UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	July 9, 2010

ORDER
(Granting Motion for Summary Disposition of Contention 3)

Before the Board is the Applicant's Motion for Summary Disposition of Contention 3. For the reasons set forth below, the Board grants the Motion, without prejudice to the filing of a new or amended contention challenging the adequacy of the Applicant's revisions to its Environmental Report that explain its plans for the management of Class B and C low-level radioactive waste.

BACKGROUND

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), designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan. On September 18, 2008, DTE submitted its combined license application (COLA) for Fermi Unit 3 to the NRC.[1] On January 8, 2009, the Commission published in the Federal Register a notice of

[1] 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

hearing and opportunity to petition for leave to intervene on the COLA for Fermi Unit 3.[2] The Commission instituted this adjudicatory proceeding after Intervenors[3] submitted a petition to intervene on March 9, 2009.[4] In July 2009, the Board found that Intervenors had standing to participate in this proceeding, admitted four of the contentions that Intervenors submitted for litigation, and granted Intervenors' hearing request.[5] One of the contentions admitted by the Board, Contention 3, concerned Applicant's failure to explain in the Environmental Report (ER) how they will manage Class B and C low-level radioactive waste (LLRW) in the absence of an offsite disposal facility.[6]

Applicant now seeks summary disposition of Contention 3.[7] Applicant notes that the contention, as described by the Board, is a "'contention of omission.'"[8] In particular, the contention alleges that the ER omits information that should have been included to satisfy the requirements of the National Environmental Policy Act (NEPA)[9] and the NRC's regulations

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Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009).

[2] Id.

[3] 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.

[4] 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) (Petition to Intervene).

[5] Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3) LBP-09-16, 70 N.R.C. __, __ (slip op. at 1-2) (July 31, 2009), aff'd, CLI-09-22, 70 NRC __, __ (slip op. at 2-3) (Nov. 17, 2009).

[6] Id. at 25.

[7] Applicant's Motion for Summary Disposition of Contention 3 (April 26, 2010) [hereinafter Applicant Motion].

[8] Applicant's Motion at 4 (quoting LBP-09-16 at 25).

[9] 42 U.S.C. §§ 4321 to 4370f.

implementing NEPA.[10] The Board, Applicant explains, faulted the ER because it failed to acknowledge that DTE "lacks an offsite disposal facility and to either explain its plan for storing such wastes onsite during the license term, or show that it has some alternative means of managing the wastes that will not require either an offsite disposal facility or extended onsite storage."[11] Contention 3 required the ER to explain how the Class B and C waste from the new reactor would be managed given the lack of access to such a disposal facility. Applicant maintains that Contention 3 is "limited to (1) the ER's failure to acknowledge the closure of Barnwell to out-of-compact waste; and (2) the ER's failure to either (a) address the need for, and the environmental consequences of, long-term storage of Class B and C waste at the Fermi 3 site, or (b) demonstrate that long-term storage at the Fermi 3 site will not be necessary."[12]

Applicant states that, on February 16, 2010, it revised the ER to address the omissions upon which Contention 3 is based.[13] The revised ER now acknowledges that the Barnwell facility no longer accepts Class B and C waste from sources in Michigan.[14] According to Applicant, "the revised ER also describes how, in the absence of an offsite disposal facility for Class B and C waste generated at Fermi Unit 3, Applicant would store Class B and C waste on-site and discusses the environmental consequences of extended on-site storage."[15] Applicant states that: (1) DTE has reconfigured the Fermi Unit 3 Radwaste Building to accommodate up to ten years of packaged Class B and C waste; and, (2) additional waste minimization measures could be implemented to reduce generation of Class B and C waste to extend the storage

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[10] 10 C.F.R. Part 51.

[11] Applicant's Motion at 5 (citing LBP-09-16, 70 NRC __ (slip op. at 25).

[12] Id. at 5 (citing LBP-09-16 at 25).

[13] Applicant's Motion at 6.

[14] Id. at 6.

[15] Id. at 6.

capacity beyond the ten years provided for in the design.[16] Applicant explains that the revised ER "concludes that continued storage of Class B and C waste would maintain occupational exposures within permissible limits and result in no additional environmental impacts."[17] Applicant further states in the revised ER that if additional storage capacity were to be necessary, a new temporary storage facility could be constructed in accordance with NRC design guidance.[18] In addition, the revised ER discusses the possibility that DTE could enter into a commercial agreement with a third party contractor to process, store, own, and ultimately dispose low-level waste generated as a result of Fermi Unit 3 operations.[19]

On April 26, 2010, Applicant filed its motion for summary disposition of Contention 3. Applicant alleges that the contention is moot because they have amended the ER to explain their plan for managing Class B and C waste if no offsite disposal facility is available when Fermi Unit 3 begins operation.[20]

Intervenors filed a response opposing the motion on June 1, 2010, pursuant to an extension of time granted by the Board.[21] Intervenors argue that Applicant's proposed COLA changes do not fully supply the omitted information and that "genuine issues of material fact warrant denial of summary disposition."[22] Intervenors allege that: (1) the proposed COLA changes are tentative and not final; (2) dozens of drawings and illustrations of the contemplated radwaste facility have been redacted; (3) plans for waste generated beyond the ten years that

[16] Id. at 6-7.

[17] Id. at 7.

[18] Id. at 6.

[19] Id. at 8.

