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Fermi Nuclear Plant, Unit 3

Docket Number: 52-033-COL

ASLBP Number: 09-880-05-COL-BD01

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 HEARING

7 -----x

8 In the Matter of: : Docket No.

9 DETROIT EDISON COMPANY : 52-033-COL

10 : ASLBP No.

11 (Fermi Nuclear Power : 09-880-05-COL-BD01

12 Plant, Unit 3) :

13 -----x

14 Thursday, October 31, 2013

15
16 Monroe County Courthouse

17 Board Meeting Room

18 125 E. Second Street

19 Monroe, Michigan

20
21 BEFORE:

22 RONALD M. SPITZER, Chair

23 DR. ANTHONY J. BARATTA, Administrative Judge

24 DR. RANDALL J. CHARBENEAU, Administrative Judge

25

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9:27 a.m.

CHAIRMAN SPITZER: Good morning.

Everybody present and accounted for, at least everyone we need to get started this morning?

MR. TYSON SMITH: Yes, Your Honor.

CHAIRMAN SPITZER: Before we move or resume the testimony of the DTE witnesses on Contention 15, we received two new proposed exhibits, and we'll go ahead and deal with them now, or at least I assume DTE wants to move into evidence its new exhibit, which is 000108.

(Whereupon, the document was marked as DTE Exhibit 000180 for identification.)

MR. TYSON SMITH: Correct. That's the B&V Employee Concerns Program Procedure MP1.2 that we discussed yesterday.

CHAIRMAN SPITZER: Is there any objection to that exhibit being admitted?

MR. LODGE: No, Your Honor, not from Interveners.

MS. CARPENTIER: And not from staff.

CHAIRMAN SPITZER: Very well. That will be admitted.

(Whereupon, the document marked as DTE

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1 Exhibit 000108 was received in evidence.)

2 CHAIRMAN SPITZER: We also received from
3 the interveners their proposed Exhibit INTS 0071,
4 which is the Entergy River Bend combined license
5 application and final safety analysis report,
6 particularly chapter 17, the QA Program.

7 (Whereupon, the document was marked as
8 INTS Exhibit 0071 for identification.)

9 CHAIRMAN SPITZER: I take it you want to
10 move that into evidence, Mr. Lodge?

11 MR. LODGE: Yes, and we so move.

12 CHAIRMAN SPITZER: Is there any objection
13 to admitting that exhibit?

14 MR. TYSON SMITH: Well, on DTE's part
15 we're not sure of the relevance or what the purpose of
16 this exhibit was.

17 CHAIRMAN SPITZER: For the staff?

18 MS. CARPENTIER: And the same from the
19 staff.

20 MR. LODGE: If I may respond, Your Honor.
21 There was discussion yesterday from our expert and I
22 believe from the Panel briefly about the whole River
23 Bend quality assurance matter. I think that it
24 certainly is relevant. And that does not seem to me
25 to be a straightaway reason to object to its

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1 admissibility.

2 CHAIRMAN SPITZER: We'll take a minute
3 here. Just a second.

4 All right. In the interest of moving
5 things along, we'll admit the exhibit, however we
6 understand the positions of DTE and the staff. You're
7 more than welcome to argue the relevance or lack of
8 relevance of this document in your proposed findings
9 and conclusions of law. We're not making any final
10 determination on that issue, but since there has been
11 at least some testimony related to that document, we
12 will admit it as an exhibit.

13 (Whereupon, the document marked as INTS
14 0071 was received in evidence.)

15 CHAIRMAN SPITZER: Let's move along then.
16 As for the schedule, we will be resuming with the DTE
17 witnesses who were on the stand yesterday.
18 Fortunately we've over the evening been able to
19 shorten our questions considerably, I'm sure they
20 won't be sad to learn, and then we will be moving onto
21 the staff witnesses.

22 I expect we'll take a break for lunch. If
23 counsel do desire, we may allow you some additional
24 time so you can work a little on your closing
25 arguments. And then as indicated yesterday, we should

1 finish today with closing arguments in the afternoon.

2 So unless there are any other procedural
3 matters to take up --

4 MS. CARPENTIER: Is the Board still
5 planning to have a session for proprietary materials?

6 CHAIRMAN SPITZER: We will if we need to.
7 As of now we don't have anything definite, but if we
8 need to, we'll do it. I don't think it's going to be
9 of such length that it's going to delay things
10 noticeably.

11 Very well. The DTE witnesses may resume
12 the stand.

13 Good morning, gentlemen. Let me remind
14 you; I'm sure you're aware of this, but you're still
15 under oath.

16 JUDGE CHARBENEAU: I'd like to start off
17 with a couple of questions with regard to the Notice
18 of Violation from 2009. And if we could call up the
19 DTE testimony at the top of page 41. And as I recall,
20 there was an inspection in August of 2009 by staff of
21 the DTE Program and in October a Notice of Violation
22 was received. And that was appealed to staff. Staff
23 agreed with the appeal in part and disagreed in part.
24 And we see here that in April the staff came back with
25 recognition of two violations. Violation A is in

1 essence failures to evaluate the B&V Quality Assurance
2 Program. And then B is the internal audits of the QA
3 Program and then the document of trending.

4 And if we can scroll down I guess over to
5 the top of the next page that DTE accepted that it had
6 failed to sufficiently document the basis for qualify
7 B&V, the QA Program.

8 And then scroll down to the middle of that
9 page, please. In the testimony you note that in April
10 -- so we're looking at the sentence that starts off
11 "But in any event, by April 2009." We go down to the
12 middle of that. It's acknowledged that DTE had
13 conducted an audit of B&V in July of 2009. And the
14 documentation of that is Exhibit DTE 038, which is a
15 proprietary document. and I don't want that pulled up
16 right now, but I've got -- my questions are directly
17 related to part of the aspects of that audit.

18 The audit team was a Mr. Bragg along with
19 Mr. Smith and Mr. Stasek. They've got a number of
20 elements that were being looked at. But the question
21 is with regard to the scope. And I think I'm okay to
22 read this even though it's a proprietary document.
23 The scope says, "Limited scope audit focusing on QA
24 Program implementation for Detroit Edison contracts
25 for COLA activities."

1 Can you explain to me what that scope
2 means?

3 MR. PETER SMITH: Stan, go ahead and do
4 it.

5 MR. STASEK: So when -- when an audit is
6 done of a -- of a vendor, what -- what we chose to do,
7 which was fully appropriate for -- for our situation,
8 was to evaluate the Black and Veatch QA Program
9 against the requirements that we specified for them
10 under our project. So what -- what that means is we
11 did not evaluate Black and Veatch programmatic
12 controls that they applied to other projects simply to
13 our -- our particular project. So how they employed
14 their QA Program and then how they applied that
15 program under the PMM to our project.

16 JUDGE CHARBENEAU: So that was basically
17 an audit based on your ND QAPD Program, that part of
18 the QA Program that you had at that time?

19 MR. STASEK: In June of 2009 when we
20 conducted the audit it was the Fermi 3 QAPD.

21 JUDGE CHARBENEAU: So Fermi 3 was in place
22 at that time?

23 MR. STASEK: That's correct.

24 JUDGE CHARBENEAU: It was not the full
25 audit of all of the B&V activities that were performed

1 for the COLA? It was simply their QA Program, rather
2 than all the activities that went on?

3 MR. STASEK: We -- we -- we did look at
4 the ongoing activities at the time that we performed
5 the audit. What we did not do is we did not look at
6 the QA Program controls that Black and Veatch would
7 apply elsewhere that were not applicable to our
8 project.

9 JUDGE CHARBENEAU: Okay. Is this audit
10 considered then a response to the Notice of Violation
11 A that actually came later, or was there a separate
12 audit that was done in response to violation A?

13 MR. STASEK: No, this was not in response
14 to the violation. This was scheduled within our --
15 our audit program that we established for that year to
16 be complete. And we actually completed it in July of
17 2009, which was approximately a month to I think five
18 weeks ahead of the -- the -- the NRC inspection.

19 JUDGE CHARBENEAU: Okay. Was there then
20 a separate audit of B&V in response to violation A?

21 MR. STASEK: No -- no, there was not. We
22 were -- that -- this was done under our -- I'll call
23 our routine QA Program is how we would apply that to
24 that particular vendor. Subsequently relative to that
25 program we do do annual evaluations of -- of -- of our

1 approved vendors, which Black and Veatch is -- is one
2 of those. And then we're required to re-audit them
3 and look at their program every three years. And
4 that's -- that's standard on -- in -- in the program.

5 JUDGE CHARBENEAU: Do you know whether
6 staff ended up considering this audit to have been
7 responsive to violation A?

8 MR. STASEK: I don't recall if that was
9 something that they specifically reviewed and
10 documented.

11 JUDGE CHARBENEAU: Then with regard to
12 violation B you did implement internal audits?

13 MR. STASEK: Yes, we did.

14 JUDGE CHARBENEAU: And you implemented the
15 trending analysis?

16 MR. STASEK: That's correct.

17 JUDGE CHARBENEAU: And those are ongoing?

18 MR. STASEK: Yes, they are.

19 JUDGE CHARBENEAU: And what is the
20 frequency of those? Are they annual or --

21 MR. STASEK: The -- the audits, we're
22 required to perform an annual internal audit of the
23 program, of -- of the project itself. That's to be
24 done annually. We have done that annually. In
25 addition, there's an external audit that's done of the

1 QA oversight function. So I do the audits of the --
2 of -- of the project. And then once per year separate
3 from that there is an external review done of my
4 function. So there's a second tier of -- of
5 verification there.

6 And then the -- the trending is done in
7 two tiers. There is a formal trending analysis that
8 is done twice per year that looks at the previous
9 year's worth of -- approximately year's worth of
10 corrective action documents that were initiated to
11 determine if there's any adverse trends that were
12 identified.

13 And then built into the Corrective Action
14 Program is a CAR Committee, a Corrective Action
15 Request Committee that oversees the program. And they
16 meet nominally once per week to evaluate corrective
17 action statuses, I'll -- I'll -- I'll call it, and to
18 make certain committee-type decisions. And as part of
19 that committee they have a -- an ongoing agenda item
20 to discuss any trends that might become obvious to
21 them based upon their -- their more -- more frequent
22 reviews versus once every six months.

23 JUDGE CHARBENEAU: Tony, do you have
24 anything?

25 JUDGE BARATTA: Not on this topic.

1 JUDGE CHARBENEAU: Okay. Then I'm going
2 to have a separate question then. Does DTE Electric
3 have a Whistleblower or Employee Protection Program?

4 MR. PETER SMITH: Yes, we do.

5 JUDGE CHARBENEAU: Do you know when that
6 was established?

7 MR. PETER SMITH: We've had a corporate
8 program that's existed for a very long time throughout
9 the whole corporation. The Fermi 2 Program has -- has
10 been in -- in existence for a very long time as well.

11 CHAIRMAN SPITZER: Go ahead.

12 MR. PETER SMITH: I -- I'm -- I'm sorry.
13 Being in -- and I -- it predated my arrival at -- on
14 the Fermi site in 1996.

15 JUDGE CHARBENEAU: But that exists
16 throughout DTE Electric? Not just the nuclear
17 program, but throughout the entire --

18 MR. PETER SMITH: Well, we have a
19 corporate program that -- that covers the whole
20 corporation. We've had -- we have a -- a nuclear
21 program that --

22 JUDGE CHARBENEAU: But it's possibly a
23 separate one?

24 MR. PETER SMITH: That's a -- that's a
25 separate one as well.

1 MR. STASEK: And -- and -- and that one's
2 a -- a common program between Fermi 2 and Fermi 3, as
3 well as the decommissioning activities associated with
4 Fermi 1.

5 JUDGE CHARBENEAU: Thank you. That's all
6 I've got.

7 JUDGE BARATTA: when you say it's a common
8 program, when did it become a common program? Was it
9 as soon as the project was conceived or what?

10 MR. PETER SMITH: When we -- when we
11 staffed the Nuclear Development Organization in -- in
12 early 2008, that was -- that was -- as I brought on
13 new people, that was their first introduction to it.
14 The -- the other folks, myself and others who were
15 involved had been subject to the Fermi 2 Program
16 throughout our existence.

17 JUDGE BARATTA: Okay. All right.

18 MR. PETER SMITH: Yes.

19 JUDGE BARATTA: So at the time it
20 wasn't --

21 MR. PETER SMITH: Right. And --

22 JUDGE BARATTA: It may not have been Fermi
23 3-specific program?

24 MR. PETER SMITH: Right. And so -- so,
25 you know, I mentioned yesterday when we in-processed

1 people to work on the Fermi site from B&V --

2 JUDGE BARATTA: Yes.

3 MR. PETER SMITH: -- part of the general
4 orientation training they had for site access included
5 the orientation with the Employee Concerns Programs.

6 JUDGE BARATTA: All right. You want to go
7 on to another topic?

8 JUDGE CHARBENEAU: That's fine.

9 CHAIRMAN SPITZER: Mr. Smith, this
10 question is directed to you. I think it's a follow-
11 up. You may have already answered it, but let me be
12 clear. Just to be -- the record is clear, would a
13 whistleblower doing site work for Fermi 3 have access
14 to DTE's Employee Concern Program? I take it that's
15 the same as the Whistleblower Program?

16 MR. PETER SMITH: Yes.

17 CHAIRMAN SPITZER: And would such an
18 employee no matter who they were employed by; that is
19 a contractor or subcontractor, whoever -- would they
20 have access to that Employee Concern Program?

21 MR. PETER SMITH: Yes, as -- as part of
22 the orientation training they -- they were introduced
23 to the program as well as who -- who our Employee
24 Concerns Program manager was and -- and all of their
25 other avenues for raising concerns.

1 CHAIRMAN SPITZER: So I take it they would
2 have -- someone employed doing site work for Fermi 3
3 would have at least two options then. One would be
4 the Black and Veatch Program. The other would be the
5 Fermi 3 Program?

6 MR. PETER SMITH: Correct.

7 CHAIRMAN SPITZER: That's again
8 Whistleblower or Employee Concern Programs?

9 MR. PETER SMITH: (No audible response.)

10 CHAIRMAN SPITZER: Can you better answer
11 audibly?

12 MR. PETER SMITH: Oh, correct.

13 CHAIRMAN SPITZER: Shake of the head is
14 hard for him to --

15 MR. PETER SMITH: I'm sorry.

16 CHAIRMAN SPITZER: There was discussion
17 yesterday afternoon of DTE Exhibit 94. Why don't we
18 bring that up? And Mr. Gundersen pointed to the -- or
19 identified the date of this document as October 2008
20 and stated this was in conflict with the testimony
21 that the Fermi 3 QA -- Quality Assurance Program
22 description went into effect when the application was
23 filed. Can you clarify the date of the exhibit; that
24 is Exhibit 94?

25 MR. PETER SMITH: Clarify the date on the

1 -- the October 2008 date is -- is what you're looking
2 for clarification on?

3 CHAIRMAN SPITZER: Well, yes. Can you
4 clarify what the date of DTE 94 is?

5 MR. PETER SMITH: When we created this
6 exhibit? I'm -- I'm sorry, I don't --

7 CHAIRMAN SPITZER: Can we go to the top of
8 the document? I don't know if there's anything that
9 would help you with that here.

10 MR. TYSON SMITH: No, I think the question
11 is to resolve -- to address the issue raised by Mr.
12 Gundersen regarding the October date, not the actual
13 date of the exhibit.

14 CHAIRMAN SPITZER: Okay.

15 MR. TYSON SMITH: This was prepared for
16 our testimony.

17 CHAIRMAN SPITZER: All right. Can you
18 answer Mr. Smith's question?

19 MR. PETER SMITH: So -- so we submitted
20 the application on September 18th of 2008. We -- we
21 signed in the policy and made effective the Fermi 3
22 QAPD. And I don't know the exact date. I can look it
23 up, what day it was signed, but it was in early
24 October. It was in the first week of October. And
25 then we started transitioning to work under that

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1 program from the Fermi 3 -- or I'm sorry, from the
2 original Nuclear Development QAPD.

3 CHAIRMAN SPITZER: Yesterday afternoon Mr.
4 Gundersen mentioned a concern regarding the quality of
5 raw geotechnical data that he stated is now driving
6 the structural analysis related to the foundation of
7 structures for Fermi 3. Are you aware of any such
8 structural analysis?

9 MR. PETER SMITH: Let me explain what
10 analysis is going today.

11 CHAIRMAN SPITZER: All right.

12 MR. PETER SMITH: So -- so I'll just give
13 you a little bit of background of how we interface
14 with the Economic Simplified Boiling Water Reactor
15 Design Certification Document. That document provides
16 an envelope for site parameters that we have to
17 demonstrate we're bounded by in the -- in the ESBWR
18 DCD. So one set -- set of those parameters relates to
19 the seismic input response factor that's assumed in
20 the ESBW -- ESBWR design and -- and other parameters
21 around backfill, for -- for example.

22 So in the -- in -- in our original
23 application based on our site investigations and on
24 the characterization of the seismic hazard in -- the
25 deep rock seismic hazard, the -- part of the site

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1 investigation data is used to translate the deep rock
2 hazard to the foundation level of the structure. So
3 that was done with the original application.

4 In -- in -- in May of 2010, or around May
5 of 2010, General Electric-Hitachi modified the design
6 certification document to add an additional
7 requirement related to -- or additional specifications
8 related to backfill adjacent to safety-related
9 structures, which previously did not exist within the
10 design certification document. The specification for
11 that is for all intents and purposes impossible to
12 meet because it is linear all the way to the surface
13 of the -- of the plant. The DCD provided an option
14 for us to do analysis to show that that backfill had
15 no impact on the safety-related structures and wasn't
16 required to satisfy -- satisfy the requirements of the
17 design certification.

18 In 2010, we embarked upon that analysis,
19 which is called a soil structure interaction analysis.
20 It's -- and that's the analysis that has continued on,
21 because after we started that analysis there were
22 industry issues associated with the analytical
23 methodology that surfaced out of the Department of
24 Energy and other major users of -- of that software
25 package. And -- and we got ourselves caught in that

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1 whole analytical -- you know, addressing the -- both
2 the analytical methodology aspects with it as well as
3 performing the analysis.

4 And then the Fukushima event occurred in
5 2011 and one of the outcomes for that was we were
6 required to reevaluate our deep rock seismic hazard
7 using a new Central and Eastern United States seismic
8 source characterization. So that essentially happened
9 for us in July of 2012 -- of last year. So at that
10 point in time what we decided to do is we decided to
11 re-execute all of our seismic analysis using the new
12 Central and Eastern U.S. hazard as -- as well as the
13 improvements to address the Department of Energy
14 concerns with the use of the computer modeling that
15 was used for that analysis. That analysis is now
16 complete.

17 So it was -- was -- it's unrelated to
18 anything related to the site investigation other than
19 data from the site investigation is used to translate
20 the deep rock seismic hazard to the -- to the
21 foundation level.

22 CHAIRMAN SPITZER: So if I'm understanding
23 your testimony correctly, the structural analysis
24 you're now doing that you've just described is not
25 related to defects in geotechnical data that were

1 gathered before the application was submitted to the
2 NRC?

3 MR. PETER SMITH: That's correct. It was
4 influenced by changes in the design certification
5 document and the requirement to -- you know, questions
6 about the methodology for soil structure interaction
7 that were -- were raised external to us and -- and the
8 new seismic hazard that we had a concern post -- or
9 consider post-Fukushima.

10 CHAIRMAN SPITZER: All right. This
11 question is also directed to --

12 MR. THOMAS: Excuse me. Before we go on
13 I would like to address issues that were raised
14 yesterday regarding the quality of that data that was
15 developed on site by Black and Veatch. There was --
16 there were some ties that were made between the
17 analysis that we just discussed and the gathering of
18 that data. That -- we believe that that data was --
19 was gathered in a fully-qualified manner underneath a
20 -- an appendix B program, being the Black and Veatch
21 Program. We used trained and qualified individuals.

22 We had qualified data collection plans
23 that we used, work -- work procedures, work plans that
24 guided the -- the work. We had detailed work
25 instructions for the on-site activities. We had

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1 geotechnical geologists, we -- we discussed yesterday,
2 that were at each of the drilling rigs that were
3 monitoring the activities that were going on,
4 recording the boring logs, all the data for the boring
5 logs. The information in all the boring logs is -- is
6 actually available on ADAMS as part of the FSAR. It's
7 in FSAR 2.5 delta delta. There's over 600 pages of
8 boring log information that's contained therein.

9 The chain of custody procedures were all
10 outlined in those -- in those work instructions. As
11 -- as soon as that core came out of the ground and was
12 placed in the box, it was tagged. Then it was --
13 there was a chain of custody log that then tracked
14 that -- that boring, you know, that -- that -- that
15 core bore all the way from its -- you know, from that
16 drill hole location to its final resting place,
17 including if any samples were taken from that and sent
18 to the lab.

19 There were -- you know, and I -- I guess
20 that's what I wanted to --

21 JUDGE BARATTA: So the process you just
22 described, does that then meet Subpart 2.20 quality
23 assurance requirements for subsurface investigations
24 for nuclear facilities of NQA-1?

25 MR. THOMAS: Precisely. That -- our --

1 our procedures, our methodology were -- were developed
2 to meet Subpart 2.20 of NQA-1-1994.

3 MR. SACCO: I'd like to add on to what
4 Steve is saying from the quality assurance
5 perspective. You know, all those procedures, both
6 those work instructions and of course our nuclear
7 procedures are reviewed and approved by me. So
8 there's a quality assurance aspect to all these that
9 ensures that they are meeting the requirements stated
10 in NQA-1, both the Part 1 general requirements and the
11 Part 2.20 subsurface investigation requirements.

12 And, you know, once you set up a program
13 and a system and you train your people, as we do, we
14 rely on our people to perform their work in a quality
15 manner. And the Quality Assurance Group does their
16 oversight to ensure it is done. And -- and in this
17 project it was done and is done at a high level.

18 There was some inference yesterday that
19 the quality of Black and Veatch's subsurface
20 investigation work would be suspect because it was
21 alleged that there wasn't any client oversight.
22 Client oversight has nothing to do with how we
23 implement our program. Whether we're audited 10 times
24 a year or zero times a year by a client has no effect
25 on how we perform. And -- and our program really is

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1 industry-leading. We make sure that we have a top-of-
2 the-line program. You know, I personally make sure
3 our program is -- is of the highest order with NQA-1.
4 I mean I am on the NQA-1 Committee. We are the
5 committee that writes, revises and interprets NQA-1.
6 So our understanding of the NQA-1 requirements is --
7 is at the point where, you know, I feel our program is
8 second-to-none and, you know, we do implement it very
9 well.

10 CHAIRMAN SPITZER: Now I take it the
11 measures that both of you have just been talking about
12 related to the gathering of geotechnical data are
13 measures implemented under Black and Veatch's QA
14 Program?

