

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

DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

ASLBP No. 09-880-05-COL-BD01

May 20, 2010

MEMORANDUM AND ORDER

(Denying Motions for Summary Disposition of Contentions 6 and 8; Denying in Part and Granting in Part Motion to Strike)

On September 17, 2010, Detroit Edison Company (“DTE” or “Applicant”) submitted a Motion for Summary Disposition of Contention 6.¹ Two months later, on November 16, 2010, DTE submitted a Motion for Summary Disposition of Contention 8.² On December 16, 2010, DTE filed a Motion to Strike Portions of Intervenors’ Response to the Motion for Summary Disposition of Contention 8.³ For the reasons discussed below, the Board denies the Motions for Summary Disposition. The Motion to Strike is granted in part and denied in part.

BACKGROUND

This combined license (“COL”) proceeding concerns the application of DTE pursuant to 10 C.F.R. Part 52, Subpart C, to construct and operate a GE-Hitachi Economic Simplified

¹ Applicant’s Motion for Summary Disposition of Contention 6 (Sep. 17, 2010) at 1 [hereinafter C- 6 Motion].

² Applicant’s Motion for Summary Disposition of Contention 8 (Nov. 16, 2010) at 1 [hereinafter C-8 Motion].

³ Applicant’s Motion to Strike Portions of Intervenors’ Response to Motion for Summary Disposition of Contention 8 (Dec. 16, 2010) at 1 [hereinafter Motion to Strike].

Boiling Water Reactor (“ESBWR”), designated Unit 3, on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan. DTE originally submitted its COL application (“COLA”) for Fermi Unit 3 to the NRC on September 18, 2008.⁴ The Commission published a notice of hearing and opportunity to petition for leave to intervene in the Federal Register on January 8, 2009.⁵ On March 9, 2009, the Intervenors⁶ filed a timely Request for a Hearing and Petition to Intervene,⁷ and on March 19, 2009, this Board was established to preside over the proceeding.⁸ In its July 31, 2009 Order, the Board found that the Intervenors had standing, admitted four of their contentions, and granted their hearing request.⁹

One of the contentions admitted by the Board in its July 31, 2009 Order, Contention 6, concerns the adequacy of the analysis in the Applicant’s Environmental Report (“ER”)¹⁰ regarding the potential impact of chemical and thermal discharges from the proposed Fermi Unit

⁴ 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, 836 (Jan. 8, 2009).

⁵ Id.

⁶ Intervenors include 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.

⁷ Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating Proceedings and Request for Adjudication Hearing (Mar. 9, 2009); REFILED Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Apr. 21, 2009) [hereinafter Petition].

⁸ Establishment of Atomic Safety and Licensing Board, 74 Fed. Reg. 12,913 (Mar. 25, 2009).

⁹ LBP-09-16, 70 NRC 227, 236–37 (2009), aff’d, CLI-09-22, 70 NRC __, __–__ (slip op. at 2–3) (Nov. 17, 2009).

¹⁰ Fermi 3 Combined License Application, Part 3: Environmental Report, Rev. 0 (Sept. 2008) (ADAMS Accession No. ML082730641) [hereinafter ER Rev. 0]. Contentions 6 and 8, along with all of the other contentions addressed in the Board’s July 31, 2009 Order, were analyzed based on Rev. 0 of the Applicant’s ER.

3 on algal blooms in the western Lake Erie basin and the failure of the ER to discuss potential proliferation of a newly identified species of harmful algae, the Lyngbya wollei, in the basin.¹¹

In addition, in its July 31, 2009 Order, the Board also admitted Contention 8, which concerns the ER's alleged failure to adequately assess the Fermi Unit 3 project's impacts on the eastern fox snake, a threatened species according to the Michigan Department of Natural Resources and Environment ("MDNRE"), and to consider alternatives that would mitigate or eliminate those impacts.¹²

Applicant now seeks summary disposition with regard to Contention 6 and Contention 8.¹³ Intervenors timely filed oppositions to the Applicant's summary disposition motions.¹⁴ In addition, Applicant filed a Motion to Strike Portions of Intervenors' Response to Motion for Summary Disposition of Contention 8 ("Motion to Strike"), which Intervenors opposed.¹⁵

LEGAL STANDARD

The standard for summary disposition motions in a subpart L proceeding such as this is set forth in 10 C.F.R. § 2.1205.¹⁶ Under that regulation, licensing boards must apply the summary disposition standard for subpart G proceedings, found in 10 C.F.R. § 2.710. According to Section 2.710(d)(2), a moving party is entitled to summary disposition if the

¹¹ LBP-09-16, 70 NRC at 277–82.

¹² Id. at 286–92. Prior to being named "Michigan Department of Natural Resources and Environment," that organization was known simply as "Michigan Department of Natural Resources."

¹³ C-6 Motion at 1; C-8 Motion at 1.

¹⁴ See Intervenors' Memorandum in Opposition to DTE's 'Motion for Summary Disposition of Contention 6' (Oct. 27, 2010) at 1 [hereinafter C-6 Answer]; Intervenors' Memorandum in Opposition to DTE's 'Motion for Summary Disposition of Contention 8' (Dec. 6, 2010) at 1 [hereinafter C-8 Answer].

¹⁵ See Motion to Strike; Intervenors' Memorandum in Opposition to DTE's 'Motion to Strike Portions of Intervenors' Response to Motion for Summary Disposition of Contention 8' (Dec. 29, 2010).

