

May 15, 2013

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 MOTION IN LIMINE FOR
INTERVENORS' STATEMENTS OF POSITION ON CONTENTION 8

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Licensing Board's Order (Modifying the Schedule), dated December 12, 2012, DTE Electric Company ("DTE" or "Applicant") files this motion to strike portions of "Intervenors' Direct Examination and Case-In-Chief Presentation of Contention 8 (Eastern Fox Snake)," dated March 29, 2013 ("Intervenors' Direct Presentation") and "Intervenors' Rebuttal Position Statement on Contention 8 (Eastern Fox Snake)," dated April 29, 2013 ("Intervenors' Rebuttal Presentation").¹ Specifically, DTE seeks to strike portions of the Intervenors' Direct and Rebuttal Statements of Position that raise issues outside the scope of admitted Contention 8.²

¹ The Intervenors did not present any expert testimony in conjunction with Contention 8. As a result, there is no testimony to strike. Nevertheless, in the course of their presentations, the Intervenors make a number of legal and factual claims. To the extent they raise issues outside the scope of admitted Contention 8, DTE is seeking to exclude consideration of those arguments of counsel that are beyond the scope of this proceeding.

² DTE consulted with the parties on the issues raised in the motion as required by 10 C.F.R. § 2.323(b). Counsel for the Intervenors indicated that they oppose the motion. The NRC Staff's views on the scope of the testimony that should be excluded are found in its motion in limine filed today.

DISCUSSION

In their Direct and Rebuttal Position Statements, the Intervenor impermissibly attempt to expand the scope of Contention 8 by introducing new bases and arguments in their Direct and Rebuttal Presentation.³ Longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions.⁴ In particular, “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”⁵

Contention 8, as admitted, focused only on impacts to Eastern Fox Snakes resulting from site preparation and construction of Fermi 3 and, in particular, on the impacts resulting from the destruction of wetlands (*i.e.*, potential Eastern Fox Snake habitat). Nothing in Contention 8 purported to address the impacts on the Eastern Fox Snake within the offsite transmission corridor that will be constructed by ITC*Transmission*.⁶ Nor did Contention 8, as admitted, include any issues relating to characterization of the offsite wetlands mitigation area or the U.S. Army Corps of Engineers’ enforcement history. As discussed below, the portions of the Intervenor’s Direct and Rebuttal Presentations addressing these topics should be excluded from the hearing.

³ A Licensing Board has the authority to strike individual arguments. *See, e.g.*, 10 C.F.R. § 2.319(d).

⁴ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998) (citation omitted).

⁵ *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation omitted).

⁶ Intervenor’s Direct Presentation at 13; Intervenor’s Rebuttal Presentation at 5-6.

A. Impacts in Offsite Transmission Corridors Are Beyond the Scope of Contention 8

Issues relating to the offsite transmission corridor are outside the scope of Contention 8, as admitted. Only site preparation and construction at the Fermi site, not the transmission corridor, were discussed in the original contention.⁷ And, in LBP-11-14 (at 24), the Board confirmed that the scope of Contention 8 is limited to site preparation and construction impacts at the Fermi site. This conclusion regarding the scope of Contention 8 is also consistent with Intervenor's own subsequent treatment of transmission-related impacts on the Eastern Fox Snake in more recent filings, including the Intervenor's proposed contentions based on the DEIS and the FEIS.⁸ Finally, nothing in the Board's recent Order, dated April 30, 2013, denying admission of proposed Contention 23 or Contention 26, can be read to suggest that transmission-related impacts to the Eastern Fox Snake fall within Contention 8.

Accordingly, the Board should exclude the portions of the Intervenor's Direct and Rebuttal Presentations identified below:

Direct Presentation at 13-14	<u>Strike</u> : Entire Section entitled "Failure to Include Transmission Corridor in Survey and Planning for Eastern Fox Snake Mitigation." <u>Basis</u> : Outside scope of admitted contention.
------------------------------------	---

⁷ "Petition of [Intervenor] for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing," dated March 9, 2009, at 97-98. The Intervenor also did not mention Eastern Fox Snake impacts in the transmission corridor in its response to DTE's summary disposition motion. "Intervenor's Memorandum in Opposition to DTE's 'Motion for Summary Disposition of Contention 8,'" dated December 6, 2010. Instead, the Intervenor focused solely on impacts at the Fermi site.

