

May 24, 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))	

APPLICANT’S MOTION FOR LEAVE TO FILE A REPLY ON CONTENTION 15

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), The Detroit Edison Company (“Detroit Edison”) files this motion for leave to file a reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 15,” dated May 17, 2012 (“Response in Opposition”).¹ In their response, the Intervenors raise a new basis that was not included in Contention 15 as originally filed or as admitted. Because Detroit Edison could not have reasonably anticipated this new argument, which was raised for the first time in the Intervenors’ response, Detroit Edison requests leave to file a reply for the narrow purpose of addressing this new issue.² For the sake of efficiency and the convenience of the Licensing Board and parties, the reply identifying and responding to the new basis is attached.

¹ Detroit Edison has consulted with the Intervenors and the NRC Staff prior to filing this motion, as required by 10 C.F.R. § 2.323(b). The NRC Staff and the Intervenors have no objection.

² As the Board noted previously, a motion for leave to reply is an appropriate procedural vehicle for addressing new information and arguments raised for the first time in a response to a summary disposition motion. See LBP-11-14, “Memorandum and Order Denying Summary Disposition of Contentions 6 and 8; Denying in Part and Granting in Part Motion to Strike,” 22 at n. 108 (May 20, 2010), citing *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-3, 67 NRC 85, 97-103 (2008); see

DISCUSSION

While replies are not normally permitted for summary disposition, permission may be granted where “the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply.”³ Here, Detroit Edison could not have anticipated that the Intervenor’s Response in Opposition would raise an issue not previously identified and outside the scope of the admitted contention. Proposed Contention 15 was extrapolated entirely from an NRC Staff inspection in August 2009 which found, in certain clearly-defined respects, that Detroit Edison had failed to comply with the QA requirements of Appendix B. Contention 15A concerns the reliability of safety-related information in the Final Safety Analysis Report (“FSAR”) in light of the Notice of Violation (“NOV”) as originally issued by the NRC Staff based on the inspection.⁴ The second issue, Contention 15B, is also premised on the original NOV and alleges that Detroit Edison is not committed to implementing a Quality Assurance (“QA”) program for the Fermi 3 project.⁵

However, in their Response in Opposition, the Intervenor introduces an entirely new issue that was not mentioned in Contention 15, as proposed or as admitted, and that was not

also Duke Cogema Stone & Webster (Savannah River Mixed Oxide fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer was granted where Applicant alleged that the Intervenor’s answer made statements that mischaracterized the MOX facility’s seismic design).

³ 10 C.F.R. § 2.323(c); *see Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1357 (1982) (“If an intervenor must make new factual or legal arguments in a reply, it should clearly identify the new material and explain why it did not anticipate the need for the material in the initial filing. If the explanation is satisfactory, the new material may be considered, but the other parties should be permitted to respond.”).

⁴ LBP-10-09 at 15.

⁵ *Id.*

raised by Detroit Edison in its Motion for Summary Disposition. Specifically, the Intervenor allege, for the first time, “conflicting interests” between “B&V the QA contractor, design contractor, [and] pre-application activity contractor and B&V the ‘Owner’s Engineer’” that supposedly undermines the quality of information in the FSAR. This topic was not addressed in the NOV and was not raised, even in a roundabout way, in proposed Contention 15.⁶ This is an entirely new issue in the proceeding. Because Intervenor has now introduced a new argument that Detroit Edison could not have reasonably anticipated, there is good cause for granting leave for Detroit Edison to file a reply.

CONCLUSION

For the above reasons, Detroit Edison respectfully requests that the Board grant this motion and allow a reply.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 24th day of May 2012

⁶ Response in Opposition at 8.

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REPLY TO RESPONSE IN OPPOSITION
TO SUMMARY DISPOSITION OF CONTENTION 15

INTRODUCTION

The Detroit Edison Company (“Detroit Edison”) hereby submits this reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 15,” dated May 17, 2012 (“Response in Opposition”). As described below, the Intervenors’ reply includes a new argument that was not part of Contention 15 as originally filed. This argument is outside the scope of Contention 15 and, in any event, fails to demonstrate a genuine dispute with the Fermi 3 combined license (“COL”) application. The Intervenors also mischaracterize the supporting materials offered by Detroit Edison in support of its motion. There is no remaining dispute and, as a result, the Board should grant summary disposition on Contention 15.⁷

⁷ Although the Intervenors’ Opposition in Response does not distinguish between Contentions 15A and 15B, their argument is focused on the issues in Contention 15A — that is, the quality of information used in the FSAR. The Intervenors do not appear to dispute Contention 15B, which relates to ongoing implementation of the Quality Assurance (“QA”) program for Fermi 3. For example, the Intervenors do not dispute Detroit Edison’s conclusion — in its motion, supporting affidavits, and statement of material facts — that there is reasonable assurance that the Fermi 3 QA program has been, can be, and will be implemented effectively. Where a responding party does not adequately controvert material facts set forth in a motion for summary disposition, those

DISCUSSION

A. The Intervenors Raise a New Issue that is Outside the Scope of Contention 15

In their Response in Opposition, the Intervenors impermissibly attempt to expand the scope of Contention 15A by introducing a new basis — without addressing the criteria for late-filed or amended contentions and without demonstrating that the new issue is within the scope of Contention 15A. Longstanding NRC practice requires adjudicatory boards to adhere to the terms of admitted contentions.⁸ “Where 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.”⁹ Here, Contention 15A, which was based solely on a Notice of Violation (“NOV”) issued by the NRC Staff, asserts that the violations infect the safety-related information in the FSAR that is based on Black & Veatch’s (“B&V”) tests, investigations, and other safety-related activities.¹⁰ In their Response in Opposition, the Intervenors allege, for the first time, a “conflicting interest” resulting from B&V Ann Arbor’s role as the “Owners Engineer”.¹¹ According to Intervenors, the fact that different B&V offices served as the QA, design, and pre-

facts should be deemed admitted. *See* 10 C.F.R. § 2.710(a); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999). Contention 15B therefore must be resolved in favor of Detroit Edison and the NRC Staff.

