

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman  
Dr. Michael F. Kennedy  
Dr. Randall J. Charbeneau

In the Matter of

DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

ASLBP No. 09-880-05-BD01

June 15, 2010

ORDER

(Ruling on Proposed New Contentions 15 and 16)

This combined license (COL) proceeding involves the application of Detroit Edison Company (DTE or Applicant) under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR)<sup>1</sup> designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan.<sup>2</sup>

<sup>1</sup> The ESBWR design is the subject of an ongoing rulemaking proceeding under Docket No. 52-010. See General Electric Company; Notice of Acceptance of Application for Final Design Approval and Standard Design Certification of the ESBWR Standard Plant Design, 70 Fed. Reg. 73,311 (Dec. 9, 2005).

<sup>2</sup> On September 18, 2008, DTE submitted its COL Application for Fermi Unit 3 to the NRC. See Notice of Hearing, and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009) [hereinafter Notice of Hearing]. The NRC accepted and docketed the Application on November 25 and December 2, 2008, respectively. On January 8, 2009, the Commission published in the Federal Register a notice of hearing and opportunity to petition for leave to intervene on the COL Application for Fermi Unit 3. Id. The Commission instituted this adjudicatory proceeding after Petitioners submitted a petition to intervene on March 9, 2009. See Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Mar. 9, 2009). In July 2009, the Board found that Petitioners had standing to

Intervenors<sup>3</sup> have submitted two new contentions, 15 and 16, for the Board's consideration.<sup>4</sup> In Contention 15, Intervenors allege that DTE failed to implement a quality assurance (QA) program under 10 C.F.R. Part 50 Appendices A and B during preparation of its COL Application (COLA) for Fermi Unit 3.<sup>5</sup> In Contention 16, Intervenors allege QA deficiencies in the ESBWR reactor design certification application.<sup>6</sup> Both Applicant and Nuclear Regulatory Commission (NRC) Staff oppose admission of Contentions 15 and 16.<sup>7</sup>

For the reasons explained in Section II below, the Board concludes that Contention 15, as clarified by the Board, is admissible. We deny, however, Intervenors' request to suspend partially the adjudication of the Fermi Unit 3 COLA.<sup>8</sup>

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participate in this proceeding, admitted four of the contentions that Petitioners submitted for litigation, and granted Petitioners' hearing request. LBP-09-16, 70 NRC 227 (2009), aff'd, CLI-09-22, 70 NRC \_\_, \_\_ (slip op. at 2-3) (Nov. 17, 2009).

<sup>3</sup> Intervenors are Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club (Michigan Chapter), and numerous individuals.

<sup>4</sup> Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, et al. for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Nov. 6, 2009) [hereinafter Contention 15]; Second Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, et al. for Admission of a New Contention on ESBWR Quality Assurance, and for Partial Suspension of COLA Adjudication (Dec. 14, 2009) [hereinafter Contention 16].

<sup>5</sup> See Contention 15 at 2-6.

<sup>6</sup> See Contention 16 at 2-3.

<sup>7</sup> See Applicant's Response to Proposed Supplemental Contention (Dec. 1, 2009) [hereinafter Applicant Answer to 15]; NRC Staff Answer to Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Dec. 1, 2009) [hereinafter NRC Staff Answer to 15].

<sup>8</sup> We note that Intervenors request at least three different types of "suspension" in Contentions 15 and 16. The titles of both Contentions 15 and 16 include the phrase "request . . . for partial suspension of COLA adjudication." In Contention 15, Intervenors move for suspension of "part of the adjudication of the Fermi 3 COLA, except for their proffered Contention 15, indefinitely until there is satisfactory proof positive of a fully-implemented quality assurance program for Fermi 3 which integrates all previous and contemplated QA revisions." Contention 15 at 2. In

The Board concludes that Contention 16 is inadmissible, as described in Section III below. We also deny Intervenors' requests to suspend partially the Fermi Unit 3 COLA adjudication and to suspend the ESBWR design activities.

### I. Background

Contentions 15 and 16 arose following the October and November 2009 NRC Staff issuance of Notices of Violation (NOV) to DTE or to GE-Hitachi Nuclear Americas LLC (GEH) for various QA violations related to the Fermi Unit 3 COLA.

In Contention 15, Intervenors state that, in or about March 2007, DTE entered into a contract with Black and Veatch (B&V) under which B&V performed activities in support of the COLA for Fermi Unit 3, including site-related testing and investigation.<sup>9</sup> We are told that, pursuant to Appendix B of 10 C.F.R. Part 50 (Appendix B), DTE was required to establish a QA program and to apply that program to the safety-related activities of B&V.<sup>10</sup> Nevertheless, a NRC Staff inspection concluded that DTE failed to comply with the QA requirements of Appendix B.<sup>11</sup> On October 5, 2009, NRC Staff issued an Inspection Report and NOV in which it described the results of its August 18-21, 2009 inspection of DTE's activity relating to the Fermi

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Contention 16, however, it appears that Intervenors request both suspension of the COLA adjudication (as the title of the document suggests) and suspension of ESBWR design activities "by DTE until the quality problems at GEH are resolved . . ." Contention 16 at 3. Later in Contention 16, Intervenors state that "adjudication on the COLA must be delayed until the rulemaking on the ESBWR is complete." Contention 16 at 17. Suspending design activities until the quality problems at GEH are resolved would involve stopping work by either the Applicant or its reactor vendor (GEH). That request is different from a request for suspension of this adjudication proceeding, which would involve a halt to this Board's activities.

<sup>9</sup> See Contention 15 at 4-5.

<sup>10</sup> Id.

<sup>11</sup> See id. at 3-4; see also Letter from Richard Rasmussen, Chief Quality and Vendor Branch B, Division of Construction Inspection & Operational Programs, Office of New Reactors, to Jack Davis, Chief Nuclear Officer, Detroit Edison Company [hereinafter NOV Letter] and attached Notice of Violation (Oct. 5, 2009) [hereinafter NOV]; Vendor Inspection Report, U.S. NRC, Office of New Reactors, Division of Construction Inspection & Operational Programs (Inspection Report Number 2009-201) (Aug. 18-21, 2009) (ADAMS Accession No. ML0927400640).

Unit 3 COLA.<sup>12</sup> In the NOV, NRC Staff cited DTE for three violations of NRC requirements under “Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants,” set forth in Appendix B. These violations included: (A) failing to establish and implement a Fermi Unit 3 QA program between March 2007 (when DTE initially contracted with B&V for the conduct of COLA activities for Fermi Unit 3) and February 2008 and failing to retain overall control of contracted COLA activities as required under Criterion II, “Quality Assurance Program” of Appendix B, resulting in inadequate control of procurement documents and ineffective control of contract services performed by B&V for COLA activities; (B) failing to perform internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities; and (C) failing to document trending of DTE’s corrective action reports (CARs).<sup>13</sup>

DTE responded to the NOV letter on November 9, 2009, denying that any violation occurred because DTE was not actually a COL applicant before September 18, 2008, and thus was not subject to Appendix B.<sup>14</sup> DTE’s reply also describes the corrective actions it had taken since the NOV was issued.<sup>15</sup> On April 27, 2010, NRC Staff responded to DTE, explaining that, despite its lack of applicant status before September 18, 2008, DTE must demonstrate

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<sup>12</sup> See NOV Letter.

<sup>13</sup> Id. at 1-2. To promote clarity, the violations have been labeled as A, B, and C in this Order.

<sup>14</sup> Letter from Peter Smith, Director, Nuclear Development Licensing & Engineering, Detroit Edison Company, to NRC Staff (Nov. 9, 2009) (ADAMS Accession No. ML093160318) [hereinafter DTE NOV Reply].

<sup>15</sup> Id. at 9.

compliance with QA regulations.<sup>16</sup> The NRC Staff response contained a new NOV that reformulated the original violations A, B, and C into two new violations.<sup>17</sup>

In response to Applicant and NRC Staff answers opposing admission of Contention 15, Intervenors filed a reply and the Declaration of Arnold Gundersen.<sup>18</sup> Due to the breadth of Intervenors' reply to their answer to Contention 15, NRC Staff submitted its Motion for Leave to Reply to Intervenors' Combined Reply.<sup>19</sup> In that motion, NRC Staff requested leave to reply to Intervenors' submission of the Gundersen Declaration and the June e-mails, which NRC Staff asserts Intervenors had not previously cited or mentioned.<sup>20</sup> While reserving judgment on admissibility of Contention 15, this Board issued an order on December 23, 2009, granting NRC

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<sup>16</sup> Letter from Richard Rasmussen, Chief Quality and Vendor Branch B, Division of Construction Inspection & Operational Programs, Office of New Reactors, to Jack Davis, Chief Nuclear Officer, Detroit Edison Company and Revised Notice of Violation to Detroit Edison Company (Apr. 27, 2010) (ADAMS Accession No. ML100330687) [hereinafter NRC Response to DTE NOV Reply].

