

October 7, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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DETROIT EDISON CO. ) Docket No. 52-033  
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)  
(Fermi Nuclear Power Plant, Unit 3) )

STAFF OBJECTIONS TO INTERVENOR EXHIBITS FOR CONTENTION 15

On September 16, 2013, the Licensing Board held a conference call with all the parties to the Fermi combined license (COL) proceeding to resolve administrative matters related to the upcoming evidentiary hearing at the end of October. Tr. at 232-270. The Board subsequently issued an order directing the Intervenors to file their exhibits and to refile their testimony to include exhibit numbers by September 26, 2013. See Licensing Board Order (Summarizing Pre-Hearing Conference) (Sept. 20, 2013) at 2.

On September 26, 2013, the Intervenors filed some of their exhibits, including public documents numbered INTS 001 to 030 and non-public documents numbered INTS 050 to 055. They also submitted a motion for an extension of time to file the remaining exhibits and to refile their testimony, and requested a new deadline of October 1, 2013. See Intervenors' Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony With Exhibit References (Sept. 26, 2013) (First Motion).<sup>1</sup> The Applicant and Staff did not oppose this motion. Late on

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<sup>1</sup> The Intervenors indicated in the First Motion that they consulted with the other parties prior to filing their motion, as required by 10 C.F.R. § 2.323(b). Although the Staff did not object to that motion, the Staff

October 1, 2013, the Intervenor filed a motion for a second extension of time that would grant them a new deadline of October 4, 2013. See *Intervenors' Second Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony With Exhibit References (Oct. 1, 2013) (Second Motion)*. The Staff filed an answer opposing this motion on the following day. See *Staff Answer Opposing Second Motion for Extension of Time to File Exhibits and Refile Testimony (Oct. 2, 2013)*. On October 3, 2013, the Licensing Board issued an order granting the Intervenor's Second Motion, establishing a final deadline of October 4, 2013, for all filings, and indicating that no further extensions would be granted. *Licensing Board Order (Granting Intervenor's Motions for Extension of Time, Requesting List of Objections from the NRC Staff, and Explaining Board Procedure in the Event of a Continued Government Shutdown (Oct. 3, 2013) (Board Order)*. The Board also noted that some of the exhibits appeared to be new and directed the NRC Staff to file any objections to Intervenor exhibits by close of business on October 7, 2013. Board Order at 2. This filing is in response to that order.

On October 4, 2013, the Intervenor filed additional exhibits, including public documents numbered INTS 031 to 033 and non-public documents numbered INTS 056 to INTS 063. In an e-mail to counsel for the Applicant and Staff dated October 4, 2013, the Intervenor also indicated that they would be withdrawing non-public documents INTS 050 to 055, which were filed on September 26. At 6:27 p.m. on October 4, counsel for the Intervenor sent a further e-mail to counsel for the other parties indicating that all exhibits were filed, unless he inadvertently "overlooked one or two." Further e-mail exchanges on Saturday, October 5, established that there were no exhibits numbered INTS 034 to 049.

Beginning at 11:18 p.m. on Sunday, October 6, and continuing until 2:18 a.m. on Monday, October 7, the Intervenor filed an additional set of exhibits including public documents numbered INTS 034 to 047 and INTS 064 to 066. On October 7, the Intervenor also filed an

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notes that the Intervenor did not initiate consultation until after the close of business on the Board's September 26 deadline.

exhibit list for Contention 15 that included the withdrawal of INTS 050 to 055 noted above, and that also withdrew exhibits INTS 012 to 026, 028 to 030, 032, and 033, all of which had been filed on September 26. The Intervenor filed their testimony at noon on October 7. They also refiled an affidavit by their witness Arnold Gundersen – an affidavit that the Intervenor originally filed on December 8, 2009, and refiled on September 26, 2013 as Exhibit INTS 007 – but with additional citations added to the affidavit.

To address this sequence of filings, the Staff's response to the Board Order is divided into two sections, the first of which covers exhibits filed before the October 4, 2013, deadline and not subsequently withdrawn, and the second of which covers documents in the nontimely filings of October 6 and 7. Nearly all the exhibits that correspond to documents that were actually cited in the Intervenor's testimony were filed on October 6 and 7, after the Board's final deadline of October 4, 2013.

