

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
Before the Atomic Safety and Licensing Board**

In the Matter of ) Docket No. 52-033  
The Detroit Edison Company ) October 18, 2013  
(Fermi Nuclear Power Plant, Unit 3) )  
)  
)

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**INTERVENORS' REPLY IN OPPOSITION TO NRC STAFF OBJECTIONS  
TO INTERVENOR EXHIBITS ON CONTENTION 15**

Now come Intervenors Beyond Nuclear, *et al.*<sup>1</sup> (hereinafter “Intervenors”), by and through counsel, and oppose the NRC Staff “Objections to Intervenor Exhibits on Contention 15,” which contests the admissibility and relevance of certain exhibits submitted for the adjudication of Contention 15.

**1. Background**

On September 7, 2013, the NRC Staff filed “Staff Objections to Intervenor Exhibits For Contention 15.” On October 8, the ASLB in this matter issued an order “Requesting Intervenor Response to NRC Staff Evidentiary Objections,”<sup>2</sup> by which Intervenors were given until October 10, 2013 to file a response. On October 10, 2013, the Commission issued a Notice in which it

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<sup>1</sup>In addition to Beyond Nuclear, the Intervenors include: Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

<sup>2</sup>ASLBP No. 09-880-05-COL-BD01 (October 8, 2013).

observed that the then-pertaining shutdown of the Federal government due to lack of operational appropriations caused it to order that “ All filing deadlines in the captioned matters are therefore automatically extended by the number of days that the NRC is shut down,” which included deadlines in proceedings pending before ASLBs. In a Notice issued on October 17, 2013, the Commission announced that it “has lifted the suspension described in a Notice issued on October 10, 2013. All filing deadlines in the captioned matters affected by the shutdown have been extended by eight days.” Hence, Intervenors’ deadline was extended from October 10 until October 18, 2013.

Intervenors response *seriatim* to the Staff’s objections below. As further detailed below, some of the Staff’s objections are in the nature of premature or *in limine* challenges<sup>3</sup>, and as to those, Intervenors request that the Licensing Board withhold rulings until pertinent in-court testimony occurs, from which it will be clear where the items which the Staff contests fit into Intervenors’ case presentation, and an informed ruling might be made on the Staff’s objections.

## **2. Staff Objections and Intervenor Responses**

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

However it is accomplished, Intervenors agree with the NRC Staff that inclusion in evidence

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<sup>3</sup>The 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. *See Luce v. U.S.*, 469 U.S. 38, 40 n. 2 (1984); *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (“[t]he purpose of an *in limine* motion is ‘to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial’”). The use of the motion *in limine* to exclude evidence is borne out by the NRC’s regulations. 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). But by seeking to excise Intervenors’ exhibits as proffers, instead of requesting only an advance, tentative ruling to preclude certain evidence from the record at trial, the Staff’s Motion should be denied.

of Exhibit INTS 007, the declaration of Intervenor's expert, Arnold Gundersen, as an exhibit supporting the original motion for admission of Contention No. 15, is warranted. Intervenor included the exhibits referenced in the 2009 Gundersen declaration as exhibits for hearing because they are relied upon as the basis for Gundersen's expert conclusions in 2009, which conclusions are in turn referenced at length<sup>4</sup> in Gundersen's April 30, 2013 prefiled testimony, at pp. 6-8.

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<sup>4</sup>From Gundersen's April 30, 2013 testimony, pp. 6-8:

**Q9. In your previous declarations regarding the Fermi 3 Licensing Project, what issues have you found and what concerns have you raised?**

A. In an earlier Fairewinds ASLB Declaration on the "Fermi 3 Licensing Project" dated December 8, 2009, Fairewinds identified that Detroit Edison's decision to subcontract its Quality Assurance function was a deviation from the NEI template without informing the NRC of this deviation. This deviation from the NEI template was significant, and created significant confusion within the Fermi 3 project organization. Later, when finally identified by the NRC in mid-2009, this problem was memorialized with a Notice of Violation (NOV) [INTS 001].

