessitated by the Intervenors' own failure to follow the Commission's Rules of Practice. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2),

LBP-82-89, 16 NRC 1355, 1357 (1982) (If an intervenor must make new factual or legal arguments in a reply, it should clearly identify the new material and explain why it did not anticipate the need for the material in the initial filing. If the explanation is satisfactory, the new material may be considered, but the other parties should be permitted to respond.). Thus, even if the Licensing Board were to consider "the equities" as urged by the Intervenors (Motion for Surreply at 4), those equities would not favor permitting the Intervenors' surreply.

Finally, even a cursory look at the attached surreply reveals that the Intervenors are not addressing the purported basis for the motion (*i.e.*, that the NRC Staff made new, unanticipated arguments regarding timeliness). Instead, the proffered surreply merely repeats and reinforces arguments made in the Intervenors' December 8, 2009 Reply. *Compare* Intervenors Reply at 9 (explaining that the Intervenors "prudently waylaid any plans of a formal filing to ascertain what the outcome of the regulatory involvement of the NRC Staff would be") *and* Intervenors' Surreply at 5 (stating that the "decision to file only after the NOV was lodged in early October, then, was quite prudent; only then could the Petitioners learn, for the first very first time, that the NRC had limited its QA enforcement to the time period February 2008 and before.").[2] The Intervenors have addressed the timeliness of the proposed Contention 15 on several occasions.[3] There is nothing more to be said that has not already been said.

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[2] In any event, the Intervenors' justification for the late-filing — that they were waiting for the NRC to take enforcement action — in fact undermines the admissibility of proposed Contention 15. As noted previously, 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). Moreover, the Intervenors' own definition of the relief they seek begs the question of what relief could be granted in this licensing proceeding. *See* Intervenors' Surreply at 8 ("Petitioners seek, not that the COLA be stopped, but that DTE comply with statutory federal regulations and implement a QA program.").

[3] Likewise, the Intervenors have repeatedly (and mistakenly) asserted that the violations are ongoing. *See* Late-Filed Contention at 8 ("[T]o date, DTE can show zero QA

At bottom, the Intervenors have had multiple opportunities to address the timeliness and admissibility of proposed Contention 15. Permitting additional filings is unlikely to produce any new information that would aid the Licensing Board and would not materially advance resolution of the admissibility of the proposed contention.

CONCLUSION

For the above reasons, the Licensing Board should deny the Intervenors' motion for leave to file a surreply.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 15th day of January 2010

Compliance"); Intervenors' Reply at 2 ("[T]he claimed quality assurance violations are continuing in nature"); Intervenors' Surreply at 6-7.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO INTERVENORS' MOTION FOR LEAVE TO FILE SURREPLY" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 15th 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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