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Title: Detroit Edison Company
Fermi Nuclear Power Plant Unit 3

Docket Number: 52-033-COL

ASLBP Number: 09-880-05-COL-BD01

Location: (teleconference)

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 HEARING

7 -----x

8 In the Matter of: : Docket No.

9 DETROIT EDISON COMPANY: 52-033-COL

10 (Fermi Nuclear Power : ASLBP No.

11 Plant, Unit 3) : 09-880-05-COL-BD01

12 -----x

13
14 Tuesday, December 4, 201215
16 Teleconference17
18 BEFORE:

19 RONALD M. SPRITZER, Chair

20 DR. ANTHONY J. BARATTA, Administrative Judge

21 DR. RANDALL H. CHARBENEAU, Administrative Judge

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P R O C E E D I N G S

10:01 a.m.

CHAIRMAN SPRITZER: All right, let's go on the record. We are here in the matter of Detroit Edison Company FERMI Nuclear Power Plant Unit 3 which is Docket No. 52-033-COL and also ASLBP No. 09-880-05-COL-BD01.

Again, I'm Ron Spritzer. I am the Legal Judge on this panel. Let me ask the other two Judges who are here to identify themselves.

ADMIN. JUDGE BARATTA: I am Dr. Anthony Baratta. I'm one of the Legal Judges, Technical Judges, sorry, on this panel.

CHAIRMAN SPRITZER: Randy, are you there? Randy, can you hear me? Can you please just identify yourself for the record?

ADMIN. JUDGE CHARBENEAU: Randall Charbeneau. I'm one of the Technical Judges.

ADMIN. JUDGE CHARBENEAU: Okay, and can the parties go around and identify themselves? Why don't we start with the Intervenors.

MR. LODGE: Thank you. This is Terry Lodge for the Intervenors. And I have Michael Keegan who is a representative of Don't Waste Michigan with me. I also believe that Kevin Kamps is probably

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1 listening in remotely from Beyond Nuclear.

2 CHAIRMAN SPRITZER: Sounds good. And
3 next, why don't we go to the Applicant.

4 MR. REPKA: Yes, this is David Repka for
5 Detroit Edison Company. Tyson Smith is also on the
6 line from a separate location. Mr. Smith will take
7 the lead in the discussion this morning. And also
8 with me in my office is Rachel Miras-Wilson. And then
9 I do understand that some individuals from Detroit
10 Edison may be on a separate line as well.

11 CHAIRMAN SPRITZER: Very good. And from
12 the NRC staff?

13 MS. CARPENTIER: This is Marcia Carpentier
14 and with me are Anthony Wilson, Megan Wright, and
15 Myrisha Lewis.

16 CHAIRMAN SPRITZER: All right, and the
17 purpose of our call this morning is to have a
18 conference call to discuss future scheduling in this
19 case, particularly the conduct of an evidentiary
20 hearing. We are aware, of course, that a Motion for
21 Reconsideration was filed for reconsideration of the
22 Board's ruling on contention 8, but for purposes of
23 this discussion we'll proceed on the assumption that
24 that contention will remain part of the case.

25 We do have the parties' letters. We got

1 letters from all the parties which were helpful, at
2 least in understanding where everybody stands.

3 Let me start with the NRC staff. Can you
4 give us any more specific information about when we
5 might see the advanced SER with no open items?

6 MS. CARPENTIER: I really can't at this
7 time. It depends on things that haven't happened and
8 decisions that haven't been made yet. So we really
9 can't go on the record with anything like that at this
10 time, but we will inform you as soon as we have
11 anything.

12 CHAIRMAN SPRITZER: All right, that would
13 be helpful. Do you have any idea when you might have
14 some better idea?

15 MS. CARPENTIER: They're working on that
16 now, but you know, as soon as we've got something and
17 that will have to be worked out after they get some
18 responses to RAIs and things. Then we'll be able to
19 publish that, but we haven't got it yet.

20 CHAIRMAN SPRITZER: One reason for asking
21 that, of course, is at least our preliminary thought
22 among the Board members, it makes sense logistically
23 to have one hearing on both safety and environment
24 contentions if we can. On the other hand, you're
25 anticipating the final EIS coming out next month. If

1 we're looking at another year or more for the advanced
2 SER with no open items, that's a long time to wait to
3 resolve the environmental contention. And we're
4 simply sympathetic with the Applicant's interest in
5 getting that resolved sooner rather than later.

6 Any thoughts on that from anyone,
7 including the staff?

8 MS. CARPENTIER: Well, Chapter 17 of the
9 advanced SER with no open items has been complete for
10 more than a year. We talked about this in our answer
11 to the Motion for Summary Disposition. It's out there
12 now and staff review is complete so there's no real --
13 we don't expect it to change, so the record in that
14 sense is complete and we're ready to go at any time.

