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)	November 23, 2011

MEMORANDUM AND ORDER
(Denying as Moot Intervenors' Motion to Admit Contention 17 and Motion to Supplement the Basis of Contention 17)

Before the Board is Intervenors' Motion to Admit proposed Contention 17,[1] challenging the Fermi Unit 3 Combined License Application (COLA) Environmental Report (ER), Revision 2, because it fails to address the environmental and safety implications of the findings made by the NRC's Fukushima Task Force (Task Force) in its "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (Task Force Report). We rule that the Motion to Admit has been rendered moot by the NRC Staff's issuance of the Draft Environmental Impact Statement (DEIS) for the Unit 3 COLA.[2] We will therefore not admit Contention 17. We also conclude that Intervenors'

[1] See Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) at 1 [hereinafter Motion to Admit]. Intervenors did not provide a specific number to identify this contention. Nonetheless, this is the seventeenth sequential contention proffered by Intervenors in this proceeding. We accordingly refer to it as Contention 17.

[2] See Detroit Edison Company; Notice of Availability of Draft Environmental Impact Statement for a Combined License for Unit 3 at the Enrico Fermi Atomic Power Plant Site, 76 Fed. Reg. 66,998 (Oct. 28, 2011). It appears that the DEIS was first available on the NRC's public website on October 20, 2011.

Motion to Supplement the Basis of Contention 17 is moot.[3] Intervenors may, however, file a new proposed contention directed at the DEIS if they believe it fails to adequately address the environmental or safety implications of the findings made in the Task Force Report. Such a new proposed contention (as well as any other new or amended contentions based on the DEIS) should be filed within the sixty (60) day deadline provided in our scheduling order for new or amended contentions based on the DEIS.[4]

BACKGROUND

This combined license (COL) contested 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. We have previously ruled that Intervenors have standing and admitted four of their contentions. Although we subsequently determined that one of those contentions had been rendered moot as the result of new information submitted by the Applicant, three contentions remain pending before the Board.

On August 11, 2011, Intervenors[5] submitted proposed Contention 17, together with the

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[3] Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Oct. 28, 2011) at 1 [hereinafter Motion to Supplement].

[4] See Licensing Board Order (Establishing Schedule and Procedures to Govern Further Proceedings) (Sept. 11, 2009) at 2 (unpublished) [hereinafter Scheduling Order].

In this ruling, we do not address whether any new contention based on the DEIS will satisfy all the timeliness requirements of either 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c), or the admissibility requirements of 10 C.F.R. § 2.309(f)(1). If the Intervenors elect to file new contentions based on the DEIS, they will have to demonstrate the timeliness and admissibility of the new contentions.

[5] 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.

Motion to Admit that addresses the timeliness of the proposed new contention. Contention 17 itself is a two-part document. The first part is entitled "Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report of the Fukushima Dai-Ichi Accident" (Contention in Support).[6] The second part is a copy of a new proposed contention in the Seabrook license renewal proceeding (the Seabrook Fukushima Contention), alleging that the applicant's ER in that proceeding must be supplemented to address the safety and environmental implications of the NRC's Task Force Report on the Fukushima accident.[7] In the Contention in Support, Intervenors "incorporate by reference as though written herein the averments and arguments contained in the" Seabrook Fukushima Contention.[8] Intervenors also filed the Declaration of Dr. Arjun Makhijani[9] (Makhijani Declaration) in support of proposed Contention 17.

Contention 17 is based on NEPA's requirement that federal agencies supplement their NEPA documents when "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[10] Intervenors assert that the need to supplement NEPA documents in the case of new and significant information is

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[6] Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 12, 2011) at 1 [hereinafter Contention in Support].

[7] Contention in Support, Exh. 1, Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report at 1 (Aug. 11, 2011) [hereinafter Seabrook Contention].

[8] Contention in Support at 7.

[9] Motion to Admit, Exh. 1, Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) at 1.

[10] 40 C.F.R. § 1509(c)(1)(ii); see also Seabrook Contention at 12.

reiterated throughout the NRC regulations.[11] Based on these regulations, Intervenors contend that information contained in the Task Force Report is both new and significant, and thus that the Applicant's ER must be supplemented.

In response, the NRC Staff and the Applicant filed timely responses challenging the admissibility of Contention 17, and Intervenors timely filed their reply supporting admission of the Contention.[12]

On October 28, 2011, Intervenors filed a Motion to Supplement the Basis of Contention 17.[13] The Motion asks that the basis of the Contention be supplemented to reflect the Commission's recent directive to the NRC Staff to "strive to complete and implement the lessons learned from the Fukushima accident within five years – by 2016."[14] The NRC Staff opposes the motion, and the Applicant does not object to it.[15]

ANALYSIS

In general, a new contention must satisfy the timeliness requirements of either 10 C.F.R.