<sup>17</sup> NRC Staff formulated two new violations citing DTE's noncompliance with 10 C.F.R. Part 50, Appendix B. NRC Staff withdrew Violation A of the original NOV and formulated new Violation A using the requirements of Criterion VII in Appendix B. Original Violations B and C were reformulated into a new Violation B. NRC Staff accepted Applicant's corrective actions regarding the reformulated Violation B (which superseded the original NOV's violations 05200033/2009-201-02 and -03). Applicant must respond to the new violation 05200033/2009-201-04 within 30 days of the April 27, 2010 letter. See NRC Response to DTE NOV Reply at 2.

<sup>18</sup> RESUBMITTED Intervenors' Combined Reply in Support of Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Dec. 8, 2009) [hereinafter Intervenors' Reply]. Intervenors filed part of this reply document on December 8, 2009, and shortly thereafter, a few minutes into December 9, 2009, filed the remaining portion of the same document. The timing of these filings indicates the possibility of error or complications involving the electronic filing system. While the deadline was December 8, not December 9, neither Applicant nor NRC Staff submitted a motion within the ten-day time period required under 10 C.F.R. § 2.323 to challenge this filing as late. Because of the apparent electronic complications and because no party filed a challenge to Intervenors' Reply document as "late," the Board will treat the December 9, 2009 filing as a valid reply. See Declaration of Arnold Gundersen Supporting Supplemental Petition of Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (Dec. 8, 2009) [hereinafter Gundersen Declaration].

<sup>19</sup> NRC Staff Motion for Leave to Reply in Support of Supplemental Petition (Dec. 18, 2009) [hereinafter NRC Staff Reply to Intervenors' Reply].

<sup>20</sup> Id. at 1.

Staff's Motion for Leave to Reply.<sup>21</sup> In that same order, we allowed the Applicant to file a reply to the same arguments and supporting material that formed the subject of NRC Staff's reply, but stated that no additional filings concerning Contention 15 would be permitted.<sup>22</sup>

Meanwhile, Intervenors filed a second new contention in this proceeding on December 14, 2009. Contention 16 is based on a letter and NOV from NRC Staff to GEH.<sup>23</sup> GEH has filed an application with the NRC seeking design certification for the ESBWR, and DTE has stated in the Fermi Unit 3 COLA that it intends to use the ESBWR design. In Contention 16, Intervenors allege QA problems in the ESBWR reactor design process.<sup>24</sup> They further allege that the November NOV identifies errors that appear to violate the ESBWR Design Control Document (DCD) that is incorporated by reference in the Fermi Unit 3 COLA.<sup>25</sup> Intervenors relate the history of GEH's QA problems with the ESBWR design, which they claim started when the Fermi Unit 3 project began in March 2007.<sup>26</sup> Reasoning that it is DTE's responsibility to

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<sup>21</sup> Licensing Board Order (Granting Motion for Leave to Reply) (Dec. 23, 2009) (unpublished).

<sup>22</sup> Id. On the same day the order was issued, Applicant submitted its response to the NRC Staff's Motion. Applicant's Response to NRC Staff Motion for Leave to Reply (Dec. 23, 2009). In this response, Applicant agrees with NRC Staff's arguments that the scope of Intervenors' reply was improper and that Intervenors cannot bypass the requirements of 10 C.F.R. § 2.309(c) for late-filed contentions by stating these arguments for the first time in a reply. Id.

<sup>23</sup> In this NOV, NRC Staff outlined three Severity Level IV violations of NRC requirements at the GEH facility in Wilmington, North Carolina. After its review of the GEH QA program implementation and documentation, NRC Staff cited the first violation because GEH failed to provide procedural guidance for managing the computer databases that contain training records of its personnel. The second violation concerns GEH's failure to provide adequate guidance for receipt inspections of design and engineering work from its suppliers and its failure to perform an adequate annual evaluation of Empresarios Agrupados Internacional, S.A. (a contractor) in 2008. The third violation is due to GEH's failure to adequately classify a corrective action report and to perform an accompanying root cause evaluation for the corrective action, which involves radiation shielding. Letter from Richard Rasmussen, NRC, to Russell Bastyr, GEH, NRC Inspection Report 05200010/2009-201 and Notice of Violation (Nov. 12, 2009) (ADAMS Accession No. ML093090440) [hereinafter November NOV].

<sup>24</sup> Contention 16 at 1.

<sup>25</sup> Id. at 2, 4.

<sup>26</sup> Id. at 4-5.

construct and to operate Fermi Unit 3's ESBWR using the QA protocols that GEH sets, Intervenor state that they are alarmed at the violations<sup>27</sup> and GEH's failure to remedy them.<sup>28</sup> Applicant and NRC Staff each filed answers on January 8, 2010, in which they oppose admission of Contention 16.<sup>29</sup> Intervenor filed their reply to these answers on January 15, 2010.<sup>30</sup>

## II. Ruling on Contention 15

Contention 15 states:

Detroit Edison has failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and maintain a quality assurance (QA) program since March 2007 when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. DTE further has failed to complete any internal audits of QA programmatic areas implemented for Fermi 3 COLA activities performed to date. And DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi 3 project in March 2007.<sup>31</sup>

### A. Timeliness

We first consider whether this new contention may be filed after the expiration of the deadline for filing contentions established in the notice of opportunity for a hearing.

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<sup>27</sup> In Contention 16, Intervenor cite two separate NOVs related to GEH QA issues: one dated March 25, 2009, and the other dated November 12, 2009. The November 12, 2009 NOV is the basis for Contention 16.

<sup>28</sup> Contention 16 at 9.

<sup>29</sup> See Applicant's Response to Second Proposed Supplemental Contention (Jan. 8, 2010) [hereinafter Applicant Answer to 16]; NRC Staff Answer to Second Supplemental Petition for Admission of a Newly-Discovered Contention, and for Partial Suspension of COLA Adjudication (Jan. 8, 2010) [hereinafter NRC Staff Answer to 16].

<sup>30</sup> Petitioners' Combined Reply in Support of Second Supplemental Petition for Admission of a New Contention on ESBWR Quality Assurance (Jan. 15, 2010) [hereinafter Intervenor's Reply to 16].

<sup>31</sup> Contention 15 at 2-3.

A new contention may be filed after the deadline found in the notice of hearing with leave of the presiding officer upon a showing that:

- i. The information upon which the amended or new contention is based was not previously available;
- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.<sup>32</sup>

Given that NOV first became available on October 7, 2009, NRC Staff acknowledges that Contention 15 was timely filed<sup>33</sup> under the Board's scheduling order for this case.<sup>34</sup> DTE, however, contends that Contention 15 was untimely.<sup>35</sup> Recognizing that Contention 15 is based upon the NOV, DTE argues that information upon which the NOV was based -- although not the NOV itself -- was available before October 7, 2009.<sup>36</sup> DTE points to documents related to the QA issue that pre-date the NOV, including its own submittals to the agency stating its intent to rely on the B&V QA program; an NRC Staff internal memorandum that, according to DTE, "highlighted the precise issues that are the basis for the Notice of Violation"; and Requests for Additional Information (RAIs) related to the QA issue.<sup>37</sup> DTE maintains that the NOV contains no information that is materially different from that previously available to the Intervenors.<sup>38</sup>

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<sup>32</sup> 10 C.F.R. § 2.309(f)(2).

<sup>33</sup> NRC Staff Answer to 15 at 9.

<sup>34</sup> Licensing Board Order (Establishing schedule and procedures to govern further proceedings) (Sept. 11, 2009) at 2 (unpublished) [hereinafter Scheduling Order].

<sup>35</sup> Applicant Answer to 15 at 8.

<sup>36</sup> Id. at 8-12.

<sup>37</sup> Id. at 9-10.

<sup>38</sup> Id. at 10.



We disagree. The NOV is not simply a reiteration of information and NRC Staff conclusions contained in the various documents cited by DTE. On the contrary, the NOV Letter explains that the NOV is based on the results of an inspection conducted on August 18-21, 2009, during which an “NRC inspection team reviewed certain portions of [DTE’s] quality assurance (QA) program implementation to ensure that they were effectively implemented with respect to the Fermi Unit 3 combined license . . . application.”<sup>39</sup> The NOV Letter and its attachments announced the results of the August 18-21 inspection and NRC Staff’s finding of three specific violations of Appendix B requirements based on those results.<sup>40</sup> Both the Inspection Report and the three specific violations listed in the NOV constitute new information that was materially different from that previously available to Intervenors.<sup>41</sup>

We are not persuaded by DTE’s argument for an additional reason. As the Board in the Prairie Island relicensing proceeding stated, “we are ‘not impressed with arguments suggesting that, in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance.’”<sup>42</sup> The Prairie Island Board rejected such an argument, explaining:

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<sup>39</sup> NOV Letter at 1.