15 MR. THOMAS: Yes, that is correct.

16 MR. SACCO: That's correct.

17 CHAIRMAN SPITZER: Now related to that,
18 here's another question. This is also for Mr. Smith.
19 It says Mr. Gundersen stated that unless an applicant
20 assumes ownership of the QA Program you do not have
21 quality. How in your view did DTE assume ownership of
22 the QA function prior to the application date? Why
23 don't we start with that?

24 MR. PETER SMITH: So -- so as -- as we
25 discussed yesterday, first of all, we applied -- all

1 of our QA requirements were applied to B&V through our
2 contracts and -- and -- and we were accountable both
3 to my board of directors for the administration of
4 those contracts -- but if NRC had a concern with the
5 way we were doing business, I was the person they were
6 coming to on that. And that has existed right from --
7 from day one.

8 In addition, as we discussed yesterday, we
9 did -- we did have site presence. We weren't doing it
10 under a program, but we did have site presence that
11 had I would call intrusive oversight of -- of -- of
12 B&V's activities on site. I watched them using their
13 procedures. We did stop work on -- on occasions for
14 when -- when we had -- when we had questions. I was
15 made aware of the results of the audits and
16 surveillances that B&V performed that was relevant to
17 the work we did and I was assured that corrective
18 actions to my satisfaction were taken related to
19 things that related to my project. And then --

20 JUDGE BARATTA: Okay.

21 MR. PETER SMITH: I'm sorry.

22 JUDGE BARATTA: No, go ahead.

23 MR. PETER SMITH: And then as -- as we
24 talked about yesterday, that -- that was during the
25 conduct of the geotechnical work, but I was -- I'm --

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1 I'm accountable for the combined license application.
2 And so before we started to receive the combined
3 license application materials, we had a program in
4 place for us, our Nuclear Development Quality
5 Assurance Program that we implemented and -- and had
6 procedures, trained personnel and -- and reviewed and
7 accepted the COL information that ultimately ended up
8 in -- in our application on September 18th.

9 Steve, do you want to add to that, or
10 I'm --

11 MR. THOMAS: No, I think you -- I think
12 you stated it fine. I agree with everything you said.

13 JUDGE BARATTA: Yes, I keep coming back to
14 this issue that -- for example, in your rebuttal
15 statement -- and could we bring the -- Andy, could we
16 bring up the DTE rebuttal statement, or rebuttal
17 testimony, I should say? And go to -- it looks like
18 it should be page 10. Yes. No, you just passed it.
19 The answer to 16.

20 Yes, I keep coming back to this question
21 where you say there's no QA requirements, but then go
22 on to say that in a manner that such a quality can be
23 demonstrated. And we just heard, you know, that this
24 was done under 2.20 and such. I mean it seems like
25 there's kind of half a truth there and half not true.

1 I mean --

2 MR. PETER SMITH: So -- so -- so again,
3 I'll -- I'll -- I'll distinguish between the legal
4 requirement that we contested in the violation versus
5 what our obligation was. Our obligation has always
6 been that when we presented our combined license
7 application that it was complete and accurate and that
8 it contained all of the information required. And I
9 have the obligation to demonstrate that the material
10 that was developed for safety-related information in
11 that was -- was done in a quality manner.

12 And the way we assured that that quality
13 manner was is I went to a professional organization
14 who had a well-functioning and well-established NQA-1
15 Program in place to do that. That's -- that's how we
16 assured the quality of -- of the -- of the
17 information. And then we reviewed the information
18 that was developed from that for conformance with the
19 regulatory guidance associated with the contents of --
20 of our combined license application as -- as I
21 described yesterday.

22 JUDGE BARATTA: And during the time the
23 data was collected you provide oversight, is that
24 correct?

25 MR. PETER SMITH: Yes.

1 JUDGE BARATTA: For your --

2 MR. PETER SMITH: But it was -- it was not
3 under a QA Program.

4 MR. THOMAS: Although as we did state all
5 the data was collected underneath the QA Program via
6 the B&V QA Program.

7 JUDGE BARATTA: Thank you.

8 CHAIRMAN SPITZER: Related to this
9 assumption of ownership issue, I would assume that
10 when you filed your application in September of 2008,
11 your COLA application, your COL application for Fermi
12 3, you were certifying to the NRC that the information
13 in that application, all of it --

14 MR. PETER SMITH: Right.

15 CHAIRMAN SPITZER: -- was accurate to the
16 best of your knowledge and belief, right?

17 MR. PETER SMITH: That -- that is correct.
18 And -- and a -- the focus of the activities that we
19 did from February of 2008 within my organization until
20 September 18th when we -- when we submitted the -- the
21 application, my -- my threshold was to convince my
22 chief nuclear officer that he could with confidence
23 sign that application under oath and affirmation. And
24 the process that we had established to do that was
25 much like I -- well, it was like I described yesterday

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1 with checklists, with -- with verifications by my
2 people that there were -- there were references to
3 where information came from that -- we generated a
4 large number of comments. I think in total over the
5 COLA we probably generated 1,500 comments, on that
6 order, during our review and -- and that B&V
7 addressed.

8 So, you know, we -- we were intimately
9 involved. And as we completed the reviews, we
10 communicated through the process with the CNO and --
11 and built the case for him to be able to -- to sign it
12 under oath and affirmation. I met with him probably
13 three times a month during -- during that period of
14 going over the status of reviews and -- and where we
15 had open items, where we had questions, what
16 commitments we were making, what unusual information
17 or -- or what, you know, unique circumstances
18 surrounded various aspects of the -- of the
19 application.

20 CHAIRMAN SPITZER: I take it that oath and
21 affirmation that your chief nuclear officer signed
22 doesn't contain any exceptions for work performed by
23 contractors or subcontractors?

24 MR. PETER SMITH: No, it doesn't.

25 CHAIRMAN SPITZER: This question I believe

1 is directed to either of eh Black and Veatch
2 witnesses. Are you familiar with the requirements of
3 10 CFR Part 21?

4 MR. SACCO: Yes, I am.

5 CHAIRMAN SPITZER: Did those apply to
6 Black and Veatch's work on the Fermi 3 project prior
7 to the submission of the combined license application?

8 MR. SACCO: Absolutely.

9 CHAIRMAN SPITZER: Can you give me
10 generally a summary of what Part 21 requirements are?

11 MR. SACCO: Well, what -- basically Part
12 21 requires that if you have something that is
13 considered a safety-related defect, that you have to
14 report it to the NRC, and you have to report it within
15 a timely manner, which is basically 60 days after
16 you've discovered the initial problem. And there's
17 criteria for what you do in that evaluation. We have
18 a -- a procedure NP16.2 that goes into quite a bit of
19 detail as to what you do to evaluate something that
20 could be considered a 10 CFR 21 issue. It applies to
21 all nuclear work we do.

22 CHAIRMAN SPITZER: These issues covered by
23 Part 21, can they arise during the kind of work you do
24 in the pre-application period?

25 MR. SACCO: Yes.

1 CHAIRMAN SPITZER: Even though there's
2 obviously no reactor building in existence at the
3 time?

4 MR. SACCO: Well, because he site
5 investigation work is considered safety-related work,
6 it definitely is covered by Part 21.

7 CHAIRMAN SPITZER: So let's assume
8 hypothetically during the process of collecting the
9 geotechnical data you learned of defects that would
10 make the site unsuitable for the type of reactor
11 proposed. Would that be covered by Part 21?

12 MR. SACCO: Yes, it would be. And these
13 Part 21 evaluations are all covered in our Corrective
14 Action Program that documented our Corrective Action
15 Program and resolved according to our Corrective
16 Action Program.

17 CHAIRMAN SPITZER: This question is also
18 directed to you, Mr. Sacco. Do you recall testifying
19 yesterday that the first DTE audit of Black and Veatch
20 was in July 2009?

21 MR. SACCO: Yes, at our Overland Park
22 office, that's correct.

23 CHAIRMAN SPITZER: And also that the NRC
24 first expressed concern about DTE's quality assurance
25 in June of 2009?

1 MR. SACCO: I'm not sure how I can answer
2 -- concern about DTE. I can only really answer Black
3 and Veatch.

4 CHAIRMAN SPITZER: All right. Can either
5 of the DTE witnesses answer that?

6 MR. PETER SMITH: We were -- we were
7 starting to have a round of -- of -- of questions from
8 NRC related to the quality assurance applied pre-COL
9 submittal. And -- and that series of conversations
10 ended up with NRC deciding to perform the inspection
11 in August of 2009. I'm not sure that Black and Veatch
12 was necessarily aware of -- of that -- that -- that --
13 that questioning as most of the questions related to
14 what program DTE had in place.

15 CHAIRMAN SPITZER: Did the NRC's
16 expressions of concern begin in or about June of 2009?

17 MR. PETER SMITH: They -- they were in
18 that first part of 2009 time frame. I don't recall
19 the exact date that -- that --

20 CHAIRMAN SPITZER: The issue that this
21 question is leading up to is whether it was a
22 coincidence that this first DTE audit of Black and
23 Veatch in July 2009 came a short period after the NRC
24 first expressed concern about the quality assurance
25 issue.

1 MR. STASEK: Maybe I can give you a bit of
2 a timeline associated with that particular audit.

3 CHAIRMAN SPITZER: All right.

4 MR. STASEK: So I -- I joined the project
5 in March of 2009. Being the -- the new guy on the
6 project, I -- I -- I -- I started to do a -- a series
7 of reviews and evaluations of different aspects
8 associated with the Quality Assurance Program, which
9 was the Fermi 3 QAPD at that point, and noted that as
10 we progressed with the project that we would be adding
11 additional vendors possibly; which we have since that
12 point, and taking a look at -- I'll call it the QA
13 oversight portion of the program, and which procedures
14 we had in place, and what activities we needed to do
15 and then do periodically as -- as -- as well as that.

16 So if you -- it was mentioned earlier, a
17 name of Jerry Bragg. Jerry Bragg is a -- an ex-Fermi
18 2 QA audit supervisor who I retained -- he -- for the
19 project for a period of time. Jerry and I worked
20 through what particular -- what activities we needed
21 to -- to perform in 2009 and then a period --
22 periodically do going forward.

23 So around I'd say maybe the middle of
24 April time frame, maybe towards the end of April time
25 frame, I determined that we needed to perform an audit

1 of Black and Veatch and establish that three-year tri-
2 annual requirement that -- that -- that's specified by
3 the program.

4 So Jerry and I worked through the
5 procedures to allow us to do that. We established the
6 audit and surveillance procedures specifically that I
7 deemed necessary to allow us to go do that audit and
8 review. We scheduled that with Black and Veatch in I
9 want to say early June. Late May, early June.
10 Typically we try to give 30 to 45 days notice that we
11 will be coming to perform an audit of their program.
12 And that led up to the -- the schedule that the
13 earliest that we could actually do the -- the audit
14 was in about the mid-July time frame. So there was a
15 lot of preparatory work that led up to the audit. It
16 wasn't that we identified just a -- a few days before
17 that we needed to go do the audit.

18 CHAIRMAN SPITZER: Regardless of the
19 specific time table, was there any connection between
20 anything the NRC had expressed to DTE about any
21 concern that the NRC expressed about quality assurance
22 and the timing of this particular audit?

23 MR. STASEK: No, there was not.

24 CHAIRMAN SPITZER: Mr. Smith, I believe
25 this is directed to you again. I think you referred

1 yesterday to Greenfield combined license application
2 plants? You recall that?

3 MR. PETER SMITH: Yes, I do.

4 CHAIRMAN SPITZER: Do you know of any such
5 proposed plants that have COL applications?

6 MR. PETER SMITH: I -- I don't know the --
7 the current status, but I know there was one in --

8 MR. THOMAS: There was one in Texas and in
9 Idaho.

10 MR. PETER SMITH: -- in -- in -- in -- and
11 -- and, yes, in -- in Idaho that were working down the
12 path of becoming -- you know, that if you looked on
13 the NRC Web site, you would see references in -- in
14 perspective COLs in their -- in their schedule.

15 CHAIRMAN SPITZER: This question is for
16 Mr. Thomas. Were the borings for Fermi 3 benchmarked
17 against the historic Fermi 2 borings?

18 MR. THOMAS: Yes. As -- as part of the
19 process for developing the data collection plan, the
20 first step was to review all the relevant geotechnical
21 data that already existed. So what we did is we -- we
22 collected eh Fermi 2 data, the Fermi 1 data, basically
23 whatever site sub-surface investigation that there was
24 for the site and for the region. We used that to
25 inform the scope of our -- our geotechnical

1 investigation. And then following the geotechnical
2 investigation -- and which I should say that we -- we
3 drilled 38 holes in the vicinity of Fermi 3, which is
4 actually beyond the scope that would be needed for the
5 ESBWR design. And that was associated -- we -- we had
6 talked, or there was discussion yesterday that when we
7 started we had looked at multiple reactor designs.
8 What that drove us to -- to eventually do was to drill
9 more holes than would be required for the ESBWR.

10 So to answer your question, when we had --
11 as we were collecting the data and after we had
12 collected the data we -- we did go back and compare
13 that to the Fermi 2 to look for inconsistencies. The
14 -- the Fermi 3 reactor center line is approximately
15 400 meters give or take from the Fermi 2 reactor
16 center line. They're on essentially the same sub-
17 surface material. So that -- you know, that -- that
18 gave us a benchmark, but we necessarily did not use
19 that Fermi 2 data as input into our analysis.

20 JUDGE BARATTA: So do you use data to make
21 sure that there was a consistency among --

22 MR. THOMAS: Yes, we did. Yes, we did.
23 And this was also to look for any cased formation or
24 any abnormalities. We did not see any cased
25 formation at the site. Fermi 2 did not see any cased

1 formation. We do not believe there's any carsed
2 formation at the site.

3 CHAIRMAN SPITZER: What is the sub-
4 surface? What is the rock formation at the site?

5 MR. THOMAS: It's a dolomite hard rock
6 formation.

7 CHAIRMAN SPITZER: How is that different
8 from a carsed formation?

9 MR. THOMAS: Well, a carsed would be a --
10 where you have large cavities that are formed within
11 that material. We did not see any large cavities. In
12 -- in addition Fermi 2 has not experienced any -- any
13 significant settlement that you would see if you had
14 those types of formations underneath the plant.

15 CHAIRMAN SPITZER: As a layman I would
16 assume you would not want to build something as heavy
17 as a nuclear plant on top of rock that has holes in
18 it.

19 MR. THOMAS: That is correct.

20 CHAIRMAN SPITZER: Or at least large
21 holes.

22 MR. THOMAS: That is correct. That's why
23 we're very sensitive to that issue.

24 CHAIRMAN SPITZER: Now dolomite if I
25 remember is magnesium calcium carbonate? Well,

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1 whatever the chemical --

2 MR. THOMAS: I'm -- I'm -- I'm sorry, I'm
3 not a geologist, so --

4 CHAIRMAN SPITZER: Well, whatever the
5 chemical formula is.

6 JUDGE CHARBENEAU: I think the answer is
7 yes.

8 (Laughter.)

9 CHAIRMAN SPITZER: Whatever the chemical
10 formula is, does dolomite ever develop these kind of
11 cavities that are seen in carsed formation?

12 MR. THOMAS: I'm -- I'm sorry, I'm -- I'm
13 not sure of the answer to that question.

14 CHAIRMAN SPITZER: Okay. You don't know.

15 JUDGE CHARBENEAU: Yes. The answer is no.

16 (Laughter.)

17 CHAIRMAN SPITZER: I guess I should ask
18 the judges the question.

19 (Laughter.)

20 JUDGE BARATTA: No, just got a Levy
21 decision. It's got a good discussion --

22 JUDGE BARATTA: Could I ask a couple of
23 clarifying questions? Is that all right?

24 CHAIRMAN SPITZER: Yes.

25 JUDGE BARATTA: Are you done?

1 CHAIRMAN SPITZER: Yes.

2 JUDGE BARATTA: Okay. Yes, if we could go
3 to page 17 of that exhibit there, the rebuttal
4 testimony? And I just want a clarification on
5 something that's in the footnote. That footnote
6 there, could you blow that up a little bit so
7 everybody can see that? Yes, also could you get
8 Exhibit 55 ready to throw up there.

9 I just want to know for the record, it
10 says that -- this references I think the procurement
11 services agreement that you all had, that DTE had with
12 Black and Veatch. And I was wondering if you could
13 point out in that where you invoke the QA Program,
14 Black and Veatch's QA Program. It's about the third
15 line down there. It says including Black and Veatch
16 QA Program details and audits.

17 MR. PETER SMITH: Yes, I understand. I'm
18 just thinking about the exhibit that -- that -- that's
19 referenced here, the NDP-NP-4.1, which doesn't I --
20 that doesn't specifically invoke them. Where -- where
21 we invoke them is actually physically within the body
22 of the contracts themselves.

23 JUDGE BARATTA: Okay.

24 MR. PETER SMITH: Because our contracts --

25 JUDGE BARATTA: It's in the PMM? Is that

1 where?

2 MR. PETER SMITH: Well, the -- the PMM is
3 a -- is a -- is a playback. It -- it's a -- it's a
4 reflection of how B&V is going to implement their QA
5 Program for our project.

6 JUDGE BARATTA: Okay.

7 MR. PETER SMITH: That's -- that's
8 project-specific. The -- the -- I believe in the NOV
9 response we describe all of the places where we --
10 where we invoke the QA requirements, as well as the
11 other place that I -- I believe that we also describe
12 that is in -- there was a -- a large request for
13 additional information from NRC that is -- is I
14 believe an NRC exhibit here that delineates -- oh
15 somebody's -- okay -- that -- that goes through, you
16 know, essentially -- I'll use the phrase chapter and
17 verse of -- of where we've -- where we've invoked --
18 invoked the -- the requirements --

19 JUDGE BARATTA: I was just looking for a
20 place that I can point to that says, you know, you've
21 got to use your QA Program. That's all.

22 MR. PETER SMITH: Right. And -- and --
23 and it's in -- it's physically in the contract.

24 JUDGE BARATTA: Okay. And the contract
25 though is not in evidence, right? I don't think it's

1 an exhibit.

2 MR. PETER SMITH: No, but I -- I believe
3 the -- the -- where it's described in in response to
4 a specific question to that is in two places that are
5 -- which are our NOV response and in the -- and -- and
6 in the request for additional information response
7 that -- that we had received from -- from NRC. So I
8 -- I -- given -- given a little bit of time, I can go
9 and point those to you.

10 JUDGE BARATTA: Yes, could you? I just
11 would like to get those --

12 MR. PETER SMITH: Right.

13 JUDGE BARATTA: -- in the record, if you
14 don't mind.

15 MR. PETER SMITH: Yes.

16 JUDGE BARATTA: Okay.

17 MR. SACCO: I -- I can just add from the
18 Black and Veatch perspective. Every contract we get
19 from a client we'll address the QA requirements that
20 will apply to that requirement. Since I review every
21 contract, I make sure that that -- it's crystal clear
22 in our contract. If it is not, you know, I basically
23 inform our management that we can't sign until we know
24 whose QA Program applies, what the QA Program
25 requirements are, because it's the basis for us

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1 determining, you know, how we contract. So it will be
2 there.

3 JUDGE BARATTA: I'm certain of that
4 because you get paid for it.

5 (Laughter.)

6 MR. SACCO: Absolutely.

7 JUDGE BARATTA: Also if we go, let's see,
8 to -- there was an issue raised by the staff and
9 objecting to the two exhibits that referenced the ER.
10 And that's on page 25. Can we go to page 25? And I
11 was just curious because it seems as though your
12 answer on page 25 says, yes, they are relevant. And
13 I just want to make sure I'm interpreting that right.
14 If you go up to the top of the page there, it says,
15 "And the issue was identified prior to the ER being
16 submitted to the NRC. So far from representing a
17 breakdown in the DTE Program, the issue represents
18 effective functioning of the Black and Veatch QA
19 Program." That is your position, that this is an
20 example where you found a mistake in --

21 MR. PETER SMITH: Yes.

22 JUDGE BARATTA: -- the QA Program and --

23 MR. PETER SMITH: Yes, I -- I would be
24 very concerned if we didn't document things in our
25 Corrective Action Program that were identified.

1 JUDGE BARATTA: Even if they're in an ER
2 document or whatever document there?

3 MR. PETER SMITH: Correct.

4 JUDGE BARATTA: As long as they're in a
5 licensing document, I guess.

6 MR. PETER SMITH: Yes. In fact, we -- we
7 apply our Corrective Action Program more broadly than
8 -- than -- than just specific things related --
9 related to the activities. I -- I mean people are
10 free to write corrective actions or initiate
11 corrective actions for things that they see as
12 improvements in -- in processes or a whole myriad of
13 -- of things.

14 JUDGE BARATTA: All right. Thank you.

15 MR. THOMAS: That's the same at Black and
16 Veatch also. We will write CRs for -- you know, we
17 don't limit our CRs to just safety-related
18 information. If it's non-safety-related, if -- if
19 it's -- obviously if it's a product we're developing
20 to -- to submit to the client or in support of
21 information for the client, which is our work, we'll
22 write a CR if we find a discrepancy.

23 MR. SACCO: SMITH: Yes, in fact I can add
24 to that. I give the mandatory training to all Black
25 and Veatch nuclear personnel about our Corrective

1 Action Program. And the standard that I invoke in
2 that training is that if you think it's an issue,
3 that's enough for you. You document it in our
4 program. We will evaluate it. It doesn't matter how
5 insignificant or how serious, if you think it's a
6 problem, that's enough for us. And that message is --
7 comes down from the head of nuclear, you know, all the
8 way down.

9 JUDGE BARATTA: That's all I have.

10 CHAIRMAN SPITZER: This question is for
11 the DTE witnesses, at least initially. Yesterday I
12 believe you testified about oversight you did during
13 the pre-application period of safety-related work, and
14 some of this or much of this sounded like it was done
15 -- I believe the term is as contractual oversight. Am
16 I characterizing your testimony accurately?
17 Commercial oversight or contractual oversight?

18 MR. PETER SMITH: That was part and --
19 part -- part of it, but knowing where this was going
20 I -- I had a vested interest to make sure that things
21 were being done correctly. I mean that's -- you know,
22 I -- I was lead for this project. I had -- I had my
23 contractual obligations as the contract manager for
24 this project. I had -- you know, knowing -- knowing
25 that we were planning to submit a combined license

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1 application, I had to assure myself that I would be
2 able to convince my chief nuclear officer that he had
3 confidence in signing it. So I had -- had the -- you
4 know, all aspects of the -- of the work that was done.
5 I needed to make sure that it was done safely on site.
6 I needed to make sure that we were -- were not going
7 to impact Fermi 2 operations.

8 CHAIRMAN SPITZER: Oh, so there's no neat
9 division between commercial oversight and quality
10 assurance oversight? Am I characterizing your
11 testimony correct?

12 MR. PETER SMITH: Correct.

13 CHAIRMAN SPITZER: Okay. I mean as a non-
14 expert in this field my perception of commercial
15 oversight or contractual oversight would be I'd be
16 there -- the person would be there trying to make sure
17 that the contractor did his work efficiently, that he
18 was moving at a reasonable pace, that the company was
19 getting its money's worth, as opposed to quality
20 assurance where I'm more looking to make sure that
21 quality guidelines are being followed.