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[11] Seabrook Contention at 12; (citing 10 C.F.R. §§ 51.92(a)(2), 51.50(c)(iii), 51.53(b), 51.53(c)(3)(iv)). Intervenors also cite federal case law holding that a federal agency's duty to take a "hard look" at the environmental consequences of a proposed project is a continuing duty, and thus that federal agencies must create supplemental NEPA documents to address any new and significant information that becomes available after the issuance of a NEPA document. Id. (citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023–24 (9th Cir. 1980); Stop H-3 Association v. Dole, 740 F.2d 1442, 1463–64 (9th Cir. 1984)).

[12] NRC Staff Answer to Intervenors' Motion to Admit New Contention Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-Ichi Accident (Sep. 6, 2011) at 1; Applicant's Response to Proposed New Contention (Sep. 6, 2011) at 2; Intervenors' Reply Morandum [sic] to Staff and Applicant Oppositions to Admission of New Contention (Sep. 14, 2011) at 1.

[13] Motion to Supplement at 1.

[14] Id. at 1–2 (citation omitted).

[15] NRC Staff Answer to "Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report" (Nov. 7, 2011); Applicant's Reply to Motion for Leave to Supplement Basis (Nov. 7, 2011).

§ 2.309(f)(2) or 10 C.F.R. § 2.309(c),[16] and the admissibility requirements of 10 C.F.R. § 2.309(f)(1). Before turning to those questions, however, we must decide whether Contention 17 has been rendered moot by the issuance of the DEIS. If the Contention is moot, it is unnecessary, and arguably inappropriate,[17] for the Board to rule on the timeliness or the admissibility of the Contention.

A contention is moot when the relief Intervenors seek—in this instance, revision of the ER—would make no difference to their interests.[18] Once the DEIS was issued, it became the appropriate focus of any challenge to the NRC's compliance with NEPA. An order finding the ER inadequate and directing its revision would therefore no longer make any difference to Intervenors' interests.

It is not invariably true, however, that issuance of an NRC Staff NEPA document such as a DEIS or Final Environmental Impact Statement (FEIS) will moot a previously admitted NEPA contention that was based on an earlier NEPA-related document. Thus, an admitted contention contesting the adequacy of the ER can be construed as a challenge to the subsequently issued

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[16] We have reviewed the standards for new contention admissibility on previous occasions in this proceeding, and thus refrain from reiterating them in full once again here. See, e.g., LBP-10-09, 71 NRC __, __, __, __–__ (slip op. at 8, 11, 12, 14–25) (June 15, 2010).

[17] In general, when a claim becomes moot in federal court, the court loses jurisdiction to decide the merits of that claim. Flast v. Cohen, 392 U.S. 83, 94 (1968). Thus, the court may do no more than dismiss the claim for lack of jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (quoting Ex parte McCardle, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)). Although the NRC is not strictly bound by the mootness doctrine, "the agency's adjudicatory tribunals have generally adhered to the principle." Advanced Med. Sys., Inc., CLI-93-08, 37 NRC 181, 185 (1993) (citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979)).

[18] See Texas Util. Elec. Co. (Commanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 204 (1993).

DEIS or FEIS, without modification of the admitted contention.[19] This concept has been referred to as the "migration tenet."[20] The migration tenet helps to expedite hearings by obviating the need to file and litigate the same contention up to three times—once against the ER, then against the DEIS, and then finally against the FEIS.[21] This tenet, however, applies only where the information contained in an the Staff's NEPA document (e.g., the DEIS or FEIS) is sufficiently similar to the relevant information contained in the earlier document upon which the original contention was filed: "only so long as the DEIS analysis or discussion at issue is essentially in para materia with the ER analysis or discussion that is the focus of the contention."[22] If it is not, an intervenor may need to amend the admitted contention, or file a new contention altogether.[23]

We conclude that the migration tenet does not apply here. Contention 17 does not directly identify defects in the Applicant's ER for the Fermi Unit 3 COLA, but rather alleges deficiencies in the ER for the Seabrook license renewal application. We recognize that Intervenors intended the Board to apply the allegations concerning the Seabrook ER to the ER for Fermi Unit 3. But "[i]t is a 'contention's proponent, not the licensing board,' that 'is responsible for

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[19] Louisiana Energy Servs., L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998) ("In this proceeding, CANT filed most of its environmental contentions on the basis of LES's ER. But by the time the various NEPA issues came before the Board on the merits, the NRC Staff had issued its FEIS. In LBP-96-25 and LBP-97-8, therefore, the Board appropriately deemed all of CANT's environmental contentions to be challenges to the FEIS."); Duke Energy Corp., CLI-02-28, 56 NRC at 383 n.44 ("[A] contention 'initially framed as a challenge to the substance of an applicant's ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff's DEIS (or final environmental impact statement) analysis of the same matter.'"); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001).