**Q10. What were the details of the NRC NOV regarding Fermi QA?**

A. On October 5, 2009, the NRC Staff issued an Inspection Report and Notice of Violation in which it described the results of its August 2009 inspection. In the NOV, the NRC Staff cited Detroit Edison for:

(1) Failing to establish and implement a Fermi Unit 3 QA program between March 2007 (when Detroit Edison initially contracted 20 with B&V for the conduct of COLA activities for Fermi Unit 3) and February 2008, and failing to retain overall control of contracted COLA activities as required under Criterion II, "Quality 23 Assurance Program" of Appendix B, resulting in inadequate control of procurement documents and ineffective control of contract services performed by B&V for COLA activities;

(2) Failing to perform internal audits of QA programmatic areas implemented for Fermi Unit 3 COLA activities; and (3) failing to document trending of Detroit Edison's corrective action reports ("CARs").

The NRC Staff characterized all these violations as Severity Level IV violations.

**Q11. What did your review of the records show you regarding DTE's response to the NRC NOV?**

A. Detroit Edison responded to the NOV [INTS 010] by saying that the firm was not required to have an Appendix B program in place during its COLA development *prior to its COLA submittal*. Moreover, DTE claimed that it had delegated its QA responsibilities to its consulting contractor Black and Veatch. Furthermore, the QA responsibilities were divided between two different Black and Veatch divisions.

The responsibility for the QA program was given to one division of Black and Veatch while DTE delegated all the Fermi 3 Licensing Project Engineering to a separate division within Black & Veatch. Incredibly, DTE still claimed that it recognized the need for Quality Assurance during pre-application work to assure that information used as input for design or construction of future systems, structures, and components important to safety would not adversely impact their ability to perform satisfactorily in service. Detroit Edison submitted its Combined Operating License Application (COLA) on September 18, 2008.

Gundersen further discusses in his April 30, 2013 testimony that he compared post-2009 quality assurance documents with those he had referenced and discussed in his 2009 declaration. He repeatedly specifically mentions the 2009 throughout his prefiled April 30 testimony, at various turns in pp. 12-23 (on these pages of his April 30 testimony, Gundersen makes direct reference to his 2009 declaration: 12, 13, 14, 16, 18, 20, 21, 22, 23). It is fairly inferable that Gundersen does, in fact, incorporate his 2009 declaration wholly into his April 2013 testimony.

The larger flaw in the NRC Staff's objection reflects a fundamental misunderstanding of the structure and presentation of expert opinions. Although the Federal Rules of Evidence are not directly applicable to Commission proceedings, NRC presiding officers often look to the rules for guidance, including Federal Rule 702, which allows a witness to be qualified as an expert "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982), quoting Fed. R. Evid. 702; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001). A witness is qualified as an expert by knowledge, skill, experience, training, or education. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 732 n.67 (1985), citing Fed. R. Evid. 702.

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**Q13. What is your expert opinion regarding DTE's response to the NRC's NOV of its QA program?**

A. Detroit Edison's response to the NRC's NOV represented that the bifurcated COLA Quality Assurance function on the *Fermi 3 Licensing Project* was a well-oiled team of two companies working in unison. The non-proprietary portion of this current declaration clearly shows that the teamwork claimed by DTE is an illusion. The data Fairewinds reviewed shows that confusion and lack of organizational control reigned within Detroit Edison for years prior to the COLA submittal and to this day. These early QA problems are the root cause of the current site characterization issues that continue to plague the *Fermi 3 Licensing Project*.

It is not acceptable for an expert witness to state his ultimate conclusions on a crucial aspect of the issue being tried, and then to profess an inability – for whatever reason – to provide the foundation for them to the decisionmaker and litigants. *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-555, 10 NRC 23, 26 (1979). *See Gen. Pub. Util. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), LBP-89-7, 29 NRC 138, 171-72 (1989), *stay denied on other grounds*, ALAB-914, 29 NRC 357 (1989), *aff'd on other grounds*, ALAB-926, 31 NRC 1 (1990). An assertion of “engineering judgment,” without any explanation or reasons for the judgment, is insufficient to support the conclusions of an expert engineering witness. *Tex. Util. Generating Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-83-81, 18 NRC 1410, 1420 (1983), *modified on reconsid. sub nom.*, *Tex. Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 518, 532 (1984). While an expert witness testifying to the results of an analysis need not have at hand every piece of datum utilized in performing that analysis, it is not unreasonable to insist that, where the outcome on a clearly defined and substantial safety or environmental issue may hinge upon the acceptance or rejection of an expert conclusion resting in turn upon a performed analysis, the witness make available (either in his prepared testimony or on the stand) sufficient information pertaining to the details of the analysis to permit the correctness of the conclusion to be evaluated. *North Anna*, ALAB-555, 10 NRC at 27.

