

May 15, 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))

NRC STAFF MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF
THE PARTIES' TESTIMONY AND STATEMENTS OF POSITION ON CONTENTION 8

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's (Board) Order Modifying the Schedule¹ for the evidentiary hearing, the NRC staff (Staff) submits this motion *in limine* to exclude portions of the Intervenors² Direct Examination and Case-in-Chief Presentation of Contention 8 (Intervenors' Direct Presentation) filed on March 29, 2013 (Intervenors' Direct Presentation) and the Intervenors' Rebuttal Position Statement on Contention 8 (Intervenors' Rebuttal) filed on April 29, 2013. For the reasons set forth below, the portions of the Intervenors' Direct Presentation and Intervenors' Rebuttal addressing impacts in transmission line corridors are outside the scope of this proceeding. Further, because both DTE Electric Company (Applicant) and the Staff responded to portions of the Intervenors' Direct Presentation relating to transmission lines, if the Board agrees with the Staff's position in this

¹ Order (Modifying the Schedule) (December 12, 2012) (unpublished) (ADAMS Accession No. ML12347A050).

² The Intervenors are several organizations and individuals. The organizations are the Michigan Chapter of the Sierra Club, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan.

Motion, portions of the Staff's and Applicant's pre-filed rebuttal testimony and statements of position should also be excluded.

BACKGROUND

A thorough recitation of the background of this case is provided in the Staff's Initial Statement of Position. On March 29, 2013, the Intervenors, Applicant, and Staff filed their initial statements of positions on Contention 8, with supporting exhibits. The Staff and Applicant also filed direct testimony. The Staff's testimony was entitled "Prefiled Direct Testimony of J. Peyton Doub and David A. Weeks Regarding Contention 8" (Staff Contention 8 Direct Testimony). The Applicant's testimony was entitled "Initial Written Testimony of DTE Electric Company Witnesses Peter W. Smith, Randall Westmoreland, and David Mifsud on Contention 8." On April 29, 2013, the Intervenors, Applicant, and Staff filed rebuttal statements of position. On the same day, the Applicant also filed the "Written Rebuttal Testimony of DTE Electric Company Witnesses Peter Smith, Randall Westmoreland, and David Mifsud on Contention 8."

DISCUSSION

A. Legal Standard

In an evidentiary hearing, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable." 10 C.F.R. § 2.337(a). While the "strict rules of evidence do not apply to written submissions," Licensing Boards may "on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative." 10 C.F.R. § 2.319(d); *see also* § 2.319(e).

NRC hearings are limited to the scope of the admitted contentions, and if intervenors proffer testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-10-05,*

71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board properly excluded the intervenors' testimony and exhibits that were outside the scope of the admitted contention); see also *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 309 (2010) (the focus of an admitted contention is defined at the outset and may not be freely changed). As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

Vogle ESP, CLI-10-05, 71 NRC at 100.

B. Arguments Concerning Impacts in Transmission Line Corridors Should Be Excluded

Portions of the Intervenors' Direct Presentation and Rebuttal should be excluded because the Intervenors did not include in the bases of their original contention arguments regarding impacts to the eastern fox snake in the transmission line corridors. These arguments are outside the scope of the evidentiary hearing on Contention 8 as admitted by the Board. The Commission has ruled that testimony or evidence that is presented on matters outside the scope of the admitted contention should be excluded. *Id.* The scope of a contention is determined "by its terms *coupled with its stated bases.*" *Pilgrim*, CLI-10-11, 71 NRC at 309 (emphasis in original). Where warranted, the Commission's rules of adjudication permit the amendment of admitted contentions according to the process described in 10 C.F.R. § 2.309(c),³ but Intervenors "may not 'freely change the focus of admitted contention at will' to

³ The Intervenors have not attempted to amend Contention 8 to include transmission line impacts to eastern fox snakes, but did raise such claims in their recent re-filed Contention 23. See Intervenors Motion for Resubmission of Contentions 3 and 13, For Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27 (Feb. 19, 2013) (ADAMS Accession No. ML13050A935). In an Order issued on April 30, 2013, the Board ruled that these claims were untimely, while noting it would separately consider

add a host of new issues and objections that could have been raised at the outset” or “stretch[] the scope of admitted contentions beyond their reasonably inferred bounds.” *Id.*

As originally pled by the Intervenors, Contention 8 stated that there “are four endangered and threatened animal species *on proposed Fermi 3 site.*” REFILED Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing at 89 (Apr. 21, 2009) (ADAMS Accession No. ML091110726) (emphasis added). The Intervenors only discussed one species, the eastern fox snake, and therefore, the Board only admitted the contention with respect to the eastern fox snake. *Fermi*, LBP-09-16, 70 NRC at 286. The Intervenors referenced the comments of the Michigan Department of Natural Resources (MDNR) on the Applicant’s environmental report (ER) to support their contention. *Id.* at 288. “The comments highlight discrepancies between recorded MDNR sightings of the eastern fox snake *at the Fermi property* in June 2008 and the Applicant’s statement in the ER that this species has not been observed *on the property.*” *Id.* at 286 (emphasis added). The MDNR comments state, “[a]ccording to our records there is a viable population of Eastern fox snake *at the site of the proposed project.* We believe that going forward with the construction would not only kill snakes but destroy the habitat in which they live and possibly exterminate the species from the area.” Sargent Letter at 1 (Exhibit NRC E7) (emphasis added); *see also Fermi*, LBP-09-16, 70 NRC at 288. In admitting the contention, the Board noted that “the primary factual dispute is whether a population of eastern fox snake is present *at the site of the proposed project...or whether...no such population has been observed.*” *Fermi*, LBP-09-16, 70 NRC at 289 (emphasis added). After the Applicant revised its

whether to request Commission approval to take *sua sponte* review of issues related to transmission lines in Contention 23. *See* Memorandum and Order (Denying Intervenors’ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (April 30, 2013) (unpublished) (ADAMS Accession No. ML13120A527).

