

May 24, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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DETROIT EDISON CO.) Docket No. 52-033
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(Fermi Nuclear Power Plant, Unit 3))

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

The staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the motion filed May 17, 2012, by the Intervenors that requested leave to supplement their response to a Motion for Summary Disposition of Contention 15 filed by Detroit Edison (Applicant) on April 17, 2012. Intervenors request leave to supplement their response by July 31, 2012. The NRC Staff opposes this motion on the grounds that it fails to show good cause for the requested extension, as required by 10 C.F.R. § 2.307, and because it fails to demonstrate that "extraordinary circumstances" exist, as specified by this Licensing Board in its May 9, 2012, order granting the Intervenors' first request for an extension of time to file a response to the Applicant's April 17, 2012, motion.

BACKGROUND

On November 6, 2009, the Intervenors filed a Supplemental Petition for Admission of a Newly Discovered Contention, which included a quality assurance (QA) contention numbered as Contention 15. Following all briefing, the Board admitted a reformulated version of

Contention 15 that remains pending. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-10-9, 71 NRC 493, 510-11 (2010).

On April 17, 2012, the Applicant filed a motion for summary disposition of Contention 15. Applicant's Motion for Summary Disposition of Contention 15 (Apr. 17, 2012) (Motion for Summary Disposition). Pursuant to 10 C.F.R. § 2.1205(b), answers to the Motion for Summary Disposition were due on May 7, 2012. Late on Friday, May 4, 2012, the Intervenors filed a motion requesting a 10-day extension of time to file its answer on the grounds that Arnold Gundersen, the Intervenors' expert who previously submitted affidavits related to Contention 15, would be unavailable until May 8 because of other work. Intervenors' Motion for Enlargement of Time to Respond to Pending Motions for Summary Disposition (May 4, 2012) (First Extension Request). On May 7, 2012, the Staff filed its answer to the Motion for Summary Disposition. NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 15 (May 7, 2012) (Staff Answer).¹ On May 9, 2012, the Licensing Board granted the Intervenors' extension request, establishing a due date of May 17, 2012, for the Intervenors' answer, and noting that further extensions would be granted only in "extraordinary circumstances." Order (Granting the Intervenors' Motion for Extension of Time) (May 9, 2012) (Extension Order).

On May 16, 2012, the Intervenors consulted with the Applicant and Staff and requested non-opposition to a motion to file an answer to the Motion for Summary Disposition on the scheduled due date of May 17, and to file supplements to that answer for up to eight weeks following that date. The Applicant and Staff indicated that they opposed this motion. On May 17, 2012, the Intervenors filed an answer to the Motion for Summary Disposition (Intervenors' Answer), along with a Motion to Supplement Response in Opposition to Applicant's Motion for

¹ Since Contention 15 was admitted, the Staff's evaluation of the Applicant's QA plan has been completed and documented in Chapter 17 of the Advanced SER With No Open Items, ADAMS Accession No. ML112630120. This SER chapter was presented to the Advisory Committee on Reactor Safeguards (ACRS) in October 2011, and no further changes are anticipated. Staff Answer at 3.

Summary Disposition of Contention 15 (May 17, 2012) (Second Extension Request). The Second Extension Request was accompanied by an affidavit signed by Ms. Margaret Gundersen (M. Gundersen Decl.), wife of Intervenors' expert witness Arnold Gundersen.

As described below, the Intervenors have not shown good cause for a second extension request, as required by 10 C.F.R. § 2.307, much less the "extraordinary circumstances" that the Board has deemed necessary for any extensions beyond the ten days already granted. For this reason, the Intervenors' motion should be denied.