15 MR. SMITH: And from the Applicant's
16 perspective, we would agree with the staff that all
17 the issues involved in contention 15 are ripe for
18 adjudication at this point. As Ms. Carpentier
19 mentioned, staff has completed its review of Chapter
20 17 which relates to QA. The ACRS has completed its
21 review and there's really nothing left to be done with
22 respect to QA prior that would warrant delaying the
23 hearing.

24 CHAIRMAN SPRITZER: I don't know that
25 there's any hard and fast rules, but I think most

1 boards have generally preferred to at least give the
2 Intervenors the chance to look at the advanced SER in
3 some form because there's always -- while that can't
4 be directly challenged, it can be the basis for
5 additional contentions. If we go ahead and do the
6 hearing, then of course, they would face a very
7 significant burden when the advanced SER comes out of
8 trying to reopen the proceeding. So that's at least
9 one concern that might make some difference whether
10 the entire advanced SER is finished as opposed to just
11 Chapter 17 on the quality assurance issue.

12 MR. SMITH: This is Tyson Smith again. I
13 guess it's my understanding that there is no single
14 bound integrated advanced SER document. Rather, it is
15 completed on a chapter-by-chapter basis as the staff
16 completes the reviews of each chapter. So for
17 contention 15 which relates to QA, the chapter
18 relating to that has been done, was complete over a
19 year ago.

20 And so I think there's no reason to delay
21 a hearing and in fact, some of the issues that are
22 involved are much older than that. They began in the
23 2007 time frame and I think it's our concern that if
24 we delay for another year or however long it takes to
25 get to some point, all that information is becoming

1 stale. And frankly, if there's a problem, we have to
2 go back and redo some of those analyses and it doesn't
3 make sense to wait until everything is all but done in
4 order to go start over at the beginning. If there's
5 an issue, we want to know sooner than later so we can
6 resolve it and correct it.

7 CHAIRMAN SPRITZER: Those are certainly
8 significant concerns. Do the Intervenors have
9 anything to add on this question?

10 MR. LODGE: Yes, thank you. This is Terry
11 Lodge, Your Honor. As we indicated in our letter, it
12 is our position that quality assurance concerns
13 permeate the process right down to the moving present
14 and that, in fact, we also will need to have our
15 expert witness review a great deal of material in
16 order to prepare.

17 We have been monitoring the ACRS meetings
18 and understand that there's a soil structure analysis
19 that is apparently about to -- or is underway and
20 ongoing and is projected not to be completed until
21 some time possibly in early 2014. We believe that
22 that is something that would be certainly covered by
23 the SER. It is something that may also have quality
24 assurance implications because it is a very
25 fundamental part of the construction and foundation

1 for the proposed new plant.

2 Therefore, we certainly tend to agree with
3 the Board's interpretation of having finality and
4 having an opportunity to review the entire document at
5 some point down the road.

6 CHAIRMAN SPRITZER: While we're on that,
7 Mr. Lodge, maybe you have cleared this up. The first
8 paragraph on page 2 of your letter, you say you are
9 preparing a proposed amendment to the quality
10 assurance contention based upon a delay for completion
11 of a soil structure analysis by approximately March
12 2014.

13 We wouldn't see this proposed amendment,
14 I take it, until March of 2014 or later?

15 MR. LODGE: No, Your Honor. We are
16 contemplating a filing date that would be much sooner
17 than that, but simply adds it and of course, subject
18 to possible prospective amendment. But we're looking
19 at doing so within the relatively near future.

20 CHAIRMAN SPRITZER: Okay.

21 MR. LODGE: I guess I'm thinking more in
22 terms by the approximately end of 2012 or very early
23 2013.

24 CHAIRMAN SPRITZER: All right. Keep in
25 mind we have our regulation that sets out some pretty

1 strict time deadlines, but we need to keep those in
2 mind.

3 All right, in terms of the schedule, we've
4 got a proposed schedule, a specific schedule from
5 Detroit Edison which was helpful. Let's talk first
6 about the possibility of doing a hearing on both
7 contentions. Detroit Edison's schedule -- suppose we
8 were to take -- this is page, what page is it? The
9 last page in their letter of December 3, 2012.
10 Attachment 1 it says at the top.

11 Suppose we were to have a schedule, but
12 instead of having two hearing dates or two possible
13 hearing dates, one in late June, late July of 2013 and
14 the other in August, September of 2013, we were simply
15 to have a hearing probably September to October of
16 2013 on both contentions and essentially combine these
17 two schedules. We would keep the due dates, that is,
18 for the written testimony, rebuttal testimony, motions
19 in limine. Also the deadlines that are proposed for
20 new contentions based on the Final Environmental
21 Impact Statement and for submittal testimony should
22 any such new contention be admitted. Go to hearing on
23 that and -- well, let's talk about first the
24 possibility to going to hearing on everything in let's
25 say September to October of 2013.

