

**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	)	
(Fermi Nuclear Power Plant, Unit 3)	)	October 29, 2013
	)	

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**MOTION FOR SUSPENSION OF LICENSING HEARING, FOR ADMISSION OF  
PROPOSED CONTENTION 13 FOR ADJUDICATION,  
AND FOR SUPPLEMENTATION OF THE  
FINAL ENVIRONMENTAL IMPACT STATEMENT**

Now come Intervenors Beyond Nuclear, *et al.*<sup>1</sup> (hereinafter “Intervenors”), by and through counsel, and move for an immediate, indefinite suspension of the scheduled October 30, 2013 adjudication, for reconsideration and admission of Intevenors’ proposed Contention 13, and for supplementation of the Final Environmental Impact Statement.

**I. INTRODUCTION**

This combined license (COL) proceeding involves the application of Detroit Edison Company (“DTE” or “Applicant”) under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) designated Unit 3 (“Fermi 3”), on its existing Fermi nuclear facility site near Newport City in Monroe County, Michigan.

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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.

The Final Environmental Impact Statement (“FEIS”) for Fermi 3 was formally released to the public on January 16, 2013. Intervenors timely moved in February 2013 for resubmission of several contentions based upon claimed differentiations in position as between the Detroit Edison Environmental Report and the FEIS, which was prepared by the NRC Staff. See Intervenors’ “Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or Its Admission as a New Contention, and/or Admission of New Contentions 26 and 27.” Contention 13, which contested whether there was a need for the power which would be generated by a new Fermi 3, was rejected (for the second time) along with the other contentions by the ASLB’s order of April 30, 2013.<sup>2</sup> Presently the FEIS is nearly complete, awaiting the ASLB’s determination of Contention 8 on the Eastern Fox Snake.

Since that time, however, significant new information has emerged. On October 24, 2013, the Monroe Evening News revealed plans by DTE Energy to reconsider a natural gas-fired generator and commercial-scale wind generators as an alternative to early construction of Fermi 3. The first paragraph of the article, a copy of which is attached, states:

DTE Energy still is seeking a federal license to build and operate a new nuclear plant, but is studying the prospects of building a natural gas fueled plant first, given plummeting natural gas prices.

"I would suspect if we were going to go out and build something immediately, it would be gas," said Ron May, DTE's vice president of major enterprise projects. "I doubt if we'd build another coal plant but even before gas, we'd probably put in more wind turbines."

This announcement reveals that DTE, as the applicant for a combined operating license (COL) for Fermi 3, is actively rejecting its preferred alternative of a new nuclear baseload plant. Inasmuch as this revelation reflects serious reconsideration by the Applicant, it is “significant new information” which

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<sup>2</sup>ASLBP No. 09-880-05-COL-BD01 (ML 13120A527).

requires supplementation of the FEIS, and these proceedings should be immediately suspended pending supplementation, to determine whether there would be differences in the environmental effects from DTE's pursuit of non-nuclear power generation options.

Notably, this pullback by DTE is consistent with other recent statements. On October 25, 2013, DTE issued a press release<sup>3</sup> quoting its CEO, Gerry Anderson, as saying, "Our energy production will evolve significantly over the next decade to include increased quantities of renewable energy and natural gas generation." In a "Business and Financial Update" slideshow<sup>4</sup> dated October 17, 2013, DTE predicted \$6.5 to \$8.5 billion in investments from 2018 through 2022 in existing nuclear (Fermi 2), "incremental renewable investments" and "potential new gas generation," without a mention of Fermi 3. DTE sales have declined 9% from 2007 through 2012, and are forecast by DTE to increase only 1% from 2012 through 2017 per the company's+ filing with the Michigan Public Service Commission.<sup>5</sup>

## **II. STANDARDS FOR ADMISSIBILITY OF FEIS-RELATED CONTENTIONS**

The Nuclear Regulatory Commission ("NRC" or "Commission"), as lead agency for purposes of compliance with the National Environmental Policy Act ("NEPA"), must document and disclose the environmental issues which are engendered by this power plant project. *Crouse Corp. v. Interstate Commerce Comm'n*, 781 F.2d 1176 (6th Cir. 1986). NEPA imposes continuing obligations on the

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<sup>3</sup>"DTE Energy reports third quarter 2013 results; tightens guidance range," <http://finance.yahoo.com/news/dte-energy-reports-third-quarter-111500181.html>