22 MR. PETER SMITH: Right.

23 CHAIRMAN SPITZER: Is that a --

24 MR. PETER SMITH: Well, I don't -- I don't
25 think that's an uncommon thing within -- within the

1 nuclear industry because we're always interested in
2 getting work done efficiently. And we're also always
3 interested in ensuring that it's done in a quality
4 manner.

5 CHAIRMAN SPITZER: So as I understand your
6 testimony you were kind of doing both at the same
7 time.

8 MR. PETER SMITH: That's correct.

9 CHAIRMAN SPITZER: All right. Let me ask
10 -- again, I guess this is directed to the DTE
11 witnesses. Are Fermi 2 and Fermi 3 separate corporate
12 entities?

13 MR. PETER SMITH: I need to -- we're --
14 we're -- we're separate. We -- we are separate
15 entities. The -- the Fermi 3 project reports to a --
16 an organization that was formed in 2007. So actually
17 the project started a little bit before this. But we
18 have a -- a group called Major Enterprise Projects
19 where myself and Mr. Stasek report. We report to the
20 senior vice-president of Major Enterprise Projects who
21 ultimately reports to the president of DTE Electric
22 Company.

23 CHAIRMAN SPITZER: Mr. Stasek? Who?

24 MR. PETER SMITH: Mr. Stasek.

25 MR. STASEK: That's me.

1 MR. PETER SMITH: Yes. Yes.

2 CHAIRMAN SPITZER: Okay. Sorry.

3 MR. PETER SMITH: And then -- and then the
4 Fermi Nuclear Generation Organization reports up
5 through the chief nuclear officer, Mr. Joe Plona. Mr.
6 Plona, the chief nuclear officer, reports to the
7 president of DTE Electric as well. So there's --
8 there's a parallel reporting path. So we're within --
9 we're within the same company, DTE Electric, however
10 we are separate entities?

11 CHAIRMAN SPITZER: Okay. And were they
12 separate corporate entities in around 2007 when
13 quality assurance work began on the proposed Fermi
14 Unit 3?

15 MR. PETER SMITH: So they were -- the
16 initial people that were involved in the project
17 before we all congealed within Major Enterprise
18 Projects -- I was from the Fermi organization. I --
19 I had a role in the engineering organization at Fermi
20 and as we -- as we started this project my involvement
21 increased and ultimately became full time at about the
22 time that we -- we went out for the request for
23 proposal. The project was initially initiated within
24 our -- our corporate strategy group that was -- it was
25 exploring ways to get to new -- new base load

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1 generation. But eh -- the project ultimately
2 congealed within Major Enterprise Projects.

3 MR. TYSON SMITH: Just to be clear, your
4 question asked about a corporate entity. And I think
5 Mr. Smith is referring to organizations. But there's
6 just a single corporate entity here, and that's DTE
7 Electric.

8 CHAIRMAN SPITZER: And that was true in
9 2007 also?

10 MR. PETER SMITH: It was Detroit Edison at
11 the time.

12 CHAIRMAN SPITZER: Was the Fermi 2 QA
13 Program applied by DTE to the Fermi 3 site
14 hydrological and geological testing at any time from
15 2007 to 2009?

16 MR. PETER SMITH: No, it was not.

17 CHAIRMAN SPITZER: All right. Let me ask
18 Intervener's counsel, I'm, as you may have noticed,
19 going through questions you've given to me. You have
20 a document attached. You want me to ask a question
21 about engineering change notices. Is that an exhibit
22 in this case?

23 MR. LODGE: I'm sorry, which document are
24 we talking about? May I approach?

25 CHAIRMAN SPITZER: This is your questions

1 on Contention 15 filed on June 17th and you have a
2 document attached called an engineering change notice
3 which is dated May 15, 2007. I wasn't able to find
4 it, but maybe you could enlighten me.

5 MR. LODGE: No, it has not been.

6 CHAIRMAN SPITZER: Okay. Well, I can't
7 ask questions about documents that aren't exhibits.

8 MR. LODGE: Your Honor, may I approach and
9 have a look at that?

10 CHAIRMAN SPITZER: All right. Well, you
11 can look through here if you want. I've got some more
12 questions to go through. So while I'm doing that, you
13 can look and check.

14 All right. This is essentially a legal
15 question, but I'm going to go ahead and ask it and you
16 can give me your understanding. Your counsel of
17 course may disagree. Can a person or corporation
18 which claims not to be a COLA applicant be cited,
19 charged or sanctioned under the provisions of 10 CFR
20 52.4, the NRC's deliberate misconduct regulation? And
21 I'm only asking for your understanding, if you have
22 one. If you don't, that's fine.

23 MR. PETER SMITH: I -- I haven't -- I
24 haven't even thought about the legalities of that. I
25 would defer that to counsel.

1 CHAIRMAN SPITZER: Yes, I think that would
2 be best. All right. I think that's pretty much --

3 JUDGE BARATTA: As long as we've got a
4 second here, just for a point of clarification, I
5 think Mr. Sacco said you were on the NQA-1 Committee?

6 MR. SACCO: That's -- that's correct, yes.

7 JUDGE BARATTA: Okay. Yes. The NQA-2, it
8 turns out it's referenced in one of the documents.
9 Okay? And I believe you said, or someone said that it
10 had been incorporated into NQA-1 at some point. Could
11 you just clarify that --

12 MR. SACCO: Sure.

13 JUDGE BARATTA: -- or go through the
14 history of that for the record?

15 MR. SACCO: In NQA-1-1994 it incorporated
16 what was previously called NQA-2. In fact, if you
17 pull up your Board Exhibit No. 1, right on the second
18 page it says that. So --

19 JUDGE BARATTA: Okay. Just want to
20 quickly pull it up?

21 MR. SACCO: Pull up the second page.
22 Right underneath "Revision and consolidation of ASME
23 NQA-1-1989 and ASME NQA-2-1989 editions."

24 JUDGE BARATTA: And there has not been a
25 follow-on NQA-2-1989?

1 MR. SACCO: No, NQA-2 is now a superseded
2 document.

3 JUDGE BARATTA: Thank you for that
4 clarification.

5 CHAIRMAN SPITZER: All right. I think
6 we're done with these witnesses, however, why don't we
7 take a 15-minute break? During that break, Mr. Lodge,
8 you can see if you can clarify whether that
9 engineering change notice is in fact an exhibit. If
10 it is, I'll attempt to ask your questions based on it.
11 If it is not, we'll be finished with these witnesses.

12 MR. LODGE: Your Honor, we will have a few
13 additional questions.

14 CHAIRMAN SPITZER: Oh, all right. Well,
15 why don't we take a 15-minute break now anyway and
16 hopefully we will finish with all of you shortly after
17 that.

18 (Whereupon, at 10:27 a.m. off the record
19 until 10:46 a.m.)

20 CHAIRMAN SPITZER: Do you have some
21 additional questions for eh Board to ask of the DTE
22 witnesses?

23 MR. LODGE: Yes, Your Honor. A few minute
24 ago I submitted -- well, probably half an hour ago I
25 submitted a clutch of them.

1 CHAIRMAN SPITZER: Yes, we've already gone
2 through those and we've asked those that we intend to
3 from the previous set, but we have -- we'll take a
4 look at these.

5 As for the -- what was it called?

6 MR. LODGE: Your Honor, it's not -- we
7 have not marked it.

8 CHAIRMAN SPITZER: Okay. The change sheet
9 is not an exhibit? Okay.

10 All right. Mr. Smith, this question is
11 addressed to you. Your testimony as I understand it
12 here today and yesterday has been that DTE always had
13 responsibility for the safety-related work that was
14 done -- that led to the COLA application, the COL
15 application.

16 MR. PETER SMITH: That -- that -- that's
17 correct. We've had responsibility for the entire
18 application.

19 CHAIRMAN SPITZER: Now this refers to your
20 initial testimony, and I'm not sure of the exhibit
21 number. DTE's initial testimony. You know the
22 exhibit number for DTE's initial testimony?

23 MR. TYSON SMITH: DTE Exhibit 15.

24 CHAIRMAN SPITZER: Exhibit 15? Okay. If
25 we could go to page 10 of that. And this is answer

1 21. Maybe a little further out. Maybe it's earlier.
2 And you state there are no QA requirements that apply
3 prior to submittal of a COL application that is before
4 a company as an applicant. Now do you perceive any
5 inconsistency between your statement that you always
6 had responsibility and this line of testimony that
7 we've just read?

8 MR. PETER SMITH: No.

9 CHAIRMAN SPITZER: Okay.

10 MR. PETER SMITH: No, this -- this is --
11 as I explained yesterday, this is, you know, from --
12 from a standpoint of what the -- what the regulation
13 requires that we're not -- at the time we did this
14 requirements that applied to us that did not obviate
15 us from the responsibility of demonstrating that the
16 information we provided in our COL application was --
17 was conducted in a quality manner. And the way we
18 implemented that was through the use of Black and
19 Veatch and use of their Quality Assurance Program to
20 perform that work.

21 CHAIRMAN SPITZER: All right. Well, I
22 guess we'll have to decide if those positions are
23 consistent or not.

24 All right. Let's bring up Interveners 7,
25 Exhibit 7, page 14. All right. It's dated at the

1 top, I think. There's a statement here. This is the
2 email on the top of the page apparently directed to a
3 Marcia from -- well, it says, "As I understand it
4 today, Detroit Edison (DTE) does not have a QA Program
5 for the design phase of Fermi 3." And then this is
6 the highlighted language. Skip down a few sentences.
7 It says, "Our QA folks believe DTE needs to have
8 oversight of B&V in the form of a QA Program and
9 without it their application is incomplete."

10 Do you agree with this statement?

11 MR. PETER SMITH: No, I don't.

12 CHAIRMAN SPITZER: Why not?

13 MR. PETER SMITH: As I stated previously
14 I don't believe that there was a requirement that
15 applied for me to have a program in place for the
16 conduct of this work. I ensured that the work
17 submitted in support of the combined license
18 application was of -- of quality by having it done by
19 a qualified vendor under a Quality Assurance Program.

20 CHAIRMAN SPITZER: Let's go to
21 Intervener's Exhibit 3. There is a statement in here
22 -- it's a two-page document -- a statement in here
23 from a John something -- Nakoski of NRC stating,
24 "However, based on our continued review the staff
25 determined that the oversight provided by DTE was not

1 governed by a DTE QA Program meeting the requirements
2 of Appendix B."

3 Do you agree that that statement is true?
4 Maybe we could -- yes, there we go.

5 MR. PETER SMITH: That's true. For the --
6 for the work that was done prior to the -- if we're
7 referring to the period of the site investigation
8 work, we did not have a -- a -- a DTE Appendix B QA
9 Program that we applied to the work, however, the work
10 was done under Black and Veatch's Quality Assurance
11 Program.

12 CHAIRMAN SPITZER: All right. I think we
13 understand your position. Unless my colleagues have
14 anything further, we can move onto the NRC staff
15 witnesses.

16 And if NRC counsel will introduce their
17 witnesses to us and identify them?

18 MS. CARPENTIER: Certainly, Your Honor.
19 Beginning at your far right is Adrian Muniz, who is
20 the overall project manager for the Fermi 3 SER. In
21 the middle is George Lipscomb, who is the technical
22 reviewer for chapter 17, section 5 of the SER, which
23 is the review of the QA Program. And to his left is
24 Ida Rivera-Verona, who is his predecessor. She was
25 the person who first flagged this issue in the summer

1 of 2009. She's the author of some of the emails that
2 the interveners have cited. She led the inspection
3 team that did the inspection in August 2009 and she's
4 the primary author of the NOV. Mr. Lipscomb was also
5 a member of that inspection team and he was also a
6 member of the 2010 staff inspection of Black and
7 Veatch.

8 CHAIRMAN SPITZER: Since we just had them
9 out, why don't we go back to the emails that were just
10 up on the screen. Go back to Intervener's 3, if we
11 could, and we'll see if we can find that language
12 again. Yes, there we go. This language that we've
13 highlighted is however based on our continued review,
14 the staff determined that the oversight provided by
15 DTE was not governed by a DTE QA Program meeting the
16 requirements of Appendix B.

17 Mr. Lipscomb, do you still agree with that
18 -- or do you agree? It's not your document, I
19 believe. Do you agree with that statement?

20 MR. LIPSCOMB: At the time that is
21 correct.

22 CHAIRMAN SPITZER: Well, is it true today?
23 Understanding that we're referring to the pre-
24 application period. I believe that's what's intended
25 here.

1 MR. LIPSCOMB: If it's pre-application,
2 that's a correct statement.

3 CHAIRMAN SPITZER: All right. And is it
4 the staff's position that that is in your view
5 consistent with NRC requirements; that is that, there
6 need not be a DTE QA Program meeting the requirements
7 of Appendix B during that time period?

8 MR. LIPSCOMB: DTE did not have to have a
9 QA Program during that time period but they had to
10 assure that the safety-related activities met the
11 requirements of Appendix B.

12 JUDGE BARATTA: I really don't understand
13 how you can do that. Can you explain that to me?

14 MR. LIPSCOMB: Absolutely. DTE did not
15 have a program at that point, but they contracted to
16 Black and Veatch that did have a Quality Assurance
17 Program that met the requirements of Appendix B. So
18 they ensured as part of their application that those
19 safety-related activities that occurred prior to their
20 application in September of 2009 did meet the
21 requirements of Appendix B through contract names with
22 Black and Veatch.

23 JUDGE BARATTA: How much experience do you
24 have in QA?

25 MR. LIPSCOMB: I have 20 years Navy

1 experience. During that period I was the safety
2 department head in the aviation squadron. I was also
3 a quality assurance officer during that period, which
4 has direct quality assurance attributes as far as
5 inspecting, audits, qualifications of individuals.
6 I've also been at GE-Hitachi in supply chain
7 management there and worked with the quality assurance
8 members there. I also have been at the NRC, and since
9 at the NRC the majority of my job is related to
10 quality assurance, which is six years roughly.

11 JUDGE BARATTA: Okay. And the six years
12 with the NRC, is that the first time you had to meet
13 Appendix B requirements?

14 MR. LIPSCOMB: That's correct.

15 JUDGE BARATTA: And what about NQA-1?

16 MR. LIPSCOMB: That's the same.

17 JUDGE BARATTA: Okay. And are those
18 different in your background with the military?

19 MR. LIPSCOMB: They are different.

20 JUDGE BARATTA: Thank you. Isn't it the
21 basic philosophy of QA which is expressed in Appendix
22 B and NQA-1 that oversight has to be provided of any
23 QA Program?

24 MR. LIPSCOMB: As a basic tenant of QA,
25 yes.

1 JUDGE BARATTA: Then how can you say that
2 they ensured that the data and such collected by Black
3 and Veatch was in fact quality data if there was no
4 required oversight, which is I think what I said?

5 MR. LIPSCOMB: That is correct, they can
6 have assurance by other methods that the data meets
7 the requirements of Appendix B without what you'd
8 consider a full Quality Assurance Program.

9 JUDGE BARATTA: Please explain what those
10 are then in detail.

11 MR. LIPSCOMB: Explain what what are?

12 JUDGE BARATTA: Those other methods that
13 you referenced.

14 MR. LIPSCOMB: Sure. In the case of the
15 Fermi 3 plant DTE had contractual oversight over Black
16 and Veatch.

17 JUDGE BARATTA: Okay. Could you go into
18 more detail there?

19 MR. LIPSCOMB: Sure. They issued a
20 purchase order to Black and Veatch accompanied by a
21 number of quality and technical attachments and
22 requirements that laid out the requirements for the
23 work that Black and Veatch was doing. Those
24 requirements required that Black and Veatch meet the
25 requirements of Appendix B. And so through

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1 contractual methods they did do that through
2 procurement, and they supplemented that by internal
3 methods using their ND QAPD at the time for part of
4 that pre-application time. And then they supplemented
5 also by hiring an owner's engineer, and they also
6 supplemented it by doing a -- a variety of like
7 surveillance-type activities and oversight, some of
8 which might not have been formally documented.

9 JUDGE BARATTA: Are you familiar with the
10 Midland decision that was cited yesterday?

11 MR. LIPSCOMB: I'm not.

12 JUDGE BARATTA: Okay. You can provide or
13 require something be done, but how do you ensure that
14 it was in fact done? What you've given me are
15 basically requirements that they do things. In your
16 mind how did DTE ensure that they were done?

17 MR. LIPSCOMB: Well DTE required Black and
18 Veatch to meet certain standards. As I outlined in my
19 testimony and just a moment ago, they put certain
20 methods in place to verify and control the contractor.
21 And then -- that's for pre-application. And then
22 after they submitted the application they continued
23 the oversight. They completed audits and the did
24 other activities. So from a DTE perspective, that's
25 what I'm aware of that they did.

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1 MS. RIVERA-VERONA: Can I add?

2 JUDGE BARATTA: Sure.

3 MS. RIVERA-VERONA: During the inspection;
4 if we can bring up the Exhibit 2 of the staff, we did
5 mention that during our inspection we did look at the
6 surveillances and activities that were completed prior
7 to the -- if you can go -- let me look at the page
8 number.

9 JUDGE BARATTA: Did you say Exhibit 2?

10 MS. RIVERA-VERONA: Yes, that's our
11 inspection report. And during the inspection report
12 we did mention that we did look at the audits and
13 surveillances. There were a total of eight of them.
14 If you can go to page 10, to the bottom of page 10, we
15 look at all these surveillances that were performed in
16 support of the pre-application activities. And that
17 would include all the activities that were conducted
18 by Black and Veatch to verify that all the
19 requirements and contract requirements were -- were
20 done.

21 JUDGE BARATTA: And these were formed --

22 MS. RIVERA-VERONA: We look at them during
23 the inspection.

24 JUDGE BARATTA: No, I'm referring to the
25 surveillance.

1 MS. RIVERA-VERONA: It was a combination
2 between Black and Veatch and -- and DTE.

3 JUDGE BARATTA: Okay. What this says is
4 the NRC inspectors were provided eight surveillances
5 of Fermi 3 site characterization and COL application
6 activities between July 2007 and June 2008.

7 MS. RIVERA-VERONA: Yes.

8 JUDGE BARATTA: In one audit, right.

9 MS. RIVERA-VERONA: And if you can go to
10 -- to the next page?

11 JUDGE BARATTA: Okay.

12 MS. RIVERA-VERONA: I'm sorry.

13 CHAIRMAN SPITZER: If I may interject for
14 a section. To make sure we've got the records clear,
15 I believe the document we're talking about is NRC S2.

16 MS. RIVERA-VERONA: S2, yes. Did I say 3?

17 JUDGE BARATTA: No, you said 2.

18 MS. RIVERA-VERONA: Oh, okay.

19 CHAIRMAN SPITZER: All right. There was
20 some uncertainty.

21 JUDGE BARATTA: Yes. Okay. Now these
22 surveillances though were conducted not by DTE, but by
23 B&V. That's on the top of the next page. Or five of
24 the eight surveillances, particularly the ones that
25 were done between July 2007 and June 2008.

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1 MS. RIVERA-VERONA: Yes.

2 JUDGE BARATTA: Okay. So the staff
3 considers those to be adequate --

4 MS. RIVERA-VERONA: We do.

5 JUDGE BARATTA: -- even though it's not
6 DTE doing the work? It's a contractor for DTE?

7 MS. RIVERA-VERONA: Yes.

8 MR. LIPSCOMB: If there's not a specific
9 regulatory requirement that defines the amount of
10 oversight that's required.

11 JUDGE BARATTA: There's some pretty strong
12 language in NQA-1 though. And you cite NQA-1, don't
13 you, in the staff Standard Review Plan.

14 MR. LIPSCOMB: That's correct, we do.

15 JUDGE BARATTA: Is there evidence that DTE
16 provided QA oversight of Black and Veatch? I guess
17 this is Michigan. I think MI stands for Michigan. Is
18 that correct?

19 MS. RIVERA-VERONA: Yes.

20 JUDGE BARATTA: Do you have any evidence
21 of how they ensured that Black and Veatch Michigan
22 when they did these surveillances did the correctly?

23 MR. LIPSCOMB: I -- I have not reviewed --
24 other than what's in the inspection report that the
25 inspection team reviewed, I haven't reviewed anything

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1 specific to Black and Veatch Michigan.

2 JUDGE BARATTA: And yet you feel that that
3 satisfied the requirements that are cited in your
4 Standard Review Plan from NQA-1?

5 MR. LIPSCOMB: If we could bring up the
6 staff Exhibit No. 1, S1, which is our SER for Section
7 17.5? And there's a section in this that refers
8 specifically to the conclusions reached for pre-
9 application activities, and that would be on page 17-
10 35. There it is. Staff conclusions for pre-
11 application activities. And in that paragraph right
12 there we outline our conclusions and how we reached
13 them.

14 And if you look in that paragraph,
15 probably about the fifth -- fifth line down where it
16 starts -- the beginning line is -- is "Internal
17 oversight. If you go to the end of that, it says,
18 "The staff also determined that the applicant is not
19 required to implement a QA Program in compliance with
20 the criteria of Appendix B, however, the applicant did
21 establish applicable portions of an Appendix B program
22 by creating the ND QAPD and by creating procedures for
23 implementing those elements of the ND QAPD associated
24 with the activities planned in support of the review
25 and acceptance of the Black and Veatch COLA

1 application work product." And then it goes on.

2 JUDGE BARATTA: All right. When was the
3 ND QAPD put into effect?

4 MR. LIPSCOMB: In early two-thousand -- in
5 the early two-thousand of eight.

6 JUDGE BARATTA: Were there activities that
7 were covered under the Section 2.20 of the -- yes,
8 sorry -- the quality assurance, ASME quality assurance
9 requirements? Were they done prior to 2008?

10 MR. LIPSCOMB: Well, that would be a -- an
11 applicant question for the exact timeline, but my
12 understanding is that there were geology-type
13 activities that were safety-related that occurred
14 prior to the application.

15 JUDGE BARATTA: But you say for activities
16 occurring before the date of the COL application. Now
17 doesn't that include that time period?

18 MR. LIPSCOMB: Yes, it does.

19 JUDGE BARATTA: Then don't you know
20 whether or not they were done prior to 2008?

21 MR. LIPSCOMB: Well, I know that they
22 would have had to have been done if they supported
23 what was submitted with the original application. I
24 did not review the geology portions of the
25 application, and I would assume if you're referring to

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1 the sections of work that were done by Black and
2 Veatch in 2007-2008 time frame, then, yes, they would
3 have been pre-application.

4 JUDGE BARATTA: But they would be covered
5 by your statement though?

6 MR. LIPSCOMB: Covered by what?

7 JUDGE BARATTA: Your statement that
8 appears for activities occurring before the date of
9 the COL application it appears.

10 MR. LIPSCOMB: That -- that's correct.
11 They would be covered.

12 JUDGE BARATTA: Well, they were not
13 covered though then by the ND QAPD. So is your
14 statement correct in that chapter?