1 Can anybody see any obstacle to that?

2 MR. LODGE: Your Honor, this is Terry
3 Lodge again. As I suggested in my letter, I am
4 anticipating a case that may involve a three-week
5 trial. And I am anticipating a remand from a Court of
6 Appeals or the Ohio Supreme Court that by my rough
7 guesstimate would probably put the trial reschedule,
8 that three-week trial, in other words, pretty much
9 squarely in that time slot. I wonder if it would be
10 possible to add 45 days or we had proposed 90, but at
11 least put the matter into November of 2013, please.

12 MR. SMITH: This is Tyson Smith for
13 Detroit Edison. I think our view is that these issues
14 are ripe now and they're going to continue to get more
15 stale. There's no reason to delay much beyond -- so
16 we had proposed to hear it on an earlier schedule as
17 we proposed. But the Board wanted to have a single,
18 integrated schedule. I think we would obviously
19 support that, but don't see the reason, the need for
20 any more delay.

21 I mean this process is spread out.
22 There's lots of different due dates throughout for
23 filing testimony. And those dates can be moved
24 around, but the actual date of an evidentiary hearing,
25 I don't see a reason that we can't do multiple

1 activities at the same time.

2 We, of course, also have other
3 obligations, but we're going to manage to squeeze
4 those in that time frame and don't see a need for any
5 more delay.

6 CHAIRMAN SPRITZER: Mr. Lodge, you said
7 you were anticipating a remand from a Court of
8 Appeals. Can you -- I mean we're not going to force
9 someone to come to this hearing at the same time you
10 have a scheduled trial in another case that's
11 realistically going forward.

12 MR. LODGE: Right.

13 CHAIRMAN SPRITZER: On the other hand, we
14 need to simply block out months at a time and say
15 we're just going to assume -- it would be helpful --
16 do you have any idea -- I know this is kind of asking
17 you to forecast the future, but do you have any idea
18 when you're going to hear from the Court of Appeals?
19 Do you have any more specific information?

20 MR. LODGE: Well, the circumstance is that
21 I expect a ruling from the intermediate level of the
22 Court of Appeals in Ohio by mid-January, hopefully.
23 I anticipate the -- there's some possibility that the
24 defendant, which is the City of Toledo, may take an
25 accelerated appeal to the Ohio Supreme Court which

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1 involves the typical two-stage certiorari process.
2 And I'm anticipating that not to actually take very
3 long because I don't think the Supreme Court will take
4 the matter up.

5 I would also add, Your Honor, that Michael
6 Keegan of Don't Waste Michigan sitting here has
7 reminded me that there are pending requests for
8 additional information on the soil structure analysis
9 matter where DTE is being allowed presently to respond
10 in September of 2013 which is a reason that we would
11 hope to have some period of time to review that no
12 doubt detailed response and possibly change the
13 contention on quality assurance by amendment.

14 CHAIRMAN SPRITZER: We are going to go off
15 line for just a second. if you all can hold on?

16 (Off the record.)

17 CHAIRMAN SPRITZER: We will take a
18 specific date under advisement, but whatever day we
19 set and we'll make this clear in whatever order we
20 issue that if somebody really has a trial scheduled as
21 opposed to something that might come up, we're
22 obviously not going to force counsel to appear in two
23 places at the same time. Please, however, notify us
24 as promptly when you have the information about such
25 conflicts so that we can reschedule. And that, of

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1 course, applies to everybody, not just to the
2 Intervenors.

3 All right, in terms of location, one
4 possibility we've been thinking of is the University
5 of Michigan Law School in Ann Arbor, Michigan, which
6 is somewhere around 30, 35 miles from Monroe. We
7 thought we might be able to use their moot court
8 facilities. And they might be interested in seeing
9 what the NRC does or at least some of their students
10 might be.

11 Does anybody have any feelings one way or
12 the other about that?

13 MR. LODGE: For the Intervenors, Your
14 Honor, we believe it should be closer to Monroe,
15 possibly in a courtroom in the Monroe Courthouse,
16 similar to what happened in our pre-hearing or our
17 hearing on the admissability of contentions.

18 CHAIRMAN SPRITZER: Local courthouses are
19 often kind of busy, particularly if we're talking
20 about a two-day. We probably have to reserve two
21 days, even though we might not go that long. I
22 wouldn't think this would be more than a two-day
23 hearing.

24 MR. LODGE: Your Honor, this is Terry
25 Lodge. Are you -- you're talking about one contention

1 or 8 and 15 together?

2 CHAIRMAN SPRITZER: Our inclination would
3 be to have 8 and 15 together, if we can. We haven't
4 made a final decision, but that's at least our sense.