<sup>40</sup> By contrast, although the June 23, 2009 Staff memo cited by DTE indicates that NRC Staff had concerns about DTE’s QA program, it also states that “[t]hese concerns will be assessed during an inspection . . . .” See Memorandum from John Nakoski, NRC, to Jeffrey Cruz, NRC, “Fermi 3 Application Quality Assurance (QA) Program” (June 23, 2009) (ADAMS Accession No. ML091671550). Thus, the June 23, 2009 Staff memo contemplates further investigation by the NRC Staff before it decides whether any violations occurred. We will not deem Contention 15 untimely merely because Intervenors waited for the NRC’s investigatory process to be concluded and the Staff to announce its determination.

<sup>41</sup> The Board reviewed the documents posted in ADAMS on the Fermi Unit 3 docket between August 18, 2009 (the start date of NRC Staff’s QA inspection) and October 5, 2009 (the NOV issuance date). This review confirmed that the Inspection Report was not available on ADAMS until after October 5, 2009. See supra notes 11, 16-17 and accompanying text.

<sup>42</sup> Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), Order (Narrowing and Admitting PIIC’s Safety Culture Contention) (Jan. 28, 2010) at 6 (unpublished) (quoting U.S. Dep’t of Energy (High Level Waste Repository), LBP-09-29, 70 NRC \_\_, \_\_ (slip op. at 12) (Dec. 9, 2009).

Applicant and NRC Staff . . . claim that [the Petitioner] could have filed this contention in the wake of numerous events that transpired since late 2008. Those events include meetings and reports on the cavity leakage issue, the issuance of yellow and white findings in early 2009, NSPM's responses to the NRC Staff's requests for additional information (RAIs), and issuance of the preliminary SER in June 2009, which identified the cavity leakage issue as an open item. All of those events revealed fragments of the story that PIIC would ultimately fashion into a contention. But none of those events, by itself, fully captured the scope of PIIC's concerns related to safety culture. We would not expect PIIC to "piece together" those "shreds of information" and formulate its contention prior to issuance of the final SER. Accordingly, we find that PIIC's contention meets all of the criteria at 10 C.F.R. § 2.309(f)(2).<sup>43</sup>

Similarly, we do not expect Intervenors to have pieced together various shreds of information to conclude that DTE violated QA requirements in the three specific ways stated in the NOV even before NRC Staff itself announced its determination.

The only remaining issue is whether Intervenors filed Contention 15 in compliance with the requirements of our scheduling order once the NOV was issued. We agree with NRC Staff that they did. The scheduling order states that "a proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."<sup>44</sup> The NOV is dated October 5, 2009; it was posted on ADAMS on October 7, 2009; and Contention 15 was filed on November 6, 2009.

We therefore conclude that Contention 15 satisfies the criteria of 10 C.F.R. § 2.309(f)(2). DTE maintains that we must also determine whether Contention 15 may be admitted under the balancing test in 10 C.F.R. § 2.309(c), which applies to nontimely contentions.<sup>45</sup> We doubt that

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<sup>43</sup> Id. at 6-7.

<sup>44</sup> Scheduling Order at 2.

<sup>45</sup> Applicant Answer to 15 at 2.

this is correct.<sup>46</sup> Nevertheless, we will apply the Section 2.309(c) criteria to remove any lingering question concerning the timeliness issue.

Section 2.309(c) sets forth eight factors that apply to nontimely intervention petitions, hearing requests, and contentions.<sup>47</sup> Even if we assume *arguendo* that Contention 15 was nontimely, we conclude that Intervenors have on balance satisfied the Section 2.309(c) factors. The Commission has long affirmed that “[g]ood cause’ is the most significant of the late-filing

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Several Licensing Boards have recently recognized a dichotomy between “new” contentions filed under 10 C.F.R. § 2.309(f)(2) and “nontimely” contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information (“new” contentions) to make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline (“nontimely” contentions).

Virginia Elec. & Power Co. (North Anna Unit 3), LBP-09-27, 70 NRC \_\_\_, \_\_\_ (slip op. at 6-7) (Nov. 25, 2009); see also Shaw AREVA MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP- 07-14, 66 NRC 169, 210 n.95 (2007); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006); Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006); Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005). Simply put, “[i]f a contention satisfies the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. § 2.309(c) which specifically applies to ‘nontimely filings.’” Vermont Yankee, LBP-06-14, 63 NRC at 573 n.14 (emphasis in original).

<sup>47</sup> The criteria are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the [petitioner’s] right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the [petitioner’s] property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the [petitioner’s] interest;
- (v) The availability of other means whereby the [petitioner’s] interest will be protected;
- (vi) The extent to which the [petitioner’s] interests will be represented by existing parties;
- (vii) The extent to which the [petitioner’s] participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the [petitioner’s] participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

factors in § 2.309(c).<sup>48</sup> Recently, the Commission upheld the Crow Butte Licensing Board's finding that a petitioner demonstrated "good cause" for its late filing.<sup>49</sup> In this case, Intervenor have shown good cause. For the reasons we have previously explained, they acted reasonably in waiting for NRC Staff to announce the results of its August 18-21 inspection and its determination, based on the Inspection Report, that DTE had in fact violated Appendix B requirements in three specific ways. To force intervenors to file contentions before the results of an ongoing NRC investigation are announced to the public would effectively force intervenors to speculate about the results of such investigations and the conclusions the Staff might reach. We doubt the Commission would want to encourage the filing of such speculative contentions.

Most of the other factors also weigh in favor of Intervenor.<sup>50</sup> We have already ruled that Intervenor have standing based upon their proximity to the proposed Fermi Unit 3, admitted four of their contentions, and granted their request for a hearing.<sup>51</sup> They have therefore established their right to be parties to the proceeding.<sup>52</sup> The nature of their interest in the proceeding is based upon the fact that members of the Intervenor organizations reside, work, or recreate within fifty miles of the proposed nuclear power plant.<sup>53</sup> Any order that may be entered in this proceeding concerning QA issues may affect those interests.<sup>54</sup> As Intervenor state, "[i]f the NRC de-emphasizes quality concerns in plant design and construction, the margin

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<sup>48</sup> Crow Butte Res., Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 549 n.61 (2009); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 558 (2005); Private Fuel Storage, LLC (Independent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000).

<sup>49</sup> North Trend, CLI-09-12, 69 NRC at 549.

<sup>50</sup> 10 C.F.R. § 2.309(c)(1)(ii)–(vi), (viii).

<sup>51</sup> LBP-09-16, 70 NRC at 227, aff'd, CLI-09-22, 70 NRC \_\_, \_\_ (slip op.) (Nov. 17, 2009).

<sup>52</sup> 10 C.F.R. § 2.309(c)(1)(ii).

<sup>53</sup> LBP-09-16, 70 NRC at 242.

<sup>54</sup> 10 C.F.R. § 2.309(c)(1)(iii).

of public safety, including the safety of [Intervenors] or their members, will be directly affected.”<sup>55</sup> And, although the NRC has issued a NOV to DTE on the subject of QA, the scope of the issues in this licensing proceeding is potentially broader. Intervenors claim, for example, that “the FSAR’s accuracy in explicating accident scenarios and probabilities” is brought into question by DTE’s QA violations.<sup>56</sup> By contrast, the NOV does not address the impact of the alleged QA violations on the FSAR. We therefore cannot say that means other than this proceeding are available to protect Intervenors’ interests.<sup>57</sup> Although NRC Staff is a party to this proceeding, Intervenors appear to have much broader concerns with the impact of DTE’s QA violations than NRC Staff has articulated in its filings before the Board. We therefore doubt that Intervenors’ interests will be represented by the existing parties to this proceeding.<sup>58</sup> Finally, Intervenors have directed the Board to various internal NRC documents that appear relevant to the QA issue, and they have provided the declaration of an expert witness concerning the extent of DTE’s QA violations.<sup>59</sup> This suggests they may be able to assist the Board in developing a sound record.<sup>60</sup>

The one factor that may not favor Intervenors is “[t]he extent to which the [Intervenors’] participation will broaden the issues or delay the proceeding.”<sup>61</sup> Contention 15 will broaden the issues in this proceeding because none of the other admitted contentions concern QA violations. This might delay the proceeding to some extent, although we doubt any delay would

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<sup>55</sup> Contention 15 at 11.

<sup>56</sup> Contention 15 at 12.

<sup>57</sup> 10 C.F.R. § 2.309(c)(1)(v).

<sup>58</sup> 10 C.F.R. § 2.309(c)(1)(vi).

<sup>59</sup> See Gunderson Decl., discussed supra note 18 and accompanying text.

<sup>60</sup> 10 C.F.R. § 2.309(c)(1)(viii).

<sup>61</sup> 10 C.F.R. § 2.309(c)(1)(vii).

be significant. To the extent there will be any delay, it is the price for affording the public the opportunity to litigate questions arising from an applicant's failure to comply with QA requirements. Licensing boards have recognized compliance with QA requirements as an important factor in the licensing decision,<sup>62</sup> and we are reluctant to deny Intervenors the chance to address this important issue based solely on the possibility of a minor delay.