⁸ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998) (citation omitted).

⁹ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation omitted).

¹⁰ *Id.* at 15.

¹¹ Response in Opposition at 8.

application activity contractor and as the Owner's Engineer somehow undermines the quality of the information in the application.¹²

But this supposed conflict of interest was never part of Contention 15A. The Intervenor's never mentioned the Owner's Engineer and never pointed to a conflict of interest as a factor undermining the quality of the COL application. The potential conflict of interest issue also was not raised in the NOV on which the contention was based. An answer to a motion for summary disposition is not an opportunity for the Intervenor's to raise an issue that they failed to identify at the outset of the proceeding. As the Commission has explained, a party is not allowed to amend or supplement its contention in an answer to a motion for summary disposition. Otherwise, there would be no end to NRC licensing proceedings if petitioners could disregard the NRC's timeliness requirements every time they "realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."¹³ If the Intervenor's wish to litigate new issues not encompassed by Contention 15, they should either move to amend the existing contention or file a new one.¹⁴ They cannot expand the scope of the admitted contention to include a supposed conflict of interest issue that could have been, but was not, raised earlier.

Accordingly, the Board should disregard the portions of the Response in Opposition concerning the alleged "conflict of interest." In addition and for the same reasons, the Board should disregard in their entirety paragraphs 4-7 of the Intervenor's "Statement of

¹² *Id.*

¹³ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

¹⁴ LBP-11-14 at 24. Any new or amended contention must meet the Commission's requirements for both timeliness and admissibility. *Id.*

Facts Demonstrating Issues of Material Fact in Support of Intervenor's Opposition to DTE's 'Motion For Summary Disposition of Contention 15,' dated May 17, 2012.

B. The Intervenor's New Argument Fails to Demonstrate a Genuine Dispute with the Application on a Material Issue

In addition to being outside the scope of Contention 15, the new issue raised by the Intervenor fails to create a genuine dispute with the COL application on a material issue. The Intervenor baldly asserts that the fact that B&V Ann Arbor served as the Owner's Engineers constitutes a failure of Detroit Edison to retain responsibility over its QA program.¹⁵ But, the Intervenor does not demonstrate that B&V Ann Arbor fulfilling the Owner's Engineer role violates NRC regulations or negatively impacts the Fermi 3 QA program.¹⁶ And, the Intervenor does not include a statement from any technical expert or point to any other information describing how this arrangement could affect the quality of information in the FSAR. The Intervenor also does not point to any information in the COL application that is allegedly flawed due to deficient quality assurance. The Intervenor merely parrots the description of the Owner's Engineer function in the FSAR and in a response to a Request for Additional Information ("RAI"). This is insufficient to establish a genuine dispute on a material issue.

To avoid summary disposition, the Intervenor 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."¹⁷ In the face of well-pled

¹⁵ Response in Opposition at 8.

¹⁶ This is a non-issue — the NRC Staff did not address the supposed conflict of interest in the NOV or in its review of Chapter 17 of the COL application, which addresses quality assurance.

¹⁷ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977).

undisputed material facts, the Intervenor must provide something more than suspicions or bald assertions to establish a material factual dispute.¹⁸ The Intervenor fails to meet that burden here. A conclusory statement by counsel in a legal pleading is inadequate to establish a genuine dispute at the summary disposition stage.

C. The Intervenor Ignores Evidence Provided in Support of the Motion

Intervenor further alleges that Detroit Edison “offers merely an unsworn, undocumented and unverified allegation ... that ‘the Director, Quality Management, position was filled prior to the QA manager position being vacated.’”¹⁹ Contrary to Intervenor’s assertion, Detroit Edison provided a sworn affidavit from Peter W. Smith, attesting to the fact that “[t]here are no gaps or unexplained position descriptions [in the Fermi 3 program]” and confirming that “[t]he Director, Quality Management, position was filled prior to the QA Manager position being vacated.”²⁰ The Intervenor’s allegation should be disregarded by the Board.

CONCLUSION

For the foregoing reasons, the Licensing Board should grant the motion for summary disposition and resolve Contention 15 in favor of Detroit Edison.

¹⁸ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994), *aff’d*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

¹⁹ Response in Opposition at 10.

²⁰ “Affidavit of Peter W. Smith in Support of Summary Disposition of Contention 1,” dated April 16, 2012, at ¶10.

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION FOR LEAVE TO FILE A REPLY ON CONTENTION 15” and “REPLY TO RESPONSE IN OPPOSITION TO SUMMARY DISPOSITION OF CONTENTION 15” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 24th day of May 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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