

June 1, 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' MEMORANDUM IN OPPOSITION
TO 'APPLICANT'S MOTION FOR SUMMARY DISPOSITION
OF CONTENTION 3'**

Now come the intervening Petitioners ("Petitioners") in this case, by and through counsel, and set forth their opposition to "Applicant's Motion for Summary Disposition of Contention 3."

Intervenors' Contention 3 concerns low-level radioactive waste and is deemed by the Licensing Board to be a "contention of omission." Where a contention alleges the omission of particular information or an issue from an application, and the information is supplied later by the applicant, the contention is moot. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006).

Intervenors believe that the omitted information has not been fully supplied here. As the attached "Declaration of Diane D'Arrigo" explains, which is explicated in the "Statement of Material Facts in Support of Intervenors' Opposition to 'Applicant's Motion for Summary Disposition of Contention 3,'" these genuine issues of material fact warrant denial of summary disposition to DTE at this point:

> The proposed COLA changes ("content") are tentative and nonfinal.

> There are dozens of diagrams and illustrations of the contemplated radwaste facility which apparently have been redacted from the proposed plan contained in Attachment 1 to the February 26, 2010 DTE-NRC letter on which the Motion is predicated.

> The omission is still present for waste that would be generated beyond the approximate 10 years that the reconfigured radwaste building would be used. DTE says it will take further action if needed according to guidance, but does not specify what action will be taken, and if additional construction is to be carried out, where the location would be (other than on already disturbed land).

> There is no disposal available for Class B and C waste and that the possibility of such cannot be relied upon for Fermi 3. Third party processors have the same limitations that DTE has with regard to disposal. They have no disposal for B or C waste and can return it to the original generator after a year at their facilities. Thus even if the waste goes to a third party, it can and will come back to Fermi, meaning that DTE will still have to provide for onsite storage in the absence of disposal.

> Although the claim is made in the 2/16/10 letter from DTE to NRC in response to the RAIs that storage is possible for Class B and C waste in the radwaste building for 10 years, storage after radwaste building is filled will require additional storage for decades. It is to be expected that there will be no permanent disposal because there is no disposal site open to out-of-compact waste and the only possible site (Waste Control Specialists in Texas) has license and capacity limits that will fill it before Fermi 3 waste can gain access. The 30-year history of the US search for "low-level" disposal sites has not resulted in one new operating facility. It is unrealistic to expect one to open that will take Fermi 3 waste.

> Studsvik, a third party processor in Tennessee, does not have access for disposal of the Class B and C waste it processes, and combined with its one-year storage limit, cannot be relied upon for permanent disposal of the waste. Further, the storage at WCS has limits that will be exceeded before Fermi could gain access.

The burden of proof here with respect to summary disposition is upon DTE, which must demonstrate the absence of any genuine issue of material fact. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 102 (1993); *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982), citing *Adickes v. Kress and Co.*, 398 U.S. 144, 157 (1970). Summary disposition is not appropriate when the movant fails to carry

its burden of setting forth all material facts pertaining to its summary disposition motion. *Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 466 (1995). Thus, if a movant fails to make the requisite showing, its motion may be denied even in the absence of any response by the proponent of a contention. *La Crosse, supra*, 16 NRC at 519.

The moving party fails to meet its burden when the filings demonstrate the existence of a genuine material fact, when the evidence introduced does not show that the nonmoving party's position is a sham, when the matters presented fail to foreclose the possibility of a factual dispute, or when there is an issue as to the credibility of the moving party's evidentiary material. *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 122 (2006).