¹⁶ 10 C.F.R. § 2.1205.

presiding officer finds that “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.”¹⁷

In general, when ruling on motions for summary disposition, the Commission applies standards analogous to those used by federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.¹⁸ Consistent with Rule 56, the moving party bears the initial burden of demonstrating that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law.¹⁹ If the moving party fails to make the requisite showing to satisfy that initial burden, then “the Board must deny the motion—even if the opposing party chooses not to respond or its response is inadequate.”²⁰ Thus, “no defense to an insufficient showing is required.”²¹ If the moving party meets its burden, however, the non-moving party must “counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation” and cannot rely on “mere allegations or denials,” or the facts in controversy will be deemed admitted.²² In addition, because the initial burden rests on the moving party, a licensing board must examine the record

¹⁷ 10 C.F.R. § 2.710(d)(2).

¹⁸ See Advanced Med. Sys., Inc. (One Factory Row, Geneva Ohio 44041), CLI-93-22, 38 NRC 98, 102–03 (1993).

¹⁹ 10 C.F.R. § 2.325; see also Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962) (summary judgment should be granted only where the truth is clear); Advanced Med. Sys., CLI-93-22, 38 NRC at 102; Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999).

²⁰ Advanced Med. Sys., CLI-93-22, 38 NRC at 102.

²¹ Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977) (internal citation omitted).

²² 10 C.F.R. § 2.710(a); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-30, 54 NRC 231, 235 (2001).

in the light most favorable to the non-moving party and all justifiable inferences must be drawn in favor of the non-moving party.²³

Summary disposition “is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing.”²⁴ Summary disposition is particularly inappropriate when a licensing board is presented with conflicting expert testimony, for at that stage of a proceeding it is not the role of licensing boards to “untangle the expert affidavits and decide ‘which experts are more correct.’”²⁵ Thus, as the Commission noted: “At this stage, the ‘judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].’ . . . If ‘reasonable minds could differ as to the import of the evidence,’ summary disposition is not appropriate.”²⁶

ANALYSIS

A. Motion for Summary Disposition of Contention 6

Contention 6 alleged that “[t]he COLA omits critical information disclosing environmental impacts to Lake Erie’s Western Basin and Maumee River/Maumee Bay.”²⁷ The Board narrowed Contention 6, holding that it was “admissible insofar as it challenges the adequacy of the ER’s analysis of the potential contribution of chemical and thermal effluent from the proposed Fermi

²³ Advanced Med. Sys., CLI-93-22, 38 NRC at 102.

²⁴ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001) (emphasis omitted).

²⁵ Id. at 510 (quoting Norfolk S. Corp. v. Oberly, 632 F. Supp. 1225, 1243 (D. Del. 1986), aff’d on other grounds, 822 F.2d 3888 (3d Cir. 1987)).

²⁶ Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, __ (slip op. at 13) (Mar. 26, 2010) (internal citations omitted).

²⁷ See Petition at 67.

Unit 3 to algal production and the potential proliferation of the newly identified species of harmful algae [Lynngbya wollei].²⁸

1. The Parties' Positions

DTE characterizes Contention 6 as raising two issues: "(1) the lack of analysis in the ER regarding the potential for Fermi Unit 3 to increase the risk of algal blooms in the western Lake Erie basin; and (2) the failure of the ER to discuss proliferation of a newly-identified species of algae in the basin."²⁹ DTE asserts that it "has revised the ER so as to render both aspects of the contention moot."³⁰

DTE states that it "specifically revised the ER to reflect that it will not use phosphoric acid at Fermi Unit 3 (thereby eliminating phosphorus discharges); to incorporate a discussion of the impacts of thermal and chemical discharges on algae; and to include a discussion of Lynngbya wollei."³¹ In response to an NRC Staff Request for Additional Information ("RAI"),³² Applicant acknowledges that Lynngbya wollei is described as a bottom mat forming species of

²⁸ LBP-09-16, 70 NRC at 280.

²⁹ C-6 Motion at 3. Contention 6 and Contention 8 were analyzed and admitted by the Board in its July 31, 2009 Order based on Rev. 0 of the Applicant's ER. See supra note 10. Applicant then submitted summary disposition motions for Contentions 6 and 8 on September 17, 2010 and November 16, 2010, respectively. See C-6 Motion; C-8 Motion. These summary disposition motions were submitted based on the then current revision of the ER—ER Rev. 1—as supplemented by the pertinent DTE RAI responses. The motions will therefore be analyzed by this Board under ER Rev. 1. See Fermi 3 Combined License Application, Part 3: Environmental Report, Rev. 1 (Mar. 2010) (ADAMS Accession No. ML101110551) [hereinafter ER Rev. 1]. Since Applicant submitted its summary disposition motions for Contentions 6 and 8, a new version of the ER in this proceeding has been released—ER Rev. 2. See Fermi 3 Combined License Application, Part 3: Environmental Report, Rev. 2 (Feb. 2011) (ADAMS Accession No. ML110600476). Given that ER Rev. 2 was not on file with the NRC when DTE submitted its two summary disposition motions or when Intervenors filed their responses to those motions, the Board will not consider ER Rev. 2 in reaching its rulings on these motions.

³⁰ C-6 Motion at 3.

³¹ Id. at 4.

