

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman  
Dr. Anthony J. Baratta  
Dr. Randall J. Charbeneau

In the Matter of	Docket No. 52-033-COL
DETROIT EDISON COMPANY	ASLBP No. 09-880-05-COL-BD01
(Fermi Nuclear Power Plant, Unit 3)	June 17, 2013

ORDER

(Granting in Part and Denying in Part Motions in Limine; Denying Intervenor's Request for Cross-Examination as Moot)

In this Order, the Board resolves the pending motions in limine filed by the NRC Staff and Detroit Edison Company (DTE). In addition, the Board denies as moot Intervenor's Request for Cross-Examination on Contention 8, because the Intervenor has recently withdrawn that Request.

I. Motions in Limine

On May 15, 2013, the NRC Staff and DTE filed Motions in Limine to exclude portions of the Intervenor's Direct Examination and Case-in-Chief Presentation of Contention 8 and their Rebuttal Position Statement on Contention 8 (hereinafter Intervenor's direct and rebuttal position statements).<sup>1</sup> Intervenor filed a Response to both Motions in Limine on May 28.<sup>2</sup>

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<sup>1</sup> See NRC Staff Motion in Limine to Exclude Portions of the Joint Intervenor's Direct and Rebuttal Testimony, Exhibits, and Portions of the Joint Intervenor's Rebuttal Statement of Position (May 15, 2013) [hereinafter Staff Motion in Limine]; Applicant's Motion in Limine for Intervenor's Statements of Position on Contention 8 (May 15, 2013) [hereinafter DTE Motion in Limine].

<sup>2</sup> Intervenor's Reply in Opposition to DTE and NRC Staff Motions in Limine on Contention 8 (Eastern Fox Snake) (May 28, 2013) [hereinafter Int. Opp.].

Initially, the Board notes that the Staff and DTE motions are not really “Motions in Limine,” because neither seeks to exclude testimony or other evidence. Instead, both motions ask the Board to strike or exclude various statements from Intervenor’s statements of position. As Intervenor’s correctly argue, “[t]he purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence.”<sup>3</sup> Position statements filed by parties to NRC adjudications are legal argument and are not, in and of themselves, evidence. The admissibility standards in 10 C.F.R. § 2.337(a) apply only to “evidence.” Statements of position, like proposed findings of fact and conclusions of law, simply present the arguments of the parties as to what they think the evidence means and how the law should be applied to the evidence. We need not rule on the admissibility of statements of position because they will not be admitted as evidence, but will only be considered by the Board in its merits ruling to the extent they are based on admitted evidence. Thus, a position statement, no matter how objectionable, is not the proper subject of a motion in limine.

The Board will therefore treat both motions as motion to strike. That is in fact the relief that DTE requests.<sup>4</sup> In addition, Intervenor’s themselves interpreted the filings as motions to strike.<sup>5</sup>

Both the Staff and DTE argue that Intervenor’s have impermissibly attempted to expand the scope of Contention 8 by introducing argument related to the impact on the Eastern Fox Snake of the new transmission line corridor that will serve Fermi Unit 3.<sup>6</sup> Intervenor’s have agreed to resolve this issue by striking from “Intervenor’s Direct Examination and Case-in-Chief Presentation

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<sup>3</sup> Int. Opp. at 2 (citing Luce v. United States, 469 U.S. 38, 40 n.2 (1984); Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996)) (emphasis added).

<sup>4</sup> DTE Motion in Limine at 1 (“DTE seeks to strike portions of the Intervenor’s Direct and Rebuttal Statements of Position that raise issues outside the scope of admitted Contention 8.”)

<sup>5</sup> See Int. Opp. at 2.

<sup>6</sup> See Staff Motion in Limine at 3; DTE Motion in Limine at 3.

of Contention 8 (Eastern Fox Snake)” the section appearing at pp. 13-14, entitled “Failure to Include Transmission Corridor in Survey and Planning for Eastern Fox Snake Mitigation.”<sup>7</sup>

Intervenors also offer to stipulate

that they will not conduct direct or indirect evidentiary presentation at trial, nor conduct cross-examination which in any way suggests or refers to, the presence or absence of the Eastern Fox Snake (EFS) within the proposed 29.4 mile transmission line corridor. Further, Intervenors will not raise any argument concerning NEPA and its applicability to the corridor at that adjudication.<sup>8</sup>

The Board will therefore grant the motions insofar as they pertain to statements in Intervenors’ direct and rebuttal position statements that concern the impact of the transmission line corridor upon the Eastern Fox Snake. The statements to be stricken include both the section appearing at pp. 13-14 of Intervenors’ direct position statement and the statements in Intervenors’ rebuttal position statement identified on page 4 of DTE’s Motion in Limine. Intervenors should delete those passages from their statements of position on Contention 8 and refile the documents.