⁸ Both the original proposed Contention 23, which was rejected by the Board in LBP-12-12, and the new/resubmitted Contention 23, which was also rejected by the Board, alleged insufficient consideration of impacts to the Eastern Fox Snake in the transmission corridor. The clear implication is that the Intervenor themselves did not consider transmission-related impacts to the Eastern Fox Snake to be within the scope of Contention 8.

Rebuttal Presentation at 5	<p><u>Strike</u>: “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.”</p> <p><u>Basis</u>: Outside scope of admitted contention.</p>
Rebuttal Presentation at 6	<p><u>Strike</u>: Entire Section entitled “<i>c. No depiction of Eastern Fox Snake presence in transmission corridor.</i>”</p> <p><u>Basis</u>: Outside scope of admitted contention.</p>
Rebuttal Presentation at 9	<p><u>Strike as follows</u>: “Comprehensive identification of the environmental drawbacks of the Fermi 3 construction and the development of a supporting transmission line corridor has not been accomplished.</p> <p><u>Strike</u>: “The damage to Eastern Fox Snake populations in the transmission line corridor has yet to be quantified.”</p> <p><u>Basis</u>: Outside scope of admitted contention.</p>
Rebuttal Presentation at 10	<p><u>Strike as follows</u>: “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.”</p> <p><u>Basis</u>: Outside scope of admitted contention.</p>

B. Characterization of the Offsite Wetland Mitigation Area is Outside the Scope of Admitted Contention 8

In their Direct and Rebuttal Presentations, the Intervenors also raise issues regarding the planned offsite wetland mitigation area. But, Contention 8 was only about impacts to the Eastern Fox Snake; it was not a broad contention relating to wetland impacts or offsite wetland mitigation areas. In admitting the portion of Contention 8 related to the Eastern Fox Snake, the Board specifically rejected a challenge to the adequacy of the discussion of wetlands or wetland impacts generally. The Board agreed with DTE that the Intervenors did not identify in Contention 8 any impacts to wetlands that were overlooked or otherwise not considered.⁹

⁹ LBP-09-16 at 68. The Board explained that the Intervenors “will have to wait until the draft or final EIS is issued to file any contentions alleging that the EIS fails to adequately assess wetlands impacts or consider alternatives that would minimize those impacts.” No such contentions were subsequently admitted.

Accordingly, the Board should exclude the portions of the Intervenor's Direct and

Rebuttal Presentations identified below:

Direct Presentation at 9-10 Strike as follows: "A 107.31 acre farm field is being re-wilded as mitigation habitat some miles from Fermi, but there is no characterization of that land in the HCP or other documents in the FEIS. It is thus not possible to tell how long the land has lain fallow, how much petrochemical fertilizer or pesticide has been applied to it or whether any residue remains. This land is adjacent to a huge coalburning power plant, the Monroe Power Plant, the second largest volume coal burning power plant in the U.S., at 3,300 Mwe, which is at least 40 years old. In January 2009, the Monroe Power Plant was listed 5th nationally in terms of coal combustion waste (CCW) stored in surface impoundments, with 4,110,859 pounds of coal combustion waste in 2006. The data came from the U.S. Environmental Protection Agency. There has been no presentation with in the FEIS of soil status: no depiction of pH levels, no explanation about any toxic chemical depositions accrued from the decades of coal usage nearby, nor the presence of radioactive contamination or mercury, which are byproducts of the burning of coal. There further is no topographical description of the field, no description of how much of the surface of the field is covered with vegetation or deemed to be wetland, nor delineation of the wetland type or types present on the property."

Basis: Outside scope of admitted contention.