<sup>4</sup><http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTIxNTQxfENoaWxkSUQ9MjA2NDZFR5cGU9MQ==&t=1>

<sup>5</sup>Michigan PSC Case No. 17097, Doc. 0001, p. 140 (<http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17097&submit.x=0&submit.y=0>)

NRC to re-evaluate its environmental disclosures in light of new and significant information received which casts doubt upon a previous environmental analysis. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). Legal harm is caused under NEPA when an agency makes a decision without sufficiently considering information which NEPA requires be placed before the decisionmaker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). “The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury (NEPA) was designed to prevent.” *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996).

Section 10 C.F.R. §2.309(f)(2) allows a new contention to be filed after the initial docketing with leave of the presiding officer upon a showing that:

- i. The information upon which the amended or new contention is based was not previously available;
- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

*Id.*

### **III. TIMELINESS OF SUBMISSION OF CONTENTIONS**

Intervenors hereby timely resubmit amended and new contentions within the time period allowed for same by the ASLB’s scheduling order. The ASLB’s September 11, 2009 order recognizes as timely contentions which are predicated upon FEIS information, if submitted “within thirty (30) days of the date when the new and material information on which it is based first becomes available.”<sup>6</sup>

If a contention is timely under 10 C.F.R. § 2.309(f)(2)(ii), it is contradictory to rule that the

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<sup>6</sup>ASLBP No. 09-880-05-COL-BD01, p. 2.

intervenor must also satisfy the eight additional factors for nontimely filings found in 10 C.F.R.

§ 2.309( c). *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 (2005). Since the triggering act which has prompted this motion occurred by publication in a Monroe-area newspaper on October 24, 2013, the submitted and new contentions raised in this motion as a matter of law are “timely.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007).

Even if a petitioner is unable to show that the NRC Staff’s NEPA document differs significantly from the ER, it “may still be able to meet the late filed contention requirements.”<sup>7</sup> Similarly, if a contention based on new information fails to satisfy the three-part test of Section 2.309(f)(2)(I)-(iii), it may be evaluated under Section 2.309( c).<sup>8</sup>

#### **IV. RESUBMITTED CONTENTION 13**

Thus Intervenors move to resubmit their former Contention 13 regarding the lack of need and demand for the power which would be produced by Fermi 3. Intervenors renew this contention pursuant to 10 C.F.R. § 2.309(f)(1), seeking reconsideration of the above-mentioned new information and its implications for the continuing adequacy of the Final Environmental Impact Statement (“FEIS”) for the Combined Operating License (“COLA”) for Fermi 3. Intervenors’ present motion builds upon the case

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<sup>7</sup>*Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993).

<sup>8</sup>*Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC*, LBP-10-24 at 8.

they made earlier in 2013 for admission of Contention 13.

Contention 13, brought under the National Environmental Policy Act (NEPA), addresses the core issue of economic justification for the entire Fermi 3 enterprise by addressing the question of how much demand is there expected to be for the electricity that would be produced by adding this proposed baseload power plant to the DTE system. Analysis of need and demand is essential to determining whether Fermi 3 is the least environmentally-destructive means of addressing the power supply issues.

1. Statement of Contention 13 (Amended)

The FEIS still does not contain the “hard look” required by NEPA or the Atomic Energy Act respecting need and demand for Fermi 3. It overestimates forecast demand for electricity through the decade of the 2020s, when Fermi 3 is planned to begin power generation. The FEIS relies on two flawed analyses of future demand, one of which predates and so does not account for the 2007-08 economic recession, and the other of which has consistently overestimated electrical consumption, belied by actual usage data, for every year since it was compiled. The FEIS analyses of need for power, energy alternatives and cost/benefit analysis are consequently skewed and grossly inaccurate, falsely justifying need for a new baseload nuclear plant because they are based on inaccurate, irrelevant and/or outdated information.

2. Brief Explanation of the Basis for the Contention

The NRC mandates that a COLA EIS associated with plant licensing must include a Need for Power analysis as part of the EIS’ cost-benefit analysis. 68 FR 55905, 55909. That analysis attempts to determine whether there is future electricity need that a proposed plant could supply. In so doing, the need for power analysis measures the benefit of a new nuclear plant in the EIS’s cost-benefit analysis, as a plant supplying electricity that is not needed does not provide a benefit. While the need for power

analysis “should not involve burdensome attempts to precisely identify future conditions . . . it should be sufficient to reasonably characterize the costs and benefits associated with the proposed licensing actions.” 68 FR 55910.