15 MR. LIPSCOMB: Well, the -- you got to I
16 guess keep in perspective that the activities were
17 being conducted by Black and Veatch as a contractor to
18 Detroit Edison. So if the activities occurred before
19 Detroit Edison put in place internally the
20 programmatic controls of their ND QAPD, then you're
21 correct they would be before the ND QAPD. But it is
22 possible that some of those activities occurred after
23 that document was put in place at the Detroit Edison
24 facility. Because there's a time period that's before
25 the activities were going out and there's a time

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1 period after prior to application.

2 JUDGE BARATTA: Yes, I understand that
3 from the previous testimony. What I'm trying to get
4 at though is this paragraph that you referenced
5 appears to imply that all of the activities that
6 occurred before the day of the COL application; I'm
7 just reading what you wrote, were done under the ND
8 QAPD Program, and that doesn't seem to be correct.

9 MR. LIPSCOMB: Well, I -- I think that
10 what is being said here is that the ND QAPD was put in
11 place at some point prior to the application and that
12 -- that the staff's position is that they did not have
13 to have a QA Program in compliance with Appendix B in
14 place at -- at DTE at that point. But they did
15 establish some procedures, and that's one example of
16 procedures that they put in place.

17 CHAIRMAN SPITZER: But I take it under
18 your interpretation they didn't have to do that.
19 Every bit of work done before the COL application was
20 submitted could have been done by Black and Veatch
21 with not oversight review whatsoever by the license
22 applicant? Is that correct?

23 MR. LIPSCOMB: They were -- they were not
24 required to have a Quality Assurance Program in place,
25 but they are required to make sure each and every one

1 of the safety-related activities met the requirements
2 of Appendix B in order to get a license from the NRC.

3 CHAIRMAN SPITZER: By what are they
4 required to do that under your interpretation? Can't
5 be Appendix B because under your interpretation
6 Appendix B doesn't apply. So there must be some other
7 regulatory requirement that -- that requires what you
8 just said. What is it?

9 MR. LIPSCOMB: Well, if I said -- if I
10 said Appendix B didn't apply, I misspoke. Appendix B
11 does apply. I said that they -- Detroit Edison is not
12 required to have a Quality Assurance Program in place
13 prior to the date of their application.

14 JUDGE BARATTA: I really find your
15 position to be very, very troubling. I can't
16 understand how somebody can meet NQA-1, which is quite
17 clear you feel they must meet based on your testimony,
18 based on the Standard Review Plan, etcetera, without
19 having some elements of a QA Program in place.

20 MR. LIPSCOMB: If possible can we pull up
21 our revised Notice of Violation, which would be NRC
22 Exhibit S5?

23 JUDGE BARATTA: That's the reply to the
24 Notice of Violation, is it not? Is that what you
25 meant?

1 MR. LIPSCOMB: It should be -- I believe
2 it's S5. It's -- can you go down one more? It's
3 dated -- no, that's not correct. I'm sorry S6,
4 please. Well, then it's S4?

5 MS. RIVERA-VERONA: That's the revised.

6 MR. LIPSCOMB: Is that the revised one?
7 What's the date on it?

8 MS. RIVERA-VERONA: June 4th.

9 MR. LIPSCOMB: Yes, if you'll look -- go
10 down to where we talk about violation, the first
11 violation.

12 CHAIRMAN SPITZER: This is 6?

13 MR. LIPSCOMB: That's S4. Try S4, page --
14 page No. 3. That's the one. A little further. Page
15 -- there must be another 3 a little further on. Keep
16 going. There we are. Okay.

17 In this section, this is the -- the
18 reissued Notice of Violation A. And in the section
19 that begins there with "specifically" and continues
20 from there on. It talks specifically about exactly
21 what we're talking about, what needs to be in place.
22 It says, "In the sense Black and Veatch was a DECo
23 contractor performing safety-related activities after
24 they were required to have the activities complying
25 with NRC requirements as of their date of

1 application." And that's why we retracted the first
2 violation was because they were cited for -- for
3 omissions and deficiencies prior to the date of
4 application.

5 JUDGE BARATTA: So you're saying there was
6 no requirement for them to have in place anything
7 prior to September 18th, 2008?

8 MR. LIPSCOMB: They were -- they were not
9 required to have a Quality Assurance Program in place.

10 JUDGE BARATTA: Then how do you meet the
11 requirement that's in Section 2.20 of NQA-1?

12 MR. LIPSCOMB: They contractually
13 delegated that to Black and Veatch who met that
14 requirement.

15 JUDGE BARATTA: But you just said a few
16 minutes ago that a good QA system requires oversight.
17 Can you delegate responsibility?

18 MR. LIPSCOMB: They maintain they had
19 responsibility during the period.

20 JUDGE BARATTA: How?

21 MR. LIPSCOMB: Because they are the
22 applicant.

23 JUDGE BARATTA: At that time they weren't
24 the applicant.

25 MR. LIPSCOMB: That's correct, they were

1 not an applicant until they filed their --

2 JUDGE BARATTA: Then how did they maintain
3 responsibility?

4 MR. LIPSCOMB: How did they maintain their
5 responsibility?

6 JUDGE BARATTA: To ensure to meet 2.20 of
7 NQA-1.

8 MR. LIPSCOMB: They contractually had
9 Black and Veatch do that for them through the Black
10 and Veatch --

11 JUDGE BARATTA: Can you delegate
12 responsibility, yes or no, in a QA Program?

13 MR. LIPSCOMB: They -- they delegated
14 meeting the Appendix B requirements to their
15 contractor. They maintained their responsibility.

16 JUDGE BARATTA: So they delegated the
17 authority relative to a QA Program to Black and
18 Veatch. Is that what you're saying?

19 MR. LIPSCOMB: They delegated the
20 requirements to meet the Appendix B requirements and
21 if applicable the NQA-1 requirements to a vendor that
22 had an Appendix B NQA-1 Program in place.

23 JUDGE BARATTA: And how did they ensure
24 that they complied with that?

25 MR. LIPSCOMB: They used a combination of

1 contractual requirements and contractual oversight.
2 They hired an --

3 JUDGE BARATTA: Well, that's what I'm
4 trying to find out. What's the contractual oversight
5 that they did?

6 MR. LIPSCOMB: They issued a purchase
7 document that required the vendor to meet those
8 requirements. And then they at that point -- after
9 that point they put in place parts of QA Program, the
10 ND QAPD Program as they established their program in
11 establishing the application. At any point prior to
12 when they filed the application they could have
13 decided not to file an application even though they
14 were conducting activities.

15 JUDGE BARATTA: But the point is they did
16 decide to file it and therefore they had to meet the
17 requirements for sub-surface investigations that are
18 in 2.20 of NQA-1. And from what you've told me, I
19 could go out tomorrow and contract with somebody that
20 has it and forget about it until they decide to submit
21 the application. And that doesn't seem consistent at
22 all with NQA-1.

23 MR. LIPSCOMB: Well, I -- I understand
24 what you're saying, but my understanding was that
25 meeting -- and the specific example you gave of

1 meeting the requirements of 2.20, that that was
2 required with their contractor Black and Veatch, and
3 Black and Veatch met that requirement.

4 JUDGE BARATTA: How do you know that? How
5 did DTE know that without having some elements of a QA
6 Program in place, which you told me they didn't have,
7 nor were they required to have?

8 MR. LIPSCOMB: Well, they provided
9 documentation. At the time of the inspection we
10 asked, I guess not the specific question you're asking
11 about -- but at the time of the inspection we asked
12 those kinds of questions. And that was part of the
13 reason that they were issued the initial Notice of
14 Violation from the NRC. They contested those findings
15 and we consulted within the NRC to determine what --
16 what the basis was for issuing those enforcement
17 actions and it was determined that we could not issue
18 those enforcement actions, but that did not relieve
19 the responsibility for DTE as part of the licensing,
20 part of the application to ensure each and every one
21 of those requirements were met.

22 And they did that through contractual
23 means at that time and continuing on to using their
24 QAPD which went in time -- in place at the time of
25 their application. And they proved to the NRC as part

1 of the licensing process, which we issued a number of
2 RAIs related to exactly these pre-application
3 activities, to give us assurance that every one of
4 those safety-related requirements were met through
5 their method they -- they chose to use.

6 CHAIRMAN SPITZER: You seem to be saying
7 that there -- it almost sounds as if there are two
8 versions of Appendix B, one that applies during the
9 pre-application period where there doesn't have to be
10 an applicant's QA Program but they have to meet all
11 Appendix B requirements through their contractor, and
12 there's a second version of Appendix B that applies
13 once the application is filed which requires that the
14 applicant in fact have its own QA Program. Am I
15 summarizing your position correctly?

16 MR. LIPSCOMB: That's incorrect. There's
17 one version of Appendix B.

18 CHAIRMAN SPITZER: If there's one, then
19 how can -- if you can't be an applicant until you
20 actually file an application, it would seem to me that
21 Appendix B doesn't apply at all during the pre-
22 application period. Right?

23 MR. LIPSCOMB: No, because if they're
24 conducting activities, they need to make sure that
25 those activities met the requirements of Appendix B.

1 CHAIRMAN SPITZER: Well, as I read
2 Appendix B, it requires an applicant. That seems to
3 be the staff's position. Am I wrong about that?

4 MR. LIPSCOMB: They don't have to have the
5 full -- the Quality Assurance Program until they're an
6 applicant, but it doesn't relieve them of the
7 responsibility as -- applying for a license as a part
8 of that licensing review, making sure that all the
9 safety-related activities, whether they occur prior to
10 application or after application, still met the
11 requirements of Appendix B.

12 CHAIRMAN SPITZER: Right. What I would
13 like you to provide me is a citation to whatever you
14 say in the Code of Federal Regulations says what you
15 just said. Maybe if you can't do that here today your
16 counsel may be able to do it in closing argument.

17 JUDGE BARATTA: Well, I think we're going
18 to have to have a little discussion with counsel on
19 this, because I think this is -- I find it an
20 appalling interpretation by the staff and I'm very
21 troubled by it.

22 CHAIRMAN SPITZER: Let me go back to
23 Exhibit -- this is Intervener's Exhibit INT S5, and I
24 believe we're on page -- no, this is not -- all right.
25 I think this is the same. And this is an email from

1 Aida Rivera-Verona to Jerry Hale, and the last
2 sentence says, "At this time;" this is June 4, 2009,
3 "the applicant is not providing an applicant's QA
4 Program for these activities as required by
5 52.79(a)(25)." I take it that's 10 CFR 52.79(a)(25).

6 Now the way I read that last sentence it's
7 saying 52.799(a)(25) does require an applicant's QA
8 Program. Do you disagree with that? Let me start
9 with you, Mr. Lipscomb since --

10 MR. LIPSCOMB: Well, I think you have to
11 put in perspective when this email came out, and this
12 was in June of 2009 before we went to Black and
13 Veatch, or before we went to Detroit Edison and before
14 we had more knowledge as to what they were doing in
15 their Quality Assurance Program. This was in the very
16 early stages of beginning the review of their
17 application, and questions were coming up from the
18 staff as to what they were doing as far as controlling
19 their activities. So there was mentions of Black and
20 Veatch, there was mentions of Detroit Edison within
21 their application and it was -- staff at the time
22 didn't understand how they were controlling activities
23 at that time and previous to that time, previous to
24 the application.

25 So there was a series of phone calls that

1 happened to try to determine what was going on within
2 the Quality Assurance Program. So putting it in the
3 perspective that that's in the very early stages
4 before we had time to collect more information, before
5 we had time to even go on site and to talk to them
6 about what was happening, before we issued a Notice of
7 Violation in part for activities brought -- that
8 occurred prior to their application, before that was
9 contested and then retracted and reissued by the NRC
10 staff which occurred well after 2009 June -- you have
11 to put that in perspective that this is very early in
12 that stage and what you're seeing is -- is discussions
13 within the NRC staff that's trying to understand what
14 Detroit Edison was doing.

15 CHAIRMAN SPITZER: Well, I understand that
16 part, but I really was more -- maybe I didn't make the
17 question clear enough. I was more focused on the fact
18 that according to this email 10 CFR 52.79(a)(25)
19 requires an applicant's QA Program. That hasn't
20 changed, has it?

21 MR. LIPSCOMB: No.

22 CHAIRMAN SPITZER: So and that applicant's
23 QA Program that's required by 52.79(a)(25) applies to,
24 among other things, design work, the safety-related
25 design work that's included in the application,

1 doesn't it?

2 MR. LIPSCOMB: Can I take a look at the
3 citation?

4 CHAIRMAN SPITZER: Certainly.

5 MR. LIPSCOMB: Thank you.

6 CHAIRMAN SPITZER: We have it here. I
7 don't know if it's -- got a copy?

8 MR. LIPSCOMB: So 52.79 goes over the
9 contents of the application. And in part (a)(25) it
10 talks about the description of the Quality Assurance
11 Program applied to design and to be applied to
12 fabrication and -- and other areas and meeting the
13 requirements of Appendix B, that the description of
14 the Quality Assurance Program just include a
15 discussion of how the applicable requirements of
16 Appendix B have and will be satisfied. So that has to
17 do with what they're submitting as part of the
18 application.

19 So at the time when we were discussing
20 this, it was not clear to the staff what they had
21 submitted, how that met Appendix B and how it was a
22 complete Quality Assurance Program that would meet all
23 these requirements as set out in 52.79(a)(25). So it
24 was part of the submission is what we were trying to
25 understand. And so when you see the email at this

1 time, the application is not provided in applicant's
2 QA Program for these activities. We were trying to
3 understand how what had been submitted was -- was
4 complete as part of the application.

5 CHAIRMAN SPITZER: All right. I
6 understand all that, but I'm focusing on the
7 interpretation that you've been providing us, and it
8 seems to me, again, looking at the last sentence which
9 you have in front of you, I take it, of 52.79(a)(25),
10 the description of the Quality Assurance Program for
11 a nuclear power plant must include a discussion of how
12 the applicable requirements of Appendix B to 10 CFR
13 Part 50 have been -- well, I guess I should emphasize
14 the words "have been" and will be satisfied including
15 a discussion of how the Quality Assurance Program will
16 be implemented. So I take that to mean Appendix B
17 applies to the information included in the applicant's
18 final safety analysis report which is submitted at the
19 time the application is filed. Correct?

20 MR. LIPSCOMB: At the time the application
21 was filed, at this time we were trying to establish
22 how that met that requirement, yes, you're correct.
23 And this was part of the initial discussion within the
24 staff to try to do that.

25 CHAIRMAN SPITZER: Right. You're not

1 really -- my question simply relates to what this
2 provision 52.79(a)(25) requires, not what you were
3 looking at as far as the particular application at
4 this time. I read this to say Appendix B to Part 50
5 applies with full force to the information that's
6 included in the final safety analysis report submitted
7 with the application if it's safety-related. There's
8 no if, ands or buts. It applies with full force at
9 that time just as much as it does after the
10 application is filed. Do you disagree with that?

11 MR. LIPSCOMB: Can you please repeat it
12 again? I'm sorry.

13 CHAIRMAN SPITZER: I read this provision
14 52.79(a)(25) to require the final safety analysis
15 report, safety-related information in the final safety
16 analysis report including design information that's
17 safety-related to comply with Appendix B to 10 CFR
18 Part 50 just as much as any information that might be
19 submitted after the application is submitted if it's
20 safety-related. Do you agree or disagree?

21 MR. LIPSCOMB: When they submit their
22 application, they have to have a program in place that
23 meets the Appendix B at that point that they submit
24 and become an applicant. If it's prior to that point,
25 there's still a requirement to meet Appendix B

1 requirements. What I'm saying is the -- the umbrella
2 of the Appendix B Program doesn't have to be in place
3 prior to that application. They need to ensure all
4 the activities still meet Appendix B, but the
5 individual DTE Program in this case does not have to
6 be complete. They still have to meet the Appendix B
7 requirements. And that is part of eh review that we
8 do is to ensure that those requirements are met,
9 whether it's through inspection or whether it's
10 through licensing.

11 CHAIRMAN SPITZER: Isn't one of the
12 Appendix B requirements that the applicant retain
13 responsibility -- and I'll find the precise language
14 in a minute here. We'll be with you in a minute.

15 MR. TYSON SMITH: Are you looking for this
16 colored book?

17 CHAIRMAN SPITZER: Yes. Never mind, we
18 got it here.

19 MR. TYSON SMITH: Nine-sixty-nine, the
20 first column?

21 CHAIRMAN SPITZER: I was looking at the
22 wrong one. Okay.

23 The language I'm referring to; this in 10
24 CFR Part 50, Appendix B, "The applicant shall be
25 responsible for the establishment and execution of the

1 Quality Assurance Program. The applicant may delegate
2 to others such as contractors, agents or consultants
3 the work of establishing and meeting the Quality
4 Assurance Program or any part thereof, but shall
5 retain responsibility for the Quality Assurance
6 Program."

7 That would seem to mean to me that the
8 applicant must be actively involved in retaining
9 responsibility during the pre-application phase,
10 assuming Appendix B applies in some manner. Do you
11 disagree?

12 MR. LIPSCOMB: Appendix B does apply pre-
13 application and post-application.

14 CHAIRMAN SPITZER: So the applicant must
15 retain responsibility during the pre-application
16 phase?

17 MR. LIPSCOMB: But the applicant is not an
18 applicant until they apply.

19 CHAIRMAN SPITZER: So how do we make sense
20 of your interpretation that -- it seems to lead to the
21 completely irrational result that something that
22 doesn't exist -- if Appendix B applies, the applicant
23 has to retain responsibility. But you're telling me
24 there is no applicant in the pre-application phase, so
25 we just seem to be left with a totally incoherent

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1 version of this regulation. It somehow applies but
2 doesn't apply.

3 MR. LIPSCOMB: Well, Appendix B applies
4 pre and post-application.

5 CHAIRMAN SPITZER: Maybe I should save
6 this for your counsel.

7 JUDGE BARATTA: Yes, I think that would be
8 best.

9 MS. CARPENTIER: Just to clarify, the
10 distinction between the applicant pre and post-
11 application is not at the core of the staff's
12 argument. That's more DTE's argument in testimony.
13 And we frame it in a different way, which we can
14 discuss as needed.

15 CHAIRMAN SPITZER: It will be needed.

16 JUDGE BARATTA: It sure seemed like it was
17 in that anyway.

18 MR. TYSON SMITH: Along those lines I
19 think there's a distinction between enforcement
20 authority, which is part of what this NOV is about,
21 and licensing requirements, which is what, you know,
22 DTE has demonstrated that it retained responsibility
23 by, among other things, requiring that B&V have an
24 Appendix B Program and apply that to site
25 investigation activities.

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1 CHAIRMAN SPITZER: Yes, I mean I guess our
2 problem is how do you have an Appendix B Program
3 without an applicant if that's really true that there
4 is no applicant in the pre-application period? But
5 let's not debate that now. We have plenty of time to
6 talk about that.

7 JUDGE BARATTA: Why don't we let Randy go
8 for --

9 JUDGE CHARBENEAU: No.

10 CHAIRMAN SPITZER: Well, I mean I
11 certainly agree there's a distinction between
12 enforcement and regulatory requirements, but --

13 MR. TYSON SMITH: Well, I guess any vendor
14 that -- like B&V that has an Appendix B Program,
15 they're not applicants. They have a program that is
16 consistent with Appendix B. And that's what we're
17 talking about here. The information that was
18 developed, was it developed under a program that's
19 consistent with Appendix B and that is designed to
20 ensure the quality of the information that's in the
21 application?

22 MR. LODGE: Your Honor, this might be --

23 MR. TYSON SMITH: That's precisely what
24 that --

25 MR. LODGE: -- appropriate for closing

1 statement. I'm not sure it's appropriate at this
2 point. This is a fact finding --

3 JUDGE BARATTA: We're going to have more
4 than closing statements, I take it.

5 MS. CARPENTIER: That's fine.

6 JUDGE BARATTA: So, let's go back. Could
7 you explain the relationship between Appendix B and
8 NQA-1?

9 MR. LIPSCOMB: Appendix B is the
10 regulatory requirement. NQA-1 is -- certain versions
11 of NQA-1 are more detailed documents that might in
12 some cases meet the requirements of Appendix B. So
13 there are certain versions of NQA-1 that would provide
14 more details.

15 JUDGE BARATTA: Let's say the 1994
16 version.

17 MR. LIPSCOMB: Yes, the -- the staff has
18 found that the 1994 version of NQA-1 meets the
19 requirements of Appendix B.

20 JUDGE BARATTA: And do you use that during
21 your review to determine the sufficiency of a QA
22 Program?

23 MR. LIPSCOMB: During the review we use
24 the Standard Review Plan, and in this particular case
25 with the Detroit Edison application the NEI template

1 that they were following was also used. We were
2 comparing what they submitted to the NEI template. So
3 those two items.

4 JUDGE BARATTA: Okay.

5 MS. RIVERA-VERONA: And if I can add, the
6 SRP does use the NQA-1-1994.

7 JUDGE BARATTA: That was my next question.
8 Thank you.

9 Let's see. That's where I get into
10 trouble though, because you keep saying that in your
11 Standard Review Plan, okay, I'm going to look at what
12 they're doing against NQA-1 and NQA-1 seems to apply
13 to information that was generated prior to them
14 becoming an applicant. So there seems to be this
15 circular logic that exists there.

16 MR. LIPSCOMB: Well, NQA-1, the -- DTE
17 chose in this case to follow NQA-1-1994. That is one
18 method acceptable to the staff. There are other
19 methods that you could as a applicant choose to meet
20 the requirements of Appendix B, but you still have to
21 meet the requirements of Appendix B. And in this case
22 they chose to use NQA-1-1994. So they --

23 JUDGE BARATTA: Well, what I'm trying to
24 get at is how do you tie that all together if Appendix
25 B, because they're not an applicant, doesn't really

1 apply? Okay? So and yet you're saying it does apply
2 because, you know, you have to ensure the quality of
3 the data that's in the FSAR, which is clearly out of
4 Appendix B.

5 MR. LIPSCOMB: Appendix B does apply.

6 JUDGE BARATTA: Okay. All right. Then if
7 they use NQA-1 to meet that and NQA-1 has these
8 requirements to ensure that the data that's used in
9 the FSAR is of sufficient quality, then how can you
10 say that they don't have a QA requirement prior to
11 them becoming an applicant? Because it seems like
12 once they become an applicant, then work that they did
13 prior to becoming an applicant has to be done under a
14 QA Program.

15 MR. LIPSCOMB: Well, I think it's
16 important to -- to understand the distinctions between
17 a QA Program and making sure that all the safety-
18 related activities met regulatory requirements. And
19 if the -- Detroit Edison is -- is not required to have
20 a Quality Assurance Program in place prior to the date
21 of their application for that application, that does
22 not relieve the necessity to meeting -- ensuring that
23 all the safety-related activities meet Appendix B
24 requirements as part of that licensing process and as
25 part of the review that the NRC goes through. And I

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1 think that's the method that they've chosen to
2 demonstrate that those -- all those activities have
3 met Appendix B requirements by delegation to Black and
4 Veatch and under their program which met those
5 requirements.