Because the most important factor, the "good cause" issue, favors Intervenors, and because most of the other factors also weigh in their favor, we may admit Contention 15 even if it was nontimely.

### **B. Admissibility**

Having concluded that Contention 15 was timely filed, we next consider whether it satisfies the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

In order to be admissible, a proposed contention must include specific statements of law or fact to be raised or controverted, as required by Section 2.309(f)(1)(i), and provide a brief explanation of the basis for the contention, as required by Section 2.309(f)(1)(ii). In opposing the new contention, NRC Staff complains that Contention 15 merely restates the violations alleged in the NOV, without identifying the specific issues to be raised or controverted.<sup>63</sup> NRC Staff acknowledges, however, that "[i]n their discussion of proposed Contention 15, the Intervenors do attempt to explain the significance of the violations cited in the NOV and to link them to issues they wish to litigate in this proceeding."<sup>64</sup> We can identify from Intervenors'

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<sup>62</sup> Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 632-33 (1985). See also Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 89 (1983) (noting "the importance of the subject of QA/QC").

<sup>63</sup> NRC Staff Answer to 15 at 10-14.

<sup>64</sup> Id. at 14. NRC Staff maintains, however, that those issues are "outside the subject matter covered by the NOV, and in some cases . . . outside the scope of this licensing proceeding." Id. We disagree, for the reasons explained infra.

discussion of Contention 15 two specific issues related to the licensing decision that Intervenor intend to litigate.

The first issue concerns the reliability of safety-related information in the FSAR. Intervenor complains that DTE's failure to comply with Appendix B requirements infects the safety-related information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities, thereby precluding the NRC from relying on such information in its licensing decision. Intervenor notes that, "[b]efore issuing a COL, the NRC staff must complete safety and environmental reviews of the application" and that the COLA "must comply with . . . NRC regulations and all applicable laws."<sup>65</sup> They state that

[s]ince there has apparently not been a genuine QA program administered by DTE in the Fermi 3 preconstruction phase, the lack of QA infects all of the steps taken to date, and a halt to COLA processing is needed because of the potentially large revisions which might become necessary to it.<sup>66</sup>

Intervenor further argues that "the FSAR's accuracy in explicating accident scenarios and probabilities is brought into question by the claimed utter lack of ongoing quality assurance activity."<sup>67</sup> Thus, Intervenor's first argument is that safety-related information in the FSAR is unreliable and should not be used to support the licensing decision because it is based in whole or in part on tests, investigations, or other safety-related activities performed by B&V during the period when DTE had neither established nor implemented its own Appendix B QA program to govern those activities.

We understand Intervenor's second argument to be that, given DTE's history of QA violations and perceived lack of commitment to compliance with Appendix B requirements, the NRC cannot make the safety findings necessary to support issuance of the COL. Intervenor states at the beginning of Contention 15 that "DTE . . . appears to be serially in violation of NRC

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<sup>65</sup> Contention 15 at 16.

<sup>66</sup> Id.

<sup>67</sup> Id. at 12.

regulations requiring the implementation of a Quality Assurance program during the planning and development stages of the Economic Simplified Boiling Water Reactor design which it proposes for the proposed Fermi 3 nuclear reactor.”<sup>68</sup> Intervenor also state that DTE’s failure to comply with General Design Criteria #1<sup>69</sup> “suggests that DTE’s corporate management has little concern for nuclear quality assurance, as they allowed the situation to become serious for more than two (2) years, without intervening,” and that “[b]y willingly and deliberately choosing not to comply with 10 CFR part 50 since the inception of the COLA proceeding, DTE cannot provide adequate assurance that Fermi 3 can ever comply.”<sup>70</sup>

In rebuttal to NRC Staff’s argument that DTE’s QA violations were much less extensive than Intervenor’s claim,<sup>71</sup> Intervenor maintain in their Reply that “the lack of a meaningful, DTE-run quality assurance program continues right down to the present.”<sup>72</sup> Intervenor attached to their Reply the Declaration of Arnold Gundersen, a nuclear engineer, who had examined various internal NRC Staff e-mails stating that, in fact, DTE was out of compliance with some Appendix B requirements as late as June 2009, well after the date by which, according to NRC Staff’s Answer, the issue of DTE’s noncompliance had been resolved.<sup>73</sup> Intervenor contend that they “have articulated evidence that there has been a breakdown of DTE’s QA program for Fermi 3 ‘sufficient to raise legitimate doubt as to whether the plant can be operated safely.’”<sup>74</sup>

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<sup>68</sup> Id. at 1-2.

<sup>69</sup> General Design Criteria #1 is contained in 10 C.F.R. Part 50, Appendix A, and it requires a COLA submitted under 10 C.F.R. § 52.79 to establish and to implement a QA program.

<sup>70</sup> Id. at 3, 7.

<sup>71</sup> See NRC Staff Answer to 15 at 14-16.

<sup>72</sup> Intervenor’s Reply at 2.

<sup>73</sup> Id. at 3-5.

<sup>74</sup> Id. at 7 (quoting Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-45 (1983)) (other citations omitted).



Intervenors demand that DTE “provide satisfactory proof positive of a fully-implemented quality assurance program which integrates all previous and contemplated QA revisions.”<sup>75</sup>

Given our understanding of Intervenors’ arguments, we can restate Contention 15 to satisfy the requirement that it identify the specific issues to be litigated. As we noted in our previous ruling on contention admissibility, boards have the discretion to reformulate contentions so as to clarify the issues for litigation.<sup>76</sup> We therefore need not reject a contention based solely on technical pleading defects. Instead, the Board will restate the contention as follows to clarify the specific issues arising from the NOV that Intervenors want to litigate and that relate to the licensing decision for Fermi Unit 3.

Contention 15 (including subparts A & B):

Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007.

Contention 15A: These deficiencies adversely impact the quality of the safety-related design information in the FSAR that is based on B&V’s tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.

Contention 15B: Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of

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<sup>75</sup> Id. at 14.

<sup>76</sup> LBP-09-16, 69 NRC at 256 (quoting North Trend, CLI-09-12, 69 NRC at 552 (quoting Shaw Areva MOX Serv. (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 482 (2008) (emphasis omitted))); see also Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291, 295-96 (1979).

B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully-implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.

As clarified by the Board, Contention 15 includes two specific statements of law or fact to be raised or controverted and briefly explains the bases of these statements.<sup>77</sup> Contention 15A questions the reliability of safety-related design information in the FSAR that is based in whole or in part on B&V tests, investigations, or other activities conducted during any period when DTE lacked the required QA program to oversee those activities, or failed to implement the QA program. Contention 15A maintains that such safety-related design information is not reliable given the deficiencies in Applicant's QA program, and that, accordingly, the NRC may not rely upon such analyses and data in deciding whether a license should be granted. Contention 15B contends that the NRC lacks reasonable assurance that DTE will implement the QA program required by Appendix B during future phases of the Fermi Unit 3 project, including any future safety-related design work,<sup>78</sup> construction of the plant, and operation. This is based on the ongoing pattern of QA violations described above and the perceived lack of corporate commitment to compliance with Appendix B requirements.

Contentions 15A and 15B are within the scope of this proceeding, as required by Section 2.309(f)(1)(iii).<sup>79</sup> The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board; any contention that falls outside the specified scope of the proceeding is inadmissible. The Notice of Hearing for this proceeding explained that the Licensing Board would consider DTE's Application under Part 52

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<sup>77</sup> 10 C.F.R. § 2.309(f)(1)(i) and (ii).

<sup>78</sup> This might include, for example, responses to Requests for Additional Information (RAIs) issued by NRC Staff or future departures from the Standard ESBWR design.

<sup>79</sup> 10 C.F.R. § 2.309(f)(1)(iii).

for a COL for Fermi Unit 3. Because Contentions 15A and 15B concern alleged violations of NRC regulations in connection with the preparation of the FSAR for Fermi Unit 3, they fall within the scope of this proceeding, as Section 2.309(f)(1)(iii) requires.