#### I. DOCUMENTS FILED BEFORE THE OCTOBER 4, 2013, DEADLINE

The Staff objects to five of the Intervenor exhibits filed prior to the October 4, 2013, deadline established in Board Order and not subsequently withdrawn by the Intervenor. These objections fall into the following four categories: documents initially filed as supporting exhibits and now recast as testimony; documents cited in another Intervenor exhibit but not in the Intervenor's testimony; documents not previously referenced in this proceeding; and documents outside the scope of Contention 15.

A. Document was originally filed as an exhibit, but is now being treated as testimony.

On September 26, 2013, the Intervenor filed the following document as an exhibit supporting their testimony on Contention 15.

- **INTS 007:** Declaration of Arnold Gundersen Supporting Supplemental Petition of Intervenor Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (Dec. 8, 2009).

This document was cited in the Intervenor's testimony filed on April 30, 2013, and the Staff does not object to its admission purely as an exhibit in support of specific arguments made in that testimony. However, the Intervenor's filings of October 7, 2013, imply that the Intervenor is relying more broadly on INTS 007 as an amendment to their pre-filed written testimony. Specifically, their exhibit list refers to other exhibits as supporting INTS 007, and their testimony filed at noon on October 7 includes a refiled version of INTS 007, revised to include exhibit numbers. The Intervenor's previous testimony does not indicate any intent to incorporate the entire content of Mr. Gundersen's 2009 affidavit as testimony, and their doing so now represents an amendment to (and expansion of) their pre-filed written testimony. Accordingly, the Staff objects to the re-filing of INTS 007 on October 7 and its apparent purpose of amending and expanding the Intervenor's testimony without leave of the Board. However, the Staff does not object to the admission of the version submitted on September 16 as an exhibit supporting the Intervenor's pre-filed testimony.

B. Document is cited in another Intervenor exhibit but not in testimony.

The following document is cited in INTS 007, described above, but is not referenced in the Intervenor's testimony.

- **INTS 006:** Audit of NRC's Quality Assurance Planning for New Reactors, OIG-10-A-02 (Nov. 16, 2009).

Mr. Gundersen quoted from this document in his affidavit submitted earlier in this proceeding on Dec. 8, 2009, but he never made any argument linking this document to the specific issues in Contention 15. Mr. Gundersen's 2009 affidavit is submitted as Exhibit INTS 007, and the Staff does not object to its admission as an exhibit because it is cited in Intervenor's testimony in relation to other issues. However, Mr. Gundersen's testimony filed on Apr. 30 and May 30, 2013, does not reference either INTS 006 or those portions of INTS 007 that refer to INTS 006. The Staff therefore objects to the admission of INTS 006 as an exhibit.

C. Document has not been referenced previously in this proceeding.

The following document appears to be new and not previously referenced by the Intervenors in this proceeding.

- **INTS 027:** Approved Vendors List (Oct. 10, 2007).

In their exhibit list, the Intervenors claim this document is referenced in the testimony of Arnold Gundersen filed on April 30, 2013. However, the Staff has not found any reference to this document in that testimony as originally filed.<sup>2</sup> Accordingly, the Staff objects to the admission of this exhibit.

D. Documents outside the scope of Contention 15.

The following documents are outside the scope of Contention 15 because they relate to environmental matters.

- **INTS 057 NONPUBLIC:** Nuclear Issue Details, No. 00478 (Nov. 11, 2008).
- **INTS 059 NONPUBLIC:** CAR Record Supplement (July 1, 2010).

Contention 15 relates to safety-related activities subject to 10 C.F.R. Part 50, Appendix B. Matters concerning the Environmental Report (ER) are not safety-related and are therefore outside the scope of Contention 15. Accordingly, the Staff objects to the admission of these exhibits.