6 JUDGE BARATTA: All right. So they do
7 have a quality requirement?

8 MR. LIPSCOMB: Appendix B has to be met
9 for pre and post-application activities if they're
10 safety-related activities.

11 JUDGE BARATTA: Okay. And I guess I still
12 haven't seen in your documents, other than in
13 reference to the Black and Veatch Michigan office,
14 which is still not DTE, where they kept this sense of
15 responsibility which is required under any -- I don't
16 care how you try to meet QA, but it's required.
17 That's one of the fundamental tenets, if you like.
18 And I think you agree with you, is that correct, that
19 it's a basic tenet that whoever is having the work
20 done has to have responsibility for ensuring the
21 quality of that work?

22 MR. LIPSCOMB: DTE had responsibility for
23 ensuring that the requirements were met.

24 JUDGE BARATTA: Okay. And I'm trying to
25 get at exactly how they did it. You told us, well,

1 it's contractual. Okay. Well, let's get more
2 specific. And I haven't heard yet what the specifics
3 are that in your mind have -- we heard what DTE said.
4 I want to hear in your mind, you know, how you were
5 able to make that statement that appears in Chapter 17
6 of the FSAR that was cited a little while ago.
7 Because you do reference the ND QAPD, but that didn't
8 exist prior to 2008, I believe. And work was done
9 prior to 2007, correct?

10 MR. LIPSCOMB: Well, I -- there was at
11 that time frame -- I think we just went over this
12 discussion, but, yes, during that time frame work was
13 being done --

14 JUDGE BARATTA: Right.

15 MR. LIPSCOMB: -- prior to application.

16 JUDGE BARATTA: Okay. So how did they
17 meet -- I want specifics of how they met the retained
18 responsibility for the quality of the work that was
19 being done by Black and Veatch. And you said it's
20 contractual. Okay. Can you tell me what they did in
21 your mind to do that?

22 MR. LIPSCOMB: What they did to ensure
23 that -- it -- that the requirements were met is they
24 issued a contract to Black and Veatch that required
25 them to meet those particular requirements in their

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1 contract. And then they began to establish their
2 program which would guide whatever work product was
3 coming from Black and Veatch under those contractual
4 requirements with the knowledge at that time that
5 Black and Veatch had a program, an NQA-1 Appendix B
6 Program, that could meet those requirements. And then
7 as they accepted work product, prior to the
8 application to -- the basis of the application is they
9 accepted work product. They had established their ND
10 Q-- QAPD to guide those specific activities, but the
11 ND QAPD did not guide the geological work that had
12 happened previously. That was guided and controlled
13 under the Black and Veatch Program.

14 And so at that point they submitted an
15 application and as part of that application their
16 Quality Assurance Program description, or QAPD, went
17 into effect.

18 JUDGE BARATTA: How did they meet the
19 requirement under Appendix B to retain responsibility
20 of the quality of the work that was being done by
21 Black and Veatch other than you put a clause in the
22 contract? I mean if you go back to Midland, one of
23 the issues that was raised there was you can have the
24 paperwork there, but if you don't follow through with
25 actions, it's worthless.

1 MR. LIPSCOMB: Well, I'm not -- not
2 familiar with the Midland example, but I believe the
3 example you read right out of Appendix B said an
4 applicant. And again, it goes back to were they an
5 applicant at the time that those activities were going
6 on, whether -- whether they under their program --
7 whether they under their program would have to apply
8 a program. And I think that if you look at the actual
9 activities that were conducted, the safety-related
10 activities -- to my knowledge, all of them were
11 conducted under the Black and Veatch Program to the
12 requirements specified by Detroit Edison to meet
13 Appendix B and to meet NQA-1 requirements. And that
14 they -- they were done to those -- those activities
15 did meet those requirements and that forms the basis
16 of what was submitted to the NRC as part of the
17 Detroit Edison application. So they assured that the
18 activities met Appendix B, not by their own program.
19 They ensured that the activities met Appendix B
20 through a contractor with the appropriate program that
21 met those requirements.

22 JUDGE BARATTA: But how --

23 MR. LIPSCOMB: They will establish --

24 JUDGE BARATTA: How did they ensure that
25 Black and Veatch was in fact complying with their

1 Appendix B QA Program?

2 MR. LIPSCOMB: Well, they outlined to the
3 inspection group what their methodology was and they
4 considered NUPIC audits, which I think were in
5 previous testimony. They considered their response to
6 proposal and their current qualifications at that time
7 when they issued the contract, which would have been
8 2006-2007 period. So at that time that what's they
9 considered. After that they went on to do other
10 activities including hiring an owner's engineer, which
11 was prior to the application, to conducting
12 surveillances. They did an audit of Black and Veatch
13 that was after the application was filed. So there
14 were other activities that they did after the contract
15 and after the application was filed. So those are all
16 activities that go into that.

17 The -- the NRC looked at what the Detroit
18 Edison Program was doing as part of the inspection.
19 There was early site audits that were conducted in
20 2007, which we've discussed, that the NRC was a part
21 of. And we also went and as a separate issue
22 inspected the Black and Veatch Program as a -- a
23 routine vendor inspection. So we not only as the NRC
24 as part of our oversight had the licensing and what
25 was submitted as part of RAI responses, we had the

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1 inspection of both Detroit Edison and Black and
2 Veatch. So we used both together to reach the staff
3 conclusion that the Appendix B requirements were met
4 even if Detroit Edison did not have a program prior to
5 the application.

6 JUDGE BARATTA: So you do now agree that
7 Detroit Edison had to do something other than simply
8 say, okay, Black and Veatch has a program? You just
9 told me that there was what I'll call oversight,
10 correct? Because this is not explained in your
11 discussion about the conclusions of the pre-
12 application activities. In fact, I think that appears
13 to me to be somewhat misleading because you rely
14 strictly on the fact that there was an ND QAPD there.
15 At least that's what I see in that 17-35 paragraph
16 that you cited earlier.

17 MR. LIPSCOMB: We did not rely on the ND
18 QAPD. That was part of what they did. It was
19 mentioned that they had that in place, but that was
20 not relied upon. They relied on their subcontractor
21 Black and Veatch and their program as part of the
22 contracting for eh Appendix B -- meeting the
23 requirements of Appendix B and NQA-1. That was --
24 that was the primary method, and then other things
25 were put in place as they went.

1 MS. RIVERA-VERONA: For the geotechnical
2 activities.

3 MR. LIPSCOMB: For the early geotechnical
4 activities.

5 JUDGE BARATTA: Right, that's what's in
6 question are those. All right. I understand your
7 position, I think.

8 CHAIRMAN SPITZER: If DTE could exercise
9 satisfactory control through contractor oversight
10 before the COL application was actually submitted,
11 then why after the submission date does it suddenly
12 become necessary that the applicant develop an
13 Appendix B Program, or have an Appendix B Program?

14 MR. LIPSCOMB: Well, once -- once they're
15 an applicant, there are a large number of requirements
16 that go in place. So I think we've discussed quite a
17 few of them. So I guess it gets into when you become
18 an applicant more activities need to be in house, I
19 guess we would say, that they would need to have the
20 program in place to guide those activities. At that
21 point they would have to as an applicant.

22 CHAIRMAN SPITZER: Well, just --

23 MR. LIPSCOMB: And --

24 CHAIRMAN SPITZER: Sorry. Go ahead.

25 MR. LIPSCOMB: No, I was saying that

1 there's -- there's two parts to it: There's the
2 enforcement part as to whether you can issue a Notice
3 of Violation, for instance, for something that --
4 while they're not an applicant, which is the reason
5 that we retracted the NOV, but there's still the
6 requirement to meet Appendix B, whether it's pre or
7 post-application.

8 CHAIRMAN SPITZER: Are you familiar with
9 the requirements of the regulations and in 10 CFR 52.5
10 dealing with employee protection?

11 MR. LIPSCOMB: Well, I don't have the
12 words in front of me, but I'm generally familiar with
13 them.

14 CHAIRMAN SPITZER: Are those enforceable
15 by the NRC before a COLA has been received by eh NRC?

16 MR. LIPSCOMB: Well, the decision of
17 whether something is enforceable is -- is determined
18 by our Office of General Counsel and our Office of
19 Enforcement. So if it's a situation that's not a
20 standard situation, which in this particular case that
21 might be the case, that would have to be decided as to
22 whether those particular regulations required.

23 Now you're referring to 52.5 specifically?

24 CHAIRMAN SPITZER: That's what this
25 question refers to, yes.

1 MR. LIPSCOMB: Which is the employee
2 protection requirements?

3 CHAIRMAN SPITZER: I believe so.

4 MR. LIPSCOMB: And it gives kind of a long
5 list of who it applies to; I could read it if you
6 like, but it does say an applicant for a license. So
7 it would -- in my mind would apply at the time that
8 they become an applicant.

9 CHAIRMAN SPITZER: But not before?

10 MR. LIPSCOMB: Well, that's my
11 interpretation and my -- my opinion, but Office of
12 General Counsel and Office of Enforcement would have
13 to make their decision on any particular Notice of
14 Violation or any type of citation for something. But
15 that would be my interpretation, the way I read that.
16 But to be said, if there were, as we brought up, a --
17 a situation where an employee wanted to enact parts of
18 the employee protection, when they apply for an
19 application, they become an applicant. So at that
20 point certainly that would apply.

21 MS. RIVERA-VERONA: If I can add, if -- if
22 a -- if an employee raises concern about application
23 before the staffs -- NRC staffs receive an
24 application, there is nothing we can enforce. There
25 is nothing we -- we can do at a time. We don't have

1 the application. We don't have anything to base it
2 on. So we would have to hold it until we get an
3 application and then verify any -- any issues that
4 were raised at that time.

5 CHAIRMAN SPITZER: All right. Let's bring
6 up INTS 009. And somewhere in here is the statement
7 that --

8 MR. LODGE: Your Honor, it's the lower --

9 CHAIRMAN SPITZER: Yes, this -- no, I
10 think it's -- well, no, I think it's the -- are you
11 referring to the last -- the statement, "This issue
12 puts into question the quality of the overall
13 application?" At least that's the first part of your
14 question that I have in front of me. I take it this
15 is -- who is the author of this?

16 MS. RIVERA-VERONA: I am.

17 CHAIRMAN SPITZER: All right. And what
18 issue are you stating puts into question the quality
19 of the overall application?

20 MS. RIVERA-VERONA: We were -- at the time
21 we were questioning on how they -- how we understood
22 they were meeting the requirements of Appendix B. And
23 since we didn't have that explanation on how those
24 requirements were met, then the overall application
25 would be in question.

1 CHAIRMAN SPITZER: Okay. The issue as I
2 see it here is whether they're meeting the requirement
3 of 52.79 --

4 MS. RIVERA-VERONA: Which is how it's --
5 the requirement --

6 CHAIRMAN SPITZER: Let me finish the
7 question.

8 MS. RIVERA-VERONA: Okay.

9 CHAIRMAN SPITZER: 52.79(a)(25).

10 MS. RIVERA-VERONA: Yes, which is, you
11 know, how the requirements of Appendix B were met.
12 And at the time we didn't understand how those were
13 met. And if we didn't understand, we can get those
14 clarified. Then the overall application would be
15 under question.

16 CHAIRMAN SPITZER: All right. What
17 specific concerns about quality did you have at that
18 time?

19 MS. RIVERA-VERONA: Can you repeat the
20 question?

21 CHAIRMAN SPITZER: What specific concerns
22 about quality did you have at that time?

23 MS. RIVERA-VERONA: It was really the
24 siting activities that were performed before the
25 application was submitted.

1 CHAIRMAN SPITZER: Okay. And what
2 specific concerns did you have about the quality of
3 that information?

4 MS. RIVERA-VERONA: That it was actually
5 performed under a QA Program, under Appendix B QA
6 Program.

7 JUDGE BARATTA: Yes, we just heard that
8 there's no requirement to perform it under an Appendix
9 B QA Program. I guess I find that very confusing.

10 MS. RIVERA-VERONA: If -- if I can add,
11 from what I understand that my colleague here said,
12 the requirements will have to be met, but it was not
13 required to be -- it was the applicant to have that
14 program in place. We did have to verify that the
15 requirements of Appendix B were met for all the safety
16 activities that were used to develop the application.

17 JUDGE BARATTA: Do you know of any other
18 instance in which a nuclear power plant that has begun
19 the NRC application process toward a commercial power
20 operating license has informed the NRC that they were
21 not actually an applicant until the very day their
22 completed application was turned into the NRC in final
23 form?

24 MS. RIVERA-VERONA: I'm not aware.

25 MR. LIPSCOMB: I'm not aware either.

1 JUDGE BARATTA: Because Black and Veatch
2 was not and is not today to my knowledge an applicant
3 for a license from the NRC for a nuclear power plant,
4 under what legal authority is the NRC able to approve
5 Black and Veatch's authority to develop and implement
6 the alleged QA Program for Fermi Unit 3?

7 MR. LIPSCOMB: Well, we don't approve the
8 Black and Veatch Program. They were contracted with
9 to create that for the Detroit Edison project. We
10 don't approve them to do any work. That's a
11 contractual agreement that they have with in this case
12 Detroit Edison.

13 CHAIRMAN SPITZER: So if I understand what
14 you just told me correctly, the NRC never approved the
15 Black and Veatch QA Program for use at Fermi 3?

16 MR. LIPSCOMB: Well, Black and Veatch is
17 a vendor, so we do not approve the QA Programs for
18 vendors. There are some circumstances, for instance
19 like General Electric-Hitachi, which is a vendor and
20 also an applicant, which might be a -- a separate
21 issue. But Black and Veatch being a vendor, we do not
22 approve their Quality Assurance Programs. We -- we
23 review and approve as part of a licensing decision the
24 applicant's program, in which case Detroit Edison. We
25 do not approve Black and Veatch as a vendor.

1 CHAIRMAN SPITZER: All right. If I'm
2 understanding your testimony and system again
3 correctly, there seems to be another distinction then
4 between the pre-application and post-application
5 period, at least if it's done the way it was done
6 here. During the pre-application process, as I
7 understand your testimony, for safety-related work it
8 would not be done under a QA Program actually approved
9 by the NRC, if it's done by a contractor such as Black
10 and Veatch operating under their own program.

11 MR. LIPSCOMB: That's correct. So
12 activities prior to application were done under the
13 Black and Veatch Program, which is not specifically
14 approved by the NRC, but is audited by other agencies
15 to meet Appendix B requirements. And in -- in our
16 review of the application material that was submitted,
17 we found that the safety-related activities that
18 occurred prior to Detroit Edison submitting their
19 application were done under the Black and Veatch
20 Program.

21 CHAIRMAN SPITZER: No, all I was talking
22 about was the fact that that program itself wasn't --
23 the Black and Veatch Program was not actually approved
24 by eh NRC.

25 MR. LIPSCOMB: That is correct.

1 CHAIRMAN SPITZER: Whereas after the
2 application is submitted all work will have to be done
3 under an applicant's QA Program that you would
4 approve. Is that correct?

5 MR. LIPSCOMB: As proof as far of
6 licensing, yes, sir.

7 CHAIRMAN SPITZER: And that would continue
8 through, as I understand it, the life of the project.
9 In other words, even though a licensee is not
10 technically an applicant, they're still subject to
11 Appendix B requirements? Is that correct?

12 MR. LIPSCOMB: Yes, they are.

13 CHAIRMAN SPITZER: So the entire 40-year
14 period of construction and operation of a plant post-
15 submission of the application is going to be governed
16 by a QA Program approved by eh NRC?

17 MR. LIPSCOMB: To my knowledge, yes.

18 CHAIRMAN SPITZER: But pre-application
19 there's no requirement that the QA Program used to
20 develop the information submitted in the application
21 be itself approved by the NRC?

22 MR. LIPSCOMB: That -- yes, that's
23 correct.

24 JUDGE BARATTA: Wait. Referring to your
25 testimony you did explain the citation that heard --

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1 and let me see, it's in the response to -- could we
2 bring up Mr. Lipscomb's testimony? The direct. And
3 go to question -- it's -- page 15 I think is the -- I
4 think it's page 15. It should be question 22. It
5 starts on 14 I guess and goes on to 15. I'm looking
6 at the discussion that's on the next page.

7 See where it says -- go up to the top of
8 the page. All right. One, two, three, four, five,
9 six. There's a discussion that appears about the
10 sixth line down. It says, "First these replaced the
11 first three violations and cited the applicant for
12 failure to perform the evaluation of Black and Veatch
13 Quality Assurance Program and adequately document that
14 the basis for the qualification of Black and Veatch to
15 perform safety-related Fermi 3 CO activities as of
16 September 18th, 2008."

17 Could you just elaborate a little bit on
18 what you meant by that discussion there?

19 MR. LIPSCOMB: Yes, that we had retracted
20 the violation. The original violation that was issued
21 was specifically for activities prior to their
22 application date, so that was retracted. But there
23 was a new violation that was issued specifically
24 beginning on September 18th, 2008, which is their
25 application date, for failure to perform an evaluation

1 of eh Black and Veatch Quality Assurance Program and
2 document the basis for qualification of Black and
3 Veatch. And that's important because at that point
4 the Quality Assurance Program description went into
5 effect and they were relying on Black and Veatch still
6 to do safety-related activities and in this case did
7 not have documentation to show how they reached the
8 basis that Black and Veatch was qualified to do that.

9 They did respond to that violation and
10 outlined what they did to -- to meet that requirement,
11 which the NRC accepted as part of the closure for the
12 violations.

13 JUDGE BARATTA: Could you summarize that
14 response, what they said?

15 MR. LIPSCOMB: Basically what they said
16 that they did is they outlined the activities that
17 were conducted early in the project prior to
18 application, the contractual requirements that they
19 put in place. They cited the -- the audit they did of
20 Black and Veatch, which was after the application just
21 before our inspection. They cited that that
22 particular audit looked at the qualification for Black
23 and Veatch to do the activities then and previously
24 and it specifically looked at safety-related
25 activities before -- before the application was

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1 submitted. And in their -- their audits they had no
2 particular findings as far as any concern for Black
3 and Veatch doing and being qualified to do those
4 activities at that point as part of that audit. So
5 that's kind of a summary of what they respond. That's
6 part of our -- one of our exhibits, if you wanted to
7 look at all the details of that.

8 JUDGE BARATTA: I don't need to bring it
9 up now, but just for eh record which exhibit is that?

10 MR. LIPSCOMB: That would be the DTE
11 response dated May 26th, 2010, which would be our
12 Exhibit --

13 MS. CARPENTIER: S5.

14 MR. LIPSCOMB: S5? Yes, it is. Yes, S5.
15 Thank you.

16 JUDGE BARATTA: All right. Thank you.

17 JUDGE CHARBENEAU: Just so I can
18 understand again, did you find at least that the DTE
19 audit of July 2009 was partially responsive to the
20 Notice of Violation that came out in 2010?

21 MR. LIPSCOMB: Well, that -- that was part
22 of the basis they used to -- to explain the
23 qualification of Black and Veatch and to respond to
24 our Notice of Violation. So they -- in their response
25 they used a number of different things that they cited

1 as their basis for qualification, and some of them was
2 prior to the inspection. In that case the audit was
3 just prior to the inspection. So that was part of it.

4 CHAIRMAN SPITZER: Mr. Lipscomb, have you
5 read 10 CFR 50.2, and in particular the definition of
6 an applicant as anyone applying for a license?

7 MR. LIPSCOMB: I haven't read it lately.

8 CHAIRMAN SPITZER: All right. Well, let
9 me refresh your recollection, if I can take a minute
10 here, or perhaps your counsel can give you a copy.
11 It's 50.2, the definition section.

12 MR. TYSON SMITH: Just a point of
13 clarification. That particular definition wasn't in
14 existence at the time of the site investigation
15 activity was being performed. That's a new definition
16 as of --

17 CHAIRMAN SPITZER: All right. Well, I
18 think it was August of 2007, according to --

19 MR. TYSON SMITH: Correct.

20 CHAIRMAN SPITZER: All right. And the
21 site investigation work was completed prior to August
22 of 2007?

23 MR. TYSON SMITH: It was wrapping up at
24 that time.

25 CHAIRMAN SPITZER: Do you have the

1 definition in front of you?

2 MR. LIPSCOMB: I see what you're referring
3 to, yes.

4 CHAIRMAN SPITZER: Now assuming for
5 whatever time period that's relevant to this case that
6 this definition may have applied, are you saying that
7 DTE became an applicant only on the day the
8 application was actually filed under this definition?

9 MR. LIPSCOMB: Well, DTE became an
10 applicant on the day the application was filed. I'm
11 not totally familiar with this particular definition
12 and I -- if you'd like me to read it, I can, but --

13 CHAIRMAN SPITZER: No, that's all right.
14 I'm not going to ask you to come up with a definition
15 or an understanding sitting here today. I mean we
16 have a number of other questions here. I think my
17 inclination at this point though is to -- they're
18 mostly really questions that I think more
19 appropriately go to counsel. And I should say we have
20 questions from both interveners and eh applicant.
21 Probably most of them, if not all of them, are
22 appropriate for counsel. I'm not sure we're going to
23 get much further pursuing these issues with the
24 witnesses here, who I think have already made clear
25 what their understanding is.

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1 MR. LODGE: Your Honor, there is one line
2 of questioning I wonder if you'd reconsider, and that
3 is the matter of the public meeting being canceled.

4 CHAIRMAN SPITZER: All right.

5 MR. LODGE: Please?

6 CHAIRMAN SPITZER: Well, let me ask this:
7 Mr. Lipscomb, did you determine that the owner's
8 engineer from the Michigan office of Black and Veatch
9 had an acceptable level of independence such that DTE
10 could rely on their work?

11 MR. LIPSCOMB: I did not make that
12 specific determination, but I really did not
13 specifically try to make that determination.

14 CHAIRMAN SPITZER: All right. Let me see
15 if I can find this other question.

16 MR. LIPSCOMB: I will say that our
17 understanding of the relationship was that they were
18 basically independent groups within Black and Veatch,
19 a large corporate structure, that were indeed tied
20 together at a very high level, but they were
21 functionally independent.

22 CHAIRMAN SPITZER: All right. Let's bring
23 up INTS 005. All right. Now, Mr. Lodge, can you
24 enlighten me as to what specific part of this
25 document --

1 MR. LODGE: Yes, the top email referenced
2 in the very first line to contemplating having a
3 public meeting. Then in the bottom email there's
4 reference to Mr. Smith of DTE, I believe -- or wait or
5 minute. No, maybe -- I'm sorry. I think it must be
6 04. Did I give the correct exhibit number?

7 CHAIRMAN SPITZER: Well, let me just ask
8 this:

9 MR. LODGE: Okay.

10 CHAIRMAN SPITZER: This is for Ms. Rivera-
11 Verona. What happened to the public meeting that was
12 apparently contemplated in the top email?