DISCUSSION

I. LEGAL STANDARDS

The NRC regulations in 10 C.F.R. §§ 2.1205 and 2.710 provide for the filing of motions for summary disposition, and this Licensing Board's Scheduling Order provides timeframes for filing such motions related to safety and environmental contentions. Order (Establishing schedule and procedures to govern further proceedings), at 3-4 (Sept. 11, 2009) (Scheduling Order). Parties have 20 days in which to answer motions for summary disposition. 10 C.F.R. § 2.1205(b). Pursuant to 10 C.F.R. § 2.307, time limits may be extended by the Commission or presiding officer for good cause shown. This Board has further stipulated that any motions to modify the schedule "should be filed when the party learns of the facts and circumstances establishing the need for an extension." Scheduling Order at 4. This Board has also ruled that further extensions related to the Motion for Summary Disposition would not be granted "absent extraordinary circumstances." Extension Order at 2.

II. THE INTERVENORS HAVE NOT DEMONSTRATED GOOD CAUSE OR "EXTRAORDINARY CIRCUMSTANCES" TO JUSTIFY A SECOND EXTENSION OF TIME TO FILE

On May 17, 2012, the Intervenors moved for leave to "supplement" their answer to the Motion for Summary Disposition. See *generally* Second Extension Request. The scheduling constraints that Ms. Gundersen describes in her affidavit and the arguments related to proprietary information that the Intervenors now raise for the first time do not demonstrate either

“good cause” or “extraordinary circumstances” that would justify granting a second filing extension after the first one has expired. For this reason, the Second Extension Request should be denied.

A. Ms. Gundersen’s Statements Regarding Schedule Conflicts Do Not Demonstrate Good Cause or Extraordinary Circumstances that Would Justify a Second Extension

The Intervenors state that it is “the Applicant’s resort to summary disposition” that has “left the Intervenors with limited access to their expert” at this time. Second Extension Request at 4. However, the Applicant’s filing of a motion for summary disposition does not constitute good cause or extraordinary circumstances, as such a motion is provided for in both NRC regulations and the Board’s Scheduling Order. Furthermore, the information in the affidavit submitted by Ms. Gundersen does not demonstrate good cause, much less extraordinary circumstances, that would justify a second deadline extension because, as described below, the affidavit (1) does not show that any circumstances have changed since the First Extension Request was filed; (2) fails to include a clear description of Mr. Gundersen’s schedule and availability through July 9, 2012, and why an extension until July 31, 2012, is necessary; and (3) fails to demonstrate the materiality of Ms. Gundersen’s limited availability.

First, the Intervenors have not established that there were any changed circumstances, especially none rising to the level of extraordinary circumstances, between May 4, 2012, when they filed their First Extension Request, and May 17, 2012, when they filed their Second Extension Request. Ms. Gundersen refers to preparation for an extended business trip to Europe that will take place in early June, but also notes that arrangements for the trip were made in October 2011 and were therefore known before May 4. See M. Gundersen Decl. ¶ 9.3. She also refers to other contractual commitments for the weeks after that business trip, *id.* ¶ 9.5, but does not explain how these are new time constraints that could not have been addressed in the First Extension Request. She notes that the Intervenors chose not to work on their response to the Motion for Summary Disposition for two of the ten days of their extended filing

period, despite the possibility that the Board might rule favorably on the First Extension Request. See *id.* ¶ 7. Insofar as the Intervenors made this decision in order to conserve financial resources, both the Commission and the Appeal Board have made it clear that a party's limited financial resources do not relieve that party of its hearing obligations. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981); *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982). For these reasons, the scheduling information presented in Ms. Gundersen's affidavit does not demonstrate the existence of new circumstances that could not have been addressed in the First Extension Request, nor does it demonstrate good cause or extraordinary circumstances that would warrant a second extension.