Section 2.309(f)(1)(iv) requires that the issues raised by a contention be material to the licensing decision. The issues raised by both subparts of the revised Contention 15 satisfy this requirement. “[T]he Board regards potential QA/QC problems as serious and significant considerations bearing heavily on the issuance of a license to operate a nuclear facility.”<sup>80</sup> Contrary to DTE’s argument<sup>81</sup> that Contention 15 raises matters of compliance rather than the adequacy of the COLA, the quality of the information presented in the FSAR is at the heart of the issues considered in this licensing proceeding. Before it may issue a combined license for a nuclear power plant, the Commission is required by its regulations to find (among other things) that “[t]here is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission’s regulations”; “[t]he applicant is technically . . . qualified to engage in the activities authorized”; and “[i]ssuance of the license will not be inimical to . . . the health and safety of the public.”<sup>82</sup> In order to make these findings, the agency must rely on extensive safety-related information that the applicant provides in the FSAR. As the Board explained in the Diablo Canyon licensing proceeding,

Normally, an effectively functioning design quality assurance program ensures that the design of a nuclear power plant is in conformance with the design criteria and commitments set forth in an applicant’s PSAR [Preliminary Safety Analysis Report] and FSAR [Final Safety Analysis Report]. In the case of Diablo Canyon, however, this confidence has been seriously eroded by the existence of significant evidence that the design quality assurance program was faulty (i.e. it failed to comply with 10 C.F.R. Part 50, Appendix B). Hence, there is now substantial uncertainty whether any particular structure, system or component was designed in accordance with stated criteria and commitments.<sup>83</sup>

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<sup>80</sup> Braidwood, LBP-85-11, 21 NRC 609, 632-33 (1985).

<sup>81</sup> Applicant Answer to 15 at 13.

<sup>82</sup> 10 C.F.R. § 52.97(a)(iii), (a)(iv), and (a)(v).

<sup>83</sup> Diablo Canyon, ALAB-763, 19 NRC at 576 (quoting that Board’s Scheduling Order).

DTE's QA violations have the same confidence-eroding effect on the safety-related design information in the FSAR for Fermi Unit 3 that the defects in the design QA program for the Diablo Canyon plant had on the agency's confidence in the design of that facility. DTE's QA violations thereby create substantial uncertainty over whether the agency can rely on the tainted information in the FSAR to make the safety-related findings required to issue the license. In short, the quality of the safety-related information in the FSAR is material to the licensing decision, and Contention 15A, by calling into question the quality of that information, raises a material issue.<sup>84</sup>

The question asserted in Contention 15B of whether the COL applicant will in fact implement the QA program required by Appendix B is also material to the licensing decision. If the NRC is not confident that DTE will implement the QA program described in the FSAR, this would certainly raise a substantial question whether the agency could find "reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations," and that "[i]ssuance of the license will not be inimical to . . . the health and safety of the public."<sup>85</sup>

Section 2.309(f)(1)(v) requires that a contention be supported by a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support Intervenors' position and upon which they intend to rely at the hearing.<sup>86</sup> As the Commission has explained, however, an intervenor need not provide all supporting facts for a

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<sup>84</sup> In its Response to the NOV, DTE disagreed that violations occurred, arguing that the QA program was not necessary because it had delegated QA responsibilities to B&V. However, DTE did acknowledge that alleged deficiencies in QA could create an issue for the license review: "It follows that deficiencies in quality would affect the licensing review, but there is no suggestion that there are requirements enforceable by the issuance of a Notice of Violation (NOV)." DTE NOV Reply, Attachment 1 at 5. DTE's statement is consistent with our conclusion that the alleged QA violations are material to the licensing decision.

<sup>85</sup> 10 C.F.R. § 52.97(a)(iii), (v).

<sup>86</sup> 10 C.F.R. § 2.309(f)(1)(v).

contention in the original submission or prove its case to have the contention admitted.<sup>87</sup> Intervenor in this proceeding, by citing and quoting the NOV, have provided documentation to show that DTE may not have complied with QA requirements with respect to the safety-related COLA activities of its contractor. Contention 15 also cited factual support for Intervenor's allegations that DTE's violations of some QA requirements continued well after February 2008. Intervenor quoted the statement in the NOV (Violation B)<sup>88</sup> that, contrary to Criterion XVIII ("Audits") of Appendix B, "as of August 21, 2009, DECo QA personnel had not completed any internal audits of QA programmatic areas implemented for Fermi 3 COL application activities performed to date."<sup>89</sup> The failure to perform required audits raises an implementation issue, and thus the statement in the NOV supports Intervenor's contention that DTE was not fully implementing a QA program in compliance with Appendix B even after the COLA was filed with the NRC. In addition, Intervenor's allegations of ongoing QA violations are supported by the Gundersen Declaration and the NRC Staff e-mails cited in it.

Thus, Intervenor has provided a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support their position and upon which they intend to rely at the hearing. This is all that Section 2.309(f)(1)(v) demands. To be sure, Applicant contends it did not violate any QA requirement,<sup>90</sup> and NRC Staff maintains that DTE's QA violations are less extensive than Intervenor alleges.<sup>91</sup> These disputes go to the merits, however, and we need not resolve them now in order to admit Contentions 15A and 15B.

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<sup>87</sup> Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

<sup>88</sup> See supra notes 13-17 and accompanying text.

<sup>89</sup> Contention 15 at 4 (quoting the NOV at 2).

<sup>90</sup> Applicant Answer to 15 at 8, 12.

<sup>91</sup> NRC Staff Answer to 15 at 7-8, 14-16.

NRC Staff argues that we should not consider the Gundersen Declaration, or any of the NRC Staff's e-mails quoted in the Declaration, because the Declaration was submitted with Intervenor's Reply Brief.<sup>92</sup> We agree that, as a general matter, a party may not present a new contention, or a new basis for a proposed contention, in its reply.<sup>93</sup> But that is not what Intervenor has done by submitting the Gundersen Declaration. Contention 15 alleged an ongoing failure by DTE to implement the QA program required by Appendix B, and, as we have just explained, NOV Violation B provides some support for that claim.<sup>94</sup> Nevertheless, in its response, NRC Staff argued that Intervenor had significantly overstated the extent of DTE's QA violations.<sup>95</sup> To challenge this NRC Staff argument, Intervenor submitted the Gundersen Declaration with their reply.<sup>96</sup> The Declaration quoted and relied on a series of NRC Staff e-mails showing that NRC Staff itself did not believe DTE had a fully implemented Appendix B QA program in place as late as June of 2009. For example, one e-mail from NRC Staff member Aida Rivera-Varona, dated June 11, 2009, explains that

Fermi is not meeting the requirements of [10 C.F.R. §] 52.79(a)(25), which requires the applicant to provide a QA program consistent with AppB to 10 CFR Part 50 for design, fabrication and construction activities. Although we understand that the FSAR is not a quality document and is a licensing document subject to 52.6, all design activities performed in support of the FSAR (e.g., sitting [sic], geotechnical, departures from the DCD) are quality activities subject to AppB requirements. At this time, the application is not providing an applicant's QA program for these activities as required by 52.79(a)(25). Fermi [did submit] with the application a QA program for construction and operations.

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<sup>92</sup> NRC Staff Reply to Intervenor's Reply at 6.

<sup>93</sup> See Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), recons. denied by LES, CLI-04-35, 60 NRC 619 (2004).

<sup>94</sup> See supra notes 88-89 and accompanying text.

<sup>95</sup> NRC Staff Answer to 15 at 14-16. For example, the Staff stated that "DTE put its Fermi 3 QA program into place in February 2008 and issued implementing procedures at that time." Id. at 15 (citations omitted).

<sup>96</sup> See Gundersen Decl.

Second, we understand that the regulations allow[ ] for delegation of QA programs to other organizations. However the Reg Guide 1.206 is very clear that the FSAR should also clearly delineate those QA functions that are implemented within the applicant's QA organization and those that are delegated to other organizations. In addition, the Reg guide states that the FSAR should describe how the applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations. Based on the application and the phone calls we have done with DTE, there is no description of how they are maintaining this responsibility and under which program. The Reg Guide clearly states that the FSAR should identify the responsible organization and the process for verifying that delegated QA functions are effectively implemented. Also, based on the calls we have had, DTE has rel[ie]d] on others for verification of implementation.<sup>97</sup>

By citing this and other NRC Staff e-mails, Intervenors have not attempted to amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE "appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program . . . ." <sup>98</sup> Although Intervenors did not cite the June 2009 e-mails in Contention 15, our contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.<sup>99</sup> When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV, it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.<sup>100</sup>

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<sup>97</sup> June 11, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 13).

<sup>98</sup> Contention 15 at 1-2.

<sup>99</sup> LES, CLI-04-35, 60 NRC 619, 623 (2004).

<sup>100</sup> Thus, Intervenors responded to a specific argument made by NRC Staff in its answer to Contention 15. Intervenors thereby complied with the requirement that replies should be "narrowly focused on the legal or logical arguments presented in the [answers] on a request for hearing/petition to intervene." South Carolina Elec. and Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI 10-01, 70 NRC \_\_, \_\_ (slip op. at 7 n. 32) (Jan. 27, 2010) (quoting "Final Rule, Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). See also PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI 10-07, 70 NRC \_\_, \_\_ (slip op. at 8) (Jan. 7, 2010).