13 MS. RIVERA-VERONA: Yes, so -- so at that
14 time we had two options, either do the public meeting
15 or do the inspection. We went with the route -- the
16 staff went with the route of -- of the inspection
17 understanding that we have a more enforcement action
18 and it would be a more -- you know, adequate at the
19 time to get a response in writing from the applicant
20 at that time on how they resolved those issues.

21 CHAIRMAN SPITZER: All right. Let me just
22 check one other -- let's bring up -- I believe it's
23 Exhibit NRC S1. It should be the final Safety
24 Evaluation Report, chapter 17. And let's go to page
25 17-37. Excuse me, 17-35 and 36. Let's go back a

1 little.

2 All right. And you see the section
3 labeled, "Staff Conclusions for Pre-Application
4 Activities" and the following text, two paragraphs?
5 Want to take a minute and look those over, unless you
6 have them committed to memory?

7 Have you had a chance to look them over?

8 MR. LIPSCOMB: I've looked them over, yes.

9 CHAIRMAN SPITZER: Okay. Now let me ask
10 you to assume -- I know this is not the staff's
11 position, but let me ask you to assume that the Board
12 were to conclude that Appendix B requirements,
13 including the requirement for the applicant to have in
14 place a QA Program during the pre-application phase
15 applies here. Would you still have reached the
16 conclusions that are in those two paragraphs?

17 MR. LIPSCOMB: If -- if the Board makes
18 the conclusion that an Appendix B Program was required
19 at Detroit Edison during the pre-application
20 activities?

21 CHAIRMAN SPITZER: Yes.

22 MR. LIPSCOMB: Would it change our
23 conclusion?

24 CHAIRMAN SPITZER: Yes, the two paragraphs
25 you've just looked at, staff's conclusion for pre-

1 application activities.

2 MR. LIPSCOMB: Yes, I -- I understand.
3 Our review and this particular section for the
4 conclusions of pre-applications activity are based on
5 what I've outlined, and that was in part due to the
6 inspection and part due to -- due to RAI responses
7 where the staff position was that they -- DTE did not
8 have to have the program in place prior to the
9 application. So if the Board's position was something
10 other than, that would be something that we would have
11 to take up on a licensing side to see how we would
12 handle that within the licensing realm. And this
13 particular part of the section is -- is complete, but
14 the application review is not complete. So there
15 would probably be a way to do that. And I will ask
16 Adrian if he knows how that works.

17 MR. MUNIZ: If you're ruling come
18 basically in contradiction to our staff's
19 determination here, I believe we should -- it will be
20 something that will be taken back by the staff. But
21 then this is our conclusions on time. So we will
22 present these conclusions to the Commission that will
23 be the route that I believe will be taken. But maybe
24 the counsel will be better prepared to answer such a
25 question.

1 MR. TYSON SMITH: The question was perhaps
2 worded in a way that wasn't entirely clear. As I
3 understood the question, it was would the NRC staff
4 still conclude even if there was a violation that the
5 applicant provided -- that second sentence, that the
6 applicant provided adequate assurance that the
7 requirements had been met for safety-related
8 activities?

9 CHAIRMAN SPITZER: I'm not sure that's the
10 question I asked, but that's a good question. So why
11 don't you try and answer that one?

12 (Laughter.)

13 MR. LIPSCOMB: So you're -- you're asking
14 me --

15 CHAIRMAN SPITZER: No, he's asking it.

16 (Laughter.)

17 MR. TYSON SMITH: Well I guess the
18 question is whether there was a violation or not,
19 would the staff agree that the information in the
20 application -- that you have reasonable assurance that
21 the information in the application meets the
22 requirements of Appendix B?

23 MR. LIPSCOMB: The staff has reached the
24 conclusion that the information in the application is
25 -- the safety-related activities were outlined as part

1 of the application met the requirements of Appendix B.
2 Yes, we reached that conclusion, and that was
3 independent of any Board decision.

4 CHAIRMAN SPITZER: Of course there is no
5 Board decision yet, but I guess if the Board were to
6 reach a different conclusion than you did about the
7 requirements of Appendix B, and specifically that
8 there must be an Appendix B applicant's program in
9 place during the pre-application period, are you still
10 satisfied that the work submitted in the COLA for the
11 pre-application period; and again, for safety-related
12 activities, is sufficient for you to act on the
13 application?

14 MR. LIPSCOMB: Well, I think any new
15 information that would put into question the quality
16 of the information in the application or the control
17 of the activities that occurred as part of submitting
18 that application -- if anything were brought up that
19 would question that and question our review, I think
20 that would be something that we would need to discuss
21 in the staff using our general -- our -- our Office of
22 General Counsel to see what would be the appropriate
23 response to that. So I -- I think that's your
24 question is -- is --

25 CHAIRMAN SPITZER: Okay.

1 MR. LIPSCOMB: -- if you were to make that
2 decision, what would we do?

3 CHAIRMAN SPITZER: Right.

4 JUDGE BARATTA: As long as we're at this
5 page, I have a question actually on the preceding
6 page, 17-34. I believe in your testimony you make
7 reference to commercial oversight activities. Can we
8 find that on there, in that section? All I have is --
9 I think on that page. It should be commercial
10 oversight of contracted activities for activities
11 occurring before the date of the COL application.
12 Somewhere on that. Maybe I've got the wrong
13 reference. Let me see if I can find it. Why don't
14 you go ahead.

15 Sorry, I had the wrong page reference.
16 That 17-35 where it's highlighted there refers to
17 commercial contract oversight. That's referring to
18 what you mentioned earlier about the contract, or is
19 it referring to something else?

20 MR. LIPSCOMB: That's referring to what I
21 was talking about earlier, that they had issued a
22 contract with the requirements in the contract to meet
23 Appendix B and regulatory requirements.

24 JUDGE BARATTA: Okay. Thank you.

25 CHAIRMAN SPITZER: All right. I think

1 we've covered all that we cover with these witnesses
2 that's going to be helpful to the Board at this point,
3 unless any of my colleagues have any further
4 questions. So we're going to take a break now. I
5 don't know how long counsel think they need to prepare
6 for closing argument.

7 JUDGE BARATTA: Well, I think we wanted to
8 more than just closing argument, don't we? Do we want
9 to have them discuss their interpretation of Appendix
10 B as part of that?

11 CHAIRMAN SPITZER: Yes. Closing argument
12 including -- we're going to obviously have some
13 discussion of legal issues related to the
14 interpretation of NRC regulations, which will be part
15 of your closing argument. Any thoughts as to how much
16 time you would like to prepare for that in light of
17 what you've heard this morning?

18 MS. CARPENTIER: Do you have specific
19 questions you'd like us to consider in the closing
20 argument?

21 CHAIRMAN SPITZER: Well, I think you've
22 heard them.

23 MS. CARPENTIER: Okay.

24 CHAIRMAN SPITZER: A number of them. Not
25 every one.

1 JUDGE BARATTA: Yes, I think maybe you'd
2 better read the Midland decision, too, because I may
3 have questions on that.

4 MS. CARPENTIER: I would think a couple of
5 hours at this point.

6 CHAIRMAN SPITZER: Well, it's 12:20.
7 Would 2:30 be sufficient? 3:00.

8 MR. TYSON SMITH: Yes, that would be
9 sufficient.

10 CHAIRMAN SPITZER: Mr. Lodge?

11 MR. LODGE: Your Honor, yes, that would be
12 fine. Are you saying we are -- that the questioning
13 is concluded?

14 CHAIRMAN SPITZER: The questioning is
15 concluded for 15 and 8. And we don't have any
16 proprietary issues, I believe, left over. So we're
17 done with witness questions. We're going to move onto
18 final arguments.

19 All right. So let's allow these witnesses
20 to step down. Thank you for your testimony. And we
21 will reconvene at 2:30.

22 (Whereupon, at 12:21 p.m. off the record
23 until 2:28 p.m.)

24 CHAIRMAN SPITZER: All right. Let's go
25 back on the record. We're here finally to hear

1 closing argument in this proceeding on Contentions 8
2 and 15. My thought, although I'm open to other
3 suggestions, is we start with interveners on both
4 Contentions 8 and 15. In opening statements we had
5 DTE go second. Here though it might be more
6 appropriate for the staff to go second, unless there's
7 some objection to that.

8 MS. CARPENTIER: None here, Your Honor.

9 MR. TYSON SMITH: None here, Your Honor.

10 CHAIRMAN SPITZER: And then DTE will be
11 the last we will hear from.

12 Unless there's anything else we need to go
13 over, why don't we go ahead and start with Mr. Lodge?

14 MR. LODGE: Thank you. May it please the
15 Licensing Board and parties and opposing counsel, my
16 argument to Contention 8 is going to be mercifully
17 short. We don't believe that there are adequate
18 assurances in place for mitigation to occur for
19 several reasons: One of them is institutional memory.
20 It looks to us as though Fermi 3 is receding into the
21 increasingly distant future. If as much as 5, 6 or 10
22 years pass before there's any serious move at
23 construction, we're greatly concerned that between
24 that and austerity Michigan and the decreasing
25 availability of governmental resources to enforce

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1 mitigation schemes such as DTE proposes, that it will
2 all be lost in the wash. Therefore, we believe that
3 the evidence shows more than sufficiently that the
4 mitigation arrangements for the eastern fox snake are
5 not adequate.

6 Turning to the major issue at hand --

7 CHAIRMAN SPITZER: Before you move on to
8 that, just one question on 8. As both the staff and
9 DTE emphasized, the FEIS, the final version of the
10 FEIS, unlike the draft version, adopted what they
11 refer to as essentially a bracketing approach. That
12 is, they put forward their belief as to what's likely
13 to happen, that more likely than not the impacts to
14 these species will be small or minor. But they also
15 consider the possibility that it would be consistent
16 with your prediction that maybe things won't work out
17 as planned, either negation won't be required or it
18 will be changed, or it won't be successful as might be
19 hoped, in which case they say the impacts might rise
20 to the level of moderate. Is there anything you can
21 point me to in the evidence we've received during this
22 proceeding that would be inconsistent with their upper
23 bound finding of moderate impacts?

24 MR. LODGE: Of moderate? No. No, there's
25 not. However, moderate is a term and a classification

1 characterization chosen by the NRC. We believe that
2 without any evidence to cite to you other than things
3 that I've read and learned over the years, that
4 mitigation is oftentimes a disastrous undertaking with
5 very few positive results, that effectively you don't
6 transfer actual examples of a species. You simply
7 bulldoze them out and hope that by creating new
8 habitat elsewhere there will be more ingress and
9 inroads.

10 So it's a very difficult call, especially
11 to call it moderate. It may be disastrous for the
12 snake and for the habitat, because it really speaks to
13 the issue of destruction of wetlands, which of course
14 has been an historic nearly 100 percent loss game
15 around the lower Great Lakes.

16 CHAIRMAN SPITZER: Okay. Why don't you go
17 ahead to Contention 15?

18 MR. LODGE: Thank you. In light of the at
19 times astonishing testimony this morning, the
20 interveners believe that it is especially true that
21 there cannot be a genuine supported finding by the
22 Licensing Board that there's reasonable assurance that
23 the quality assurance arrangements for proposed Fermi
24 3 have been adequate and that the implications flowing
25 from that inadequacy point badly and troublingly into

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1 the future.

2 A lot of testimony from all parties
3 focused upon the soil stabilization issue and the
4 adequacy in fact of the foundation for proposed Fermi
5 3. We believe that on that matter alone there is
6 sufficient doubt created as to the adequacy of quality
7 assurance, the reliability of the data that was
8 gathered and the calculations made that this Board
9 cannot in good conscience make the requisite finding
10 of approval effectively.

11 There are a number of things --

12 CHAIRMAN SPITZER: Hold on a minute. Let
13 me just --

14 MR. LODGE: Okay.

15 CHAIRMAN SPITZER: -- ask you back up a
16 minute. I'm looking at our ruling. This is LBP-10-09
17 where we originally admitted this contention, and we
18 had a fair amount to say about what the ultimate
19 standard was in terms of evaluating a quality
20 assurance contention. Among other things; and this is
21 quoting the Appeal Board decision in Diablo Canyon,
22 specifically 18 NRC issuances at 1345, and we said,
23 "Perfection in plant" -- quoting the Appeal Board, we
24 said, "Perfection in plant construction and the
25 Facility Construction Quality Assurance Program is not

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1 a precondition for a license under either the Atomic
2 Energy Act or the Commission's regulations. What is
3 required instead is reasonable assurance that the
4 plant is built, can and will be operated without
5 endangering the public health and safety."

6 Do you agree that that's what our ultimate
7 decision should be based on?

8 MR. LODGE: Absolutely.

9 CHAIRMAN SPITZER: Very good. Okay.
10 Proceed.

11 MR. LODGE: And we believe in light of the
12 evidence that you cannot in good conscience make a
13 finding of reasonable assurance.

14 CHAIRMAN SPITZER: Okay. Why not?

15 MR. LODGE: Well, for a variety of
16 reasons: Number one, there's the enormous confusion,
17 real or apparent, within the NRC as to when the
18 liability for a working and binding quality assurance
19 program attaches. That has more implications than
20 just getting your paperwork right.

21 For instance, on the matter of soil
22 stabilization, I believe I heard testimony yesterday
23 from the combined DTE and Black and Veatch witnesses
24 to the effect that when they did what we call
25 backfill, retrospectively trying to catch up, make

1 sure that quality could be assured, they didn't
2 investigate the raw data and calculations from the
3 soil borings. They looked at the arrangements and the
4 subsequent computations that had been made and the
5 inferences from that data. They did not go back into
6 the raw material.

7 Therefore, on that basis alone it's been
8 demonstrated that the problem here is apparently time
9 and money for DTE. We believe money is probably not
10 a real serious issue. We also believe in light of the
11 motion for the new contention alleging statements by
12 DTE that suggest that Fermi 3 is not a front burner
13 construction project that there's plenty of time for
14 this to be done right. I am reminded of the legendary
15 Hall of Fame basketball player Coach John Wooden who
16 said, "If you don't have time to do it right, when
17 will you have time to do it over?" And I think that
18 that thought is the essence of what must guide quality
19 arrangements for the Fermi 3 project.

20 The Fermi 3 project, it should be noted,
21 has been titled by DTE from the start as the Fermi 3
22 licensing project. The very core problem is the ad
23 hoc nature of the way quality assurance has been
24 handled, ad hoc in that the aim was to get a license,
25 possibly for commercial trafficking later, but the aim

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1 is to get the license. DTE has consistently
2 throughout the last half-dozen -- well, four or five
3 years stated they don't have immediate plans to build,
4 most recently confirmed just last week in official
5 press notices. There's plenty of time to do this
6 right now that we know that it has been done wrong.

7 The problem, or I should say the crux of
8 quality assurance is taking responsibility. There was
9 an awful lot of back and forth, especially with the
10 NRC witnesses this morning, about who's responsible
11 and when? Remember that the problem that -- the weak
12 point underlying the interpretation that supports
13 having quality assurance a requirement only on
14 September 18th, 2008 is that everything before that is
15 suspect in that it is not necessarily subject to sworn
16 requirements. It is not necessarily subject to
17 criminal punishments, which are an important parameter
18 in ensuring that applicant behavior; and not just this
19 applicant, but the applicant behavior in general in
20 the nuclear industry, adheres to some harsh standards
21 for safety.

22 The fact that there are no whistle blower
23 protections suggests that the significance of this is
24 national. The significance of a finding that it's
25 okay to backfill, that it's okay to go back and do

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1 kind of a quick superficial revaluation to make sure
2 that the paperwork was right and that the application
3 only begins on September 18th, 2008 when a COLA is
4 filed is pretty disturbing. It's disturbing as is
5 suggested in the Bellefonte case. It's disturbing
6 because if the corporate culture seizes upon the
7 ability to do whatever you need to do up to the point
8 of actually submitting the COLA, then there's a host
9 of potential problems with that. With an ad hoc
10 project, which is get me a license, we will pay you to
11 get us a license, then there is a serious tangible
12 real threat to quality assurance as providing again
13 the parameters for any of these major undertakings.

14 Hyman Rickover said that responsibility is
15 a unique concept. You can share it with others, but
16 your portion is not diminished. You can delegate it,
17 but it's still with you. If responsibility is
18 rightfully yours, no evasion, ignorance or passing of
19 blame can shift the burden. That's what Appendix B
20 seems to say, that DTE's responsibility from whatever
21 point de facto they knew they were applying. And they
22 knew they were applying well before September 2008.
23 They knew they were applying and they were
24 undertaking, or at least having B&V undertake
25 activities toward that project, that licensing

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1 project.

2 CHAIRMAN SPITZER: Let me ask you this,
3 Mr. Lodge: Can you walk me through your argument? I
4 take it your position is when the staff and DTE say,
5 well, we're not an applicant until we actually file
6 the application, you don't agree with that, at
7 least --

8 MR. LODGE: Correct.

9 CHAIRMAN SPITZER: -- interpreting
10 Appendix B?

11 MR. LODGE: Absolutely not. Right.

12 CHAIRMAN SPITZER: So why don't you walk
13 me through Appendix B and explain how you would
14 interpret the term "applicant" and why?

15 MR. LODGE: There has to be a description
16 of a Quality Assurance Program, which as Mr. Gundersen
17 said and we have tried to inquire repeatedly of
18 witnesses -- a Quality Program that attaches when the
19 applicant is applying. And we believe that the
20 definition of "applying" covers that pre-September
21 2008 span of time. They knew they were applying, and
22 thus, the FSAR requirement that there be a plan in
23 place. Sure, there should be a plan described in the
24 COLA, but it should be a plan that exists on paper and
25 in more than confused spirit in the years preceding

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1 the actual COLA submission. I don't know if that
2 answers your question.

3 The evidence is quite interesting and
4 incidentally brings me to more than a housekeeping
5 matter. The evidence in our case is very well laid
6 out in the last dozen or so pages of Mr. Gundersen's
7 first April 30th, 2013 testimony, essentially
8 beginning at page 24, which coincides with the
9 exhibits that I unfortunately submitted the Monday
10 after -- I believe it was the Monday after October
11 4th. Exhibits that were disclosed in April of 2013
12 were not proprietary and were certainly not a secret
13 from DTE or the NRC. All of the exhibits that the
14 Board has ruled out for being untimely filed roughly
15 fall between I think Exhibits 35 and 49, and we move
16 for those to be readmitted.

17 And let me tell you, a close reading of
18 Mr. Gundersen's testimony beginning on page 24 of his
19 April 30 pre-filed testimony, which footnote cites to
20 various and sundry emails and other items, is very
21 telling because it lays out the confused history and
22 in fact in some cases what we believe is conscious
23 prevarication by DTE. In particular, I'd point to
24 Exhibit 037. And incidentally, Your Honor, for the
25 record we are proffering those exhibits if it becomes

1 the Board's firm decision not to allow them in. But
2 I believe that the Board had left open the possibility
3 that if they came up in relevant circumstances at the
4 hearing that the Board would reconsider, and we
5 respectfully --

6 CHAIRMAN SPITZER: It was something like
7 if they turned out to be essential to understanding
8 the evidence in the case.

9 MR. LODGE: And I think they are
10 essential.

11 CHAIRMAN SPITZER: Well, let me suggest
12 this: I don't think it's a good idea to spend your
13 closing argument talking about exhibits that we have
14 declined to admit. Or if you want to revisit that
15 issue, you can file a motion as soon as possible after
16 the close of the hearing.

17 MR. LODGE: Okay.

18 CHAIRMAN SPITZER: And we'll see if we
19 agree with you on that.

20 MR. LODGE: Okay. But I would like to
21 point out one exhibit.

22 CHAIRMAN SPITZER: All right.

23 MR. LODGE: One of those exhibits. It's
24 037 and there's discussion of it on page 35 of Mr.
25 Gundersen's testimony. It is a 2010 internal DTE

1 slide show wherein it states in the last slide of the
2 PowerPoint, quote, "If we could wind the clock back,
3 establish a formal Quality Assurance Program much
4 earlier, implement a procurement procedure before the
5 first contract is issued, do not document procedural
6 requirements until they are already complete. If
7 only. If only DTE could turn the clock back.

8 DTE understood that they had made a
9 mistake. However it was legalistically worked out in
10 the NOV's, we believe that there was an ad hoc --
11 there's that phrase again -- an ad hoc interpretation
12 of the quality assurance obligation and that it -- as
13 I've said, if it is allowed to stand, it sets a
14 profoundly troubling national precedent that I fear,
15 we fear will come back to haunt the public and the
16 Nuclear Regulatory Commission.

17 The essence of quality assurance is to
18 trust but verify. And as we have talked about, the
19 Midland Licensing Board, the Consumer's Power
20 Licensing Board in 1973 talked a lot about how no
21 Quality Assurance Program is self-executing. We
22 believe self-executing is where you essentially make
23 some paper arrangement, but you leave the big strokes
24 and the small strokes to a contractor. The NRC
25 witness Mr. Lipscomb testified this morning, I

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1 believe, that the NRC does not approve vendor
2 commercial kinds of quality assurance arrangements.
3 If they are not the overseer, then clearly the utility
4 must be the overseer and Appendix B makes that quite
5 clear, underscores that point I think absolutely.

6 So we believe that the error here --

7 JUDGE BARATTA: Before you go further --

8 MR. LODGE: Yes, sir?

9 JUDGE BARATTA: -- could you just back up
10 for a second and I want to understand your reference
11 to the Midland case, because I did read that and I'm
12 not sure I agree that it's on point. That's why I'd
13 like you to just expound a little bit more why you
14 think it is on point.

15 MR. LODGE: Sir, I'm going to confess to
16 a certain amount of ignorance because I could not find
17 the Midland case in my researches, only the quote that
18 was used in a PowerPoint discussion that I think was
19 connected to the ASME organization. So I don't know
20 the underlying facts, but we do believe that self-
21 executing quality assurance is a misnomer and cannot
22 be allowed.

23 JUDGE BARATTA: Okay. Thank you.

24 MR. LODGE: I wonder if Exhibit 71 which
25 the interveners submitted this morning could be

1 brought up, and the first page?

2 CHAIRMAN SPITZER: I believe we admitted
3 that one, so, yes, that can go up.

4 MR. LODGE: The very first paragraph under
5 the words "insert the following information," that
6 first paragraph where Entergy is responsible for the
7 establishment and execution of the Quality Assurance
8 Program, if you read that entire paragraph, that seems
9 to be considerably at variance. And you could compare
10 it line-for-line with comparable sections within the
11 FSAR for Fermi 3. But we believe that is a fair
12 expression, and none too ironically undertaken by
13 Black and Veatch for the River Bend project.

14 CHAIRMAN SPITZER: I mean I think if were
15 DTE counsel I would say, fine, but we did assume
16 responsibility. We had our -- I don't recall Mr.
17 Smith's precise title, but we had a high officer in
18 our company looking over the work that was being done.
19 We hired a well-established competent contractor,
20 Black and Veatch, with its own QA Program that meets
21 Appendix B requirements and so forth. So we did
22 assume responsibility. What's wrong with that
23 argument?