A summary disposition nonmovant is entitled to the favorable inferences that may be drawn from any evidence submitted. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd*, CLI-94-11, 40 NRC 55 (1994). *Vermont Yankee*, LBP-06-5, 63 NRC at 121-22 (citing *Advanced Med. Sys., Inc., supra*). This authority, however, does not relieve the nonmovant from the responsibility, in the face of well-pled, undisputed material facts, of providing something more than suspicions or bald assertions as the basis for any purported material factual disputes. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

Intervenors have described a continuing omission here. The information provided by the Applicant does not describe a plan for LLRW beyond an estimated decade, and anything passed off as a plan beyond that period is tautological, in light of the circumstances recognized in the narrowed contention as edited and accepted by the Licensing Board (*viz.*, "the uncertainty whether a new disposal facility will become available during the license term"). Consequently, DTE's Motion should be denied.

Respectfully,

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June 1, 2010

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NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of:) Docket No. 52-033
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Unit 3))

**STATEMENT OF MATERIAL FACTS IN SUPPORT
OF INTERVENORS' OPPOSITION TO 'APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF CONTENTION 3'**

Now come the Intervenors herein, by and through counsel, and set forth material facts in support of their opposition to "Ap-plicant's Motion for Summary disposition of Contention 3."

1. Attachment 1 to the letter from Peter W. Smith, Director of Nuclear Development for DTE to the NRC, dated February 16, 2010 ("Detroit Edison Company Response to NRC FSAR Request for Additional Information Letter No. 4 and ER Request for Additional Information Letter No. 2", hereinafter referred to as "2/16/10 letter") sets forth proposed or suggested changes to COLA Part 3- Environmental Report ("ER") and to COLA Part 2- Final Safety Analysis Report ("FSAR") of the Combined Operating License Application ("COLA") for Fermi 3. At p. 5 of Attachment 1 to the 2/16/10 letter, DTE refers to "proposed changes to the Fermi 3 COLA, Part 2, Part 3, Part 7, and Part 10." At p. 6 of Attachment 1, DTE states:

The following markup represents how Detroit Edison intends to reflect this RAI response in the next submittal of the Fermi 3 COLA Revision 2. However, the same COLA content may be impacted by revisions to the ESBWR DCD, responses to other COLA RAIs, other COLA changes, plant design changes, editorial or typographical corrections, etc. As a result, the final COLA content that appears in a future submittal may be different than presented here.

There is not a binding commitment to actually implement the plans provided in the responses to these RAIs.

2. On pp. 1-12 through 1-17 of Attachment 1 there are references to diagrams of the proposed radwaste building purportedly to be reconfigured under certain circumstances at the Fermi 3 site to

accommodate Class B and C "low-level" radioactive waste generated at the plant. Those diagrams including INSERT 2 have been completely deleted from the publicly-available version of Attachment 1.

3. Between pp. 9-46 and 11-10 of Attachment 1 are five redacted pages of "Radwaste Building Fire Protection Zones" from which all information has been deleted.

4. Between Table 12.3-8R and p. 3-39 there are 12 missing/redacted pages of "Radwaste Building Access and Egress Routes."

5. In the absence of the redacted information, the plan for managing Class B and C nuclear waste is still effectively missing.

6. In addition, the omission is still present for waste that would be generated beyond the approximate 10 years that the reconfigured radwaste building would be used. DTE is simply stating in a letter that it will take further action if needed according to guidance, but does not specify what action will be taken, and if additional construction is to be carried out, where the location would be (other than on already disturbed land).

7. DTE has not actually implemented the changes it tentatively describes in the 2/16/10 letter within the Fermi 3 COLA. None of the changes proposed 2/16/10 letter are there, and none of them are present within the COLA, nor in its ER or FSAR. They appear at this time to exist only as proposed changes contained within a response letter to the NRC.

8. Tracking the "low-level" radioactive waste issue closely, there is no disposal available for Class B and C waste and that the possibility of such cannot be relied upon for Fermi 3. In addition, third party processors have the same limitations that DTE has with regard to disposal. They have no disposal for B or C waste and can return it to the original generator after a year at their facilities. Thus even if the waste goes to a third party, it can and will come back to Fermi, meaning that DTE will still have to provide for onsite storage in the absence of disposal.