Nevertheless, given that Intervenors did not cite the June 2009 e-mails in Contention 15, we permitted NRC Staff and Applicant to file replies to Intervenors' Combined Reply to address the issues raised by the e-mails.<sup>101</sup> In addition to the procedural objections discussed above, NRC Staff argues that the June 2009 e-mails were "pre-decisional," that the NOV was the product of additional investigation and represents the Staff's final position concerning the extent of DTE's QA violations, and that the NOV contradicts Intervenors' position that those violations continued through June 2009.<sup>102</sup> NRC Staff maintains that when "a contention is based on a factual underpinning in a document that has been essentially repudiated by the source of that document, the contention may be dismissed unless the intervenor offers another independent source."<sup>103</sup>

NRC Staff emphasizes the statement in NOV Violation A that DTE "failed to establish and implement a Fermi Unit 3 quality assurance (QA) program between March 2007 . . . [and] February 2008 . . . ."<sup>104</sup> Apparently NRC Staff interprets NOV Violation A to mean that after February 2008 DTE did establish and implement a Fermi Unit 3 QA program. Even if this is correct, we do not understand the June 2009 e-mails to focus on the general question whether DTE had any QA program whatsoever for Fermi Unit 3 after February 2008, but on the more specific question whether DTE's QA program provided the required level of supervision of the safety-related activities of B&V. In particular, the e-mails raise the question whether B&V's safety-related COLA activities were being performed pursuant to DTE's QA program or still

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<sup>101</sup> Absent permission from the Board, neither NRC Staff nor DTE could have filed a reply to Intervenors' Combined Reply in support of Contention 15. Scheduling Order at 2; 10 C.F.R. § 2.309(h)(3).

<sup>102</sup> NRC Staff Reply to Intervenors' Reply at 8-12.

<sup>103</sup> Id. at 10 (quoting Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 234, 241 (1989); Georgia Power Co. (Alvin W. Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 136 (1987)).

<sup>104</sup> NRC Staff Answer to 15 at 7-8 (quoting NOV Violation A at 1).



being delegated to B&V to perform pursuant to its own QA program. For example, one message states that as of June 2009, DTE lacked its own QA program for plant-specific design activities, relying instead on the B&V QA program.<sup>105</sup> Another asserts that all design activities performed in support of the FSAR, such as siting, geotechnical investigations, and departures from the DCD, are quality activities subject to Appendix B requirements, but that “[a]t this time, the application is not providing an applicant’s QA program for these activities as required by [10 C.F.R §] 52.79(a)(25)).”<sup>106</sup> A third e-mail complains that the FSAR fails to describe how Applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations (such as B&V).<sup>107</sup> We do not read the NOV as repudiating these or similar statements. On the contrary, NOV Violation B, concerning DTE’s failure to audit B&V’s activities, alleges violations that continued through August 2009. Thus, NRC Staff concluded that at least some of DTE’s QA violations continued well into 2009.

At bottom, NRC Staff’s argument concerns the interpretation of debatable evidence and is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention. We therefore are not persuaded by NRC Staff’s argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 15B satisfy 10 C.F.R. § 2.309(f)(1)(v).

The final requirement is that Intervenors provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that Intervenors dispute, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this

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<sup>105</sup> June 10, 2009 e-mail from Mark Tonacci (quoted in Gundersen Decl. at 10).

<sup>106</sup> June 4, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 7).

<sup>107</sup> June 11, 2009 e-mail from Aida Rivera-Varona (quoted in Gundersen Decl. at 13).

belief.<sup>108</sup> Both DTE and NRC Staff allege that the proposed contention is not admissible because it fails to directly challenge the COLA. NRC Staff focuses upon Intervenors' statement that Contention 15 is a "contention of omission."<sup>109</sup> NRC Staff points out that Chapter 17 of the FSAR and Appendix 17AA describe DTE's QA program.<sup>110</sup> Thus, in their view, the FSAR satisfies 10 C.F.R. § 52.79(a)(25). In addition, NRC Staff and DTE argue that, although Intervenors quote and rely on the NOV, they fail to explain how the violations in the NOV give rise to a dispute of material fact with the Application.<sup>111</sup>

We agree with NRC Staff and DTE that, to the extent Contention 15 alleges that the COLA fails to include a description of DTE's QA program, the contention is not admissible because the FSAR does include such a description. But, unlike NRC Staff and DTE, we do not understand the primary concern of Contention 15 to be that DTE failed to describe a QA program. Although Intervenors do characterize Contention 15 as a contention of omission,<sup>112</sup> they refer on the next page of Contention 15 to "DTE's lack of a meaningful QA program."<sup>113</sup> We understand this statement to refer to the entire pattern of DTE's QA violations, including both the complete lack of a DTE QA program between March 2007 and February 2008 and the claim that, even after February 2008, DTE failed to consistently implement a QA program that complies fully with Appendix B. Intervenors also assert that DTE cannot be relied upon to implement a compliant QA program in the future. Accordingly, the fact that FSAR Chapter 17 describes a QA program does not render Contention 15 inadmissible.

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<sup>108</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>109</sup> NRC Staff Answer to 15 at 7 (citing Contention 15 at 12).

<sup>110</sup> Id. at 8.

<sup>111</sup> See id. at 12-16; Applicant Answer to 15 at 13-14.

<sup>112</sup> Contention 15 at 12.

<sup>113</sup> Id. at 13 (emphasis added).

NRC Staff argues that Intervenor must do more than restate the QA violations in the NOV. In order to show that Contention 15 concerns a dispute of material fact with the Application, NRC Staff maintains that they must tie the QA violations in the NOV to some defect in the COLA.<sup>114</sup> “We agree in general with the Applicant and Staff that the mere recitation of unrelated adverse findings in reports of inspections and audits performed by the Staff and Applicant does not supply information on what specifically would be litigated.”<sup>115</sup> But “[t]his is to be contrasted with proceedings where particular allegations of specific patterns of QA/QC problems, often based on inspection reports, have been litigated.”<sup>116</sup> Here, the NOV describes a “specific pattern[] of QA/QC problems.”<sup>117</sup> These include DTE’s failure between March 2007 and February 2008 to establish and implement a QA program to govern safety-related COLA activities, retain overall control of safety-related activities performed by B&V, complete internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities, and document trending of corrective actions to identify recurring conditions adverse to quality.<sup>118</sup> Intervenor also allege that DTE’s failure to implement the QA program required by Appendix B continues to the present day. The alleged violations are thus not isolated instances of non-compliance, but rather reflect a pattern of violations that Intervenor claim continued throughout the period during which the COLA was under preparation, and arose from DTE’s failure to establish and implement its own QA program under Appendix B for safety-related COLA activities.

Intervenor have also cited language in the NOV which shows that, during the period when DTE lacked its own QA program, B&V was performing safety-related work connected with

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<sup>114</sup> NRC Staff Answer to 15 at 12-16.

<sup>115</sup> Limerick, LBP-83-39, 18 NRC at 89.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> NOV at 1-2.

the preparation of the COLA. The NOV states that between March 2007 and February 2008, DTE failed to “retain overall control of safety-related activities performed by B&V,” “classify safety-related B&V COL application and OE contracts as safety-related,” and “adequately document the qualification of B&V to perform safety-related COL application activities.”<sup>119</sup> If we take these statements in the NOV at face value, they confirm that B&V was performing safety-related work at the time of the QA violations in the NOV.

In addition, as we have previously explained, Intervenors allege that the FSAR is infected by DTE’s QA violations.<sup>120</sup> In particular, Intervenors state that “the FSAR’s accuracy in explicating accident scenarios and probabilities is brought into question by the claimed utter lack of ongoing quality assurance activity.”<sup>121</sup> They maintain that such tainted parts of the FSAR should not be used by the NRC as a basis for issuing the COL. It is true that Intervenors allege only that the FSAR’s accuracy is “brought into question,” not that it actually provides false information. But to argue that they must show specific information in the FSAR to be false to have Contention 15 admitted misapprehends the effect of QA violations. The effect of a pattern of QA violations is not necessarily to show that particular safety-related information is false, but, as the Appeal Board stated in the Diablo Canyon licensing proceeding, to erode the confidence the NRC can reasonably have in, and create substantial uncertainty about the quality of, the

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<sup>119</sup> Contention 15 at 4 (quoting NOV at 1).

<sup>120</sup> See supra Section II.B.

<sup>121</sup> Contention 15 at 12. Accident scenarios and probabilities are evaluated in Chapter 15 of the FSAR. Although Intervenors specifically identify only the “the FSAR’s accuracy in explicating accident scenarios and probabilities” as brought into question by the alleged pattern of QA violations, we do not interpret Contention 15A as limited to only those specific safety issues. As we have explained, we understand Contention 15A to challenge the quality of the safety-related information in the FSAR that is based on B&V’s tests, investigations, or other safety-related activities performed when DTE failed to establish and implement its own QA program that conformed to the requirements of Appendix B. Thus, Contention 15A potentially implicates other parts of the FSAR, including Chapters 5, 6, and 15.

work that is tainted by the alleged QA violations.<sup>122</sup> To be sure, this does not lead inexorably to the conclusion that the work must be rejected or the application denied.