24 MR. LODGE: What's wrong with that
25 argument would require me to plow back through Mr.

1 Gundersen's last 12 pages of pre-filed testimony
2 where --

3 CHAIRMAN SPITZER: Well, you can do that.
4 His testimony is in evidence. There's nothing --

5 MR. LODGE: Well, I know, but I don't want
6 to simply read to the Board something it can
7 certainly --

8 CHAIRMAN SPITZER: Okay. So which pages
9 should we look at then of his testimony? What
10 specific pages. This is initial testimony?

11 MR. LODGE: Yes. It's initial testimony
12 commencing on page 24. 2013 testimony. April 30th.

13 CHAIRMAN SPITZER: And this is the non-
14 proprietary, I take it?

15 MR. LODGE: Correct. Non-proprietary,
16 yes.

17 CHAIRMAN SPITZER: April 30, 2013
18 testimony of Arnold Gundersen supporting Intervener's
19 Contention 15. And pages 24 again through what?

20 MR. LODGE: Twenty-four through I believe
21 thirty-seven.

22 CHAIRMAN SPITZER: Okay. All right.

23 MR. LODGE: Among other things there's
24 evidence that -- well, on page 25, question 29, is in
25 your opinion why was DTE developing this process? It

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1 refers to a 2007 email which discusses that the goal
2 of the process is actually to avoid QA oversight, and
3 the quote there that, quote, "Peter thinks he can
4 sidestep the QA audit as we have NUPIC audits. As we
5 know, that's another utility audits he can use in
6 helping his QA Department comfort level. We will need
7 to use our QA plan."

8 There are other examples of confusion
9 including by a person who was appointed as some sort
10 of quality assurance manager. You'll have to let me
11 have a moment to see if I can find that. Mr. Ashworth
12 on page 27. It's question and answer 31. Mr.
13 Ashworth announced that he would conduct quality
14 surveillance of B&V nuclear DTE COLA activities in
15 late September of 2007. One wonders how that might
16 happen considering that DTE has stated it did not even
17 have a QA Program in place as late as October. And
18 it's sort of an interesting colloquy.

19 Give me one moment. On page 30, question
20 35, question and answer, in a DTE email dated January
21 2008 not only were clear lines of authority missing,
22 but it also is clear that any organizational knowledge
23 of the existence of a Quality Program is also lacking.
24 And it quotes email Victor to Crandell, et al.
25 However, my question is what DTE QA Program is the

1 Fermi 3 COLA being enveloped under? Is it the Fermi
2 QA Plan or is there a corporate QA Program?

3 So our response is that DTE can claim in
4 retrospect that it had some sort of responsibility.
5 The structure however was very loose. Essentially
6 it's admitted that it didn't comply with Appendix B
7 until the day it had to, according to DTE's and the
8 NRC's definition, September of 2008. We believe that
9 that is a distortion and a misinterpretation of the
10 Appendix B requirement.

11 That's all of the comments I have at this
12 point. I would like to request or at least ask for
13 clarification if in making this closing argument after
14 the other two parties have been heard that we would
15 have the opportunity to rebut.

16 CHAIRMAN SPITZER: Well, we'll give you a
17 few minutes for rebuttal.

18 MR. LODGE: Thank you.

19 CHAIRMAN SPITZER: Don't plan to go
20 through everything from start to finish again.

21 (Laughter.)

22 CHAIRMAN SPITZER: But we'll give you a
23 little time for rebuttal.

24 Staff?

25 JUDGE BARATTA: No, wait. Let me --

1 CHAIRMAN SPITZER: Sorry.

2 JUDGE BARATTA: Okay. It seems to me the
3 critical issue that is expressed in Appendix B, as
4 well as in NQA-1, is you can delegate the authority to
5 establish and operate a QA Program to somebody else,
6 but you have to be responsible for ensuring the
7 execution of that Quality Assurance Program is done in
8 accordance with the requirements of Appendix B.

9 MR. LODGE: Yes.

10 JUDGE BARATTA: Okay. Now does that
11 really mean you have to have a formal QA Program, or
12 does the word "responsibility" or the concept of
13 responsibility -- can that be achieved by other means?

14 MR. LODGE: It means you have to have a
15 real QA Program.

16 JUDGE BARATTA: Why?

17 MR. LODGE: Why? Because otherwise you
18 could substitute the word "liability" and just leave
19 it at that. The Atomic Energy Act -- Congress in
20 passing and amending the AEA recognized the inherently
21 dangerous prospect of using nuclear materials, of
22 using radioactive materials for commercial uses. And
23 so the expectation that there would be an unusual
24 amount of care taken is expressed through the
25 regulations. It has to be presumed to be expressed

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1 through the regulations.

2 This is not merely a matter of -- it's not
3 an assessment or an assignment of legal liability if
4 the train jumps off the tracks. It is a designation
5 of responsibility to keep the train on the tracks.
6 And it's inconceivable that for effectively 50 years
7 of commercial nuclear power regulatory activity that
8 in 2010 the interpretation of the quality assurance
9 responsibility becomes simply liability. Liability
10 only attaches at this particular juncture or that one.
11 Up until that point you're in open water. You have a
12 free hand. You can do whatever you like.

13 It's pretty clear that Appendix B and the
14 underlying statutory and regulatory history supports
15 the interpretation that there be a live functioning QA
16 function within the utility organization itself with
17 meaningful dotted-line authority from any delegated
18 program to top management of DTE. So it certainly
19 implies that there are some live bodies who in such a
20 large corporate organization are there working for DTE
21 as DTE employees to assure that there is quality
22 assurance.

23 JUDGE BARATTA: But what I'm saying is how
24 do you do that, because Appendix B doesn't specify how
25 you do that. It just says you have to maintain

1 responsibility for it. That's what I'm trying to get
2 at. You know, you could --

3 MR. LODGE: We don't dispute, sir, that
4 you can delegate and that you can hire contractors and
5 all that. The problem when you look at the Employee
6 Concerns Program of Black and Veatch is that it's
7 fine. They may -- and one hopes that they mean every
8 syllable of it, but the problem is is that there's not
9 -- other than a paragraph that says the employee has
10 at all times the right of recourse to just go to the
11 NRC and take their chances. But the problem with the
12 B&V Employee Concerns Program is that in the wrong
13 management it could simply be a token. It could be a
14 rather empty framework. There's not legal criminal or
15 other liability overhanging B&V because they are a
16 contracting party with DTE.

17 I don't know if that answers your
18 question. But we don't disagree that you can use
19 independent contractors, however, there must be -- and
20 I think that the expectation expressed in the
21 regulation is that the company holds the bag. The
22 buck stops some place tangible in the private sector
23 that stands to benefit from the project.

24 JUDGE BARATTA: That really isn't the
25 question here. The question is how do you demonstrate

1 responsibility as required by the regulations?

2 MR. LODGE: The NEI template is a good
3 beginning point.

4 JUDGE BARATTA: That's one possible way,
5 but are there other ways?

6 MR. LODGE: I'm not certain what Your
7 Honor is requesting or seeking. It seems to me that
8 the NEI template, which has been billed as sort of the
9 clear track, the clear path through to getting your
10 paperwork approved for being right, should be a
11 considerable approach, considerable part of the
12 approach. And in fact what happened here was Detroit
13 Edison, which was required by regulatory expectations
14 to have red flagged to the NRC that they were
15 deviating from the NEI template, did not do so. They
16 didn't notify the regulatory. What you actually have
17 here -- and I'm going beyond the scope of your
18 question. I'll stop.

19 JUDGE BARATTA: All right. Want to
20 continue? I interrupted you with --

21 CHAIRMAN SPITZER: All right. Why don't
22 we proceed onto the NRC staff?

23 MR. ROACH: Judge Spitzer, I just want to
24 make sure that it's acceptable to the Board for me to
25 present on Contention 8 and for my colleague Marcia

1 Carpentier to present on Contention 15?

2 CHAIRMAN SPITZER: That's fine.

3 MR. ROACH: Okay. I want to reiterate
4 thanks from the NRC staff to our excellent host here
5 at the Monroe County Courthouse and thanks also to the
6 ASLBP Judges and clerks for their efforts in holding
7 this hearing, to the court reporter and to the
8 parties. The staff appreciates the opportunity to
9 present its positions on Contentions 8 and 15.

10 I want to begin with a crucial point on
11 why Contention 8 should be resolved in the staff's
12 favor, and that is that the FEIS' small to moderate
13 terrestrial impact conclusion analyzes both the
14 expected scenario that the eastern fox snake
15 mitigation would be implemented as proposed as well as
16 the scenario that it would not be. It is a
17 comprehensive and conservative analysis. It considers
18 mitigation opportunities, in particular the
19 Construction Mitigation Plan for the eastern fox snake
20 and the Wetland Mitigation Plan. The interveners have
21 presented no evidence or testimony that substantively
22 disagrees with the staff's impact assessment.

23 NEPA's mandate is that agencies carefully
24 consider information concerning significant
25 environmental impacts of a proposed action, and this

1 consideration is subject to the Rule of Reason. Under
2 Robertson v. Methow all that is necessary is that
3 mitigation measures and their relevance to the impact
4 determinations be disclosed and fairly evaluated.
5 NEPA does not require mitigation to be legally
6 enforceable, fully developed or funded, but the staff
7 did extensively review the technical quality of the
8 proposed Mitigation Plans and the staff's testimony
9 demonstrated that its review exceeds the standards
10 laid out by the Supreme Court in Robertson v. Methow.

11 The staff testified about a number of
12 indicia that it used to support its determination that
13 implementation of mitigation is reasonably
14 foreseeable. These include the existence of Michigan
15 legal framework protecting the eastern fox snake,
16 MDNR's preliminary review and approval of the
17 Mitigation Plan, DTE's identification of a source of
18 funding for the Construction Mitigation Plan, and the
19 fact that the plans themselves are highly developed,
20 prescriptive and consistent with industry standard
21 mitigation plans.

22 As the staff wrote in the FEIS and in its
23 written testimony, and as witnesses for DTE
24 highlighted yesterday, the great majority of
25 potentially suitable habitat on the Fermi site would

1 not be disturbed by site preparation and construction
2 activities. I should also note that the staff took
3 into account multiple DTE site revisions that
4 minimized terrestrial impacts. Thus, while
5 approximately 197 acres of potential eastern fox snake
6 habitat would be temporarily or permanently disturbed,
7 637 acres of undisturbed habitat favorable to the
8 eastern fox snake would remain on the site even if no
9 mitigation were implemented. Because of this, a
10 viable population of eastern fox snakes would remain
11 on the western shore of Lake Erie in the vicinity of
12 the site even if no mitigation were performed. But if
13 the mitigation is performed, as the staff expects that
14 it will be, there would be a substantial net increase
15 in high-quality eastern fox snake habitat.

16 To the extent that interveners argue that
17 more information about the proposed mitigation
18 programs is needed, the NRC staff submits that more
19 information would not meaningfully contribute to
20 meeting the purposes of NEPA. More information would
21 not contribute, as the Commission has said, regarding
22 the NEPA obligations of the staff to the staff coming
23 to grips with all important considerations, not
24 details and nuances. The written and oral testimony
25 of both staff and DTE witnesses supports a conclusion

1 that the staff's compliance with NEPA was more than
2 adequate under applicable NEPA case law.

3 For this reason and the other reasons that
4 I have noted, the staff respectfully requests that the
5 Board rule in its favor and dismiss Contention 8.
6 Thank you.

7 CHAIRMAN SPITZER: Thank you.

8 MS. CARPENTIER: Okay. Turning to
9 Contention 15, I'm going to take on the easy part
10 first, and that's Contention 15B.

11 CHAIRMAN SPITZER: I'm not sure there is
12 an easy part, but --

13 MS. CARPENTIER: Contention 15B is an
14 issue that seems to be resolved. There does not
15 appear to be any remaining factual or legal dispute
16 related to the issue as the Board defined it. The
17 intervenor's witness Mr. Gundersen has stated that the
18 Fermi 3 QAPD as currently described in the COL
19 application meets Appendix B of 10 CFR Part 50. The
20 staff agrees because that QAPD was reviewed against
21 the Standard Review Plan and to the NEI template in
22 NEI 06-14A, Revision 7, and found to follow the
23 guidance. The NEI template in turn was based on the
24 1994 version of NQA-1, which has been discussed
25 extensively in this hearing. And the applicant has

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1 committed to follow NQA-1 and the NEI template in its
2 QAPD. The parties therefore appear to be in agreement
3 that the current Fermi QAPD as reviewed in the staff
4 Safety Evaluation Report meets NRC regulatory
5 requirements.

6 Turning now to the issue that was
7 discussed in almost all of the testimony offered in
8 the past few days, Contention 15A, I'd like to begin
9 with the Midland decision. We did obtain that over
10 the lunch break and read it. Assuming you meant the
11 decision in 6 AEC 182. Is that the citation you had
12 in mind?

13 CHAIRMAN SPITZER: I believe that's the
14 correct one.

15 MS. CARPENTIER: Okay. Yes. And we agree
16 with Judge Baratta that the case can be distinguished
17 on a number of factual and legal levels. It does not
18 seem to be at all what we're looking at here.

19 In that case the issue was related to the
20 QA Program in the application, comparable to the Fermi
21 3 QA Program in this case, and whether there was
22 reasonable assurance that it would be implemented in
23 practice. The self-executing terms seem to refer to
24 the distinction between a program on paper in an
25 application and a program as implemented in the real

1 world. The staff agrees with the Appeal Board in that
2 decision that a program that exists only on paper is
3 not ultimately sufficient. The activities described
4 in the Quality Assurance Program description must
5 actually take place. However, in the context of a COL
6 licensing review some projection is necessary as large
7 portions of the QAPD deal with construction and
8 operations issues that will not occur until after
9 licensing. Again, that's Contention 15B. And again,
10 it seems that all parties are in agreement that if
11 implemented that will be sufficient at those stages.

12 JUDGE BARATTA: Now let me just quick as
13 you a quick question.

14 MS. CARPENTIER: Yes?

15 JUDGE BARATTA: Suppose you have a
16 situation where you don't have the paper but you have
17 the elements of the program being executed. That
18 would not fall under the Midland decision, right?

19 MS. CARPENTIER: No. Concerning
20 preapplication activities, the factual situation in
21 Fermi is very different from the factual situation in
22 Midland because the applicant in Midland, while it
23 didn't have its construction permit yet, was carrying
24 out activities that normally require an NRC license,
25 and they were carrying these out under an exemption.

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1 They were pouring concrete which would normally be
2 done post-license in the absence of any such
3 exemption. Nowadays that would be a limited work
4 authorization and there would be a separate process
5 for granting that. It also appears, although the
6 decision doesn't say it in so many words, that the
7 activities were carried out after the application was
8 submitted, although before the permit was granted. So
9 in the kind of time period where we are now with
10 Fermi, rather than in the pre-application stage.

11 In Fermi the issue wasn't pouring
12 concrete. It was borings for sub-surface
13 investigations. Anyone can do that at any time
14 without any kind of NRC license or permit, and also
15 the activities were pre-application rather than post-
16 application, as we've discussed. That places
17 limitations on NRC's enforcement authority in Fermi
18 that did not exist in the Midland case, so the legal
19 analysis in Midland is not strictly applicable here.

20 Because the borings themselves are not
21 NRC-licensed activities to which an Appendix B Program
22 would apply, our focus is on whether the information
23 collected from those borings is reliable. We can't
24 reach back and take enforcement action for work done
25 in the field in 2007 before the application was

1 submitted, but we can ask RAIs that reach back to that
2 time in order to develop a record to support the
3 staff's conclusion. That was done here. And the
4 relevant materials are included in the record of this
5 proceeding as Staff Exhibits NRC S7, S18, S19 and S20.
6 It's these documents more so than the NOV-related
7 documents that we discussed this morning that underpin
8 the staff's conclusions regarding the pre-application
9 activities.

10 There's another factual distinction
11 because the Midland decision pointed to a series of
12 actual problems in the field that provided the
13 evidence that the QA Program that existed on paper was
14 not being implemented in practice. There's nothing
15 like that here. There's no suggestion that the B&V QA
16 Program was not implemented during sub-surface
17 investigations. Nobody has offered any evidence of
18 actual safety problems related to the sub-surface
19 investigations conducted during the pre-application
20 phase. The staff didn't find any such evidence when
21 it conducted its 2007 audit, which is described in NRC
22 S8, and that took place while those borings were
23 actually being done. And it did not find any such
24 evidence in its 2010 vendor inspection of Black and
25 Veatch, which can be found in NRC S9. Nobody else has

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1 pointed to any such evidence either.

2 We note that the interveners have alluded
3 to something that they claim might be related on a
4 teleconference that took place in December 2012. The
5 interveners stated that they were planning to file a
6 contention addressing that issue, but they haven't
7 filed any such contention and no evidence regarding
8 any such issue has been developed here.

9 It's also important to note that the
10 definition offered yesterday by Mr. Gundersen and
11 today by Mr. Lodge of self-executing QA Programs was
12 one that's run by a contractor. That doesn't come out
13 of Midland and it contradicts Appendix B Section 1,
14 Organization, which you can find on page 969 in the
15 red-bound CFR, which says that the applicant may
16 delegate to others such as contractors, agents or
17 consultants the work of establishing and executing the
18 Quality Assurance Program or any part thereof but
19 shall retain the responsibility for the Quality
20 Assurance Program. Again, that doesn't say anything
21 about the self-executing argument from Midland. It's
22 about these paper-only programs, not about use of
23 contractors. So that doesn't quite connect there.

24 As far as defining responsibility for
25 purposes of interpreting quotes like the one I just

1 read from the regulations, there is no regulation that
2 says specifically what responsibility means in the
3 context of a relying on a contractor for QA under
4 Appendix B. Ultimately DTE does have responsibility
5 in the sense that the buck stops with them. They
6 submitted the application under oath or affirmation
7 and they're the ones who will either get or not get a
8 license for Fermi 3. They took responsibility for
9 Black and Veatch's work product when it accepted their
10 work product, incorporated it into an application and
11 submitted it to the NRC.

12 The Board's questions are about an issue
13 that is linked to responsibility, but it's not that
14 sort of ultimate buck-stops-here responsibility, which
15 is how DTE kept track of the contractor's activities
16 before the ND QAPD was in place; in other words, how
17 DTE made sure that the terms of its contract with
18 Black and Veatch Kansas City were actually followed in
19 practice.

20 In the first instance DTE used its owner
21 engineer. In the second it had its own senior
22 management personnel on site. They weren't dedicated
23 QA personnel reporting to senior management. They
24 were the senior management who were there to observe
25 activities as they took place. The staff interacted

1 with DTE personnel on site during its 2007 audit of
2 the sub-surface investigation activities, and that
3 includes Peter Smith who testified here. And that's
4 documented in Exhibit NRC S8.

5 It's important to note that there were a
6 small number of activities in question and they
7 occurred over a small number of months. So it's not
8 a multi-year initiative that would normally require an
9 enormous staff, but it does appear that there were
10 people observing the activities and keeping track of
11 the contractor's activities to ensure that they were
12 following the terms of the contract. The staff then
13 and now considers the applicant's testimony regarding
14 this issue to be accurate.

15 CHAIRMAN SPITZER: Let me ask you this:
16 Let's turn to DTE Exhibit 15, and specifically page 7,
17 question 21 and the answer. And the question is what
18 NRC QA requirements apply to pre-application
19 activities? This is of course DTE's testimony and not
20 the staff's, but I'm still going to ask you whether
21 you agree or disagree. There are no QA requirements
22 that apply to submittal of a COL application; that is,
23 before a company is an applicant. Is that true?

24 MS. CARPENTIER: We strongly dislike the
25 fact that the applicant framed the issue in those

1 terms. That's not how the staff frames the issue, and
2 that applicant versus non-applicant and when they
3 become the applicant is a dispute between the
4 interveners and the applicant themselves, and it's not
5 something that the staff relies on here. It's
6 important actually just to take a step back from that
7 disagreement in order to understand the staff's
8 position, which does indeed look a little bit strange
9 when you put it in the middle of their disagreement.

10 Our main concern is --

11 CHAIRMAN SPITZER: Wait. Let me just --

12 MS. CARPENTIER: Yes?

13 CHAIRMAN SPITZER: Tell me exactly what QA
14 requirements. Walk me through the QA requirements the
15 staff believes apply, if any, during the -- to the
16 submittal of the COL application; that is during the
17 pre-application period, what those requirements are
18 and why they apply.

19 MS. CARPENTIER: Okay. We looked at the
20 activities that took place, the specific safety-
21 related activities that took place at various pre-
22 application stages and we looked at what QA applied to
23 those safety-related activities, and we do agree that
24 safety-related activities have to be carried out under
25 an Appendix B Program of some sort.

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1 Now the question is whether DTE itself
2 must have a developed program with the personnel
3 position-staffed procedures and so forth in house or
4 whether it can use contractual mechanisms and, you
5 know, surveillance and so forth in order to meet that
6 requirement.

7 CHAIRMAN SPITZER: I don't understand
8 there to be a dispute about that. In other words,
9 it's clear under Appendix B that everyone seems to
10 agree they can delegate --

11 MS. CARPENTIER: Yes.

12 CHAIRMAN SPITZER: -- under an Appendix B
13 Program. The applicant; and that seems to be a fairly
14 important term here, can delegate the responsibility
15 for the establishment and execution of a Quality
16 Assurance Program. It may delegate those functions to
17 others provided that it retain responsibility for the
18 Quality Assurance Program.

19 MS. CARPENTIER: Yes.

20 CHAIRMAN SPITZER: I mean the problem I'm
21 having is we seem to go around in a circle. You tell
22 us that Appendix B requirements apply in some
23 respect --

24 MS. CARPENTIER: Yes.

25 CHAIRMAN SPITZER: -- to the pre-

1 application period. At least I understand you to be
2 saying that.

3 MS. CARPENTIER: Yes.

4 CHAIRMAN SPITZER: But they can be
5 delegated. Then I look at Appendix B. Well, who can
6 do the delegation? An applicant. So if you're
7 telling me that DTE isn't an applicant until such time
8 as it actually files the application, the whole things
9 starts to look incoherent. Can you help me out there?

10 MS. CARPENTIER: Yes. Our main concern
11 when we withdrew part of the initial NOV was not the
12 definition of "applicant." Again, that came later and
13 that's sort of the applicant's and interveners'
14 argument. But it was what our jurisdictional hook was
15 for taking an enforcement action against DTE, whatever
16 you want to call them for the pre-application phase.
17 We do need some kind of jurisdictional hook to take an
18 enforcement action such as issuing an NOV.

19 And it's of historical interest in how the
20 record developed because some things are discussed in
21 one document and other things are discussed in another
22 document. It's of less substantive importance here
23 because, as the staff has stated in its written
24 testimony, we used the RAI process within licensing to
25 develop the record that we couldn't develop through

1 the enforcement process. So we've got two distinct
2 processes. One of them does not reach back to
3 imposing an enforceable QA requirement on DTE that we
4 enforced through NOVs.