Second, the Intervenors have not included information to illustrate why Arnold Gundersen, the expert witness who has submitted affidavits in the past and whose credentials as a technical expert have been reviewed by the other parties and the Board, was not available during the 30 days the Intervenors had to file a response, i.e., April 17 to May 17. Neither the Second Extension Request nor Ms. Gundersen's affidavit makes clear why Mr. Gundersen will be unavailable until July 9, 2012. Ms. Gundersen speaks in terms of her own availability and the availability of the Fairewinds consulting firm. The only specific reference to Mr. Gundersen's availability is that he will be moving his residence during the month of June. M. Gundersen Decl. ¶ 9.6. However, this does not explain why the Intervenors could not meet the May 17, 2012, deadline, nor does it explain why an extension until July 31, 2012, is necessary. See Scheduling Order at 4 (directing parties to establish need for the extension).

Third, with respect to Ms. Gundersen herself, the Intervenors have not demonstrated how her availability is material to their ability to file a timely response to the Applicant's Motion for Summary Disposition. They have not shown that her limited availability, whether due to work commitments, personal commitments, or medical conditions, affects her husband's ability to assist the Intervenors in meeting their filing deadline or justifies a further extension of time to

file. Ms. Gundersen states that she is a paralegal. M. Gundersen Decl. ¶ 12.3. She is not one of the Intervenors, nor an expert witness, nor legal counsel, and the Intervenors have not explained why her participation in preparing their response to the Motion for Summary Disposition is necessary.

Because the Intervenors have not set forth clear facts explained why their expert, Arnold Gundersen, has been and will continue to be unavailable, and have not demonstrated why an extension until July 31 is needed, the Intervenors have not established that they have experienced extraordinary circumstances or have met the good cause standard in 10 C.F.R. § 2.307.

B. The Intervenors' New Argument Related to Proprietary Documents Does Not Support Granting Their Motion

The Intervenors assert that a second extension of time to file should be granted because the Applicant's monthly disclosures related to Contention 15 have included proprietary documents, and they argue that their witness has not been given sufficient time to access and review these documents. Motion to Supplement at 2-4. According to the Intervenors, the Applicant's "exploitation of the proprietary privilege has snowballed" since the Applicant's first Contention 15 disclosures in September 2010. *Id.* at 2. The Intervenors state that they had been planning "to selectively review proprietary documents with their expert in preparation for the 2013 hearing," and to do so "closer to the hearing date" and "at a more leisurely pace." *Id.* at 4. According to Ms. Gundersen, those documents withheld as proprietary include "the allegedly revised QA plans." M. Gundersen Decl. ¶ 16. This is the first reference the Intervenors have made in this proceeding to the Applicant's proprietary privilege logs related to Contention 15.

The regulatory provisions of 10 C.F.R. § 2.390 govern the NRC's treatment of proprietary information in final NRC records and documents, including "correspondence to and from the NRC regarding the issuance, denial, amendment, transfer, renewal, modification,

suspension, revocation, or violation of a license, permit, order, or standard design approval” 10 C.F.R. § 2.390(a). This regulation favors public disclosure of NRC records, including documents submitted to the NRC by applicants, in the absence of a “compelling reason for nondisclosure.” *Id.* This regulation and the associated guidance in LIC-204, Handling Requests to Withhold Proprietary Information from Public Disclosure, Rev. 3 (Jan. 24, 2007), ADAMS Accession No. ML062200530, set forth the procedure NRC follows when an applicant submits documents to the NRC and requests that NRC withhold the documents from public disclosure because of a privilege claim. 10 C.F.R. § 2.390(b)(6) further specifies that proprietary information in NRC records and documents may be examined by parties to a proceeding under a protective order. Protective orders and non-disclosure agreements have also been put into place in NRC proceedings when, as here, some of the documents involved are internal Applicant documents that have not been submitted to the NRC on the docket of the proceeding in question and are not referenced in the NRC’s review. *See, e.g., Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) at 1 & n.1 (Jan. 12, 2007), ADAMS Accession No. ML070120327.

The Applicant began including documents related to Contention 15 in its monthly disclosures in September 2010. As the Intervenors note, the Applicant’s initial filing related to this contention included a proprietary privilege log listing a large number of documents. Motion to Supplement at 2. Since that time, the Applicant has filed 20 supplemental disclosures listing proprietary documents related to Contention 15. Many of these are internal Applicant documents and correspondence with its vendor Black & Veach that have not been submitted on the docket of this proceeding.