³² Supplementary Requests for Additional Information (RAIs) for the Fermi 3 Combined License Application Environmental Review (Nov. 6, 2009) (ADAMS Accession No. ML093060299).

algae that is native to the southern U.S., and that the species can respond to warm water in northern environments.³³ To help control nutrient concentrations, Applicant states that it is eliminating the use of phosphorus-containing corrosion and scale inhibitors, with replacement chemicals selected from the MDNRE website list that has been previously approved for use at other Michigan facilities.³⁴ Furthermore, Applicant asserts that the thermal plume for Fermi Unit 3 will be small and that the discharge pipe is located to prevent overlap with the Fermi Unit 2 thermal plume.³⁵ Also, DTE maintains that Fermi Unit 3 will not contribute to algal bloom production because it will have a smaller discharge than Fermi Unit 2, the thermal and chemical characteristics of the discharge from Unit 3 will be similar to the characteristics of the Unit 2 discharge, and there has been no documented algal bloom production resulting from the Unit 2 discharge.³⁶ Additionally, Applicant states that the Fermi Unit 3 cooling tower and closed-cycle cooling system represents the best available technology under the federal Clean Water Act, section 316(b),³⁷ and will reduce discharge temperature to the greatest extent possible.³⁸

Intervenors assert that there are issues of material fact that have been only partially resolved and that summary disposition is unwarranted.³⁹ Intervenors state that Applicant has not considered pertinent scientific literature that suggests that algae Lynngbya wollei has been

³³ Detroit Edison Company Response to NRC Requests for Additional Information Letter No. 2 Related to the Environmental Review, Attachment 2 (Feb. 15, 2010) at 2 (ADAMS Accession No. ML100541329) [hereinafter Contention 6 RAI Response].

³⁴ Id. at 2, 4.

³⁵ Id. at 3.

³⁶ Id. at 3, 4.

³⁷ 33 U.S.C. § 1326(b).

³⁸ Contention 6 RAI Response at 4.

³⁹ C-6 Answer at 1–2.

found within four lake-surface miles of the proposed Fermi Unit 3 site.⁴⁰ Further, Intervenor assert that Lynngbya wollei is spreading and likely to prosper in substantial volumes immediately offshore from Fermi Unit 3, and that the algae's successful colonization will probably be assisted both by the understated thermal plume and chemical effluent predicted to emanate from Fermi Unit 3 on a continuing basis throughout plant operations.⁴¹ Intervenor also contend that the bacterium develops in the poorly-lit lake bottom, and that turbidity will increase with Fermi Unit 3 construction and operation.⁴²

2. Board Ruling

We agree with Intervenor that Contention 6 is not appropriate for summary disposition because issues of material fact remain in dispute.

Contention 6 alleges that the ER is inadequate under the National Environmental Policy Act ("NEPA")⁴³ and 10 C.F.R. Part 51, the NRC's regulations implementing NEPA. The ER's adequacy is examined under NEPA, as well as under Part 51, because the ER is the basis upon which the NRC's Environmental Impact Statement ("EIS") for Fermi Unit 3 will be prepared.⁴⁴ The ER must therefore contain a sufficient analysis of potential environmental consequences and alternatives to enable the NRC Staff to prepare an EIS that fulfill's the agency's obligations

⁴⁰ See id. at 3.

⁴¹ Id. at 3-4.

⁴² Id. at 4.

⁴³ 42 U.S.C. § 4321 et seq.

⁴⁴ See Progress Energy Fl., Inc. (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC __, __ (slip op. at 8) (Jan. 7, 2010) (describing the ER as "essentially the applicant's proposal for the draft environmental impact statement," and stating that "contentions that seek compliance with NEPA must be based on that environmental report" (internal citations omitted)). See also LBP-09-16, 70 NRC at 259-64.

under NEPA.⁴⁵ As the Commission has explained, the principal goals of NEPA's EIS requirement are "to force agencies to take a 'hard look' at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process."⁴⁶ Contention 6 maintains, in substance, that the ER is insufficient to enable the NRC to prepare an EIS that will perform those functions.

DTE maintains, however, that Contention 6 is based solely upon omissions from the ER, and that it has rendered the contention moot by supplying the missing information.⁴⁷ Thus, DTE contends that "the omissions averred in [Contention 6] have been cured, and there exists no genuine issue as to any material fact relevant to the contention."⁴⁸ But the contention is not as limited as DTE assumes. The Board's ruling on contention admissibility stated that Contention 6, as the Board admitted it, concerns "the adequacy of the ER's analysis of the potential contribution of chemical and thermal effluent from the proposed Fermi Unit 3 to algal production and the potential proliferation of the newly identified species of harmful algae."⁴⁹ We must therefore determine whether, despite DTE's new information, any dispute of material fact remains concerning that issue.

The first new information DTE identifies is its commitment not to use phosphoric acid for control of corrosion and scaling at Fermi Unit 3. DTE states that it has selected replacement chemicals from a website with a list of chemicals previously used for other Michigan facilities. It asserts that because of this change "cooling water discharge will not add to the nitrogen or

⁴⁵ See 10 C.F.R. § 51.45(c).

⁴⁶ La. Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349–50 (1989); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir.1996)).

⁴⁷ C-6 Motion at 3-4 (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-383 (2002)).

⁴⁸ Id. at 1.

⁴⁹ LBP-09-16, 70 NRC at 280 (emphasis added).

phosphorus concentrations in Lake Erie.”⁵⁰ However, Intervenor’s point out that the ER acknowledges substantial amounts of calcium in Fermi Unit 3 effluent.⁵¹ They further assert, on the basis of a scientific study cited in their Statement of Facts,⁵² that calcium “boosts the growth of Lyngbya [wollei].”⁵³ As admitted by the Board, the contention was not limited to any specific chemical, but includes all chemical and thermal effluents from Fermi Unit 3 that may contribute to the proliferation of algae. Calcium continues to be listed in the ER as contributing to the chemical effluent from Fermi Unit 3,⁵⁴ but the ER includes no specific discussion of its potential impacts on algae growth. Therefore, Intervenor’s have identified an issue relevant to Contention 6 that remains in dispute.