The Draft Environmental Impact Statement’s (“DEIS”) need for power analysis relied entirely on the Michigan Public Service Commission’s (“MPSC”) 21st Century Plan, a 2006 energy planning report that was prepared before the Great Recession. DEIS pp. 8-7, 8-23. Because the demand forecast contained in the 21st Century Plan was calculated before the Great Recession, it failed to anticipate the dramatic consequential reduction in electricity demand. The 21<sup>st</sup> Century Plan predicted a 1.2% annual demand increase extending well into the future. This prediction is far greater than what has actually occurred since 2007, and is much higher than present estimates of future demand.

Intervenors objected to this reliance on the 21<sup>st</sup> Century Plan at the DEIS and again at the FEIS stages, arguing that since it “completely omits the second largest economic downturn in American history in its demand forecasting,” it cannot be “sufficient to reasonably characterize’ a realistic demand for power in Southeast Michigan over the next 15 years.”<sup>9</sup> “It is arbitrary and clear error,” Intervenors continued, “for the DEIS to adopt as the main component of its cost-benefit analysis a demand forecast that is vastly greater than the licensee’s own projections and overly optimistic projections by EIA and MISO.”<sup>10</sup>

Possibly to placate Intervenors and other public commenters, the NRC Staff in the Final EIS ( 8-19 ) changed its perspective, somewhat, about the 21<sup>st</sup> Century Plan:

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<sup>9</sup>Intervenors’ “Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions” at 11.

<sup>10</sup>*Id.* at 13.

Because the MPSC 21st Century Electric Energy Plan was completed in 2007, it did not include any potential shifts in the demand for electricity due to the economic downturn that began in late 2008. The impacts of the recession were particularly severe in Michigan, due in large part to downturns in automobile manufacturing and supporting industries. Because the industrial sector represented a significant portion of electricity demand, especially in communities hosting automobile manufacturing and assembly facilities, the projections for growth in electricity demand contained in the MPSC Plan were never realized. Concurrent reductions in populations in those same communities eroded the residential electrical customer sector, further reducing the need for electricity. Consequently, the review team concluded it was prudent to determine, based on currently available electricity demand data, whether or not the projections discussed in the MPSC Plan were still relevant.

To remedy this, the Staff in the Final EIS consulted a 2008 North American Electric Reliability Corporation (“NERC”) Long-Term Reliability Analysis (“LTRA”). The LTRA is required to be compiled by federal law. In the FEIS, the NRC Staff compares the forecasts of the LTRA with the 21<sup>st</sup> Century report.<sup>11</sup> Curiously, at footnote (b) on p. 8-6 of the FEIS, the Staff comments, “*Although more recent LTRAs have since been published, the review team has elected to refer to this 2008 version as the most appropriate analysis for use as independent corroboration of other need for power reports addressed in this analysis*” (Emphasis supplied). Even as it composed the Final EIS, the NRC Staff persisted in its pattern of choosing out-of-date forecasts.

In order for the NRC to incorporate a need for power analysis that is prepared by a state or regional authority rather than the licensee, the NRC must determine, according to its NEPA guidance (the Environmental Standard Review Plan (“ESRP”)) that the analysis is: (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecasting uncertainties.

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<sup>11</sup>At FEIS p. 8-20: “Based on the confirmatory analysis performed on the Michigan 21st Century Plan using an additional independent assessment (the NERC subregion LTRA), the review team determined the original assessment made by the MPSC Plan is still representative of the potential for future growth in electricity demand in the DTE Service Area. Therefore, the review team determined the original need for power assessment performed for the DEIS is still valid, and no revisions have been made to the analysis or the conclusions of this chapter for purposes of the FEIS.”

NUREG-1555 (Oct. 1999); Draft EIS at 8-12. The Final EIS need for power analysis violates this guidance document because it remains unresponsive to forecasting uncertainties - indeed, the forecasts are consistently belied by actual demand. The NRC Staff's decision to freeze the forecast analysis at 2008 is not reasonable and falls well short of the "hard look" expected by NEPA, especially in light of the recent DTE statements which suggest a much more extended delay in construction of Fermi 3 than previously thought.

