

December 16, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT’S MOTION TO STRIKE
PORTIONS OF INTERVENORS’ RESPONSE TO MOTION
FOR SUMMARY DISPOSITION OF CONTENTION 8

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Detroit Edison Company (“Applicant”) files this motion to strike portions of “Intervenors’ Memorandum in Opposition to DTE’s ‘Motion for Summary Disposition of Contention 8,’” dated December 6, 2010 (“Response to Motion”).¹ *See also* “Applicant’s Motion for Summary Disposition of Contention 8,” dated November 16, 2010. In their response opposing summary disposition, the Intervenors introduce new arguments and bases for Contention 8 that are not within the scope of the admitted contention or within the scope of this proceeding. Accordingly, the Licensing Board should strike the new arguments and material from the record. *See Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-199 (2006). Alternatively, the Licensing Board may choose to exclude the new information and arguments from consideration in ruling on the motion for summary disposition. *See Louisiana Energy Services LLP* (National

¹ Counsel for Detroit Edison has contacted counsel for the NRC Staff and Joint Intervenors. Counsel for the NRC Staff indicated that they do not oppose the motion. Counsel for the Joint Intervenors indicated that they oppose the motion.

Enrichment Facility), LBP-04-14, 60 NRC 40, 63-64 (2004). Either approach would be consistent with this Motion, which identifies for the Licensing Board those arguments and references that are beyond the permissible scope of the Intervenors' response.

DISCUSSION

In their Response to Motion, Intervenors impermissibly attempt to expand the scope of Contention 8 by providing new bases and new supporting material, without addressing the criteria for late-filed or amended contentions and without demonstrating that the new issues are within the scope of the combined license ("COL") proceeding.²

Intervenors may not now introduce new bases that were not raised in their original petition by providing new information and arguments in response to a motion for summary disposition.³ Longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998) (citation omitted). In particular, "[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention." *See Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation

² The Intervenors have not to date elected to revise or amend Contention 8 based on the new information provided in Detroit Edison's February 15, 2010 letters to the NRC or subsequent developments. The Licensing Board's scheduling order, dated September 11, 2009, specifically stated that new or amended contentions must be submitted "in a timely fashion based on the availability of the [new] information." Order at 2. The Licensing Board also explained that "[i]n general, 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." *Id.*

³ A Licensing Board has the authority to strike individual arguments. *See, e.g.*, 10 C.F.R. § 2.319(d).

omitted). Allowing a party to amend or supplement its contention in an answer to a motion for summary disposition would run afoul of the Commission's clear directives:

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they "realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

Here, Contention 8, as proposed, focuses only on impacts to fox snakes resulting from the construction of Fermi 3 and, in particular, on the impacts resulting from the destruction of wetlands (*i.e.*, potential fox snake habitat). *See* Petition to Intervene, at 97. Contention 8, as admitted, is a contention under the National Environmental Policy Act ("NEPA") alleging that the Environmental Report ("ER") fails to adequately assess the project's impacts on the Eastern Fox snake. LBP-09-16 at 62. Specifically, the admitted contention relates to (1) discrepancies between information presented in the ER regarding the presence of Eastern Fox snakes at the site and information regarding observations by MDNR (now MDNRE) personnel; and (2) the absence of a discussion of potential mitigation measures related to the fox snake. Nothing in Contention 8 — as proposed or as admitted — relates to decommissioning of Fermi 1, the Independent Spent Fuel Storage Installation ("ISFSI") for Fermi 2, refueling outages for Fermi 2, operation of cooling towers for existing Fermi 2 and proposed Fermi 3, or cumulative effects. Indeed, these matters are beyond the scope of the COL proceeding, which addresses only the licensing of Fermi 3, not the decommissioning of Fermi 1 or the licensing of the Fermi 2 ISFSI.

Accordingly, the Board should exclude the portions of the Intervenor's response identified below:

Response to Motion at 2 Strike: “There will be serious traffic problems at Fermi at many junctures during the construction phase of Fermi 3, especially coinciding with nuclear refueling outages at adjacent Fermi 2. There will be 3 or 4 refueling outages at unit 2, and since at least one of those will coincide with the peak construction activity at the site, an estimated 5000 workers, exclusive of deliveries, will be present for weeks if not months between the two units. *Id.* ¶¶ 3, 4.”

Basis: Outside scope of admitted contention.

Response to Motion at 2 Strike: “DTE has neither quantified nor factored in any added traffic congestion effects from the presence at the Fermi site of even more workers and large construction vehicles involved with the coming decommissioning and dismantling of the Fermi 1 reactor, which is proximate to the proposed Fermi 3 location. *Id.* ¶ 7. The Michigan Historic Preservation Officer has yet to approve the decommissioning plan.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 2 Strike: “The density of workers is anticipated by DTE to create serious traffic management problems, which means that the chances of vehicle snake meetings, resulting in reptile fatalities, will be significantly increased. DTE explains that the traffic jams can be reduced by signal installations and signal modifications, staggering worker shifts, busing employees from off-site, minor lane additions and/or a second entrance to the site. *Id.* ¶ 4. While there is discussion of the possibility of reducing traffic impacts, there is no commitment by DTE to doing so. And the measures are designed to make traffic flow more efficient, not to make avoidance of road killing the eastern fox snake.”