DTE’s discussion of potential impacts from chemical effluent focuses on the lack of phosphorus and nitrogen in chemical effluent, and the lack of documented algae blooms observed at Fermi Unit 2 and the Monroe Power Plant in the course of visual inspections conducted pursuant to the plant’s discharge permit and as part of research conducted by DTE biologists.⁵⁵ Intervenor’s counter that Applicant’s methods of observation have not been made a matter of record, and that Lyngbya wollei is a bacterium which grows on lake bottom surfaces

⁵⁰ C-6 Motion at 5.

⁵¹ Statement of Facts Demonstrating Issues of Material Fact, in Support of Intervenor’s Opposition to DTE’s ‘Motion for Summary Disposition of Contention 6’ (Oct. 27, 2010) at 2 [hereafter Intervenor’s Statement of Facts]. Intervenor’s cite table 3.6-2, ER Rev. 1, page 3-49, which lists among “Effluent Chemical Constituents,” calcium, at an average concentration of 71.9 ppm). See id.

⁵² Id. at 2 (citing Jennifer Joyner et al., Growth Dynamics and Management of the Cyanobacterium, Lyngbya wollei, in NC and FL (Apr. 5, 2006) at 7, 9, available at <http://www.ncsu.edu/wrri/conference/2006ac/pdf/Joyner.pdf>).

⁵³ C-6 Answer at 4.

⁵⁴ ER Rev. 1 at tbl.3.6-2.

⁵⁵ C-6 Motion at 6–7.

and would likely not be visible to the naked eye during visual inspections.⁵⁶ Further, Intervenor cite a study documenting the presence of Lyngbya wollei at a location between the Monroe Power Plant and Fermi Unit 3.⁵⁷ Intervenor also point to higher levels of turbidity that will be created during plant construction and operations as causing conditions favorable to Lyngbya wollei growth, and they maintain that those effects are not considered in the ER.⁵⁸ These unresolved factual issues also preclude us from granting summary disposition.⁵⁹

DTE acknowledges that increases in water temperature can increase the rate of algal growth, but states that it has selected the best available technology for the cooling system of Fermi Unit 3. DTE further asserts that the thermal plume of Fermi Unit 3 is small (9 ft by 12 ft), and that it is unlikely that algal cells would remain in the plume at the higher temperatures for sufficient time to form bloom concentrations.⁶⁰ Intervenor question the estimated size of the

⁵⁶ Intervenor's Statement of Facts at 1.

⁵⁷ Id. at 2 (citing Thomas B. Bridgeman and Wanda A. Penamon, "Lyngbya wollei in Western Lake Erie," Journal of Great Lakes Research 36 (2010) 167, 168, fig.1).

⁵⁸ C-6 Answer at 4; Intervenor's Statement of Facts at 2.

⁵⁹ The scientific reports on which Intervenor rely (the first indicating that calcium supports the growth of Lyngbya wollei and the second documenting its presence between the Monroe Power Plant and Fermi Unit 3) are hearsay under the rules of evidence; that is, they are out-of-court statements offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). We are not precluded, however, from considering these documents despite their hearsay nature. 10 C.F.R. § 2.319(d) ("In proceedings under this part, strict rules of evidence do not apply to written submissions."). The Commission ruled, in upholding summary disposition in a proceeding to enforce a suspension order, that the hearsay nature of a witness's statement did not preclude the licensing board from considering it, at least in the absence of evidence questioning its reliability. Advanced Med. Sys. (One Factory Row, Geneva, Ohio, 44041), CLI-94-6, 39 NRC 285, 306-07 (1994). The Commission cited an Appeal Board ruling in which the Board stated that, even if a witness's testimony was entirely hearsay, "evidence of that character is generally admissible in administrative proceedings." Id. at 306 n.31 (citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 412 (1976)). Even though we are not precluded from considering hearsay, under section 2.319(d) we may on motion or on our own initiative strike any portion of a written presentation that is unreliable. No party, however, has moved to strike the scientific reports cited by Intervenor, nor do we have any reason to question the reliability of those reports. We therefore have considered as support for the truth of the matters for which they are cited.

⁶⁰ C-6 Motion at 7.

Fermi Unit 3 thermal plume, stating that “DTE maintains that Fermi operations will cause a 9 [ft] X 12 [ft] plume while pumping tens of millions of gallons of lakewater through its cooling system at the height of summer heat.”⁶¹ Intervenors provide calculations suggesting a thermal plume magnitude of about 75 acre-feet (per day).⁶² Additionally, Applicant’s assertion concerning the short residence time for algae in the thermal plume appears unusual for a species that grows on the lake bottom.⁶³ Here again, we have a dispute of material fact that prevents us from granting summary disposition.

When considering a motion for summary disposition, the Commission has explained that the function of the Board is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing].”⁶⁴ In admitting Contention 6 we determined that it raised genuine disputes of material fact with regard to the ER’s compliance with NEPA and 10 C.F.R. Part 51. We find that issues of material fact remain in dispute and therefore deny DTE’s Motion for Summary Disposition of Contention 6.

B. Motion for Summary Disposition of Contention 8

Contention 8, as admitted by the Board, states that:

the ER fails to adequately assess [Fermi Unit 3]’s impacts on the eastern fox snake and to consider alternatives that would reduce or eliminate those impacts.⁶⁵

⁶¹ C-6 Answer at 4.

⁶² Intervenors’ Statement of Facts at 2.

⁶³ Applicant itself acknowledged that Lyngbya wollei is a “bottom mat forming species” in a response to an RAI. Contention 6 RAI Response at 2.

⁶⁴ Pilgrim Nuclear Power Station, CLI-10-11, 71 NRC at ___ (slip op. at 13) (Mar. 26, 2010) (internal citation omitted).

