

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))

* * * * *

**INTERVENORS' MOTION TO SUPPLEMENT RESPONSE
IN OPPOSITION TO APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF CONTENTION 15**

Now come Intervenors Beyond Nuclear, *et al.*¹ ("Intervenors"), by and through counsel, and move the ASLB for leave to supplement their "Response in Opposition to 'Applicant's Motion for Summary Disposition of Contention 15'" by July 31, 2012.

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¹In addition to Beyond Nuclear, the Intervenors include: Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

MEMORANDUM IN SUPPORT

Intervenors, contemporaneously to filing this Motion, have filed their responses to DTE's motions for summary disposition on Contentions 6 and 15, complying with the ASLB's recent order extending time.

**Excessive Use of Proprietary Protection by Applicant
Has Constricted Intervenors' Efforts to Respond
On Summary Disposition**

In the course of researching and preparing these responses over the past month, Intervenors noticed a troublesome trend in Applicant's quality assurance evidentiary disclosures: since the September 2010 disclosures which first identified evidentiary items pertinent to Contention 15, the frequency of DTE's exploitation of the proprietary privilege has snowballed. According to a count by Intervenors' counsel, in the September 2010 DTE disclosures, 700 items were claimed to be 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. And in the period of September 2011 through May 2012, DTE claimed 197 items as proprietary, and only 5 were not.

Few of the items seem, from the cursory descriptions provided, to warrant proprietary protections, given that the subject matter is a templated, supposedly-transparent process, *viz.*, quality assurance management. Some of the proprietary items selected from the March-May 2012 DTE disclosures include:

DTE-02272 3/22/2012 RE: QA Program update impact with DCD/COLA

DTE-02273 3/7/2012 Re: QA Review of Procurement Documents

DTE-02274 3/28/2012 MEP Nuclear Development NP-4.1, Rev. 6:
Procurement of Material, Equipment, and Services

DTE-02276 3/1/2012 12NS01 Checklist

DTE-02277 3/1/2012 2012-MEP-QA-0005: Detroit Edison Audit Report
No. 12NS01

DTE-02281 3/27/2012 Audit Report 12NI01: Annual Audit of the
Fermi 3 Nuclear Quality Management Organization

DTE-02293 3/30/2012 2012-MEP-QA-0007 (Closeout of B&V Audit
11NS02)

DTE-02294 3/26/2012 Quality Assurance Review for CAR 3460002

DTE-02295 3/2/2012 12NS01 Audit Report

DTE-02297 3/23/2012 Nuclear Organization Quality Assurance
Program, Design Verification NP 3.1

DTE-02298 3/26/2012 Detroit Edison Audit Finding No. 11NS02-02

DTE-02299 3/22/2012 Detroit Edison Audit Finding

DTE-02243 2/7/2010 QA Review for PO 4700507998 dated 01/19/12

DTE-02249 2/8/2012DR-17.1-1, Rev. 1, Desk Reference, Quality
Assurance Records

DTE-02251 11/2/2009 Trend Analysis of Corrective Action Reports

DTE-02252 11/24/2010 Trend Analysis of Corrective Action Reports

DTE-02222 1/11/2012 Nuc Dev CAR Review Committee Report

DTE-02223 12/19/2011 Management Assessment QAPD Implementation
and Effectiveness

DTE-02229 1/13/2012 RE: response to Black & Veatch's response to
Detroit Edison Audit 11NS02

DTE-02234 1/9/2012 BVN-2012-0003 Detroit Edison Audit Finding No.
11NS02-02 Amended Response Black & Veatch

**Litigation of the Quality Assurance Contention
Is Too Involved to Fit Into the Standard Timetable**

DTE had considerable discretion to choose the timing of its Motion for Summary Disposition on Contention 15. Intervenors, mindful of their limited financial resources, have long intended to selectively review proprietary documents with their expert in preparation for the 2013 hearing on quality assurance. Their plan was to do so closer to that hearing date, and at a more leisurely pace which was not dictated by motion response deadlines. DTE's resort to summary disposition left Intervenors with limited access to their expert, Arnold Gundersen, one of a very small number of experts who works with intervening parties.