The expert’s basis, in other words, must be revealed if requested by the examiner. Moreover, when preparing for an evidentiary hearing on a contention, if an intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would – even if not specifically stated in the original contention and bases – be relevant if it falls within the “envelope,” “reach,” or “focus” of the contention when read with the original bases offered for it.

*Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-12, 59 NRC 388, 391 (2004) (characterizing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002) and *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)).

There certainly is a sound evidentiary reason to include all of the exhibits on which Arnold Gundersen relies in his declaration and later prefiled testimony because they fall within the envelope, reach or focus of the contention. At adjudication, the ASLB will conduct all questioning. Considerably more than half of Gundersen's substantive April 30, 2013 prefiled testimony discusses expressly and centrally his 2009 declaration with its supportive exhibits.

Notwithstanding the interrelationship of Gundersen's 2009 findings and his 2013 testimony, the Staff calls Gundersen's 2013 reference to the declaration a mere "citation," objects that Gundersen did "not indicate any intent to incorporate the entire content of Mr. Gundersen's 2009 affidavit as testimony" (as though that were an express requirement) and claims that Intervenors' "doing so now represents an amendment to (and expansion of) their pre-filed written testimony."

The NRC Staff's complaints ignore the special nature of expert evidence. "An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility.'" *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir.2000) (quoting *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir.1993); *Cooke*, 991 F.2d at 342 ("[W]here the opinion has a reasonable factual basis, it should not be excluded. Rather, it is up to opposing counsel to inquire into the expert's factual basis").

The NRC Staff itself agrees that the 2009 declaration is properly an exhibit and simply quibbles as to how much weight it should be assigned.. Given that the ASLB sits as a panel of judges without a jury, and the ASLB is the trier of fact, the board has considerable discretion in the weight to be assigned to evidence. Because in effect, the Staff is arguing *in limine* for the exclusion of Gundersen's 2009 testimony and exhibits, the Staff's motion should be denied outright, subject to being raised at a more timely juncture, after the completion of Arnold Gundersen's presentation.

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

The NRC Staff maintains that this NRC Office of Inspector-General report needs to be excluded from the record because, while it is cited in Exh. INTS 007, it was not cited in Arnold Gundersen's prefiled April 30, 2013 testimony. The NRC Staff's objection presumes that listing an item as an exhibit is equivalent to its having been received into the record as evidence at the forthcoming adjudication. That is untrue. The Staff's objection is premature; the document has been identified and submitted as part of the overall basis for Gundersen's 2009 expert opinion, which is substantially incorporated into and the basis for his 2013 expert opinion. The ASLB should deny exclusion of this exhibit. Perhaps at trial the ASLB can determine whether it meets standards of relevance and materiality and should be admitted.

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

Intervenors withdraw this exhibit as submitted in error.

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

Intervenors question why nonpublic - proprietary - exhibits are being challenged by the NRC Staff in a publicly-available document. But to answer the objection raise, the NRC Staff focuses on

what the two evidentiary items pertain to - the Environmental Report - but ignore that they have been singled out as examples of what happens when there is an inadequate quality assurance program undertaken in the COL planning stages. The argument raised by the NRC Staff, albeit an incorrect one, focuses on relevance, not admissibility, and the exhibits should be allowed.

**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)**

The Staff objects that this item was not identified in Arnold Gundersen’s 2009 Declaration (Exh. INTS 007). Upon review, that is correct, and the exhibit was inadvertently submitted. Then-Commission Chair Jaczko made several speeches over a period of weeks that included some similar or identical phrasing. Intervenors submitted the wrong speech inadvertently, which included a quote substantially like the quotation in the Gundersen declaration. Intervenors agree to withdraw the exhibit which was submitted. Intervenors reserve the right and opportunity to supply evidence of the correct Jaczko speech depending upon whether the matter emerges at adjudication.

**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)**

The Staff correctly points out that INTS 044, also known as DTE-0813, does not contain the statements attributed to it in Arnold Gundersen’s April 30, 2013. Mr. Gundersen apparently meant to refer to DTE-0831 instead of DTE-0813. The DTE number was transposed in Gundersen’s testimony. As a result, Intervenors are contemporaneously, but separately, submitting DTE-0831 as the intended exhibit, marking it as follows: INTS-044 (REPLACEMENT).

The NRC Staff objection as to Exh. INTS 046, however, should be found not well-taken.

The exhibit, identified in Gundersen's testimony (4/30/2013 testimony, p. 34, fn. 20) as DTE-0659 was duly and properly marked and submitted as INTS 046.