⁶⁵ LBP-09-16, 70 NRC at 286.

In support of Contention 8, Intervenors proffered a letter from Lori Sargent, a Nongame Wildlife Biologist in MDNRE's Wildlife Division.⁶⁶ In this letter, Ms. Sargent identified discrepancies between MDNRE recordings and the analysis contained in the Applicant's ER concerning potential impacts to the eastern fox snake, a threatened species according to MDNRE.⁶⁷ Ms. Sargent stated that MDNRE's recorded sightings of the eastern fox snake at the Fermi Unit 3 site conflict with statements from the ER alleging that the species had not been observed on the site.⁶⁸ Not only did she take issue with that aspect of the ER, she also opined that "going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area. We would like to see a plan for protection of this rare species with regard to this new reactor project."⁶⁹ This conflicted with the statement in the ER that any impact of the project on the snake would be small and therefore no mitigation measures were necessary.⁷⁰ The Board admitted Contention 8 because of the conflicting interpretations concerning the project's likely impact upon the eastern fox snake and the need for mitigation.

1. The Parties' Positions

Applicant's Motion for Summary Disposition of Contention 8 asserts that the contention is moot because it has "resolved the discrepancy in the ER regarding the presence of the Eastern Fox snake at the Fermi site, developed a mitigation plan for the snake, and submitted

⁶⁶ Id. at 286 n.177, 288.

⁶⁷ See id. at 286. Ms. Sargent's letter also identified a discrepancy within the ER itself; the ER states in one section that the eastern fox snake was sighted twice on the Fermi property in June of 2008, but then states in another section that the eastern fox snake had not been observed on the Fermi property. Id. at 288.

⁶⁸ Petition at 89–90 (citing Email from Lori Sargent, Nongame Wildlife Biologist, Wildlife Division, Michigan Department of Natural Resources, to U.S. NRC (Feb. 9, 2009) (ADAMS Accession No. ML090401014) [hereinafter Sargent Email]).

⁶⁹ Id. at 90 (quoting Sargent Email).

⁷⁰ ER Rev. 1 at 4-45.

an addenda to the ER describing those plans.”⁷¹ Applicant requests summary disposition on the ground that “[t]here remains no genuine issue as to any material fact relevant to the admitted contention.”⁷²

With regard to the first part of Contention 8, concerning the discrepancy between the ER and the MDNRE records over the presence of eastern fox snakes at the Fermi Unit 3 site, Applicant claims that it “has provided additional information on the location of Eastern Fox snake sightings that resolves this discrepancy in the ER.”⁷³ Specifically, Applicant provided, in response to a NRC Staff Request for Additional Information (“RAI”), a map depicting the locations on the Fermi Unit 3 site where the eastern fox snake had been observed by Applicant’s employees during the period from 1990-2007.⁷⁴ By including the map in its response to a NRC Staff RAI, the Applicant states that it has acknowledged the presence of the eastern fox snake at the Fermi Unit 3 site, and thus has “resolve[d] the ‘primary factual dispute’ identified by the Licensing Board in admitting Contention 8.”⁷⁵

In response to the second part of Contention 8 concerning the lack of mitigation measures related to the eastern fox snake, Applicant “concluded that construction of Fermi Unit 3 will impact a portion of the fox snake habitat at the [Fermi Unit 3] site”⁷⁶ and then proposed

⁷¹ C-8 Motion at 1.

⁷² Id. at 11.

⁷³ Id. at 5. Applicant has also updated the ER to resolve this discrepancy. See ER Rev. 1 at 4-45.

⁷⁴ C-8 Motion at 6 (citing Letter from Peter W. Smith, Nuclear Development—Licensing and Engineering, Detroit Edison Company, to U.S. NRC Document Control Desk, Attachment 7, Enclosure 1 (Feb. 15, 2010) (ADAMS Accession No. ML100541329) [hereinafter Eastern Fox Snake Sighting Map]). In addition, the map also identifies two additional sightings of the eastern fox snake at the proposed Fermi Unit 3 site made by Ducks Unlimited during a wetland survey in 2008. Id. (citing Eastern Fox Snake Sighting Map).

⁷⁵ Id. (internal citation omitted).

⁷⁶ Id. at 7.

two specific mitigation measures: 1) a revised site layout that reduces potential impact to the primary eastern fox snake habitat, and 2) a draft mitigation plan, entitled Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi).⁷⁷

The first mitigation measure put forth by DTE to address the potential impacts of construction on the eastern fox snake includes a revision to “the site layout to reduce potential wetland impacts.”⁷⁸ DTE notes that “the Eastern Fox snake habitat is primarily associated with wetlands.”⁷⁹ Applicant states that the new site layout reduces Fermi Unit 3’s wetland impacts by approximately 120 acres, from 169 to 49 acres.⁸⁰ DTE also maintains that 39 of the 49 wetland acres impacted by construction will suffer only temporary impacts, and that those 39 acres will be restored to an equal or better ecological condition once construction of Fermi Unit 3 is complete.⁸¹

In addition, “to further reduce the potential impacts to Eastern Fox snakes, [Applicant] also developed a draft Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi).”⁸² Included in the draft mitigation plan are measures that DTE claims will “enhance employee awareness of the snakes” and “reduce impacts to the snakes and their habitat from

⁷⁷ Id. at 7–8.

⁷⁸ Id. at 7.

⁷⁹ Id. (citing Letter from Peter W. Smith, Nuclear Development—Licensing and Engineering, Detroit Edison Company, to U.S. NRC Document Control Desk, Attachment 7 (Feb. 15, 2010) at 3 (ADAMS Accession No. ML100541329)).