9. Although the claim is made in the 2/16/10 letter from DTE to NRC in response to the RAIs that storage is possible for Class B and C waste in the radwaste building for 10 years, storage after radwaste building is filled will require additional storage for decades. It is to be expected that there will be no permanent disposal because there is no disposal site open to out-of-compact waste and the only under consideration to open up (Waste Control Specialists in Texas) has license and capacity limits that will fill it before Fermi 3 waste can gain access. The 30-year history of the US search for "low-level" disposal sites has not resulted in one new operating facility. It is unrealistic to expect one to open that will take Fermi 3 waste.

10. Studsvik, a third party processor in Tennessee, does not

have access for disposal of the Class B and C waste it processes, and combined with its one-year storage limit, cannot be relied upon for permanent disposal of the waste. Further, the storage at WCS has limits that will be exceeded before Fermi could gain access. Lo/ DTE enumerates only potential changes to the COLA, ER, FSAR and DCD, no enforceable, guaranteed changes. Further, there is no description of no description of environmental consequences, simply reference to guidance that might possibly be used in the future.

11. DTE provides only potential changes to the COLA, ER, FSAR and DCD, and no enforceable, guaranteed changes. Further, there is no description of environmental consequences, simply reference to guidance that might possibly be used in the future.

/s/ Terry J. Lodge
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**DECLARATION OF DIANE D'ARRIGO IN SUPPORT
OF INTERVENORS' OPPOSITION TO 'APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF CONTENTION 3**

Under penalty of perjury, Diane D'Arrigo hereby states as follows:

Statement of Qualifications

1. My name is Diane D'Arrigo. I am employed by Nuclear Information and Resource Service as Radioactive Waste Project Director. My business address is 6930 Carroll Ave., Takoma Park, Maryland 20912. I have over 25 years of experience in the policy, technical, and economic issues relating to "low-level" radioactive waste. I have spoken publicly and published articles on these topics. I have testified as an expert on nuclear waste issues before the NRC. My *curriculum vita* is already on file in this COLA proceeding.

Purpose of Declaration

2. The purpose of my declaration is to provide factual Support for Intervenors' opposition to the "Applicant's Motion for Summary Disposition of Contention 3" filed by the Applicant, DTE.

3. For my response, I have reviewed several documents, including the Motion itself and its attachments, and a letter from Peter W. Smith, Director of Nuclear Development for DTE to the NRC, dated February 16, 2010, the subject of which is "Detroit Edison Company Response to NRC FSAR Request for Additional Information Letter No. 4 and ER Request for Additional Information Letter No. 2" (hereinafter referred to as "2/16/10 letter").

4. The Licensing Board specifically narrowed Contention 3 as follows:

The ER for Fermi Unit 3 is deficient in discussing the Applicant's plans for management of Class B and C wastes. The ER assumes the existence of an offsite disposal facility for those wastes. In light of the current lack of a licensed offsite disposal facility, however, and the uncertainty whether a new disposal facility will become available during the license term, the ER must either describe the Applicant's plan for storing Class B and C wastes onsite during the license term and the environmental consequences of such extended onsite storage, or show that the Applicant has a plan for managing the wastes that does not require an offsite disposal facility or extended onsite storage. LBP-09-16 at 25.

The Licensing Board has denominated this to be a "contention of omission."

5. Attachment 1 sets forth proposed or suggested changes to the COLA Part 3- Environmental Report ("ER") and to COLA Part 2- Final Safety Analysis Report ("FSAR") of the Combined Operating License Application ("COLA") for Fermi 3. At p. 5 of Attachment 1 to the 2/16/10 letter, DTE

refers to "proposed changes to the Fermi 3 COLA, Part 2, Part 3, Part 7, and Part 10." At p. 6 of Attachment 1, DTE states:

"The following markup represents how Detroit Edison intends to reflect this RAI response in the next submittal of the Fermi 3 COLA Revision 2. However, the same COLA content may be impacted by revisions to the ESBWR DCD, responses to other COLA RAIs, other COLA changes, plant design changes, editorial or typographical corrections, etc. As a result, the final COLA content that appears in a future submittal may be different than presented here."(Emphasis added).