## II. DOCUMENTS FILED AFTER THE OCTOBER 4, 2013, DEADLINE

As a threshold matter, the exhibits filed after October 4, 2013, fail to comply with the final deadline in the Board's Order, and the Board would be justified in rejecting them for that reason. Furthermore, the Staff objects to several of these Intervenor exhibits on grounds similar to those described above in Section I. These objections fall into the following three categories:

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<sup>2</sup> In the refiled version of testimony dated May 30, 2013, which the Intervenors submitted on October 7, 2013, the Intervenors include a citation to this document in Mr. Gundersen's answer to Question 19. However, this citation is new. The testimony as originally filed refers only to an Applicant document filed in 2012 that has been submitted as Exhibit INTS 034.

documents that the Intervenors claim are cited in another Intervenor exhibit but not in the Intervenors' testimony; documents not previously referenced in this proceeding; and documents that are missing or unreadable. Finally, the Staff notes below in Section II.D some additional ambiguities regarding those exhibits that were referenced in the Intervenors' testimony but filed after the October 4 deadline.

A. Document is late *and* not referenced in testimony, although the Intervenors claim it was referenced in an earlier affidavit.

The Intervenors claim that, like the document discussed in Section I.A. above, the following document is referenced in Mr. Gundersen's affidavit of December 8, 2009, that has been filed as INTS 007. According to their exhibit list, the Intervenors do not claim that it was referenced in testimony. It was also filed after the Board's October 4 deadline.

- **INTS 065:** "A Regulator's Perspective on Safety and Security," Prepared Remarks for The Honorable Gregory B. Jaczko, Chairman, U.S. Nuclear Regulatory Commission, at the 2009 Institute for Nuclear Power Operations Chief Executive Officer Conference (Nov. 5, 2009).

Mr. Gundersen's 2009 affidavit is submitted as Exhibit INTS 007, and the Staff does not object to its admission as an exhibit because it is cited in the Intervenors' testimony. However, Mr. Gundersen's testimony filed on Apr. 30 and May 30, 2013, does not reference either INTS 065 or any portions of INTS 007 that refer to INTS 065. Furthermore, the Staff has been unable to find any reference to INTS 065 in INTS 007 as originally filed. That document appears to cite two different speeches by Chairman Jaczko, one on October 8, 2009, and one on November 16, 2009. Neither of these appears to be the document filed as INTS 065, which is dated November 5, 2009. The Staff therefore objects to the admission of INTS 065 as an exhibit.

B. Documents are late *and* have not been referenced previously.

The following documents appear to be new and not previously referenced by the Intervenors in this proceeding. They were also filed after the Board's October 4 deadline.

- **INTS 044:** E-mail from Barry Gustafson, Black & Veatch, to Robert A. Crandall, Black & Veatch (May 2, 2007).
- **INTS 046:** E-mail from Charles E. Miller, Detroit Edison, to David B. Harwood, Detroit Edison (Jan. 16, 2008).

In their exhibit list, the Intervenors claim these documents support the testimony of Arnold Gundersen filed on April 30, 2013. However, the Staff has not found any references to these documents in that testimony as originally filed. Accordingly, the Staff objects to the admission of these exhibits.

C. Documents are late *and* missing or unreadable.

The following documents from the October 6-7 filing are either missing or unreadable.

- **INTS 036:** The Intervenors' exhibit list states that this exhibit number was assigned to a set of prepared remarks by then-Chairman Gregory Jaczko. However, the document actually attached is a duplicate of INTS 035. It is not clear whether the intended exhibit is the same as INTS 065, described above.
- **INTS 048:** This document is unreadable.
- **INTS 049:** This document is unreadable.

These documents have not been filed in usable form as of this response, and the Staff objects to their admission.

D. Documents were cited in testimony, but were filed after the deadline.

While the following documents were cited in the Intervenors' testimony as originally filed, all were submitted after the final deadline of October 4, 2013, established in the Board Order, and the Board would be justified in rejecting them on that basis. Furthermore, several of the exhibits are also labeled in a confusing manner, or appear to be preliminary drafts rather than final documents. These issues are described in footnotes.