3. Demonstration that the Contention is Within the Scope of the Proceeding

The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC implementation regulations for NEPA, compliance with which must be secured before Fermi 3 may be issued a Combined Operating License.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3

This contention challenges the NRC's failure to fully comply with NEPA and federal regulations for the implementation of NEPA in its EIS for the proposed Fermi 3. Unless the NRC complies with the procedural requirements of NEPA that are discussed in the contention, it cannot make a valid finding that Fermi 3 should be licensed. The contention is thus material to the findings the NRC must make in order to license this facility.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials

A. NERC Long-Term Reliability Assessment comparison

As of October 24-25, 2013, DTE admits that it is seriously considering natural gas power generation and wind power generation as alternatives to the immediate construction of the proposed Fermi 3.

This is consistent with dismal recent demand statistics. The year 2017 is the last year for an

apples-to-apples comparison, and the forecast falls off dramatically, by 17%. In the 2008 NERC Long-Term Reliability Assessment report appears this statement: “The estimated Total Internal Demand (TID) of MISO for the 2008 summer season is 104,800 MW and is forecast to increase to 119,300 MW by 2017 [the final year of forecast data in the 2008 report]. The equivalent compound growth rate (“ECGR”) of the 2008 TID forecast is about the same as the 2007 ECGR of 1.4%.”<sup>12</sup> However, in the 2012 NERC report forecasting demand for 2017, the forecast for 2017 was only 98,729, which is **17% (seventeen per cent) lower** than the 2008 number. The MISO Peak Compound Annual Growth Rate (%) for summer is 1.05% , and for winter, 1.62%.<sup>13</sup> As NERC itself notes:

Overall projections of load growth for most entities remain at levels below earlier forecasts. The 2012 Annual Energy Outlook from the U.S. Department of Energy’s Energy Information Agency (EIA) indicated that recovery from the recent recession will exhibit the weakest growth of any since 1960.<sup>14</sup> As such, near-term increases in demand are not expected to realign with the more robust projections that were anticipated in projections made prior to the 2008 economic recession.<sup>14</sup>

B. EIA and Applicant’s forecasts show 0.2% annual electric demand increase for Michigan

According to the U.S. Energy Information Administration, the latest 2012 Electricity Market Module (EMM) Reliability First Region / Michigan reference case forecasts a maximum 0.219% electric annual demand growth rate for the area which includes DTE Energy’s service delivery jurisdiction in southern Michigan for any year through 2021.<sup>15</sup> This is approximately one-sixth of the levels of future demand the NRC Staff insists will materialize.

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<sup>12</sup>See <http://www.nerc.com/files/LTRA2008.pdf> , p. 167.

<sup>13</sup>[http://www.nerc.com/files/2012\\_LTRA\\_FINAL.pdf](http://www.nerc.com/files/2012_LTRA_FINAL.pdf) , p. 261.

<sup>14</sup>*Id.* at 102.

<sup>15</sup><http://www.eia.gov/oiaf/aeo/tablebrowser/#release=AEO2012&subject=6-AEO2012&table=62-AEO2012&region=3-10&cases=ref2012-d020112c>

As it happens, DTE's own forecast is preferable to those used by the NRC. In a filing before the Michigan Public Service Commission, DTE states, "Service area electric sales are forecast to decrease from temperature-normalized sales of 49,894 GWh in 2011 to temperature-normalized sales of 49,280 GWh in 2017. This represents a 0.2% average annual decrease in sales." DTE electric sales will decline a total of 3% in the period 2011-2017, and peak demand will drop by 8%. DTE's testimony in the MI PSC case for "Authority to Implement a Power Supply Cost Recovery Plan in its Rate Schedules for 2013 Metered Jurisdictional Sales of Electricity" Case No. U-17097, p. MBL-6, Testimony of Markus B. Leuker, DTE Manager of Corporate Energy Forecasting; see also Exh. A-8 <http://efile.mpsc.state.mi.us/efile/docs/17097/0001.pdf> , p. 140/248 of .pdf). This decreasing need and demand is based on slow economic recovery from the Great Recession that commenced in 2007-8. "*The massive deleveraging of both household and business debt remains a drag on growth.*" *Id.* p. MBL-9).