⁸⁰ Id. at 8.

⁸¹ Id. The changes to the site layout also reduce impacts to undeveloped areas generally, including non-wetland areas, that were assumed to be suitable habitats for the eastern fox snake. Id. (“The changes to the site layout reduced impacts to undeveloped areas overall—including both wetland areas and non-wetland areas, which are assumed to be suitable fox snake habitat—by 117 acres (relative to the original proposed site layout).”).

⁸² Id. (citing Letter from Peter W. Smith, Nuclear Development—Licensing and Engineering, Detroit Edison Company, to U.S. NRC Document Control Desk, Attachment 7, Enclosure 2 (Feb. 15, 2010) (ADAMS Accession No. ML100541329) [hereinafter Draft Mitigation Plan]).

Fermi [Unit] 3 construction activities.”⁸³ Specific mitigation measures called for in the draft mitigation plan include: an employee education program describing the eastern fox snake and its habitat, pre-job briefings, preconstruction surveys of developed areas, preconstruction surveys of undeveloped areas, construction mitigation, and monitoring and reporting of eastern fox snake sightings on the Fermi Unit 3 site.⁸⁴

In response to the mitigation measures submitted by the Applicant, Intervenor assert that “the mitigation proposed by Applicant is ad hoc and legally insufficient under NEPA.”⁸⁵ Intervenor contend that: (1) the eastern fox snake warms itself on paved areas at the Fermi Unit 3 site, and (2) there will be serious traffic problems at many junctures during the construction of Fermi Unit 3, especially during refueling outages at Fermi Unit 2, the decommissioning and dismantling of Fermi Unit 1, and the eventual decommissioning of Fermi Unit 2.⁸⁶ Additionally, Intervenor allege that the ER is inadequate because it fails to recognize the impacts on the eastern fox snake population due to the effect of salt depositions from the cooling towers at Fermi Units 2 and 3 on local vegetation and from radiation if the snakes were to sun themselves on the Fermi Unit 2’s Independent Spent Fuel Storage Facility.⁸⁷ Lastly, Intervenor point out that neither the revised wetlands site layout nor the draft mitigation plan, Habitat and Species Conservation Plan: Eastern Fox Snake (Elaphe gloydi), has been approved by MDNRE, the NRC Staff, or the U.S. Army Corps of Engineers.⁸⁸

⁸³ Id.

⁸⁴ Id. at 8–9.

⁸⁵ C-8 Answer at 1.

⁸⁶ Id. at 1–2, 8.

⁸⁷ Id. at 3–4.

⁸⁸ Id. at 2–3.

2. Board Ruling

The Board concludes that, although DTE appears to have made significant modifications to the project and provided relevant new information, disputes of material fact remain concerning the adequacy of the ER's evaluation of the impact of Fermi Unit 3 on the eastern fox snake and the status of mitigation measures to reduce those impacts. We accordingly deny summary disposition of Contention 8.

DTE contends that Contention 8 relates solely to "(1) the discrepancy in the ER regarding the presence of Eastern Fox snakes at the Fermi Unit 3 site; and (2) the failure of the ER to discuss mitigation measures related to the Eastern Fox snake."⁸⁹ DTE maintains that it is entitled to summary disposition because it has allegedly resolved both deficiencies. As with Contention 6, the Board does not construe Contention 8 as narrowly as does DTE. Although the specific deficiencies noted by DTE were among the factors that led the Board to admit Contention 8, they were not the only concerns. As we stated in admitting the contention, "[w]e construe Contention 8 as a NEPA contention alleging that the ER fails to adequately assess the project's impacts on the eastern fox snake and to consider alternatives that would reduce or eliminate those impacts. We find the contention as so construed to be admissible."⁹⁰ Thus, the contention was not limited to the omission and inconsistency upon which DTE focuses, but also concerned the overall adequacy of the ER's assessment of the project's impacts on the eastern fox snake and the sufficiency of its consideration of alternatives that would reduce or eliminate impacts to the species. This concern was prompted by the conflict between the ER's claim that the project would have only a small impact on the snake and that no mitigation measures were necessary, and the opinion of the MDNRE that "going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species

⁸⁹ C-8 Motion at 4.

⁹⁰ LBP-09-16, 70 NRC at 286 (emphasis added).

from the area,” and that mitigation should be considered.⁹¹ Thus, Contention 8 concerns the overall adequacy of the ER’s analysis of impacts to the eastern fox snake and alternatives,⁹² not just specific omissions or discrepancies.

On the other hand, we also recognize that NEPA is a procedural statute. Thus, “[i]f the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”⁹³ Accordingly, NEPA does not require that DTE or the NRC eliminate impacts to the eastern fox snake. Instead, NEPA requires sufficient public disclosure of environmental consequences and a rigorous exploration of reasonable alternatives to the proposed action.

With these considerations in mind, we turn to comparing the relevant text of the original ER and that of the revised ER to determine whether the revised ER resolves all of the issues that led us to admit Contention 8.⁹⁴ The analysis of the project’s impact on the eastern fox snake is limited in both versions of the ER. The disputed text of the original ER stated:

The eastern fox snake (a Michigan threatened species) has not been observed on the Fermi property, but the potential for its occurrence on the property does exist. The Michigan Natural Features Inventory has recorded nine occurrences for Monroe County, with the most recent report in 2007. . . . If present, the snake would most likely be found along the cattail marshes or wetland shorelines

⁹¹ Petition at 90 (quoting Sargent Email).