Attached is the "Declaration of Margaret Gundersen," owner of Fairewinds, the consulting firm used by Intervenors. Ms. Gundersen explains the scheduling problems that accompanied the April-May motion response timing, discusses excessive DTE invocation of proprietary protection and how that affects the preparation of analysis on the complicated topic of quality assurance.

Ms. Gundersen further discloses her personal recent health problems, which restrict her ability to work as productively as she normally has. Also, over the coming 7 weeks, Arnold Gundersen will not be available to consult with Intervenors. He will be able to work with the Intervenors beginning July 9.

At that time, Intervenors will promptly retrieve, under protective order, all documents the consultant believes he needs

for an effective evaluation of the pending quality assurance controversy and will work with Mr. Gundersen to supplement their response in opposition to summary disposition of Contention 15 by July 31, 2012.

Counsel for intervenors has contacted NRC Staff counsel and Applicant's counsel, requesting their nonopposition to this request. Both of the adverse parties oppose Intervenors' motion.

Intervenors submit that their request is meritorious and should be granted.

WHEREFORE, Intervenors respectfully pray the ASLB grant Intervenors leave to supplement their response in opposition to DTE's "Motion for Summary Disposition of Contention 15" by July 31, 2012.

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May 17, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of) Docket No. 52-033
The Detroit Edison Company)
(Fermi Nuclear Power Plant,)
Unit 3))
)

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' MOTION TO SUPPLEMENT RESPONSE IN OPPOSITION TO APPLICANT'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:

Ronald M. Spritzer, Chair Administrative Judge Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: Ronald.Spritzer@nrc.gov	Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: Anthony.Baratta@nrc.gov
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the matter of

The Detroit Edison Company) May 14, 2012
Fermi Nuclear Power Plant Unit 3) Docket No. 52-033
Combined License Application)

DECLARATION OF MARGARET GUNDERSEN SUPPORTING
INTERVENORS REQUEST FOR EXTENSION OF EXPERT WITNESS TESTIMONY
CONTENTION 15: DTE COLA LACKS STATUTORILY REQUIRED
COHESIVE QA PROGRAM

I, Margaret Gundersen, declare as follows:

1. My name is Margaret Gundersen. I am sui juris. I am over the age of 18-years-old.
2. I am the founder and president of Fairewinds Associates, Inc, and Fairewinds' Chief Engineer Arnie Gundersen has been retained as an expert witness by Petitioners Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, and the Michigan Chapter of the Sierra Club to determine the root cause of Quality Assurance (QA) problems that the NRC has recently identified on the Fermi 3 COL application.
3. Beginning early in the fall of 2009, Mr. Gundersen reviewed the Fermi Unit 3 QA program and its supporting documents in order to determine what remedies might be applicable to mitigate the identified Root Cause deficiencies in the proposed Fermi Unit 3 Quality Assurance Program. Mr. Gundersen submitted his first testimony in this docket in December 2009.

4. Subsequently Mr. Gundersen submitted supplemental testimony for this docket June 8, 2010.
5. After waiting for a response to Fairewinds' expert witness testimony for almost two years, on April 17, 2012 the Intervenors in this docket were given only 20 days by the NRC staff for an Atomic Safety and Licensing Board review to reply by May 7 to a massive file and dump of all Intervenors' contentions at one time.
 - 5.1. Not only is such a massive amount of material impossible to review in 20-days, but
 - 5.1.1. The involved expert witnesses, like Fairewinds, are already committed to other testimony in other judicial proceedings or for other clients across the country and throughout the world.
 - 5.1.2. 20-days leaves no time for dissemination of material, let alone a thorough review of a docket file that has grown immeasurably in its two years of industry and NRC review and response.
6. During the interceding two years, the nuclear industry and Detroit Edison have had the opportunity to review and add to the docket file voluminously.
7. 6. When the MSD was filed in April 2012, Fairewinds was already immersed in responding to two other filings and case reviews contracted with other clients. We therefore asked that the Intervenors in this case seek an extension until May 17, 2012. Because the ASLB did not rule to allow Intervenors to have the new May 17 deadline until May 9 (two days after the original closing date for response), we lost two valuable days of consulting time. That time was redirected to other matters, because we did not wish to waste Intervenors' resources if the extension were going to be denied.
8. 7. On May 9, 2012, the ASLB ruling had the effect of giving Intervenors eight days, until May 17, 2012, to review all material and prepare an expert report.