NERC and EIA forecasts for demand growth were wrong for 2012. Electric demand in Michigan dropped 1% YTD as of November 2012. According to EIA statistics, Michigan residential and commercial demand each declined 1%, and industrial demand was flat. Electric demand in the Midwest also declined 1% YTD 2012. [http://www.eia.gov/electricity/monthly/epm\\_table\\_grapher.cfm?t=epmt\\_5\\_04\\_b](http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_04_b).

There is some probability that energy efficiency improvements are combining with the continued economic recession to slow electric demand growth in the DTE service area. The Michigan annual energy efficiency improvement mandate ramped up to a full 1% in 2012. Most states in the region also have efficiency mandates, there may be considerable "natural" improvement under way owing to technological upgrades and the cost of doing business. The role of energy efficiency improvements in demand forecasting seemingly has been overlooked by the NERC and EIA.

Despite the availability of authoritative demand forecast data from recognized sources, including DTE Energy itself, the NRC Staff clung in the FEIS to the odd conclusion that “the original assessment made by the MPSC [21<sup>st</sup> Century] Plan is still representative of the potential for future growth in electricity demand in the DTE Service Area. Therefore, the review team determined the original need for power assessment performed for the DEIS is still valid, and no revisions have been made to the analysis or the conclusions of this chapter for purposes of the FEIS.” FEIS p. 8-20.

6. Sufficient Information to Show the Existence of a Genuine Dispute With the Applicant and the NRC

The Applicant’s October 24-25, 2013 representations concerning the increasingly-attenuated timetable for Fermi 3 differ greatly from prior expressions of urgency for NRC licensing to occur and construction to commence.

In the 2009 Environmental Report, DTE maintained that “the Michigan 21st Century Electric Energy Plan satisfies the NRC’s evaluation criteria of being (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecast uncertainty. The Michigan 21st Century Electric Energy Plan extends beyond Detroit Edison’s direct service area and addresses the needs for the State. The planning period for the Michigan 21st Century Electric Energy Plan extends through 2025, or well beyond the planned date of commercial operation for the proposed project.”

The Nuclear Regulatory Commission considered in its response to a 2003 petition for rulemaking whether or not the need for power should be considered in NRC environmental impact statements (68 FR 55910). The NRC concluded (at 68 FR 55910) that:

The need for power must be addressed in connection with new power plant construction so that the NRC may weigh the likely benefits (e.g., electrical power) against the environmental impacts of constructing and operating a nuclear power reactor. ***The Commission emphasizes, however, that such an assessment should not involve burdensome attempts to precisely identify future conditions. Rather, it should be sufficient to reasonably characterize the costs and benefits associated with proposed licensing actions.*** (Emphasis supplied).

In the Final EIS need for power analysis, the Staff merely used a second, over-optimistic, forecast to try to legitimate the decrepit 21<sup>st</sup> Century Plan. It does not reasonably characterize the costs and benefits associated with the proposed licensing of Fermi 3 because it uses utterly-stale data which is of no value in predictive power forecasting. Despite the Staff's persistence in trying to rehabilitate the thoroughly-discredited 21<sup>st</sup> Century Plan, the estimates of future demand to justify a new baseload addition to the DTE generating reserves within the next decade are debunked with the passage of each year. And the statements by DTE in late October 2013 add to the lack of credibility of the Staff's conclusions. Fermi 3 is not reasonably necessary; the NRC Staff has not only not precisely identified future conditions, it is distressingly inaccurate in describing general forecast trends.

The NRC Staff's reliance in the FEIS on the 21<sup>st</sup> Century Plan forecasts in combination with the LTRA continues to confound reason even as it contravenes NRC guidance. The NRC's NEPA guidance document - the ESRP - requires that in order for the NRC to incorporate a need for power analysis that is prepared by a state or regional authority rather than the licensee, the NRC must determine that the analysis is: (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecasting uncertainties. NUREG-1555 (Oct. 1999). The FEIS need for power analysis violates this guidance document because it is neither "subject to confirmation" nor "responsive to forecasting uncertainties."

Neither the 21<sup>st</sup> Century Plan nor the now-dated LTRA have properly accounted for the 2008 economic recession in their forecasts, and they cannot reasonably be considered to be "responsive to forecasting uncertainties" in light of electricity market conditions since their preparation. DTE's management statements have added greater uncertainty to the mix, and the current FEIS must be abandoned.

