

May 29, 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 RESPONSE TO MOTION TO SUPPLEMENT  
RESPONSE IN OPPOSITION TO SUMMARY DISPOSITION ON CONTENTION 15

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Detroit Edison Company (“Applicant”) files this response to the “Intervenors’ Motion to Supplement Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 15,” dated May 17, 2012 (“Motion”).<sup>1</sup> The Intervenors have provided no basis for a two-month extension in order to supplement their initial response. Their motion does not reveal any “extraordinary circumstances” that would justify the extended delay in resolving Contention 15.<sup>2</sup> The extension also cannot be justified by the Intervenors’ failure to exercise their rights — particularly where, as here, the Intervenors did not respond to Detroit Edison’s efforts to jointly develop a protective order governing access to proprietary information in this proceeding. Finally, Detroit Edison has applied the criteria for making proprietary determinations consistently and appropriately throughout the proceeding.

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<sup>1</sup> Similar argument were include in the “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 15,” dated May 17, 2012, at 13-14.

<sup>2</sup> See Order (Granting Intervenors’ Motion for Extension of Time), dated May 9, 2012 (“No further extensions will be granted absent extraordinary circumstances.”).

The Intervenors spurious allegations of excessive protections have no basis. For these reasons, the motion should be denied.

#### DISCUSSION

The Intervenors acknowledge “the policy that the ASLB expects all parties to be prepared to litigate.”<sup>3</sup> And, they recognize that their failure to review documents related to Contention 15 was an intentional choice.<sup>4</sup> But, the Intervenors’ litigation and resource management strategies are not a basis for allowing a two-month extension of time for a response to a summary disposition motion.<sup>5</sup> The fact that a party’s representative or expert have personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations, nor does it automatically entitle the party to a lengthy extension of time.<sup>6</sup> Intervenors have a responsibility to structure their participation so that it is meaningful.<sup>7</sup> And,

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<sup>3</sup> Response in Opposition at 13.

<sup>4</sup> See Motion at 4 (stating that “mindful of their limited financial resources, [the Intervenors] have long intended to selectively review proprietary documents with their expert in preparation for the 2013 hearing on quality assurance” and that “their plan was to do so closer to that hearing date, and at a more leisurely pace.”).

<sup>5</sup> See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1935 (1982) (“A party may not be heard to complain that its rights were unjustly abridged after having purposefully refused to participate.”).

<sup>6</sup> *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

<sup>7</sup> *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 50, citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

the Intervenor should anticipate having to manipulate their resources, however limited, to meet their obligations.<sup>8</sup>

The Intervenor's complaint regarding access to proprietary documents is another matter of their own making.<sup>9</sup> Contention 15 was admitted nearly two years ago. Although provided with a draft protective order by Detroit Edison in June 2010, the Intervenor did not make any efforts to comment on the draft order or otherwise gain access to proprietary document during the course of the proceeding. Detroit Edison was (and remains) willing to work with Intervenor to facilitate access to proprietary documents, but the Intervenor's failure to pursue or even request access to such documents cannot justify a two-month extension of time. This is especially true where, as here, one of the most significant documents demonstrating the absence of a genuine dispute on the contention — the NRC Staff's evaluation of Chapter 17 of the Final Safety Analysis Report — is publicly available.<sup>10</sup> If, upon further review of publicly available or proprietary documents, the Intervenor identify additional issues that they want to raise, they must (in a timely way) either amend the existing contention or file a new one.<sup>11</sup> But, there is no reason to reward the Intervenor with an extension when they have failed to adequately participate in the proceeding.

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<sup>8</sup> *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 394 (1983), *citing Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 279 (1982).

<sup>9</sup> Detroit Edison provides the Intervenor a file containing non-protected documents each month. Documents that Detroit Edison identifies as proprietary are also listed in the monthly disclosure supplements. But, in the absence of a protective order, Detroit Edison does not provide copies of proprietary documents directly to the Intervenor.

<sup>10</sup> "NRC Staff – Advanced Final Safety Evaluation Report for Chapter 17, 'Quality Assurance,'" dated September 26, 2011 (ADAMS Accession No. ML112560382).

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

Finally, there is no basis for the Intervenor's attacks on Detroit Edison. The Intervenor's argue that Detroit Edison's invocation of proprietary protections is "excessive."<sup>12</sup> And, in the declaration supporting their motion, Ms. Gundersen states that "[i]t is disingenuous and may be illegal" to allow Detroit Edison "to abuse to abuse proprietary privilege ... in an effort to obfuscate adequate public review of this legitimate contention and the public process."<sup>13</sup> There is simply no basis for any of these hyperbolic assertions. Detroit Edison has in good faith reviewed countless documents on a monthly basis and applied consistent and appropriate criteria for designating proprietary documents throughout this proceeding. If the Intervenor's had any issue with Detroit Edison's application of these criteria, they had an affirmative obligation to raise those concerns before now. The Intervenor's should not impugn the integrity of Detroit Edison, its counsel, or the NRC Staff without submitting supporting evidence or otherwise providing a reasonable basis for such claims.<sup>14</sup> The Intervenor's lack of resources does not excuse baseless and undocumented charges against the integrity an opposing party.<sup>15</sup>

#### CONCLUSION

For the above reasons, Detroit Edison respectfully requests that the Board deny the Intervenor's motion.

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<sup>12</sup> Motion at 4.

<sup>13</sup> "Declaration of Margaret Gundersen Supporting Intervenor's Request for Extension of Expert Witness Testimony Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program," dated May 14, 2012, at ¶14. Ms. Gundersen also claims that Detroit Edison and the NRC are invoking the privilege to "obfuscate the right of the public to adequate review in this process." *Id.* at ¶12. Ms. Gundersen's status as a paralegal does not confer upon her the expertise to opine on matters of law.

<sup>14</sup> *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-5A, 15 NRC 216 (1982).

<sup>15</sup> *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), LBP-85-45, 22 NRC 819, 828 (1985).



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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO MOTION TO SUPPLEMENT RESPONSE IN OPPOSITION TO SUMMARY DISPOSITION ON CONTENTION 15” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 29th 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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