There is not a binding commitment to actually implement the plans provided in the responses to the RAIs.

6. On pp. 1-12 through 1-17 of Attachment 1 there are references to diagrams of the proposed radwaste building purportedly to be reconfigured under certain circumstances at the Fermi 3 site to accommodate Class B and C "low-level" radioactive waste generated at the plant. Those diagrams including INSERT 2 have been completely deleted from the publicly-available version of Attachment 1.

7. Between pp. 9-46 and 11-10 of Attachment 1 are five redacted pages of "Radwaste Building Fire Protection Zones" from which all information has been deleted.

8. Between Table 12.3-8R and p. 3-39 there are 12 missing/redacted pages of "Radwaste Building Access and Egress Routes."

9. In the absence of the redacted information, the plan for managing Class B and C nuclear waste is still effectively missing.

10. In addition, the omission is still present for waste that would be generated beyond the approximate 10 years that the reconfigured radwaste building would be used. DTE is simply stating in a letter that it will take further action if needed according to guidance, but does specify what action will be taken, and if additional construction is to be carried out, where the location would be (other than on already disturbed land).

11. DTE has not actually implemented the changes it tentatively describes in the 2/16/10 letter within the Fermi 3 COLA. I have personally checked sections of the Environmental Report and FSAR contained within the FERMI COLA online to ascertain whether the changes proposed in the letter are there, and none of them are present within the COLA, nor in its ER or FSAR. They appear at this time to exist only as proposed changes contained within a response letter to the NRC.

12. Tracking the "low-level" radioactive waste issue closely, I assert that there is no disposal available for Class B and C waste and that the possibility of such cannot be relied upon for Fermi 3. In addition, third party processors have the same limitations that DTE has with regard to disposal. They have no disposal for B or C waste and can return it to the original generator after a year at their facilities. Thus even if the waste goes to a third

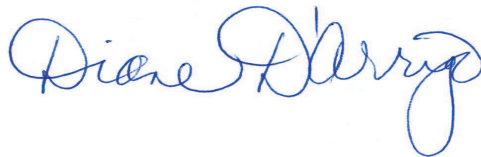
party, it can and will come back to Fermi, meaning that DTE will still have to provide for onsite storage in the absence of disposal.

13. Although the claim is made in the unenforceable letter from DTE to NRC in response to the RAIs, that storage is possible for Class B and C waste in the radwaste building for 10 years, storage after radwaste building is filled will require additional storage for decades. It is to be expected that there will be no permanent disposal because there is no disposal site open to out-of-compact waste and the only under consideration to open up (Waste Control Specialists in Texas) has license and capacity limits that will fill it before Fermi 3 waste can gain access. The 30-year history of the US search for "low-level" disposal sites has not resulted in one new operating facility. It is unrealistic to expect one to open that will take Fermi 3 waste.

14. Studsvik, a third party processor in Tennessee, does not have access for disposal of the Class B and C waste it processes, and combined with its one-year storage limit, cannot be relied upon for permanent disposal of the waste. Further, the storage at WCS has limits that will be exceeded before Fermi could gain access.

15. We dispute Material Facts 4 and 5 in that DTE provides only potential changes to the COLA, ER, FSAR and DCD, no enforceable, guaranteed changes. Further, there is no description of environmental consequences, simply reference to guidance that might possibly be used in the future.

I declare that the foregoing facts are true and correct to the best of my knowledge and that the statements of opinion are based on my best professional judgment.



Diane D'Arrigo, Radioactive Waste Project Director
Nuclear Information and Resource Service
June 1, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Memorandum in Opposition to DTE's 'Motion for Summary Disposition'", "Intervenors' Statement of Facts in Opposition," and the accompanying "Declaration of Diane D'Arrigo" have been served on the following persons via Electronic Information Exchange this 1st day of June, 2010:

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