

March 28, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of: )  
 )  
DTE ELECTRIC COMPANY ) Docket No. 52-033-COL  
 )  
(Fermi Nuclear Power Plant, Unit 3) )

APPLICANT’S RESPONSE TO MOTION FOR EXTENSION OF TIME

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, DTE Electric Company (“DTE”) responds to the Intervenor’s “Motion for Extension of Time For Submission of Testimony for Adjudication of Contention 15,” dated March 27, 2013. In their motion, the Intervenor seeks to extend the deadline for filing testimony on Contention 15 from March 29 to April 29, 2013. DTE opposes the motion on the grounds that the Intervenor has failed to establish good cause for modifying the schedule. The Intervenor has been aware of the deadlines for Contention 15 since December 2012. Their failure to effectively deploy their resources in order to meet the deadlines set by the Licensing Board cannot justify an extension at this late date. Moreover, any delays associated with obtaining access to proprietary documents are the direct result of the Intervenor’s inaction. Their failure to pursue access to the documents in a timely manner cannot, by itself, create good cause for modifying the deadline for filing Contention 15 testimony.

DISCUSSION

In their motion, the Intervenor seeks a one-month extension of the time to file testimony on Contention 15. In support of their motion, the Intervenor cites the time needed to develop a proposed protective order with the other parties, the “delay in formalization” of the

protective order by the Board, technical difficulties in accessing documents provided by DTE, and constraints on the availability of their expert witnesses. The Commission has emphasized many times that strict adherence to time limits is necessary to avoid undue delay in hearings, though time limits may be extended upon a showing of good cause.<sup>1</sup> None of the reasons cited in the motion amounts to “good cause,” much less “extraordinary circumstances.”<sup>2</sup>

First, although the Intervenors complain that DTE “declined to turn over the [proprietary] information in the absence of an approved Board order governing nondisclosure,” any delays in accessing documents are entirely of the Intervenors’ making. Contention 15 was admitted more than two and a half years ago. Although provided with a draft protective order by DTE in June 2010, the Intervenors did not make any effort to comment on the draft order or otherwise gain access to proprietary document until the end of February 2013.<sup>3</sup> DTE was at all times willing to work with Intervenors to facilitate access to proprietary documents, but the Intervenors’ failure to pursue or even request access to such documents until late-February 2013 cannot justify an extension of time at such a late date.<sup>4</sup> Intervenors have a responsibility to

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<sup>1</sup> See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), unpublished Commission Order, slip op. at 2 (Aug. 18, 2004) (denying request for extension of the hearing deadline).

<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.”).

<sup>3</sup> In response to an earlier request for an extension of time relating to Contention 15, DTE reminded the Intervenors of their failure to respond to DTE’s proposed Protective Order. “Applicant’s Response to Motion to Supplement Response in Opposition to Summary Disposition on Contention 15,” dated May 29, 2012. Despite this, the Intervenors took no action until one month prior to the deadline for filing testimony.

<sup>4</sup> DTE and the NRC Staff responded quickly to the Intervenors’ requests. The motion for a protective order was filed within three days of the Intervenors request for the documents. And, the proprietary documents were sent via overnight mail to the Intervenors’ representatives on the same day that the Board issued the Protective Order.

structure their participation so that it is meaningful.<sup>5</sup> There is no reason to reward the Intervenor with an extension when they have failed to adequately participate in the proceeding.

The Intervenor also complain that there were delays due to supposed incompatibilities between the files provided by DTE and the Intervenor's computer systems. DTE has been providing the Intervenor with non-proprietary disclosures using the same widely-available format, Adobe Portable Document Format ("PDF"), throughout this proceeding. The Intervenor never raised this issue with DTE.

As the Intervenor acknowledge, two weeks ago DTE was amenable to a two-week extension of time to file testimony on Contention 15. Nonetheless, the fact that the Intervenor's expert has personal or other obligations during the first two weeks of April does not relieve the Intervenor of their hearing obligations, nor does it automatically entitle them to a lengthy extension of time.<sup>6</sup> The Intervenor should anticipate having to manipulate their resources to meet their obligations.<sup>7</sup> Indeed, DTE's witnesses and counsel have structured their availability based on the filing deadlines, which were set in December 2012. There is no reason why the Intervenor's failure to prioritize their work or pursue access to documents in a timely manner should trump the schedules of DTE's witnesses and counsel, who have worked diligently to meet deadlines and have arranged work and vacation accordingly.

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<sup>5</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).

<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> *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).

Lastly, the motion comes too late. According to the Board, “[a]ny motion for an extension or enlargement of time or other modification should be filed when the party learns of the facts and circumstances establishing the need for an extension.”<sup>8</sup> The Intervenors first consulted with DTE and the NRC Staff two weeks ago (on March 13, 2013), indicating that they intended to file a motion for an extension of time on March 14, 2013. But, they never followed up with DTE and did not file the motion until March 27, 2013. Because the Intervenors waited until nearly the deadline to file this motion, they have created an artificial sense of urgency. The Intervenors’ litigation and resource management strategies are not a basis for allowing an extension of time.<sup>9</sup> As the saying goes, a lack of prior planning on their part does not constitute an automatic emergency on ours.

#### CONCLUSION

For the above reasons, DTE opposes the Intervenors’ motion for a one month extension of time to file testimony and initial statements of position on Contention 15. As DTE indicated previously, it would not object to a two-week extension of time.

Respectfully submitted,

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<sup>8</sup> Order (Establishing schedule and procedures to govern further proceedings), dated September 11, 2009, at 4-5.

<sup>9</sup> *Compare 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.”).

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Dated at Washington, District of Columbia  
this 28th day of March 2013

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO MOTION FOR EXTENSION OF TIME” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 28th day of March 2013.

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