According to the Intervenors’ own numbers, nearly two-thirds of the documents for which the Applicant claimed proprietary status were disclosed in the initial September 2010 filing. *See*

Motion to Supplement at 2. While the Applicant continued to file proprietary privilege logs after the initial disclosures, subsequent logs were significantly shorter. The Intervenor's assert that the Applicant's use of the proprietary privilege has "snowballed" in recent months, which implies that the privilege is being claimed for a greater number of documents. See Motion to Supplement at 2. However, the Staff has reviewed the Applicant's monthly disclosures from September 2010 to May 2012, and has not observed any trend in the number of proprietary documents listed except for the initial decline following the September 2010 filing.²

The Intervenor's did not seek access to proprietary information at any point prior to filing the Motion to Supplement on May 17, 2012, and did not previously challenge the Applicant's proprietary designations in any of the monthly disclosures. In their May 17 filing, the Intervenor's suggest that the existence of proprietary documents justifies an extension of time to file an answer to the Motion for Summary Disposition. See Motion to Supplement at 2-3. However, this Board has stated previously that requests for schedule modifications in this proceeding "should be filed when the party learns of the facts and circumstances establishing the need for an extension." Scheduling Order at 4. The Intervenor's have been on notice about the Applicant's proprietary designations since September 2010, and have received monthly updates since that time. For this reason, the fact that the Applicant has disclosed proprietary documents in the past does not support the current request to modify the schedule of this proceeding. Furthermore, Ms. Gundersen's assertion that the Applicant's QA plans have been withheld as proprietary is incorrect. The Applicant's QA plans are public, and were attached to the Motion for Summary Disposition as exhibits.

² What has changed in recent months is the number of *public* documents related to Contention 15 in both the Applicant's and the Staff's disclosures. This change is expected, because the Staff finished its review of Fermi 3 QA issues and submitted Chapter 17, "Quality Assurance," of the Advanced SER with No Open Items to the ACRS in October 2011. See Staff Answer at 3. With the completion of the Staff's QA review, all correspondence related to Requests for Additional Information (RAIs) and RAI responses ceased, and no further updates to the QA provisions of the Fermi 3 application were made.

In summary, the Intervenor's made the decision not to request access to the proprietary documents listed in the Applicant's monthly disclosures related to Contention 15, even though the rules governing this proceeding provide the opportunity for summary disposition. This decision does not give rise to good cause for a second filing extension, as required by 10 C.F.R. § 2.307, nor rise to the level of extraordinary circumstances that this Board has stated would be required.

CONCLUSION

For the reasons discussed above, the Second Extension Request should be denied.

Respectfully Submitted,

/Signed (electronically) by/
Marcia Carpentier
Andrea Silvia
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4126/415-8554
Marcia.Carpentier@nrc.gov
Andrea.Silvia@nrc.gov

Dated at Rockville, Maryland
this 24th day of May, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO INTERVENORS' MOTION TO SUPPLEMENT RESPONSE has been served upon the following persons by Electronic Information Exchange and electronic mail this 24th 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

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAmail@nrc.gov

Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Anthony.Baratta@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Randall J. Charbeneau
Administrative Judge
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Randall.Charbeneau@nrc.gov

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

David Repka, Esq.
Tyson R. Smith, Esq.
Counsel for the Applicant
Winston & Strawn, LLP
1700 K Street, NW
Washington, DC 20006-3817
E-mail: drepka@winston.com
trsmith@winston.com

Terry J. Lodge, Esq.
Counsel for Petitioners
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
E-mail: tjlodge50@yahoo.com

/Signed (electronically) by/

Marcia Carpentier
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4126
Marcia.Carpentier@nrc.gov

Dated at Rockville, Maryland
this 24th day of May, 2012