[P]erfection in plant construction and the facility construction quality assurance program is not a precondition for a license under either the Atomic Energy Act or the Commission's regulations. What is required instead is reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety.<sup>123</sup>

Similarly, in the Callaway licensing proceeding, the Appeal Board stated:

In any project even remotely approaching in magnitude and complexity the erection of a nuclear power plant, there inevitably will be some construction defects tied to quality assurance lapses. It would therefore be totally unreasonable to hinge the grant of an NRC operating license upon a demonstration of error-free construction. Nor is such a result mandated by either the Atomic Energy Act of 1954, as amended, or the Commission's implementing regulations. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). Thus, in examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation.<sup>124</sup>

Nevertheless, while perfection in the applicant's QA program is not required, once a pattern of QA violations has been shown, the license applicant has the burden of showing that the license may be granted notwithstanding the violations. For example, in the Diablo Canyon proceeding, petitioners successfully obtained reopening of the record with regard to design QA. The Appeal Board conducted an adjudicatory hearing to determine whether the applicant's design verification program established the adequacy of the unit's design notwithstanding the

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<sup>122</sup> Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984) (quoting that Board's Scheduling Order).

<sup>123</sup> Diablo Canyon, ALAB-756, 18 NRC at 1345 (citing 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i); Power Reactor Dev. Co. v. Int'l Union, 367 U.S. 396, 407 (1961); Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1004 (1973), aff'd sub nom., Citizens for Safe Power v. NRC, 524 F.2d 1291 (D.C. Cir. 1975)). See also Union Elec. Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983).

<sup>124</sup> Callaway, ALAB-740, 18 NRC at 346 (footnote omitted).

QA violations.<sup>125</sup> The Appeal Board made clear that the applicant, not the petitioners, had the burden of proof on that issue.

The [Appeal Board's scheduling order] . . . indicated we would take our lead from the Commission and permit the applicant's various verification efforts "to substitute for, and supplement, the applicant's design quality assurance program in order to demonstrate that the Diablo Canyon plant is correctly designed." It concluded by stating that the "real issue . . . has, in effect, moved beyond the question of what deficiencies existed in the applicant's Diablo Canyon design quality assurance program to the question whether the applicant can demonstrate that [its verification efforts] verify the correctness of the Diablo Canyon design."

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In order to prevail on each of the remaining factual issues, the applicant's position must be supported by a preponderance of the evidence. . . . [W]e must independently determine whether the verification programs and their results placed before us in the reopened operating license proceeding are sufficient to verify the adequacy of the Diablo Canyon design. To do this, the applicant's efforts must be measured against the same standard as that set forth in the Commission's quality assurance criteria, 10 C.F.R. Part 50, Appendix B: whether the verification program provides 'adequate confidence that a [safety-related] structure, system, or component will perform satisfactorily in service.' If the applicant's verification efforts meet this standard, then there will be reasonable assurance with respect to the design of the Diablo Canyon facility that it can be operated without endangering the health and safety of the public.<sup>126</sup>

Thus, once the petitioners in the Diablo Canyon proceeding established that the plant's design was infected by a pattern of QA violations, the burden shifted to the applicant to reestablish confidence in the adequacy of the design. The implication of that ruling for the present case is that Intervenors need show only that safety-related design information in the FSAR is infected by a pattern of QA violations. The burden would then shift to DTE to reestablish confidence in the safety-related aspects of the design. As we have explained, Intervenors point to a pattern of QA violations that coincides with the period when DTE's

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<sup>125</sup> See Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1321 (D.C. Cir. 1984).

<sup>126</sup> Diablo Canyon, ALAB -763, 19 NRC at 576-78 (quoting that Board's Scheduling Order) (emphasis added). The quotation concerns the allocation of the burden of proof at an evidentiary hearing. There would be even less justification to impose a more demanding burden upon Intervenors at the contention admissibility stage, where they are not required to prove their case on the merits.

contractor was performing safety-related tests, investigations, and other activities in support of the FSAR. Intervenors allege that the FSAR is therefore infected by this pattern of QA violations. Because this places upon DTE the burden of removing the taint of the QA violations, Intervenors have established in Contention 15A a dispute of material fact with a specific portion of the application (the FSAR), as required by 10 C.F.R § 2.309(f)(1)(vi).<sup>127</sup>

Intervenors also claim that DTE's alleged failure to consistently implement a QA program precludes the NRC from finding that the program will be implemented during future stages of the Fermi Unit 3 project. This claim also presents a dispute of material fact with a specific portion of the Application. Chapter 17 of the FSAR, as we have noted, describes DTE's QA program. "The description of the quality assurance program for a nuclear power plant must include a discussion of how the applicable requirements of appendix B to 10 CFR part 50 have been and will be satisfied, including a discussion of how the quality assurance program will be implemented."<sup>128</sup> FSAR Section 17.5 purports to satisfy this requirement.<sup>129</sup> In Contention 15B, however, Intervenors dispute whether DTE's QA program will in fact be implemented, thus taking issue with a material aspect of FSAR Chapter 17. In the Callaway licensing proceeding, the Appeal Board recognized the viability of a claim that, even when an applicant shows that all ascertained construction errors have been cured,

there may remain a question whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components. A

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<sup>127</sup> NRC Staff notes a July 2007 NRC Staff audit of B&V's subsurface investigations that were carried out to support site characterization. The audit found that "drilling and field testing activities were controlled by adequate procedures and standards with an appropriate level of supervisory and quality assurance oversight." NRC Staff Answer to 15 at 16 n.4. However, NRC Staff has not called to our attention any other record of a QA audit of other safety-related work that may have been performed by B&V.

<sup>128</sup> 10 C.F.R. § 52.79(a)(25).

<sup>129</sup> Fermi 3 COL Application, Part 2, Final Safety Analysis Report, Rev. 1, March 2009 at 17-4.

demonstration of a pervasive failure to carry out the quality assurance program might well stand in the way of the requisite safety finding.<sup>130</sup>

Intervenors here allege such a pervasive failure.

We therefore conclude that both subparts of Contention 15 (A and B) meet the requirements of 10 C.F.R. § 2.309(f)(1). We agree with DTE and NRC Staff, however, that Intervenors have provided no legal or factual basis for the Board to order partial suspension of the COLA adjudication.<sup>131</sup> We see no realistic prospect of injury to Intervenors if the adjudication continues because Intervenors will have the opportunity to fully litigate Contentions 15A and 15B before the Commission makes a final decision whether to issue the license. The Commission's general policy is to avoid unnecessary delays in adjudicatory proceedings,<sup>132</sup> and Intervenors have not provided a sufficient justification to show that a delay in this proceeding is necessary.

We accordingly admit Contentions 15A and 15 B but deny Intervenors' request for partial suspension of the COLA adjudication.<sup>133</sup>

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<sup>130</sup> Callaway, ALAB-740, 18 NRC at 346.

<sup>131</sup> Applicant Answer to 15 at 18; NRC Staff Answer to 15 at 18-19.

<sup>132</sup> See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

<sup>133</sup> NRC Staff's April 2010 decision to grant DTE's appeal of NOV Violation A does not affect our decision. See supra note 16 and accompanying text. No party has called that decision to our attention, much less suggested that it should affect our ruling on the admissibility of Contention 15. We also note that the decision to partially grant DTE's appeal seems to rest on NRC Staff's view that it lacks legal authority to issue a NOV for Appendix B violations that occurred prior to the date the COLA was filed with the NRC. Id. The issue before us, however, is not the extent of NRC Staff's legal authority to issue a NOV, but the effect of DTE's alleged QA violations on the quality of safety-related design information in the FSAR and the confidence the NRC can reasonably have in DTE's commitment to implementing QA requirements. NRC Staff's April 2010 decision does not appear to affect those issues. Moreover, even if it did so, we are not bound by NRC Staff's position or by changes in that position. See Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 824-25 (2008).



## II. Ruling on Contention 16

Contention 16 states:

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 encompassed 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. [. . .]

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 Office of New Reactors staff charged with review and approval of new COLAs have [sic] 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 C.F.R. Part 50, Appendix B.<sup>134</sup>

### A. Timeliness

Contention 16, like Contention 15, was filed after the expiration of the filing deadline in the notice of hearing. We accordingly first ask whether Contention 16 satisfies the criteria of 10 C.F.R. § 2.309(f)(2). We must consider whether the material forming the basis for the contention was previously unavailable and materially different from other information already available to Intervenors.<sup>135</sup>

Intervenors state that Contention 16 is timely filed because its basis is the November NOV, which contains information about GEH’s QA program that was not previously available.<sup>136</sup> The NOV was posted on ADAMS on November 12, 2009, and Contention 16 was filed within 30

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<sup>134</sup> Contention 16 at 2-3.

<sup>135</sup> 10 C.F.R. § 2.309(f)(2)(i) and (ii).