5 MR. LODGE: On behalf of the Intervenor,
6 I wonder if the Board would consider scheduling them
7 at least two weeks apart and I also -- and I kind of
8 suspect that all of the parties, except the Board, may
9 have varying degrees of experience, but it seems to me
10 that that may be a very short time line if you're
11 talking about essentially one day per contention. For
12 instance, we believe that the quality assurance matter
13 is pretty convoluted and complicated, that we would
14 have an expert with rather considered and lengthy
15 opinion and even understanding that the Board directs
16 the questioning, it would seem to me that it might
17 take some time for answers to properly be delivered.

18 CHAIRMAN SPRITZER: Assuming we do both
19 contentions together, what would you estimate an
20 appropriate time frame to be?

21 MR. LODGE: For 15, we would propose 2 to
22 3 days.

23 CHAIRMAN SPRITZER: Okay, and for 8?

24 MR. LODGE: For 8, I can't -- we don't
25 disagree that it might be completed within a day, but

1 I'm sure Your Honor is probably familiar with the fact
2 that things can run over and delays can occur and that
3 kind of stuff which may, at least, implicate a two-day
4 period.

5 CHAIRMAN SPRITZER: All right. Anyone
6 else have any thoughts on the amount of time we ought
7 to set for the hearing?

8 Is there anything else to talk about? Do
9 any of the other Judges have any questions?

10 ADMIN. JUDGE BARATTA: I don't.

11 ADMIN. JUDGE CHARBENEAU: I don't.

12 MR. LODGE: Your Honor, this is Terry
13 Lodge again. How is the panel dealing or going to
14 deal with the waste confidence redetermination and any
15 implications it has for nonfinality of the
16 Environmental Impact Statement?

17 CHAIRMAN SPRITZER: I don't think we can
18 address that absent a motion or something else that
19 puts an issue before us. It's not really appropriate
20 for us to address in the abstract.

21 I mean the staff is going to put out a
22 document it calls the Final Environmental Impact
23 Statement. Whether or not they eventually need to
24 supplement that or not based on what the Commission
25 may or may not do in terms of regulatory response to

1 the D.C. Circuit's decision, we'll just have to wait
2 and see on that. But I don't see any reason to delay
3 a ruling or a hearing on the Final Environmental
4 Impact Statement any further, once the document is
5 actually issued in that form.

6 We'll have to deal with waste confidence
7 decisions down the road as they come up which right
8 now, of course, your contention has been held in
9 abeyance and presumably will be until the Commission
10 issues its regulation. When, we don't know. That's
11 within our control needless to say.

12 ADMIN. JUDGE BARATTA: This is Judge
13 Baratta. You did file a waste confidence contention,
14 correct, Mr. Lodge?

15 MR. LODGE: Yes. Yes, sir.

16 CHAIRMAN SPRITZER: We held that in
17 abeyance.

18 ADMIN. JUDGE BARATTA: I just wanted to
19 confirm that.

20 CHAIRMAN SPRITZER: As we were instructed
21 to do by the Commission. All right, I think that's
22 all. We'll get out an order shortly memorializing
23 what we think is the best schedule. As I said, we
24 will take into account real scheduling conflicts, but
25 you should submit something definite, a court order,

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1 a court schedule in another case, but as I said, we're
2 not going to force anybody to be in two places at the
3 same time.

4 On the other hand, I don't know if we can
5 just defer the hearing based on what might or might
6 not come up. Everyone is pretty much in the same
7 position, including us for that matter, in terms of
8 scheduling conflicts that might develop. But as I
9 said, we're not going to require anybody to be in two
10 places at the same time.

11 All right, anything else we need to
12 discuss?

13 MS. CARPENTIER: Your Honors, will the
14 order that you issue also address witness schedules
15 and availability because that might be our issue. Our
16 witnesses support multiple hearings.

17 CHAIRMAN SPRITZER: In other words, if a
18 witness has a conflict, yes, that would be -- if
19 there's a real conflict for a witness as opposed to a
20 possibility of a conflict, yes, let us know and we'll
21 take that into account.

22 MR. LODGE: This is Terry Lodge. Please
23 do not interpret this as in any way pressuring the
24 Board, but until there's a ruling on the Motion for
25 Reconsideration, I'm wondering if it is wise to begin

1 investing time in marshaling together witnesses and
2 testimony.

3 CHAIRMAN SPRITZER: We'll get a ruling out
4 shortly on that. We've already spent a fair amount of
5 time on that issue. I don't think there will be any
6 great delay in getting a ruling out on that.

7 All right, anything further? Al right,
8 very well, Mr. Court Reporter, we'll terminate the
9 scheduling conference at this point. Thank you.

10 (Whereupon, at 10:26 a.m., the
11 teleconference was concluded.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory
Commission

Proceeding: Detroit Edison Company
Fermi Nuclear Power Plant Unit 3

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Location: teleconference

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