The conventional wisdom that historically has applied to new power plant applications was not *whether* the utility will need additional generating capacity, but *when*. *Commonwealth Edison Co.* (*Byron Nuclear Power Station, Units 1 and 2*), LBP-80-30, 12 NRC 683, 691 (1980). The standard for judging the "need-for-power" in NRC licensing was whether a forecast of demand is reasonable and additional or replacement generating capacity is needed to meet that demand. *Carolina Power & Light Co.* (*Shearon Harris Nuclear Power Plant, Units 1-4*), ALAB-490, 8 NRC 234, 237 (1978). Here, the forecast for demand in the FEIS is not reasonable support for the conclusion that Fermi 3 provides the solution - as demonstrated by DTE's own recent statements. The question respecting Fermi 3 is whether the weak Michigan economy and no-growth electricity forecasts would benefit from addition of a huge new expensive baseload generating facility which will leave DTE's system with overcapacity of as much as 80% even as it crowds out development of less expensive, more job-rich and environmentally benign alternatives - which have the distinct advantage of being incremental additions to the generating system.

The NRC is obliged to make reasonable forecasts of the future. *Northern States Power Co.* (*Prairie Island Nuclear Generating Plant, Units 1 & 2*), ALAB-455, 7 NRC 41, 48, 49 (1978); *Hydro Res., Inc.*, LBP-04-23, 60 NRC 441, 447 (2004), *review declined*, CLI-04-39, 60 NRC 657 (2004). The NRC Staff's demand forecast, in light of DTE's new statements reflecting much less interest in going forward with the Fermi 3 project, is not a reasonable forecast of the future need and economic justification for the proposed Fermi 3 plant. The clumsy economics articulated in the FEIS, and now contradicted by statements of knowledgeable DTE executives, directly affect meaningful consideration of alternatives to building the nuclear plant. Until the matter of demand is realistically addressed, there cannot be meaningful discussion of preferable alternatives. If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to

determine whether such alternatives should be implemented. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-660, 14 NRC 987, 1004 (1981), citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB 458, 7 NRC 155 (1978).

The NEPA “hard look” remains elusive in the Fermi 3 undertaking and consequently, in the mandatory discussion of alternatives. “Some factual basis (usually in the form of the Staff’s environmental analysis) is necessary to determine whether a proposal ‘involves unresolved conflicts concerning alternative uses of available resources’ - the statutory standard of Section 102(2)(E).” *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). A “factual basis” is missing from the NRC Staff’s analysis of need and demand in the FEIS. Intervenors must be accorded the right to adjudicate their claim that need and demand is woefully out of touch with reality in that document, and that consequently, NEPA has been violated.

#### **V. STANDARDS FOR REQUIRING SUPPLEMENTATION OF AN EIS**

A FEIS must be supplemented if substantial changes in the federal action occur or significant new information or circumstances arise concerning the environment. 40 C.F.R. § 1502.9(c)(1), (i)(ii). NEPA supplementation is generally required if two conditions are present: (1) a major federal action has yet to occur, and (2) new information bearing on the ongoing major federal action raises significant questions that have not been previously addressed about the ongoing action’s impact on the human environment. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (major federal action remained when the Army Corps of Engineers constructed one of three dams that the agency had decided to build). See also *Sierra Club v. Bosworth*, 465 F.Supp.2d 931, 940 (N.D. Cal. 2006) (holding that the Forest Service’s approvals of timber contracts were ongoing major federal actions). The new

circumstance must present a “seriously different picture of the environmental impact of the proposed project from what was previously envisioned.” *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996). That standard is easily met here, where the very construction of Fermi 3 may be delayed or canceled. If FEIS supplementation is not required, the decision not to use the most up-to-date information on this dynamically-growing power source “defeats the purpose of an EIS by ‘impairing the agency’s consideration of the adverse environmental effects’ and by ‘skewing the public’s evaluation’ of the proposed agency action.” *Id.* at 446-48.

### CONCLUSION

A petitioner does not have to prove its contentions at the admissibility stage. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). The factual support required is “a minimal showing that material facts are in dispute.” All that is needed at this juncture is “alleged facts” and the factual support “need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.” *First Energy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01, LBP-11-13 at 17 (April 26, 2011) (slip op.). Intervenors have made the requisite showing for admission of Contention 13, and pray the Licensing Board admit it for adjudication.