[20] Id. at 5.

[21] Intervenors' Memorandum in Response to Applicant's Motion for Summary Disposition of Contention 3 (June 1, 2010) [hereinafter Intervenors' Response].

[22] Intervenors' Response at 1.

the reconfigured radwaste building would be used are still omitted from the Applicant's ER; (4) third party processors have no disposal site available either and will have to return the waste to DTE to provide onsite storage; and (5) opening a new low-level disposal site to take the Fermi Unit 3 waste is unrealistic given that no such facility has been constructed in the United States in over thirty years.[23]

ANALYSIS

We agree with Applicant that Contention 3 is moot because they have submitted an ER revision acknowledging the partial closure of the Barnwell facility and explaining how they will manage Class B and C waste given the lack of access to such a facility. Intervenors' issues relating to the adequacy of Applicant's new LLRW management plan must be presented in a new or amended contention, which we do not have before us.

To decide summary disposition motions in Subpart L proceedings such as this, licensing boards apply the standards of Subpart G, which are set forth in 10 C.F.R. § 2.710(d)(2).[25] A motion for summary disposition must be granted "if the filings in the proceeding . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."[26]

As Applicant correctly argues, Contention 3, as admitted by the Board, required Applicant to explain its plan for the management of LLRW generated at Fermi Unit 3 given the lack of access to an offsite disposal facility.[27] The Board described Contention 3 as a

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[23] Id at 2. The Intervenors list six specific issues with the Applicant's revised ER, but two of the six issues are repetitive. For ease of explanation, we have combined them into the five listed above.

[25] See 10 C.F.R. § 2.1205(c).

[26] 10 C.F.R. § 2.710(d).

[27] LBP-09-16, 70 NRC 227 at 25.

"contention of omission."[28] The Petitioners (now Intervenors) described Contention 3 in the same terms themselves, stating that it is a "'contention of omission,' i.e., a claim, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that 'the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief.'"[29]

As another board explained concerning a similar contention of omission, "[i]f the Applicant cures the omission, the contention will become moot. Then, [the intervenor] must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by the Applicant."[30] We took note of this general rule in our ruling on standing and contention admissibility.[31]

Applicant correctly maintains that Contention 3 is moot because it has amended the ER to explain their plans for managing Class B and C wastes if an offsite facility is not available to accept such wastes. In response, Intervenors dispute the adequacy of the new plan described in the revised ER. However, it is no longer true that the ER lacks a plan for the management of such wastes in the absence of a disposal facility. The dispute has shifted from the COLA's lack of a plan to the adequacy of the plan. The contention of omission that the Board previously admitted has therefore become moot.

Intervenors have alleged various inadequacies in Applicant's plan. But we have no new or amended contention before us that challenges the adequacy of the Applicant's revisions to the ER. That fact distinguishes this case from the North Anna COL proceeding, in which the Board also dismissed a LLRW contention as moot after the applicant submitted a revision to its

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[28] LBP-09-16 at 25.

[29] Petition to Intervene at 44 (quoting Pa'ina Hawaii, LLC, LBP-06-12, 63 NRC at 413).

[30] Virginia Elec. and Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC 294, 317 (2008) (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)).

[31] LBP-09-16 at 11.

ER,[32] but subsequently admitted in part a new contention challenging the adequacy of the LLRW management plan described in the revision.[33] Here, by contrast, we have no new contention to evaluate, but only various arguments in the Intervenors' Response to the Summary Disposition motion challenging the adequacy of Applicant's revision.[34] Contention 3 as admitted by the Board cannot support a challenge to the revised ER, since Contention 3 concerned the omission from the original ER of a LLRW management plan that took into account the partial closure of the Barnwell facility. The Commission has made clear that an intervenor challenging the adequacy of information submitted to cure such an omission must file a new contention:

> If we did not require an amended or new contention in "omission" situations, an original contention alleging simply a failure to address a subject could readily be transformed — without basis or support — into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual "genuine dispute" with the applicant on a material issue of law or fact.[35]

We therefore conclude that we may not now consider Intervenors' arguments concerning the adequacy of the new LLRW management plan. We will consider those arguments only if they are presented in the form of a new or amended contention. If Intervenors do submit such a contention, they must address not only the admissibility factors listed in 10 C.F.R. § 2.309(f)(1), but also the requirements for nontimely filing of contentions in 10 C.F.R. § 2.309(c).

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[32] North Anna Unit 3, Licensing Board Order (Denying Contention 1 as Moot) at 3-4 (Aug. 19, 2009) (unpublished).

[33] North Anna Unit 3, LBP-09-27, 70 NRC ___ (Nov. 25, 2009).

[34] Intervenors' Response at 1-2.

[35] Duke Energy Corp., 56 NRC at 383 (footnote and citations omitted).

CONCLUSION

Applicant's Motion for Summary Disposition of Contention 3 is granted, without prejudice to the filing of a new or amended contention challenging the adequacy of the Applicant's revisions to its Environmental Report that explain its plans for the management of Class B and C waste.

It is so ORDERED:

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[36]

/RA/
Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/
Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/
Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 9, 2010

[36] Copies of this order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Applicant Detroit Edison Company; (2) Intervenors Beyond Nuclear et al.; and (3) NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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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 (GRANTING MOTION FOR SUMMARY DISPOSITION OF CONTENTION 3) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 9th day of July 2010