

May 17, 2012

**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))

* * * * *

**STATEMENT OF FACTS DEMONSTRATING ISSUES
OF MATERIAL FACT, IN SUPPORT OF INTERVENORS'
RESPONSE IN OPPOSITION TO DTE'S 'MOTION FOR
SUMMARY DISPOSITION OF CONTENTION 15'**

Now come the Intervenors herein, by and through counsel, and set forth material facts in support of their opposition to "Applicant's Motion for Summary Disposition of Contention 15."

1. Applicant must "retain responsibility for the quality assurance program." 10 C.F.R. Part 50, App. B. To that end, "[t]he authority and duties of persons and organizations performing activities affecting the safety-related functions of structures, systems, and components shall be clearly established and delineated in writing." *Id.*

2. Respecting authority and independence of a nuclear power plant's quality assurance effort,

The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions. The persons and organizations performing quality assurance functions shall report to a management level so that the required authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations, are provided.

Irrespective of the organizational structure, the individual(s) assigned the responsibility for assuring effective execution of any portion of the quality assurance program at any location where activities subject to this appendix are being performed, shall have direct access to the levels of management necessary to perform this function.

Id., ¶ I.

3. QA professionals are required to have access to levels of corporate management with the power inside the organization to require that changes be made:

[C]onditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are [to be] promptly identified and corrected. In the case of significant conditions adverse to quality, the measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition.

Id., ¶ XVI.

4. Commencing about April 2007, DTE retained an "Owner's Engineer ("OE") to support owner-related activities such as reactor technology selection, project cost estimates, development of a Detroit Edison QA program for the Fermi 3 project, engineering support services, and COL Application contractor oversight." DTE MSD at 17. During this period, Detroit Edison had contractually delegated the responsibility for establishing and executing the QA program to B&V for COL Application development activities, but retained responsibility for and maintained control over the QA functions performed by B&V. *Id.* DTE refers to the Owner's Engineer at four (4) additional places in its Motion.¹

¹In April-May 2007, Detroit Edison's OE staff performed and documented surveillances of construction of the monitoring wells for hydrology investigation and core boring activities for geotechnical data collection. MSD at 20.

In June 2007, Detroit Edison's OE observed B&V obtaining core samples and reported to Detroit Edison's Nuclear Development project the status of procedural compliance, including the availability of ASTM standards, compliance with the Hydrogeology Data Collection Plan and the Geotechnical Data Collection Plan, chain of custody processes, control of measurement and test equipment, and handling of corrective actions as a result of B&V Nuclear QA surveillances. MSD at 21-22.

5. The "Owner's Engineer" function, which was to comprise DTE's compliance with the regulatory obligation that the Applicant remain ultimately responsible for quality function, was outsourced. The Owner's Engineer function was staffed from the Ann Arbor branch office of the national Black & Veatch Corporation. Black & Veatch was at exactly the same time serving as the delegated general contractor for all aspects of compiling and submitting a COLA on behalf of DTE to the Nuclear Regulatory Commission. Black & Veatch continues down to the present to fulfill a general contracting role.

6. According to the Final Safety Analysis Report (FSAR), pp. 17-9 through 17-11 (<http://pbadupws.nrc.gov/docs/ML1106/ML110600471.pdf>), are found these passages:

In June 2007 the Owner's Engineer (OE), Black & Veatch Ann Arbor (referred to as "OE, Black & Veatch Ann Arbor," throughout), observed B&V (Black & Veatch Overland Part referred to as "B&V" throughout) obtaining core samples at the Fermi site and reported to Nuclear Development the status of procedural compliance, ASTM standards availability, status of compliance with the Hydrogeology Data Collection Plan and the Geotechnical Data Collection Plan, that chain of custody processes were being followed, status of control of measurement and test equipment, and how corrective actions as a result of B&V Nuclear Quality Assurance surveillances were being handled.

Also in July 2007 the ***OE, Black & Veatch Ann Arbor,*** observed B&V boring at the Fermi site and reported to Nuclear Development that on-site work was being performed under

In July 2007 and in August 2007, Detroit Edison's OE observed B&V borings on the Fermi site and reported to the Detroit Edison Nuclear Development project that on-site work was being performed under the B&V Appendix B/NQA-1 QA program and that a copy was available for reference. The OE reported that work was being performed in accordance with the Hydrogeology Data Collection Plan and the Geotechnical Data Collection Plan, that chain of custody processes were being followed, and that corrective actions as a result of B&V Nuclear QA surveillances also had been implemented and continued to be effective. MSD at 23.

During site investigation and COL Application development activities, "there was a substantial degree of oversight - under the B&V QA program and by the Detroit Edison OE." MSD at 25.

the B&V 10 CFR 50 Appendix B/NQA-1 QA program and that a copy was available for reference. It was also reported that work was being performed in accordance with the Hydrogeology Data Collection Plan and the Geotechnical Data Collection Plan and that copies of these documents were available, chain of custody processes were being followed, and the status of compliance with ASTM standards, specifically ASTM D 5079-02(2006).