Respecting Intervenors’ motion for suspension of the adjudication pending supplementation of the FEIS, presently at stake in the adjudication is a NEPA-derived cause of action, Contention 8 concerning mitigation measures for the Eastern Fox Snake. If Fermi 3 is built, approximately 49 acres will be disrupted for construction, and about 40 of those acres will be permanently removed from EFS habitat. That is one direct environmental effect which should be avoided if the Fermi 3 project ends up, as it appears will happen, on the scrap heap of history. Better now to protect the physical environment

from unnecessary destruction, than to allow any possibility of habitat destruction by early site activities occasioned for a plant that is doomed to incompleteness. Thus, Intervenor's move for an order suspending this adjudication pending resolution of the matters raised by this Motion.

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**UNITED STATES OF AMERICA  
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing “MOTION FOR SUSPENSION OF LICENSING HEARING, FOR ADMISSION OF PROPOSED CONTENTION 13 FOR ADJUDICATION, AND FOR SUPPLEMENTATION OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT” have been served on the following persons via Electronic Information Exchange this 29th day of October, 2013:

Ronald M. Spritzer, Chair  
Administrative Judge  
Atomic Safety and Licensing  
Board Panel  
Mail Stop: T-3F23  
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# Nuclear plant on back burner?

- DTE Energy still wants the option to build a new Fermi plant but says it might build a natural gas-powered generator first.

BY CHARLES SLAT 10/24/2013  
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DTE Energy still is seeking a federal license to build and operate a new nuclear plant, but is studying the prospects of building a natural gas fueled plant first, given plummeting natural gas prices.

"I would suspect if we were going to go out and build something immediately, it would be gas," said Ron May, DTE's vice president of major enterprise projects. "I doubt if we'd build another coal plant but even before gas, we'd probably put in more wind turbines."

DTE is in the midst of seeking a federal construction and operating license for a new nuclear power plant next to the Fermi 2 plant it operates near Newport, spending an estimated \$70 million toward that goal.

A federal safety panel is expected to hear arguments about the license at hearings in Monroe beginning Tuesday.

But the company's applica-

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## Fermi (cont.)

tion for the license has been delayed by regulatory fallout from earthquake-rattled nuclear plants in Fukushima, Japan, and national questions about the safety of storing used nuclear fuel.

"We thought we would have a license by the first of this year," Mr. May said. That now looks to be delayed by a couple of years, at best.

Although DTE is reviewing figures, it has estimated a new Fermi 3 nuclear plant is to cost at least \$10 billion, or about twice what it cost to build Fermi 2, which has been operating since 1988.

The Alliance to Halt Fermi 3, a group opposing nuclear power, said the cost of a new and unproven plant design would be \$20 billion or more.

"At the very least, a predictable financial meltdown will ensue if a construction license is granted for an unpredictably expensive new Fermi 3 reactor," said Paul Gunter, director of the national Reactor Watchdog Project.

Meanwhile, due to a big drop in natural gas prices, the cost of generating electricity from a nuclear plant now is nearly twice that of electricity from a combined cycle natural gas plant.

A combined cycle plant has a natural-gas fueled turbine to generate electricity and uses the waste heat to power a steam turbine, which also produces electricity.

He said the utility has

been studying the prospects of a new natural gas plant, including potential locations, such as St. Clair, but no decisions have been made.

"We're doing the right kind of due diligence, so when we make the choice, we do it smartly," he said.

But the company figures it will not need a new generating plant for at least five years, due to declining demand for electricity, further reduced by energy efficiency measures and new renewable sources of power, such as wind and solar projects.

"Gas is cheap, and a combined cycle plant is probably a really good option for the marketplace as a base load unit," Mr. May said. "If the price of gas is really low like it is, and we could project that it

would stay low, that would be a really good option."

He said DTE remains committed to getting a nuclear power plant license, although the company has not committed to build a nuclear plant.

Getting a nuclear license gives the company that option, cuts the time to complete it and would come in handy if stiffer limits on carbon dioxide emissions are imposed on both coal- and gas-fired power plants.

"If that becomes a burning issue, then nuclear becomes a more favored technology," Mr. May said. "We're spending that money to leave this option open. It's just prudent."