[20] Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-01, 73 NRC __, __ (slip op. at 7) (Feb. 2, 2011).

[21] Id.

[22] So. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-02, 67 NRC 54, 63–64 (2008).

[23] Id. (citing 10 C.F.R. § 2.309(f)(2); Duke Energy Corp., CLI-02-28, 56 NRC at 383).

formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.'"[24] It would be even more problematic if the Board were to apply the migration tenet so as to construe a contention challenging the Seabrook ER as a challenge to the DEIS for Fermi Unit 3, as we would have to do given the current posture of this case. It is one thing to conclude that an ER is in para materia with the DEIS for the same facility, quite another to find that the ER in a license renewal proceeding for an existing reactor in New Hampshire is in para materia with the DEIS for a proposed new reactor in Michigan.

We accordingly find that the Motion to Admit proposed Contention 17 is moot because the Applicant's ER has been superseded by the DEIS and the migration tenet does not apply. The issues raised by Contention 17, however, may still be the subject of a new contention directed at the DEIS for Fermi Unit 3 if Intervenors maintain that the DEIS fails to adequately address the environmental or safety implications of the findings made by Task Force Report. Such a new contention should be filed within the sixty (60) day deadline provided in our scheduling order for new or amended contentions based on the DEIS.[25] Should Intervenors file such a contention, they must (in addition to meeting all other requirements) identify the specific parts of the DEIS they contend are deficient, designate the specific findings in theTask Force Report that render those aspects of the DEIS inadequate, and explain the basis of the alleged deficiency.

In light of our ruling that Contention 17 is moot, Intervenors' Motion to Supplement the Basis of Contention 17 is also moot. If, however, Intervenors file a new contention challenging the DEIS for failure to adequately address the findings of the Task Force Report, they may include the Commission's directive, or any other appropriate matter, as a basis of the new contention.

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[24] USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (quoting Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998)).

[25] See Scheduling Order at 2.

CONCLUSION

For the foregoing reasons, the Board denies as moot Intervenors' Motion to Admit Contention 17 and Intervenors' Motion to Supplement the Basis of Contention 17.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[26]

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 23, 2011

[26] Copies of this memorandum and order were sent on 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) the 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 MEMORANDUM AND ORDER (DENYING AS MOOT INTERVENORS' MOTION TO ADMIT CONTENTION 17 AND MOTION TO SUPPLEMENT THE BASIS OF CONTENTION 17) have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ronald M. Spritzer, Chair
Administrative Judge
E-mail: Ronald.Spritzer@nrc.gov

Michael F. Kennedy
Administrative Judge
E-mail: Michael.Kennedy@nrc.gov

Randall J. Charbeneau
Administrative Judge
E-mail: Randall.Charbeneau@nrc.gov

Kirsten Stoddard, Law Clerk
E-mail: kirsten.stoddard@nrc.gov

Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
Bruce R. Matters, Assistant General Counsel
E-mail:
matersb@dteenergy.com

Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
Counsel for the Applicant
David Repka, Esq.
Rachel Miras-Wilson, Esq
Tyson R. Smith, Esq.
Carlos L. Sisco, Senior Paralegal

E-mail:
drepka@winston.com
trsmith@winston.com
rwilson@winston.com
CSisco@winston.com

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Marian Zobler, Esq.
Marcia Carpentier, Esq.
Sara Kirkwood, Esq.
Robert M. Weisman, Esq.
Anthony Wilson, Esq.
Andrea Silvia, Esq.
Patrick Moulding, Esq.
Joseph Gilman, Paralegal
Karin Francis, Paralegal
marian.zobler@nrc.gov
marcia.carpentier@nrc.gov
sara.kirkwood@nrc.gov
robert.weisman@nrc.gov
anthony.wilson@nrc.gov
andrea.silvia@nrc.gov
Patrick.Moulding@nrc.gov
joseph.gilman@nrc.gov
karin.francis@nrc.gov
OGC Mail Center : OGCMailCenter@nrc.gov

Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, NW
Washington, DC 20037-1122
Counsel for Progress Energy
Robert Haemer, Esq.
E-mail: robert.haemer@pillsburylaw.com

Beyond Nuclear
Reactor Oversight Project
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Paul Gunter, Director
E-mail: paul@beyondnuclear.org

Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental, Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club et al.
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
Terry J. Lodge, Esq.
E-mail: tjlodge50@yahoo.com

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

Dated at Rockville, Maryland
this 23rd day of November 2011