9. 8. In light of this late date of notice of the extension, Fairewinds is totally unable to respond to any filings.
- 9.1. I am recovering from a concussion and unable to work at the 100-hour plus week such a massive project would require.
- 9.2. Fairewinds is booked with other clients for the remainder of the time prior to an extended business trip and is studying and preparing material for that trip.
- 9.3. Fairewinds is scheduled to be out of the country until June 4, 2012. This business trip and its contractual arrangements were made in October 2011.
- 9.4. Fairewinds will not be back in the office until June 5, 2012.
- 9.5. Fairewinds has other case testimony review and contractual arrangements beginning June 11 through June 22, 2012.
- 9.6. Additionally, I am moving my residence along with my husband Arnie Gundersen (Fairewinds' Chief Engineer) during the month of June, and we are contractually obligated to specific dates for this dwelling transfer.
- 9.7. Finally, as I declared in 10.1, I am recovering from a car accident head injury concussion, and thus require additional time to accomplish tasks involving technical analysis and writing, due to this significant medical disability.

Document Review and Expert Testimony

10. Presently, Fairewinds will be available to begin its expert witness review and testimony on July 9, 2012.
11. We anticipate completing our research of such a full and dramatically changed document file would take time. Therefore, we believe that Mr. Gundersen would be able to write and submit his testimony within 30-days of July 9, 2012 if all the documents requested are made available for review by that time by Detroit Edison and the NRC.

Flawed Document Review

12. Two significant problems have currently marred the efficacy of this process and is clearly an attempt by the NRC and the industry to waylay Intervenors' experts and obfuscate the right of the public to adequate review in this process:
 - 12.1. First, all the documents in this docket have not been available in the electronic database known as ADAMS.
 - 12.2. *Some of the documents* were finally placed in the electronic document file on May 1, 2012, fully 15-days after the NRC clock began ticking and only 6-days prior to the arbitrarily selected expert testimony due date leaving no time for expert witness review and testimony submittal.
 - 12.3. Second, Fairewinds Associates is a paralegal services and expert witness firm that I founded in 2003. In all my time as a paralegal working in federal, state, and international proceedings, this is the first time I have seen such a blatant attempt by the parties to an adjudication to obfuscate proceedings and move a process forward without adequate public review.
 - 12.4. Third, key generic documents that have been created by NEI in conjunction with Detroit Edison have been labeled proprietary in an effort to prevent expert witness and public review in what the NRC has publicly committed to be an open and transparent process.
13. The Intervenors' contention revolves around the efficacy of DTE and its chosen QA implementation firm, Black and Veatch, to follow the rule of law and develop an operating QA program that meets every requirement of nuclear regulation from beginning to end.
14. It is disingenuous and may be illegal for the NRC staff to allow DTE and Black and Veatch to abuse proprietary privilege (see definition below) in an effort to obfuscate adequate public review of this legitimate contention and the public process.

15. “Proprietary information, also known as a trade secret, is information a company wishes to keep confidential. Proprietary information can include secret formulas, processes, and methods used in production. It can also include a company's business and marketing plans, salary structure, customer lists, contracts, and details of its computer systems. In some cases, the special knowledge and skills that an employee has learned on the job are considered to be a company's proprietary information.”¹
16. Mislabeling the allegedly revised QA plans as proprietary does not meet the regulations and the requirement that such a plan be made available for public review.