- **INTS 034:** Statement of Material Facts on Which No Dispute Exists (Applicant's Filing at Summary Disposition Stage) (Apr. 17, 2012).

- **INTS 035:** Detroit Edison Company Response to NRC Request for Additional Information Letter No. 26, Related to SRP Section 17.5 (May 10, 2010).<sup>3</sup>
- **INTS 036:** Detroit Edison Company Response to NRC Request for Additional Information Letter No. 26, Related to SRP Section 17.5 (May 10, 2010).<sup>4</sup>
- **INTS 037:** NRC Notice of Violation, Detroit Edison Fermi 3 Quality Assurance Program, NUPIC Presentation (Jan. 19, 2010).
- **INTS 038:** E-mail from Barry Gustafson, Black & Veatch, to Steven D. Thomas, Black & Veatch (Mar. 22, 2007).
- **INTS 039:** Detroit Edison Combined License Application Kickoff Meeting (Apr. 4, 2007).
- **INTS 040:** E-mail from William E. Miller, Detroit Edison, to sreduc@howey-insurance.com (Oct. 10, 2007).
- **INTS 041:** E-mail from Craig Ashworth, Black & Veatch, to Robert A. Crandall, Black & Veatch (Sept. 18, 2007).
- **INTS 042:** E-mail from William E. Miller, Detroit Edison, to Peter W. Smith, Detroit Edison (Oct. 8, 2007).
- **INTS 043:** DTE Fermi 3 Quality Assurance Program Description, Revision A1 (Nov. 2007).<sup>5</sup>
- **INTS 045:** Nuclear Development Project Organization, Procedure Number NDP-NP 1.1, Rev. 0 (Feb. 4, 2008).
- **INTS 047:** E-mail from James E. Werner, Detroit Edison, to Steven D. Thomas, Black & Veatch (Mar. 19, 2008).
- **INTS 064:** Fermi 3 QAPD, Revision 5 (dated 2013).<sup>6</sup>

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<sup>3</sup> Note that this exhibit is the same as Staff Exhibit NRC S7 and Applicant's Exhibit DTE 000054. Although the Staff has no objections to the Intervenors' referencing it under either of those exhibit numbers, the Staff includes it in this list of late-filed exhibits for completeness.

<sup>4</sup> As described above, it appears that the Intervenors intended to file a different document as INTS 036, but instead filed a duplicate of INTS 035.

<sup>5</sup> Although the Intervenors did cite this document, with this revision number, in their testimony filed May 30, 2013, the Staff notes that it appears to be an unsigned draft that predates Fermi 3 Quality Assurance Program Description (QAPD), Revision 0, which was filed with the Fermi 3 COL application in September 2008. Several revisions of the Fermi 3 QAPD are already on the record of this proceeding as Applicant's Exhibits DTE 000071 through DTE 000074. The Nuclear Development QAPD, in use prior to September 2008, is already on the record of this proceeding as Applicant's Exhibit DTE 000070.

<sup>6</sup> This appears to be an unsigned draft of the Fermi 3 QAPD. It is labeled Revision 4, the final version of which is already in the record of this proceeding as Applicant's Exhibit DTE 000073. Revision 4 is dated 2011. INTS 064 is dated 2013, which corresponds to the date of Revision 5 to the Fermi 3 QAPD. The

CONCLUSION

For the reasons described above, the Staff objects to the specified Intervenor exhibits. With respect to those exhibits filed after the final Board deadline of October 4, 2013, the Board in any event would be justified in rejecting them on that basis.

**/Signed (electronically) by/**  
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Dated at Rockville, Maryland  
This 7th day of October, 2013

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final version of Revision 5 is already in the record of this proceeding as Applicant's Exhibit DTE 000074. It is unclear to which revision this unsigned draft corresponds.

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CERTIFICATE OF SERVICE

I hereby certify that the STAFF OBJECTIONS TO INTERVENOR EXHIBITS FOR  
CONTENTION 15, dated October 7, 2013, has been filed through the E-Filing system this 7th  
day of October, 2013.

**/Signed (electronically) by/**  
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Dated at Rockville, Maryland  
This 7th day of October, 2013