In August 2007, the **OE, Black & Veatch Ann Arbor**, observed B&V boring at the Fermi site and reported to Nuclear Development that on-site work was being performed under the B&V 10 CFR 50 Appendix B/NQA-1 QA program and that a copy was available for reference. It was also observed that work was being performed in accordance with the Hydrogeology Data Collection Plan and Geotechnical Data Collection Plan and that copies of these documents were available, that chain of custody processes were being followed, and how corrective actions as a result of B&V Nuclear Quality Assurance surveillances were being handled. Later in August, the **OE, Black & Veatch Ann Arbor**, observed B&V boring, split spoon sampling, and performing vacuum excavation at the Fermi site. The **OE, Black & Veatch Ann Arbor**, reported to Nuclear Development that on-site work was being performed under the B&V 10 CFR 50 Appendix B/NQA-1 QA program and that a controlled copy was available for reference. They also reported that work was being performed in accordance with the Hydrogeology Data Collection Plan, Hydrogeology Work Plan, and Geotechnical Data Collection Plan and that copies of these documents were available, that chain of custody processes were being followed, and that corrective actions associated with B&V corrective action program continued to be effective.

7. Applicant described its "Project Engineer" for the period September 2007 - March 2008 as "An engineer with twenty plus years of engineering, licensing and quality assurance experience (previous QA manager at Fermi 2) **working with the OE, Black & Veatch Ann Arbor**, developed the Nuclear Development Quality Assurance Program Document (ND QAPD) and implementing procedures for those elements of the ND QAPD associated with the activities planned to be performed by Detroit Edison at the time (e.g., review of B&V COLA work product)." DTE Responses to RAI No. 26, ML101320254, <http://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber='ML101320254'>, Att. 2, p. 3.

8. Arnold Gundersen, Intervenors' expert nuclear engineer witness, found upon reviewing certain records that, although Detroit Edison states that the Nuclear Development QA Manager

held that position as of March of 2008, the "COLA makes no reference to that role." "Second Declaration of Arnold Gundersen." DTE's response to NRC RAI No. 26, ML101320254, <http://adamsw ebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber='ML10132025 4', Att. 2, p. 3>, reflects that person was on staff as "Nuclear Development QA Manager, March 2008 - April 2009" and that he or she was there "to independently plan and perform activities to verify the development and effective implementation of the QAPD for those activities that support the COLA" and "to ensure that vendors providing quality services to Detroit Edison in support of the COLA are meeting the requirements of 10 CFR 50 Appendix B." *Id.*

9. Mr. Gundersen also asserted that "there is a three-month long gap from April 2009 through June 2009 during which Detroit Edison admits that it had no personnel in charge of Quality Assurance." DTE's MSD states (p. 48): "The response identified ND QA Manager employment dates between March 2008 and April 2009. . . ." MSD at 48.

10. Applicant offers merely an unsworn, undocumented and unverified allegation at ¶ 68 of its "Statement of Material Facts" that "The Director, Quality Management, position was filled prior to the QA Manager position being vacated. There was continuous QA oversight during the relevant period and no 'gap' in QA oversight." Intervenors object to this statement as being unsubstantiated.

11. Intervenors' expert Gundersen also found that "DTE's new description of reporting relationships for the Nuclear Development QA Manager as defined in the DTE May 10, 2010 Reply Response does not provide the Quality Assurance mission with adequate functional separation. It is critical in nuclear QA that there be complete separation and independence between QA and other line functions, and this separation . . . does not seem to exist within the Fermi 3 organization." Second Declaration of Arnold Gundersen, ¶ 17.2.1. Gundersen was troubled by the statement in DTE's response to RAI No. 26 that if the QA manager could not bring about resolution of quality assurance matters, he or she could "bring the matter to the attention of the executive in charge of the MEP organization who will determine the final disposition." To Gundersen, this appeared to grant a veto by DTE's head of Major Enterprise Projects, which Mr. Gundersen states is "a business development arm of DTE, not a QA or Engineering division,"² over the fixing of quality discrepancies.

²Second Declaration of Arnold Gundersen, fn. 7.

12. Mr. Gunderson points out (Second Declaration ¶ 17.3) that DTE "should have alerted the NRC that it had taken exception to the NEI approved reporting relationship for its QA function. DTE did not notify the NRC in its original COLA filing for Fermi 3, that it had arbitrarily chosen to modify the NEI approved reporting relationship approved by NRC for this new generation of reactors."

13. Mr. Gundersen claims that his review of Revision 0 of DTE's initial COLA "Quality Assurance Program Description" contained no reference to a Nuclear Development QA Manager anywhere, in contradiction to DTE's response to RAI No. 26, which asserts that the Nuclear Development QA Manager role was put in place in March 2008.

14. According to a count undertaken by Intervenor's counsel, beginning with the monthly disclosures filed by DTE in September 2010, DTE listed over 700 items related to quality assurance/Contention 15 as proprietary, and 404 as non-proprietary. From October 2010 through May 2012, there were 425 claims of propriety information, and only 44 were non-proprietary. In the period of September 2011 through May 2012, DTE claimed 197 items as proprietary, and only 5 were not.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "STATEMENT OF FACTS DEMONSTRATING ISSUES OF MATERIAL FACT, IN SUPPORT OF INTERVENORS' RESPONSE IN OPPOSITION TO DTE'S 'MOTION FOR SUMMARY DISPOSITION OF CONTENTION 15'" have been served on the following persons via Electronic Information Exchange this 17th day of May, 2012:

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