⁹² Concerning alternatives, NEPA requires more than just supplying a description of alternative proposals. It requires that federal agencies “[r]igorously explore and objectively evaluate all reasonable alternatives,” and that they “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. . . .” 40 C.F.R. § 1502.14 (Council on Environmental Quality regulation). Thus, merely describing an alternative is insufficient to comply with NEPA. See also 10 C.F.R. § 51.45(b)(3), (c).

⁹³ Robertson, 490 U.S. at 350 (citing Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980); Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

⁹⁴ As with Contention 6, we base our ruling on ER Rev. 1, the latest version that was before the agency when the Motion for Summary Disposition of Contention 8 and the Intervenor’s response were filed. We therefore do not consider ER Rev. 2 in this ruling. See supra note 29.

around woody debris. . . . Fermi [Unit] 3 construction activities are primarily located away from potential habitat for the eastern fox snake and the snake would be expected to move away from these activities. Therefore, the impact to this species from the project is considered SMALL, and no mitigative measures are needed.⁹⁵

The corresponding paragraph of ER Revision 1 states:

The eastern fox snake (a Michigan threatened species) was sighted two times on the Fermi property, in June 2008. The Michigan Natural Features Inventory has recorded nine occurrences for Monroe County, with the most recent report in 2007 (Reference 4.3-5). The snake was found along the cattail marshes or wetland shorelines around woody debris. . . . Fermi [Unit] 3 construction activities are primarily located away from potential habitat for the eastern fox snake and the snake would be expected to move away from these activities. Therefore, the impact to this species from the project is considered SMALL, and no mitigative measures are needed.⁹⁶

We agree with DTE that the revised ER cures the discrepancy between the original ER and the MDNRE records by revising section 4.3.1.2.1 to acknowledge the sightings of the eastern fox snake on the Fermi Unit 3 site. It is also true that DTE has developed a revised site layout and a draft mitigation plan for the eastern fox snake. In substance, the revised site layout and draft mitigation plan constitute alternatives to the project as originally proposed that might, if implemented, reduce impacts to the species. DTE has therefore addressed two of the issues that led the Board to admit Contention 8: it has acknowledged the presence of the species at the site and developed alternatives that appear intended to reduce impacts to the species.

We agree with Intervenors, however, that substantial conflicts relevant to compliance with NEPA and 10 C.F.R. Part 51 remain unresolved. In the revised ER, DTE continues to maintain that “the impact to [the eastern fox snake] from the [Fermi Unit 3] project is considered SMALL, and no mitigative measures are needed.”⁹⁷ The revised ER, like the original ER, makes no mention of the MDNRE comments on the original ER, much less demonstrates that

⁹⁵ ER Rev. 0 at 4-45 (section 4.3.1.2.1).

⁹⁶ ER Rev. 1 at 4-45 (section 4.3.1.2.1).

⁹⁷ Id.

those concerns have been entirely resolved by DTE's draft mitigation plan, revised site layout, or other new information. In fact, the revised ER provides no information whatsoever about MDNRE's views of Applicant's draft mitigation plan or revised site layout. We thus continue to have an unresolved conflict between the opinion of MDNRE and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts. At the very least, we cannot say that this conflict that led us to admit Contention 8 has been fully resolved, and, as DTE has the burden to convince us that summary disposition is appropriate, its motion must fail.

Moreover, we continue to find conflicts on the same issues within DTE's own documents. The revised ER continues to maintain that no mitigation is necessary,⁹⁸ which is inconsistent not only with the MDNRE's comments on the original ER but with the fact that DTE in fact developed a draft mitigation plan.⁹⁹ As DTE's motion acknowledges, it "revised the application to reduce the impacts of Fermi Unit 3 construction on snake habitat, and developed a site-specific mitigation plan to reduce impact to Eastern Fox snakes."¹⁰⁰ The draft mitigation plan itself clearly states that "Fermi [Unit] 3 construction activities have the potential to kill resident eastern fox snakes as well as destroy or degrade their onsite habitat."¹⁰¹ Thus, the Motion for Summary Disposition of Contention 8 and the plan itself acknowledge what revised ER section 4.3.1.2.1 continues to deny -- that construction activities will harm the species and therefore mitigation measures are necessary.

These disputes of material fact are sufficient to require denial of DTE's Motion for Summary Disposition of Contention 8, even without considering the facts argued by Intervenors

⁹⁸ See id.

⁹⁹ See Petition at 89–90; C-8 Motion at 8–10 (citing Draft Mitigation Plan).

¹⁰⁰ C-8 Motion at 5; see also id. at 4–10.

¹⁰¹ Draft Mitigation Plan at 6.

in response. Intervenors, however, do identify one additional problem that merits discussion.

They maintain that

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. [Intervenors' Statement of Facts], ¶ 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.¹⁰²

It is true, as DTE responds, that “NEPA imposes no substantive requirement that mitigation measures actually be taken.”¹⁰³ Thus, “NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.”¹⁰⁴ We cannot agree, however, that in the revised ER “mitigation [has been] discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.” In fact, as just noted, the only statement in section 4.3.1.2.1 of the ER regarding mitigation of impacts to the eastern fox snake is that no mitigation is necessary. Although the draft mitigation plan is referred to as an addendum to the revised ER,¹⁰⁵ neither the plan nor its likely effect is discussed in the ER.¹⁰⁶ This leaves us uncertain as to what mitigation measures,

¹⁰² C-8 Answer at 2.

¹⁰³ C-8 Motion at 9–10 (quoting Robertson, 490 U.S. at 353 n.16).

¹⁰⁴ Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 528 (9th Cir. 1994) (citations omitted); see also Robertson, 490 U.S. at 352 (“There is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.”).

¹⁰⁵ See C-8 Motion at 4.