<sup>136</sup> Contention 16 at 11.

days of that posting.<sup>137</sup> Applicant argues that Contention 16 is untimely because the November NOV does not contain any information that was not previously available to Intervenors.<sup>138</sup> Applicant claims that Intervenors are actually challenging the ESBWR design certification application, which has been publicly available for several years.<sup>139</sup> Under Applicant's logic, Intervenors would be expected to carefully research the ESBWR design certification application and raise any related QA contentions before the initial opportunity to file a petition to intervene in the Fermi Unit 3 COL proceeding expired. We do not believe the Commission intended for intervenors to anticipate this type of problem and exercise such exacting scrutiny over the design process accompanying a COLA. Because Intervenors cannot reasonably be expected to discover the QA issues that gave rise to the November NOV without the NOV itself as notice, we find that Intervenors have plausibly argued that the November NOV is new and materially different information. Because Contention 16 was filed within thirty days of the release of the NOV, as our Scheduling Order requires, we consider Contention 16 timely filed. Therefore, Contention 16 satisfies the requirements of 10 C.F.R. § 2.309(f)(2), and there is no need to consider the criteria in 10 C.F.R. § 2.309(c).

### **B. Admissibility**

In contrast to Contention 15, in which Intervenors allege that DTE failed to establish and to implement a QA program for Fermi Unit 3 that conforms to Appendix B, Contention 16 principally alleges that GEH is not adequately implementing its QA program in connection with the standard design of the ESBWR.<sup>140</sup> Although Contention 16 suggests several issues arising

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<sup>137</sup> Id. A proposed new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. Scheduling Order at 2.

<sup>138</sup> Applicant Answer to 16 at 11.

<sup>139</sup> Id.

<sup>140</sup> Contention 16 at 1-2.

from the November NOV that Intervenors want to raise in this proceeding, none provides a basis to admit Contention 16.

Intervenors repeat their earlier request that the Board suspend the Fermi Unit 3 COLA adjudication until rulemaking on the ESBWR design is complete. Intervenors reason that “to permit the COLA adjudication to proceed in light of this lack of [design certification] completion mocks the NRC’s regulatory requirements.”<sup>141</sup> NRC Staff correctly analogizes this argument to that Intervenors presented in Contention 4, which this Board previously rejected.<sup>142</sup> In Contention 4, Intervenors also argued in favor of suspending this proceeding until final rulemaking to certify the ESBWR design is complete.<sup>143</sup> We reject the request again, both because our prior ruling is *res judicata*, and because NRC regulations clearly permit combined license applications that reference incomplete design certifications.<sup>144</sup>

In a related argument, Intervenors request that “the ASLB and Commission . . . suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved.”<sup>145</sup> This request must be denied because, although it sounds like a request for something analogous to injunctive relief, it actually represents another attempt by Intervenors to circumvent the regulation permitting license applicants to reference design certification applications that have not been granted. The fact that NRC Staff issued a NOV to GEH based on alleged QA violations in connection with the DCD for the standard design does not affect

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<sup>141</sup> Id. at 17.

<sup>142</sup> NRC Staff Answer to 16 at 8; LBP-09-16, 70 NRC at 268-69.

<sup>143</sup> Id.

<sup>144</sup> Under 10 C.F.R. § 52.55(c), an applicant may reference a design certification that the Commission has docketed but not granted. Citing this regulation, the Commission has previously rejected a request to hold a license application in abeyance until the design certification rulemaking is completed. Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 4 (2008).

<sup>145</sup> Contention 16 at 3.

application of the regulation. DTE may accept the risk that the standard design certification will not be granted, because of GEH's alleged QA violations or for any other reason.

To the extent Intervenor object to the regulation allowing an applicant to reference a standard design that is the subject of a rulemaking, this Board cannot address their concerns. A licensing board may not ordinarily consider the validity of or a challenge to a Commission regulation.<sup>146</sup> Although an intervenor may petition the Commission for permission to challenge a rule, the party must make a showing of "special circumstances."<sup>147</sup> The special circumstances required to obtain waiver have been described as a prima facie showing that application of a rule in a particular way would not serve the purposes for which the rule was adopted.<sup>148</sup> No such showing has been attempted here.

Intervenors' principal complaint appears to be that the GEH QA program implementation is deficient. To make their point, Intervenor reiterate portions of the November NOV.<sup>149</sup> Intervenor attempt to tie their concerns with the GEH QA program to the ESBWR DCD by stating that the NOV identifies errors that appear to violate the DCD.<sup>150</sup> However, Intervenor do not identify which specific parts of the Fermi Unit 3 COLA (or the DCD embedded in the

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<sup>146</sup> 10 C.F.R. § 2.335(a) ("no regulation . . . of the Commission . . . concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding"); Northeast Nuclear Energy Co. (Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 (2001) (intervenor may not attack regulatory limits for effluent releases).

<sup>147</sup> 10 C.F.R. § 2.335. To obtain waiver of a rule, it is not enough to merely allege special circumstances. The special circumstances must be set forth with particularity and supported by an affidavit or other proof. Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

<sup>148</sup> See, e.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 584-85 (1978).

<sup>149</sup> Intervenor also supplement their discussion of the GEH QA program with various statements about oversight of new reactors that appear to be unrelated to the Fermi Unit 3 COLA or the ESBWR DCD. See, e.g., Contention 16 at 10, 16.

<sup>150</sup> Contention 16 at 4.

COLA) were violated. Therefore, it is unclear what issue Intervenors want to litigate. Because Contention 16 contains little more than a recitation of the November NOV, it does not specify the law or fact to be challenged, as the first contention admissibility criterion requires.<sup>151</sup>

To support their general argument, Intervenors cite the Gundersen Declaration, which was filed in support of Contention 15.<sup>152</sup> The Gundersen Declaration concerns weaknesses in DTE's QA program, while Contention 16, as we understand it, concerns the adequacy of GEH's QA program implementation. Thus, the Gundersen Declaration does not support Contention 16. Intervenors also reference portions of a 2009 NRC Inspector General's (IG) report on Quality Assurance Planning for New Reactors that outlines the IG's concerns about communication issues with foreign-based companies.<sup>153</sup> Intervenors do not explain how the IG report supports the admissibility of Contention 16. To comply with 10 C.F.R. § 2.309(f)(1)(vi), Intervenors must present sufficient information to demonstrate a genuine dispute with the Application on a material issue of law or fact. Merely quoting or citing documents as the basis for a contention, as Intervenors have done for Contention 16, is not enough to fulfill this requirement.<sup>154</sup>

As an alternative to admitting Contention 16 for adjudication now, Intervenors request that Contention 16 be admitted and held in abeyance pending NRC Staff review of the design certification application.<sup>155</sup> Intervenors concede that Contention 16 raises an issue related to the design certification rulemaking.<sup>156</sup> Commission policy dictates that, when a COLA

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<sup>151</sup> 10 C.F.R. § 2.309(f)(1)(i).

<sup>152</sup> Contention 16 at 6.

<sup>153</sup> Id. at 9-10.

<sup>154</sup> See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003).

<sup>155</sup> Contention 16 at 13.

<sup>156</sup> Id. at 14.

references a docketed design certification application, a contention challenging an aspect of the standard reactor design should be resolved in the rulemaking proceeding for the standard design, not in the COL proceeding.<sup>157</sup> Such a contention may be held in abeyance by a licensing board pending completion of the rulemaking, but for a board to take that action the contention must be “otherwise admissible.”<sup>158</sup> Licensing Boards have interpreted “otherwise admissible” to mean a contention that meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) but for the fact that it challenges a yet-to-be-certified reactor design.<sup>159</sup>

Contention 16 is not “otherwise admissible” under this interpretation. The issue only leads back to the problem we previously identified: Contention 16 does not adequately assert a point of law or fact to be challenged, much less explain the reasoning for that challenge. Contention 16 could be interpreted as a vague challenge to either the ESBWR design certification application or the Fermi Unit 3 COLA, but under either interpretation it fails to identify a genuine dispute of material fact with the application. Therefore, because Contention 16 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), it is not otherwise admissible and may not be held in abeyance.

We therefore do not admit Contention 16.

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<sup>157</sup> Id.; Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

<sup>158</sup> 73 Fed. Reg. at 20,972; Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-08, 69 NRC 317, 324 (2009).

<sup>159</sup> See, e.g., Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC \_\_, \_\_ (slip op. at 21-22) (Aug. 6, 2009); Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC 554, 561-64 (2008).

**III. Conclusion and Order**

For the foregoing reasons:

- A. Contentions 15A and 15B are admitted.
- B. Contention 16 is not admitted.
- C. The Board denies Intervenors' requests to suspend partially the Fermi Unit 3 COLA adjudication and to suspend the ESBWR design activities.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Michael F. Kennedy  
ADMINISTRATIVE JUDGE

*/RA/*

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Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
June 15, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (RULING ON PROPOSED NEW CONTENTIONS 15 AND 16) (LBP-10-09) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-033-COL  
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Dated at Rockville, Maryland  
 this 15<sup>th</sup> day of June 2010