**INTS 036: The Intervenor's 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.**

Intervenor withdraws INTS 036 as marked in error. They did intend to refer to INTS 065, but that exhibit also was erroneously submitted and has been withdrawn, *see infra*.

**INTS 048: This document is unreadable**  
**INTS 049: This document is unreadable**

These two exhibits were promptly resubmitted and the defective versions of them were replaced in the official docket by the Hearings Docket office of the NRC. INTS-048 can be located as accession number ML13279A018 and under package as accession number ML13279A015. Exhibit INTS-049 can be located as accession number ML13280A001.

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

The objection to the foregoing exhibits is only that they were submitted on Monday,

October 7, 2013, instead of on or before the preceding Friday, October 4. While admittedly the deadline was October 4, and Intervenors had not filed these exhibits by that date, it is obvious from other filings made throughout October 3, 4 and the ensuing weekend that Intervenors were laboring in good faith to conclude the matter of exhibit submission. Moreover, the Staff's objection is purely rhetorical in that there is no showing of harm flowing from the belated submission of these exhibits. They were identified in the April 30 and May 29, 2013 Gundersen testimony filings. The NRC Staff even lost a week's worth of time during the recent Federal government shutdown, but when solicited by the ASLB concerning the Staff's availability to proceed to trial as scheduled, the Staff attorney asserted that even were the shutdown to persist until October 21, 2013, that they would still be able to try the matter on schedule.

Further, it is Intervenors' understanding that exhibit submissions are not self-admitting, *i.e.*, they are not automatically made part of the evidentiary record merely because they have been proffered as exhibits by the parties at this point. To "strike" or otherwise object to them at this point is premature. The law presumes that the ASLB, which includes an attorney, is capable of sifting through exhibits and identifying those which are relevant and admissible, or not, and further, that the Board will not be swayed by those proffered exhibits which are ultimately not admitted.

Finally, the exhibits form the basis of Gundersen's expert opinions, and are disclosable at any point during the evidentiary inquiry of adjudication.

For all these reasons, Intervenors urge that these exhibits be allowed to be considered for admission into the record during the adjudication.

**INTS 035: Detroit Edison Company Response to NRC Request for Additional Information Letter No. 26, Related to SRP Section 17.5 (May 10, 2010)**

The Staff opposes submission of this exhibit because it was submitted on October 7 and also,

according to fn. 3 of its Objection, because it is “the same as Staff Exhibit NRC S7 and Applicant’s Exhibit DTE 000054.” Intervenors incorporate herein their above response as to the October 7 late submission, but beyond that, maintain that the Staff’s is not a real objection, and that the exhibit should be allowed to be submitted.

**INTS 036: Detroit Edison Company Response to NRC Request for Additional Information Letter No. 26, Related to SRP Section 17.5 (May 10, 2010)**

The objection here is late submission plus, according to the Staff’s fn. 4, “ it appears that the Intervenors intended to file a different document as INTS 036, but instead filed a duplicate of INTS 035.” Intervenors agree and have withdrawn INTS 036 for all purposes, reserving the opportunity if needed to submit the correct Jaczko speech which was cited in Gundersen’s testimony.

**INTS 043: DTE Fermi 3 Quality Assurance Program Description, Revision A1 (Nov. 2007)**

This item was properly identified and submitted, albeit belatedly. The Staff’s objection, as stated at fn. 5 of its filing, is 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 00074. The Nuclear Development QAPD, in use prior to September 2008, is already on the record of this proceeding as Applicant’s Exhibit DTE 000070.” Intervenors restate by reference their arguments in response to the untimely filing point made by the Staff, but apart from that, Intervenors see no valid objection has been made by the Staff.

**INTS 064: Fermi 3 QAPD, Revision 5 (dated 2013)**

The Staff objects on grounds of late-filing, but also, according to fn. 6 of their Objection, that

INTS 064, on which Intervenors' expert relied, "This appears to be an unsigned draft of the Fermi 3 QAPD." This is not a proper objection, and had any other version been submitted, the Staff would have objected that Intervenors were submitting an exhibit which their expert did not cite. It should therefore be allowed to remain submitted for reference and use at adjudication.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing “INTERVENORS’ REPLY IN OPPOSITION TO NRC STAFF OBJECTIONS TO INTERVENOR EXHIBITS ON CONTENTION 15” was served upon the following via deposit in the NRC’s electronic information exchange this 18th day of October, 2013:

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