ORIGINAL TESTIMONY CONCLUSION RESUBMITTED

17. As Mr. Gundersen opined in his supplemental testimony submitted to this docket in June 2010:
 - 17.1. First, based upon NRC emails beginning in June 2009, it is abundantly clear to me that the NRC has been and is fully aware that the Intervenor's Petition is factually accurate and poses grave concerns about the quality of the Detroit Edison Fermi Unit 3 COLA.
 - 17.2. Second, the Code of Federal Regulations makes it abundantly clear that a formal QA Program must be in place well before the Detroit Edison Fermi Unit 3 COLA was to be reviewed by the NRC.
 - 17.3. Third, further factual evidence reviewed and presented in this report show that the Detroit Edison Fermi Unit 3 actually has agreed that a complete and thorough Quality Assurance Program is required for site-specific activities well prior to its COLA submittal to the NRC as it wrote in its COLA in the very language articulated for the nuclear industry by NEI.
 - 17.4. Fourth, the factual record shows that the actual Root Cause of the DTE Fermi Unit 3 QA Program failure is the direct result of significant differences between the critical position of “Quality Assurance Project Manager” as envisioned by the nuclear industry and articulated by NEI and the dramatically weaker and limited role of “Plant Oversight Manager” that has been created by Detroit Edison at Fermi Unit 3 as a vehicle to escape required nuclear regulation.

¹ US Legal, Proprietary Information Law & Legal Definition, <http://definitions.uslegal.com/p/proprietary-information/>

- 17.5. As a result, this weakened role for the Quality Assurance organization is the Root Cause of the current hole in a statutorily mandated Quality Assurance Program at the DTE Fermi Unit 3, and it also portends serious problems in the future of Fermi Unit 3 if construction is permitted. Such a weakened and happenstance QA program in comparison to NEI articulated industry standards foretells of Unit-wide QA issues should the NRC look the other way and not fulfill its statutory obligations.
- 17.6. Consequently, the differences in the organizational approaches toward QA well articulated by NEI compared to that created by Detroit Edison at its Fermi Unit 3 are not merely semantic nuances. Quite simply, the weakened role that DTE has chosen to give to its “Oversight Manager” indicates that the very senior levels of Detroit Edison do not comprehend the importance of a fully independent QA Organization as envisioned the nuclear industry, articulated by NEI and mandated by statute.
- 17.7. Naturally, the independence of the role of the Quality Assurance Project Manager as envisioned by NEI places Quality before Profit. The role of “Plant Oversight Manager” as limited by the Senior Management at Detroit Edison emasculates Quality Assurance and appears to place a premium on speed and profitability rather than public health and safety.
- 17.8. After all, the factual evidence and evidentiary trail exposed and detailed within this expert report clearly supports the Intervenors’ *Supplemental Petition For Admission Of A Newly- Discovered Contention, And For Partial Suspension Of Cola Adjudication*. In my opinion, all work on the Detroit Edison Fermi Unit 3 should stop and not be reinstated until a bona fide QA Program is fully implemented as mandated by the Code of Regulations.
- 17.9. Finally, all work done to date requires serious review and the pedigree of the Quality Assurance supporting that work must be evident. This inadequacy of Quality Assurance cannot be remedied simply through the hiring of additional personnel. This significant disparity over the role and independence of QA between Detroit Edison and the NRC and nuclear industry must be addressed by the NRC and rectified by Detroit Edison.

CONCLUSION

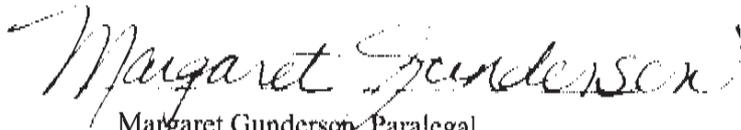
18. Fairewinds hereby requests a postponement of this process for five reasons:

- 18.1. Since the NRC has been reviewing and preparing this docket for almost two full years prior to moving this docket forward for more expert testimony, it is obvious that the material available for review must have changed considerably.

- 18.2. No complete docket file is available for expert review, and because all the requisite documents have not been made available and have not been available in a timely manner, it is impossible for Mr. Gunderson and Fairewinds to complete such a review.
- 18.3. Fairewinds has prior contractual obligations, including overseas travel arrangements.
- 18.4. The *physical health and ongoing disability* of Fairewinds' president and key researcher makes a postponement of this review process imperative.
- 18.5. The ASLB and NRC have chosen an arbitrary date that disenfranchises the public, intervenors, and expert witnesses from any opportunity to review an already flawed QA program and flawed document retrieval process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this day, May 14, 2012 at Burlington, Vermont.



Margaret Gunderson, Paralegal

President & Founder, Fairewinds Associates, Inc