Basis: Outside scope of admitted contention.

Response to Motion at 3 Strike: “Vegetation in the vicinity of the Fermi 2 and 3 cooling towers - presumably including wetlands which are the snake’s habitat – may experience salt depositions as a consequence of treatments applied by DTE to retard plume drift (also called “salt drift”). *Id.* ¶ 9. As salinity levels increase, growth of intolerant plants declines, and yields are reduced. Growth suppression is sometimes accompanied by leaf injury. The potential effects of multiplying the cooling tower plumes over Fermi, and the consequences of increased use of the retardant, are neither mentioned nor discussed in the ER or the lately-submitted mitigation plan.”

Basis: Outside scope of admitted contention.

Response to Motion at 3-4 Strike: “Nor is there mention by DTE of another surface on which eastern fox snakes might sun themselves, which has more ominous implications. Forty-four (44) BWR irradiated nuclear fuel assemblies, cooled for about 25 years post-removal from a reactor core, still give off 6,200 watts of thermal heat output. *Id.* ¶ 10. This might provide an unusually warm place on spring and fall days on the concrete pads of Fermi 2’s Independent Spent Fuel Storage Installation (ISFSI). The Holtec dry storage casks to be used at Fermi 2’s ISFSI are designed to cool the wastes within at a temperature of several hundred degrees F. (as opposed to 100 degrees F. in indoor storage pools), as permitted by NRC regulations and the casks’ technical specifications. Such heat would likely raise the temperature of the concrete pad on which the DSC’s sit, and serve to attract reptiles such as the snakes. Any reptiles so attracted to warm themselves near irradiated nuclear fuel dry casks would also be exposed to the radioactivity emanating from them. NRC regulations allow for 10 millirem per hour dose rates at a distance of 2 meters (6 feet) from a dry cask; this is about one human chest x-ray per hour worth of gamma ray exposure. *Id.* NRC allows for 200 mrem/hour dose rates at the cask’s outer surface, or 20 chest xrays per hour. Such radiation doses to the small body mass of an eastern fox snake would have not only physical impacts on that individual snake, but also on its genetic material, which could cause harm to future generations. Genetic damage to endangered and threatened species further risks its future extinction. None of this is acknowledged or addressed in the amendments proposed or made by DTE to its ER.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 4 Strike: “B. DTE has failed to perform the requisite cumulative effects analysis required by NEPA, as a result of which the proposed mitigation plan for the eastern fox snake is inadequate.”

Basis: Outside scope of admitted contention.

Response to Motion at 4-5 Strike: “As the attached “Statement of Facts Demonstrating Issues of Material Fact” reveals, DTE has not considered, at all, the additional traffic congestion impacts on the eastern fox snake of the pending decommissioning of Fermi 1.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 5 Strike: “Nor does DTE mention or analyze the potential for plume drift salinity to the wetlands habitat which is the snake’s home as a result of using a salty retardant. DTE also has not mentioned nor considered the effects of irradiation exposure of snakes sunning themselves on the concrete pads containing dry storage casks containing spent nuclear fuel.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 8 Strike: “DTE’s failure to consider multiple actions - dismantling of Fermi 1, refueling of Fermi 2, the eventual decommissioning of Fermi 2, construction of Fermi 3, and the deployment of irradiated fuel dry storage casks - together means that the full potential combined impacts on the eastern fox snake have not been properly analyzed.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 8 Strike as follows: “. . . ~~the teardown and removal of Fermi-1, changes in wetlands mitigation, the unanalyzed plume salt drift, and/or radiation effects from the ISFSI facility.~~”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

Response to Motion at 9 Strike as follows: “In light of the missing information about ~~Fermi-1 decommissioning~~; lack of various agencies’ approvals of the proposed mitigation plan; ~~lack of consideration of salt drift effects on eastern fox snake habitat; lack of consideration of the unshielded ISFSI casks~~; and the pending changed minimization of wetland impacts; the ASLB should not dismiss Contention 8.”

Basis: Outside scope of admitted contention; outside scope of COL proceeding.

In addition, the Board should strike the following paragraphs in their entirety from the Intervenor’s “Statement of Facts Demonstrating Issues of Material Fact in Support of Intervenor’s Opposition to DTE’s ‘Motion For Summary Disposition of Contention 8’”: ¶3, ¶7, ¶9, and ¶10.

CONCLUSION

For the foregoing reasons, the Licensing Board should strike the new arguments that are impermissibly included in the Intervenor’s response to the motion for summary disposition or that are beyond the scope of this proceeding. Alternatively, the Board may simply exclude the new information and arguments from consideration in ruling on the motion for summary disposition of Contention 8.

Respectfully submitted,

 /s/ signed electronically by

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Dated at Washington, District of Columbia
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION TO STRIKE PORTIONS OF INTERVENORS’ RESPONSE TO MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 16th day of December 2010, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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