¹⁰⁶ After extensive review, the Board is unable to find where the Applicant’s draft mitigation plan has actually been incorporated into ER Rev. 1. See Florida Power & Light Co. (Turkey Point Units 6 and 7), LBP-11-06, 73 NRC __, __ (slip op. at 109 n.111) (Feb. 28, 2011) (“Judges are

if any, DTE will actually take for the protection of the eastern fox snake during the construction of Fermi Unit 3, whether those measures have been reviewed or approved by MDNRE, and whether they will actually help prevent harm to the species during construction.

Thus, although we agree that NEPA does not mandate implementation of a mitigation plan, the requirement that “mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated” means the ER should explain, at a minimum, the mitigation measures DTE intends to take to protect the eastern fox snake, the effect DTE believes those measures will have if implemented, and the basis of that belief. Such information is essential for the NRC Staff to fulfill its NEPA obligations in the EIS, but ER Revision 1 fails to provide it.

For these reasons, we cannot conclude that ER Revision 1 includes the requisite hard look at potential construction impacts to the eastern fox snake and mitigation that might reduce those impacts. The Board accordingly finds that there is a material dispute whether ER Revision 1 satisfies the requirements of NEPA and Part 51.

C. Motion to Strike

DTE’s Motion to Strike challenges a number of Intervenors’ arguments as outside the scope of the admitted contention, outside the scope of a COL proceeding, or both.¹⁰⁷ The Motion to Strike is granted in part and denied in part.¹⁰⁸

not like pigs, hunting for truffles buried in briefs.” (quoting United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991))).

¹⁰⁷ See Motion to Strike at 3–6.

¹⁰⁸ Another Board concluded that the proper method for raising the issue addressed in DTE’s Motion to Strike is to seek leave to file a reply in support of the summary disposition motion. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 66-67 (2008). In our case, however, Intervenors have not argued that a motion to strike is an impermissible means of raising the issue of the scope of the admitted contention. We therefore will consider the merits of DTE’s Motion to Strike.

DTE cites Commission precedent instructing that “[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.”¹⁰⁹ As we have explained, Contention 8 was based on the risk that the construction of Fermi Unit 3 will kill snakes, destroy their habitat, and exterminate the species from the area. Thus, Contention 8 is based on potential impacts on the eastern fox snake resulting from the construction of Fermi Unit 3. To the extent Intervenors’ arguments extend beyond the impacts of construction of Fermi Unit 3, they are outside the scope of Contention 8 and were not considered by the Board in ruling on DTE’s Motion for Summary Disposition of Contention 8.

Of the various arguments that DTE moves to strike, we referred to only one in our ruling. That argument concerns the lack of any commitment by DTE to implement mitigation measures that might reduce the impact of vehicle traffic on the eastern fox snake.¹¹⁰ According to DTE, this argument is outside the scope of the admitted contention. Insofar as it concerns the impact of traffic during construction, we disagree. The impact on the eastern fox snake from vehicles moving on and off the site during construction is one aspect of the potential harm with which Contention 8 is concerned, and thus such potential impacts fall within the scope of the contention. It is true that the Petition to Intervene did not provide a list of the specific construction activities that Intervenors (then Petitioners) or MDNRE believed might harm the snake. But there was no requirement that it do so. We understand the Commission’s rule that the scope of an admitted contention is determined by “the bases set forth in support of the contention”¹¹¹ to mean that a contention’s scope is bounded by the “brief explanation of the basis for the contention” required by 10 C.F.R. § 2.309(f)(1)(ii). As long as the facts now relied

¹⁰⁹ Motion to Strike at 2 (quoting Duke Energy Corporation, CLI-02-28, 56 NRC at 379).

¹¹⁰ Motion to Strike at 4 (quoting C-8 Answer at 2). The text to which DTE objects is quoted in full at page 21, supra.

¹¹¹ Duke Energy Corporation, CLI-02-28, 56 NRC at 379.

on by Intervenors in opposition to the summary disposition motion fall within the scope of that explanation, they are properly before the Board. No more is required because a petitioner does not have to prove its contentions at the admissibility stage.¹¹² The factual support required at that point is only “a minimal showing that material facts are in dispute.”¹¹³ The factual support “need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.”¹¹⁴ We therefore find it sufficient that the specific factual argument now advanced by Intervenors falls within the scope of their general argument concerning the impact of construction that provided the brief explanation of the basis of the contention required by section 2.309(f)(1)(ii).

On the other hand, we did not consider in our ruling denying summary disposition of Contention 8 potential impacts to the eastern fox snake that do not arise from construction activities. Thus, we did not consider Intervenors' argument that the eastern fox snake population might be harmed due to the effect on local vegetation of salt depositions from the cooling towers at Fermi Units 2 and 3, nor did we consider Intervenors' theory that snakes might be injured by radiation if they were to sun themselves on spent fuel storage casks in Fermi Unit 2's Independent Spent Fuel Storage Facility. If Intervenors intend to introduce arguments regarding impacts on the snake that do not result from the construction of Fermi Unit 3, they must either amend the existing contention or file a new one. Any new or amended contention must, of course, meet the requirements for both timeliness and admissibility.

¹¹² Miss. Power & Light, Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-130, 6 AEC 423, 426 (1973).

¹¹³ Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994) (quoting 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) [hereinafter Procedural Changes]).

¹¹⁴ Procedural Changes at 33,171.

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 MEMORANDUM AND ORDER (DENYING MOTIONS FOR SUMMARY DISPOSITION OF CONTENTIONS 6 AND 8; DENYING IN PART AND GRANTING IN PART MOTION TO STRIKE) (LBP-11-14) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-033-COL
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