DTE also argues that the Board should strike statements in Intervenors’ direct and rebuttal statements of position concerning the planned offsite wetland mitigation area.<sup>9</sup> According to DTE, Intervenors are attempting to expand the scope of Contention 8 to include an issue, mitigation of wetlands loss through the creation of new wetland habitat, that is not within the scope of Contention 8.<sup>10</sup> The Staff’s Motion does not address this issue.

Intervenors respond that they are not attempting to introduce a new issue, but rather questioning the claims of DTE that the wetland mitigation will benefit the Eastern Fox Snake. Intervenors identify evidence presented by DTE suggesting that the newly created wetland habitat

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<sup>7</sup> Int. Opp. at 3-4.

<sup>8</sup> Id. at 4.

<sup>9</sup> DTE Motion in Limine at 4-7.

<sup>10</sup> Id.

will provide such benefits.<sup>11</sup> Intervenor state that “by presenting evidence of offsite mitigation habitat creation as part of its case-in-chief, DTE has opened the proverbial door with its own witness testimony, and must allow . . . proffers of rebuttal evidence to be undertaken to test DTE’s direct case sufficiency and veracity.”<sup>12</sup> The Board concludes that the argument in Intervenor’s rebuttal position statement is permissible solely for that limited purpose, and therefore we will not direct that the argument be stricken.

## II. Intervenor’s Request for Cross-Examination on Contention 8

On May 15, 2013, Intervenor filed a Request to Allow Cross Examination for Contention 8.<sup>13</sup> The Staff filed an Answer to that Request on May 28.<sup>14</sup> On June 11, however, Intervenor withdrew their Request.<sup>15</sup> Intervenor state that “they misunderstood the rule governing cross-examination; that their intention at all times was to propose cross-examination questions to the Atomic Safety and Licensing Board for the Board to propound to witnesses at the adjudication

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<sup>11</sup> Int. Opp. at 5.

<sup>12</sup> Id. at 6.

<sup>13</sup> On May 15, 2013, counsel for Intervenor submitted, by e-mail to the Board’s Chairman, a request to allow cross-examination and a proposed cross-examination plan for Contention 8. On May 16, 2013, the Board instructed Intervenor’s counsel, by e-mail, to refile the request using the NRC’s Electronic Information Exchange (EIE) system’s “In-Camera Submission” feature. On May 23, 2013, Intervenor’s counsel complied with the Board’s instructions and refiled the request in camera. On May 28, 2013, counsel for Applicant filed a notice with the Board indicating that it had not yet received Intervenor’s motion for cross-examination and requested an opportunity to respond to the motion prior to the Board’s decision on Intervenor’s request. On May 29, the Board issued an order directing Intervenor to publicly file their request for cross-examination on Contention 8 (but not the cross-examination plan itself). The Board granted DTE and the NRC Staff ten (10) days from the date Intervenor publicly submitted their motion for cross-examination to file their answers to the motion.

<sup>14</sup> NRC Staff Answer to Intervenor’s Request for Cross Examination at the Evidentiary Hearing for Contention 8 (May 28, 2013).

<sup>15</sup> Notice of Withdrawal of Request to Allow Cross-Examination on Contention 8 (June 11, 2013).

of Contention 8 according to 10 C.F.R. § 2.711.”<sup>16</sup>

Accordingly, the Board denies as moot Intervenor’s Request to Allow Cross Examination for Contention 8. If the Board has questions for any Staff or DTE witness at the evidentiary hearing, the Board will consider asking the questions submitted by Intervenor to the extent those questions are relevant to the Board’s areas of interest.<sup>17</sup>

CONCLUSION

The Staff and DTE motions in limine, construed as motions to strike, are granted in part and denied in part as explained above. Intervenor’s Request to Allow Cross Examination for Contention 8 is denied as Moot.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD  
*/RA/*

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Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE  
*/RA/*

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Dr. Anthony J. Baratta  
ADMINISTRATIVE JUDGE  
*/RA/*

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Dr. Randall J. Charbeneau  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
June 17, 2013

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<sup>16</sup> Id. at 1.

<sup>17</sup> The Board is in the process of reviewing the pre-filed testimony and exhibits to determine whether we are likely to have any questions to ask of any Staff or DTE witness at the evidentiary hearing. (Intervenor has not submitted pre-filed written testimony on Contention 8. Their direct and rebuttal position statements are based on documents, most or all of which have also been submitted by other parties). The Board will advise the parties, at or before the pre-hearing conference, whether the Board has questions to ask of any Staff or DTE witness on Contention 8. If the Board has no such questions, we will resolve Contention 8 on the basis of the pre-filed testimony and exhibits.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

DETROIT EDISON COMPANY )

(Fermi Nuclear Power Plant, Unit 3) )

(Combined License) )

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting in Part and Denying in Part Motions in Limine; Denying Intervenor's Request for Cross-Examination as Moot)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Clara I. Sola]  
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Dated at Rockville, Maryland  
This 17<sup>th</sup> day of June 2013