ER to state that the eastern fox snake has been observed at the Fermi site, developed a draft mitigation plan for the snake, revised the site layout, and filed a motion for summary disposition, the Board observed that there were “unresolved conflict[s] between the opinion of MDNRE and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts.” *Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)*, LBP-11-14, 73 NRC 591, 606 (2011). None of those conflicts described by the Board relate to transmission line corridors, which the Applicant would neither build in nor control. See *id.* at 606-08 (discussing “issues that led us to admit Contention 8”).

As pled by the Intervenor and admitted by the Board, Contention 8 relates to the adequacy of the analysis in the ER (now the FEIS) of construction impacts on the eastern fox snake at the proposed Fermi 3 site and mitigation measures that might reduce those impacts. See *Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3)*, LBP-12-23, 76 NRC ___, ___ (Nov. 9, 2012) (slip op. at 20-21); *Fermi*, LBP-09-16, 70 NRC at 289. The Intervenor has not sought to amend Contention 8 to include the transmission line corridor, which extends approximately 29.4 miles away from the Fermi site. See FEIS at 2-46 (NRC Exhibit E1A). Moreover, the Board has never stated that Contention 8 includes impacts along the transmission line corridor. Accordingly, the Intervenor’s arguments related to the transmission line corridor are outside the scope of the contention and should be excluded by the Board.

C. The Board Should Exclude the Following Portions of the Parties’ Contention 8 Filings

In their Direct Presentation, at 13-15, the Intervenor raises claims related to impacts to the eastern fox snake along the transmission line corridor. The section of the Intervenor’s Direct Presentation entitled “Failure to Include Transmission Corridor in Survey and Planning for Eastern Fox Snake Mitigation,” which spans pages 13-15, should be excluded.

The following portions of Intervenor’s Rebuttal should be excluded:

- On page 4, in the heading for section IV.a, the following strikeout text should be excluded: *a. There remains NEPA noncompliance: no characterization of soil contents of mitigation site; ~~no examination of likely presence of Eastern Fox Snake in transmission line corridor, nor related mitigation planning~~; no guarantee that wetlands mitigation facility will be built*
- On page 5, the statement “There has been no detailed investigation of the likely presence of the EFS in some 29 miles of transmission line corridor extending from the Fermi site, no disclosure of mitigation and compensatory arrangements.” should be excluded.
- On page 6, all of section IV.c, including footnote 8, entitled “*No depiction of Eastern Fox Snake presence in transmission corridor,*” should be excluded.
- On page 9, the following strikeout text in section V should be excluded: ~~Comprehensive identification of the environmental drawbacks of the Fermi 3 construction and the development of a supporting transmission line corridor has not been accomplished. Relevant information as to the chemistry and nature of the existing and replacement soils where the mitigation wetlands are to be built has not been provided to the public. The damage to Eastern Fox Snake populations in the transmission line corridor has yet to be quantified.~~
- On page 10, the following strikeout text should be excluded: Here, the presiding officer should deny the combined license and require compliance with NEPA as to the mitigation investigation, ~~the EFS investigation in the transmission corridor,~~ and the public disclosure deficits.

If the Board agrees that the foregoing portions of the Intervenors’ Direct Presentation and Rebuttal relating to impacts to the eastern fox snake in the transmission line corridor should be

excluded, then the following portions of the Applicant's and Staff's Rebuttal Statements of Position should also be excluded.

- In the Applicant's Rebuttal Statement of Position, section IV.B.2, on pages 10-11, entitled "Transmission Line Corridor Impacts Are Outside the Scope of Contention 8," should be excluded.
- In the Staff's Rebuttal Statement of Position, section III.B.1, on pages 5-7, entitled "The Intervenors Offer Arguments Outside the Scope of the Contention," should be excluded.

CERTIFICATION OF CONSULTATION WITH PARTIES

I certify that I have made a sincere effort to contact the other parties in the proceeding to explain and resolve the issues raised in this motion. The Applicant supports the positions in this Motion. I attempted to consult with Intervenors' counsel by telephone and email on May 14 and 15, 2013, but was unable to reach him prior to filing this motion.

CONCLUSION

For the reasons discussed above, the Staff moves that the identified portions of the Joint Intervenors' Direct Presentation and Rebuttal be excluded from consideration in this proceeding. If the Board agrees with the Staff's arguments, then the identified portions of the Applicant's and Staff's Rebuttal Statements of Position should also be excluded.

Respectfully submitted,

/Signed (electronically) by/

Kevin C. Roach
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2779
Kevin.Roach@nrc.gov

Dated at Rockville, Maryland
the 15th Day of May 2013

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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE PARTIES' TESTIMONY AND STATEMENTS OF POSITION ON CONTENTION 8" for Contention 8, has been filed through the E-Filing system this 15th day of May 2013.

/Signed (electronically) by/

Kevin C. Roach
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2779
Kevin.Roach@nrc.gov

Dated at Rockville, Maryland
This 15th day of May, 2013