Direct Presentation at 10 Strike: "There is no description of the process by which the restoration of the farm field to wetland habitat will be achieved, what types of revegetation would be sought, what types of wetlands will be restored, nor any expression of the timetable for the whole process to take place (including any remediation, if warranted following soil analysis)."

Basis: Outside scope of admitted contention.

Rebuttal Presentation at 5-6 Strike as follows: "The plan discusses a four-year phased construction-conversion of this large site from the current use as farmland into a wetlands area, with emphasis upon creating habitat for the EFS. DTE Exh. 9, pp. 17-20. There is no data on the historical contamination of the farmland from petrochemical fertilizers and pesticides. The nearby Monroe Power Plant is the second largest volume coal burning power plant in the U.S., at 3,300 Mwe, and is at least 40 years old. In January 2009, the Monroe Power Plant was listed 5th nationally in terms of coal combustion waste (CCW) stored in nearby surface impoundments, with 4,110,859 pounds of coal combustion waste in 2006. The data came from the U.S. Environmental Protection Agency. There has been no presentation within the FEIS of soil status: no depiction of pH levels, no explanation of any toxic chemical depositions accrued from the decades of proximate coal usage, no discussion of the presence of radioactive contamination or mercury, which are significant and toxic byproducts of the burning of coal. There is discussion

within Exh. 9 to spread new topsoil up to 6" thickness generally on the mitigation farmland, ~~but no revelation as to the origin of that material, nor any mention as to its chemical and physical constituents.~~ Exh. 9, p. 20."

Basis: Outside scope of admitted contention.

Rebuttal
Presentation
at 6 Strike: "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."

Strike: "And there are insufficient assurances to the public that the mitigation activity to produce high-quality replacement wetland are real."

Basis: Outside scope of admitted contention.

C. U.S. Army Corps of Engineers Enforcement Authority is Beyond the Scope of this Proceeding

In their Rebuttal Presentation, the Intervenors introduce, for the first time, several arguments relating to the wetland reviews being conducted by the U.S. Army Corps of Engineers ("USACE"). Specifically, they state that USACE has not yet issued a Section 404 permit and also that the Corps has a poor history of enforcing wetlands mitigation plans.¹⁰ Both of these arguments should be stricken from the Presentation.

Contention 8, as admitted did not encompass any issue related to wetland permitting by the USACE (or the Michigan Department of Environmental Quality). The Board made clear in admitting Contention 8 that the issue for hearing did not include allegations that that the EIS fails to adequately assess wetlands impacts or consider alternatives that would minimize those impacts.¹¹ Accordingly, the adequacy of the USACE reviews and enforcement related to Section 404 permits are issues outside the scope of this COL proceeding. Moreover, the requirements of other agencies are for those bodies to determine, and are beyond the

¹⁰ Rebuttal Presentation at 8.

¹¹ LBP-09-16 at 68. As the Board explained, "wetlands impacts are relevant to Contention 8 only to the extent that they concern the effect of the project on the eastern fox snake."
Id.

jurisdiction of NRC adjudicatory bodies.¹² Accordingly, the Board should exclude the portions of the Intervenor's Direct and Rebuttal Presentations identified below:

Rebuttal Presentation at 8-9	<u>Strike</u> : Entire Section entitled " <i>e. Corps of Engineers enforcement is suspect or improbable.</i> " <u>Basis</u> : Outside scope of admitted contention; outside scope of COL proceeding.
------------------------------------	---

CONCLUSION

For the foregoing reasons, the Licensing Board should strike the Intervenor's arguments that are beyond the scope of admitted Contention 8.

Respectfully submitted,

/s/ signed electronically by
David A. Repka
Tyson R. Smith
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR DTE ELECTRIC
COMPANY

Dated at Washington, District of Columbia
this 15th day of May 2013

¹² *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

THE DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

)
)
)
)
)

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION IN LIMINE FOR INTERVENORS’ STATEMENTS OF POSITION ON CONTENTION 8” in the above captioned proceeding have been served via the Electronic Information Exchange.

Respectfully submitted,

/s/ signed electronically by

Tyson R. Smith
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

COUNSEL FOR DTE ELECTRIC
COMPANY