5 CHAIRMAN SPITZER: Right.

6 MS. CARPENTIER: But the other one does
7 reach back in the sense that we can ask a lot about
8 how they ensured the quality of the data in the COL
9 and, you know, whose program did they use, how did
10 they check up on that program and how do we know that
11 the information is good? And ultimately Appendix B
12 does give us a set of guidelines and our various
13 guidance documents give us even more information about
14 what substantively they would need to show, whether or
15 not we can issue an NOV about it.

16 CHAIRMAN SPITZER: Yes. Well, I
17 understand it as an enforcement. I mean first of all
18 I guess I should say, although hopefully this is
19 obvious, this is not an enforcement case. If it
20 were --

21 MS. CARPENTIER: We agree.

22 CHAIRMAN SPITZER: -- you would be
23 bringing a case against these people over here --

24 MS. CARPENTIER: Yes.

25 CHAIRMAN SPITZER: -- DTE --

1 MS. CARPENTIER: Yes.

2 CHAIRMAN SPITZER: -- and we wouldn't have
3 interveners.

4 MS. CARPENTIER: Yes.

5 CHAIRMAN SPITZER: So maybe it's not
6 appropriate to say anything about what the law would
7 be in that context.

8 MS. CARPENTIER: Yes.

9 CHAIRMAN SPITZER: But it seems to me that
10 the reason you withdrew the NOV, as I understand it,
11 was we can't issue an NOV. We can't take an
12 enforcement action against someone that is not an
13 applicant, or for actions taken that they took during
14 a period when they were not an applicant.

15 MS. CARPENTIER: Correct.

16 CHAIRMAN SPITZER: That however doesn't
17 really answer the question necessarily of what
18 Appendix B requires during the pre-application period.
19 It could be true, for example, that you can't take
20 enforcement action for lack of compliance, I guess I
21 should call it, during the pre-application period, but
22 you can still have lack of compliance because there
23 was no Appendix B Program in effect during the pre-
24 application period. And I take it -- well, let me ask
25 you, do you agree that there must be something in

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1 effect during the pre-application period in order for
2 something consistent with Appendix B during the pre-
3 application period in order for the NRC to be able to
4 eventually grant a license?

5 MS. CARPENTIER: When you say "something,"
6 are you referring to something specific to DTE that's
7 part of their corporate structure and staffed by
8 people who get DTE pay checks?

9 CHAIRMAN SPITZER: Well, let's leave it at
10 some kind of QA Program consistent with Appendix B,
11 and we'll move onto what that would be.

12 MS. CARPENTIER: Yes.

13 CHAIRMAN SPITZER: But do you agree that
14 there must be a QA Program consistent with Appendix B
15 in effect during the pre-application period in order
16 for the reasonable assurance of public health and
17 safety requirement to be met?

18 MS. CARPENTIER: I'm saying there must be
19 some Appendix B QA Program governing safety-related
20 activities during the pre-application period.

21 CHAIRMAN SPITZER: All right. And can you
22 have an Appendix B program meeting the criteria you
23 just stated without an applicant? That's the problem
24 I'm having in a nutshell.

25 MS. CARPENTIER: Yes.

1 CHAIRMAN SPITZER: It seems to be entirely
2 circular or incoherent to say you can satisfy Appendix
3 B in the pre-application period if an applicant --
4 you're not an applicant during the pre-application
5 period.

6 MS. CARPENTIER: The way we would phrase
7 it in the pre-application period is that it's
8 consistent with Appendix B. It's got the same
9 substantive parts. It's not --

10 CHAIRMAN SPITZER: It sort of --

11 MS. CARPENTIER: -- an enforcement --

12 CHAIRMAN SPITZER: Sorry. Go ahead.

13 MS. CARPENTIER: It's not an enforcement
14 requirement in the same sense that it becomes later
15 on, but we do look at the substance of it to see
16 what's in it and, you know, look at that as indicating
17 whether or not the data was collected under
18 appropriate controls.

19 JUDGE BARATTA: We're not really looking
20 at enforceable in terms of enforcement; i.e., Notice
21 of Violations. We're looking at it in -- licensing
22 space in terms of whether or not you get your license.

23 MS. CARPENTIER: Yes.

24 JUDGE BARATTA: I think that's --

25 MS. CARPENTIER: Yes, within licensing

1 space we have to make sure the application is reliable
2 and the information in the application is reliable.

3 JUDGE BARATTA: Okay.

4 MS. CARPENTIER: And that could be done
5 under a fully-functioning DTE QA Program. In this
6 case it was done through delegation to a contractor
7 and contractual mechanisms. But again, it's not an
8 enforceable requirement then, but it is something. We
9 can look at it and it still looks like it will look
10 later on.

11 JUDGE BARATTA: Yes, it's enforceable in
12 the sense that they don't get their license unless
13 they can demonstrate it.

14 MS. CARPENTIER: Right, or they have to go
15 back and redo work --

16 JUDGE BARATTA: Right, right.

17 MS. CARPENTIER: -- if the information is
18 unreliable.

19 JUDGE BARATTA: Could I go on?

20 CHAIRMAN SPITZER: Yes.

21 JUDGE BARATTA: Okay. I think, you know,
22 Appendix B clearly allows the delegation of the
23 authority for creation and running of a QA Program to
24 a vendor. Okay? But it does of course require the
25 applicant to retain the responsibility for that

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1 Quality Assurance Program. And what is your
2 interpretation of the word "responsibility" as it
3 relates to the regulations? A legal question.

4 MS. CARPENTIER: Ultimately they have to
5 be able to present this information under oath and
6 affirmation to the NRC and stand behind it. How they
7 get there, how they assure themselves that they can do
8 that and how we evaluate it afterwards, that can take
9 many forms. Again, that's not in the regulations or
10 guidance anywhere prescriptively, but using a
11 contractor that's doing the work and also has a, you
12 know, well-audited program in place is the first step.
13 Having somebody at one level check up on them, at
14 another level check up on them; and when the hearing
15 staff came, it was the fourth-level checking up on
16 them, is another part of it. But, you know,
17 ultimately it's the buck stops here. They sign their
18 name to it in the end and they have to be responsible
19 for what's in there. And again, if it's bad, they
20 don't get their license or they have to do it again.

21 JUDGE BARATTA: Okay. Because my concern
22 here is that some of the material that's been put in
23 the record suggests otherwise. Okay? And I'm very
24 concerned that because of the mixture of the
25 enforcement and licensing arenas in this case that

1 people may get the wrong impression relative to what
2 has to be done and what doesn't have to be done. And
3 what you're saying is clearly that there has to be a
4 QA Program, right, for this type of data?

5 MS. CARPENTIER: For the data. For the
6 activity.

7 JUDGE BARATTA: Right.

8 MS. CARPENTIER: It doesn't necessarily
9 have to be in every case a fully-developed DTE-staffed
10 program.

11 JUDGE BARATTA: Yes.

12 MS. CARPENTIER: But they have to show the
13 application is reliable.

14 JUDGE BARATTA: And there has to be some
15 demonstration of responsibility on the part of
16 ultimately whoever becomes the applicant?

17 MS. CARPENTIER: Yes.

18 JUDGE BARATTA: So there has to be
19 something that has the essence of Appendix B there?

20 MS. CARPENTIER: Yes.

21 JUDGE BARATTA: Even though apparently
22 there was this issue about, well, Appendix B doesn't
23 apply until after they become an applicant?

24 MS. CARPENTIER: Again, that's the
25 applicant's statement. That's not our statement.

1 JUDGE BARATTA: Okay.

2 MS. CARPENTIER: And that's not how we
3 would phrase it.

4 MR. ROACH: Well, see, that's what I'm
5 trying to get very, very clear.

6 CHAIRMAN SPITZER: What does seem to still
7 be in dispute though is you agree that there has to be
8 a QA Program on behalf of either the applicant or its
9 contractor, whoever is doing the work, that meets
10 Appendix B requirements?

11 MS. CARPENTIER: The safety-related work,
12 yes.

13 CHAIRMAN SPITZER: And you agree that the
14 applicant has to retain responsibility even during the
15 period its not an applicant?

16 MS. CARPENTIER: Yes, ultimately that's
17 true.

18 CHAIRMAN SPITZER: One area of potential
19 disagreement then is whether compliance with Appendix
20 B requires that the applicant, either on its own or
21 through a contractor, has established and implemented
22 an applicant QA Program as opposed to a contractor QA
23 Program. At least that's the way I'm understanding
24 it.

25 MS. CARPENTIER: I think that captures the

1 issue that's still out there.

2 CHAIRMAN SPITZER: All right.

3 JUDGE BARATTA: And it's your position
4 that as long as they can demonstrate that they
5 retained responsibility, even though they didn't have
6 a fully-develop QA Program or any QA Program -- well,
7 any formal QA Program themselves --

8 MS. CARPENTIER: I'm sorry, I didn't hear
9 those last few --

10 JUDGE BARATTA: I say it's your position
11 that they retained responsibility as required by
12 Appendix B even though they did not have a formal
13 full-blown QA Program at the time in question, which
14 is I guess prior to 2008?

15 MS. CARPENTIER: That's correct. It was
16 a limited set of activities. They had not yet staffed
17 their QA positions, so their own senior management was
18 doing that sort of oversight.

19 JUDGE BARATTA: And that's sufficient to
20 satisfy the responsibility?

21 MS. CARPENTIER: For the scale of
22 activities that were taken place, yes.

23 JUDGE BARATTA: Yes. And I believe the
24 interveners say no? Okay.

25 MS. CARPENTIER: Okay. To continue, the

1 distinction about how Appendix B applies pre and post-
2 licensing is somewhat distinct from this enforcement
3 question. What the applicant was required to do on
4 September 18th, 2008 when they submitted the
5 application was to explain to the NRC what QA Program
6 did apply to design work that occurred pre-
7 application. It didn't have its own program. We know
8 that. We've discussed that at length. But they had
9 to point to something, and in this case the Black and
10 Veatch Program.

11 As of summer of 2009 they had not yet
12 pointed to anything in their presentations to the NRC.
13 The June emails that the interveners cite and that
14 were discussed extensively this morning and the early
15 revisions of the application that the applicant has
16 submitted as exhibits do not contain this information
17 about the design-related pre-application work. That's
18 why the staff did inspections and that's why the staff
19 issued RAIs.

20 And we got that information and we ensured
21 that it was included in later revisions to the
22 application. So it wasn't in the application in the
23 summer of 2009. It is there now and the application
24 now has the information as it's been presented here
25 that relates to the design that 10 CFR 52.79(a)(25)

1 requires.

2 CHAIRMAN SPITZER: Also on Appendix B, and
3 I think this was actually a provision of Appendix B
4 that pulls some language out of 10 CFR, the section
5 you just cited.

6 MS. CARPENTIER: Yes.

7 CHAIRMAN SPITZER: Every applicant for a
8 combined license under Part 52 of this chapter is
9 required by the provisions of Section 52.79 of this
10 chapter to include in its final safety analysis report
11 a description of the quality assurance applied, past
12 tense, to the design and to be applied to the
13 fabrication, construction and testing of the
14 structures and systems and components of the facility,
15 etcetera.

16 Now, as I understand the evidence, the
17 Quality Assurance Program applied to the design, or at
18 least a major part of it, was the Black and Veatch
19 Quality --

20 MS. CARPENTIER: That is correct.

21 CHAIRMAN SPITZER: -- Assurance Program.
22 And that I take it from what you've just said was not
23 actually described in the FSAR as having been applied
24 to the design?

25 MS. CARPENTIER: That's correct. That's

1 why the staff thought that there was an information
2 gap and why it determined that it had to go collect
3 more information.

4 CHAIRMAN SPITZER: But you're not
5 satisfied that that deficiency has been rectified?

6 MS. CARPENTIER: Yes. And all of the
7 information in the various RAI responses has been
8 incorporated in later revisions of the application.

9 CHAIRMAN SPITZER: Right.

10 MS. CARPENTIER: Otherwise, it would be a
11 confirmatory item in the SER.

12 Concerning the whistleblower issues that's
13 been discussed this morning, the whistleblower
14 provisions of 10 CFR 50.5, it's important to note
15 contain non-discrimination and non-retaliation
16 provisions that are not enforced by the NRC itself,
17 but rather by the Department of Labor. And that's in
18 10 CFR 50.5(b). That's true across the Government.
19 That's their regulatory authority, not ours.

20 The NRC enforcement issue deals with the
21 technical information that the whistleblower is
22 whistleblowing about. And it should be obvious that
23 we can't do that. We can't look into the application
24 and see whether there's deficient information that the
25 whistleblower brought to our attention until the

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1 information is actually submitted to the NRC. Before
2 that time it's still possible for the potential
3 applicant to change it. And so our enforcement with
4 respect to the technical information that the
5 applicant submits begins once we've got it, once we've
6 seen it submitted to us.

7 Again, we can't really speak to the
8 Department of Labor's processes here, but that's who
9 handles the non-retaliation provisions and, you know,
10 they're not limited in the same way regarding the
11 technical information as we are.

12 CHAIRMAN SPITZER: One of Mr. Gundersen's
13 points was that the term "applicant" really applies in
14 a large number of contexts in the NRC's regulations.
15 And by adopting, or appearing to adopt a narrow
16 construction of that term, at least in the enforcement
17 context, I mean maybe part of the answer to this
18 question that I haven't really asked you yet is that
19 there may be a different concept of applicant in what
20 you called licensing space as distinct from
21 enforcement space. Is that a possibility?

22 MS. CARPENTIER: Yes. I mean it comes
23 down most strongly in enforcement space that we can't
24 take enforcement action until we've got that
25 jurisdictional hook that lets us do it. And that's

1 when we're most likely to get complaints from the
2 applicant's side if we do attempt to do that. It
3 comes up in other issues. We do not normally pre-
4 approve things during application activities unless
5 they're formally submitted as topical reports. We
6 can't just have a conversation and offer a preliminary
7 opinion that, yes, if you send us what you just said,
8 we'll approve it for you. We wait until we get it.
9 And so that is another area where, you know, we're not
10 doing the review proper until the application comes in
11 under oath or affirmation, because again it could
12 change.

13 CHAIRMAN SPITZER: Let's assume -- this is
14 obviously a hypothetical. Let's assume an applicant
15 or somebody who's about to become an applicant hasn't
16 filed an application yet. So it's not clear exactly
17 what they are, but they're in the process of preparing
18 their application on their own or in conjunction with
19 their contractor. They knowingly falsify information.
20 They then submit it to the NRC. They become an
21 applicant.

22 MS. CARPENTIER: Yes.

23 CHAIRMAN SPITZER: Can the NRC take
24 enforcement action in that context even though the
25 misconduct in my hypothetical occurred entirely before

1 they became an applicant?

2 MS. CARPENTIER: Well, in this case part
3 of the misconduct takes place at the moment they
4 become the applicant, because that's when they lied to
5 the NRC. So in this case we could, even if it was
6 written down beforehand.

7 CHAIRMAN SPITZER: All right. Okay. What
8 if there weren't a Whistleblower Protection Program
9 during the pre-application period, but there is one at
10 the time the application is submitted and thereafter?
11 Would that be an enforceable violation?

12 MS. CARPENTIER: If a whistleblower came
13 to us post-application and brought to our attention an
14 issue that they raised with their management and did
15 not achieve a satisfactory resolution within their own
16 organization such that the application contained wrong
17 information, post-application we would certainly be
18 able to look at that information through the licensing
19 process.

20 CHAIRMAN SPITZER: What if the potential
21 violation is simply the failure to have whistleblower
22 protection in place during the pre-application period?
23 Not after. That's the violation we're talking about.
24 It's a two-part question. Is that something that
25 could be the subject of an enforcement action? If

1 not, can it be still an issue that would effect the
2 licensing decision?

3 MS. CARPENTIER: Not having considered
4 that previously or discussed it extensively here, I
5 would say that the first recommendation there would be
6 to go to the allegations process, which is still a
7 third process that the NRC has in place. And people
8 can submit information anonymously during that and it
9 does not come back to their employer with their name
10 attached to it. And that's outside of what anyone in
11 this room does. There's a law enforcement process
12 there.

13 CHAIRMAN SPITZER: What about in the
14 licensing context? Would that be an issue that you
15 could conclude that you can't make a reasonable
16 assurance finding because the entity that became an
17 applicant didn't have a whistleblower protection
18 provision in place during the pre-application period
19 and therefore we can't really be confident in the
20 information that was submitted? There could have been
21 a whistleblower out there who didn't come forward and
22 for whatever reason is no longer around or interested.
23 Would that be an issue as a licensing issue?

24 MS. CARPENTIER: I think to bring it into
25 licensing space we would have to have at least some

1 information that links it to the quality of the
2 application, some suggestion that something happened
3 that wasn't supposed to happen. So without the
4 whistleblower being there, it would be hard to start
5 looking at the technical content of the application,
6 you know, not knowing the content of the
7 whistleblowing. If we knew eh content, we could look
8 at it, whistleblower or not. But again, you haven't
9 said that there was technical content. It was simply
10 the absence of the program.

11 CHAIRMAN SPITZER: No, just we don't know
12 one way or the other.

13 MS. CARPENTIER: Yes. So I think that the
14 allegation process would probably be the first place
15 to go in that case rather than the licensing process.

16 CHAIRMAN SPITZER: Okay.

17 MS. CARPENTIER: Okay. I just got a note
18 from behind me that said whistleblower also applies to
19 contractors and if a contractor was not meeting
20 contractual agreements, that would be enforcement
21 under whistleblower requirements as well. So if
22 somebody had whistleblown on Black and Veatch rather
23 than DTE and that came to our attention independent of
24 DTE's information, we would be able to look at that in
25 the licensing process and potentially, depending on

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1 when it took place, an enforcement.

2 CHAIRMAN SPITZER: Okay.

3 MS. CARPENTIER: Okay. Any further
4 questions?

5 CHAIRMAN SPITZER: No, thank you, counsel.

6 MS. CARPENTIER: Thank you.

7 CHAIRMAN SPITZER: We'll now proceed to
8 hear from DTE.

9 MR. TYSON SMITH: First, thank you for
10 your efforts this week. I think we've obviously
11 covered a lot of ground and a lot of different
12 subjects and with the witnesses and I think hopefully
13 brought out some valuable insights that will help you
14 as you make your decision.

15 With respect to Contention 8, you heard
16 from DTE's witnesses about their Comprehensive Fox
17 Snake Mitigation Plan for Construction, and from the
18 NRC staff you heard about their assessment of that
19 Mitigation Plan and the evaluation of potential
20 impacts to the fox snake. Some of the key expert
21 testimony I think focused on the broad set of
22 mitigation measures that would be implemented to
23 reduce impacts to the fox snake. You have your, you
24 know, pre-construction surveys and relocation,
25 employee training and pre-job briefs, barrier fencing,

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1 habitat restoration and post-construction monitoring.
2 You also heard about DTE's commitment to
3 implementation of the Mitigation Plan. And you heard
4 from eh NRC staff, and I think from DTE's witnesses as
5 well, that these planned mitigation measures, if
6 successfully implemented, would lead to small impacts,
7 and even if not implemented or poorly implemented
8 would at most lead to moderate impacts.

9 In contrast to the DTE and NRC staff
10 witnesses, there were no expert witnesses from the
11 interveners. They've offered nothing to contradict
12 the staff or DTE's experts' conclusions. Their
13 argument that there's no firm implementation
14 arrangements for the Mitigation Plan is contrary to
15 the record. DTE is engaged in extensive discussions
16 with the state regulators regarding mitigation for the
17 project and we're firmly committed to implementation
18 of that Mitigation Plan during construction.

19 There's no basis in the record to assume
20 that MDNR will abdicate its responsibilities under
21 Michigan law. To the contrary, the preponderance of
22 the evidence supports a finding that MDNR has the
23 responsibility and the authority for ensuring
24 protection of the fox snake. The evidence also
25 demonstrates that the NRC staff has taken a hard look

1 at potential impacts to the fox snake, both with and
2 without the Mitigation Plan. This all that's required
3 by NEPA. Contention 8 should be resolved in favor of
4 the NRC staff and DTE.

5 With respect to Contention 15, DTE is
6 confident that the safety-related information in the
7 COL application is of high quality and that it has an
8 effective and fully functioning Quality Assurance
9 Program in place for the Fermi 3 project. DTE has at
10 all times retained responsibility for the quality of
11 the information in the COLA application. This is not
12 an ad hoc approach.

13 First, DTE required by contract that B&V
14 apply its Appendix B Program to specific safety-
15 related portions of the application. B&V reported to
16 and answered to DTE during site investigation
17 activities. If B&V had failed to apply its Appendix
18 B Program, DTE could reject that work or replace B&V
19 with another vendor that would apply its Quality
20 Assurance Program. And the NRC had any issue with the
21 work, it would have come to DTE as the responsible
22 party, not B&V.

23 Second, in exercising that responsibility
24 DTE took active steps to ensure quality during the
25 site investigation. DTE reviewed and approved

1 geotechnical work plans. DTE was physically present
2 for all 38 bore hole investigations. DTE observed B&V
3 and its contractors using procedures regarding
4 geotechnical information during the site
5 investigation. DTE through its OE performed
6 surveillances of that work. DTE could and in fact did
7 direct B&V and its contractors to stop work when it
8 had concerns. And DTE received copies of internal B&V
9 audits and assessments and if any of those had
10 indicated significant issues, DTE would have taken
11 action to ensure that they were addressed and
12 resolved.

13 Finally, and as Ms. Carpentier mentioned,
14 it was DTE its executives, not B&V, that submitted the
15 COL application under oath and affirmation and who
16 certified that the information in the application was
17 complete and accurate in all material respects. It is
18 difficult to see how this is really anything other
19 than taking full responsibility for the application.

20 CHAIRMAN SPITZER: On the more technical
21 legal issue that we've just been discussing with Ms.
22 Carpentier, we've heard Mr. Lodge's view of what
23 Appendix B requires, what you might call the strong
24 form. We've heard the NRC staff version, which is --
25 maybe we'll call it the intermediate form. How would

1 you interpretation of how Appendix B works differ from
2 what Ms. Carpentier outlined for the staff?

3 MR. TYSON SMITH: I'm not sure as a
4 practical matter that it does differ at all. The
5 initial question is is Appendix B enforceable during
6 the pre-application phase? The answer is no. You
7 know, as Ms. Carpentier mentioned, anyone can go out
8 and drill a bore hole and the NRC doesn't have
9 anything to do with that. But does it apply to work
10 done during that period as a formal matter, as a legal
11 matter, or as some enforceable matter? It doesn't
12 really matter because we did it. We applied Appendix
13 B and we met the Appendix B Program during that period
14 by delegating responsibility to B&V and retaining
15 authority for all the work during that time.

16 And then even if you decide that it does
17 matter and that those requirements did in fact apply
18 during that period, you can still go and look at the
19 information and you can see the work that B&V did and
20 you can see that it meets the quality requirements and
21 you can go look at the cores and trace back through
22 the records and look at all the verification
23 activities that were performed to demonstrate that
24 that information is of high quality.

25 CHAIRMAN SPITZER: I guess the sense in

1 which it matters is there's at least the possibility
2 that someone outside this case will read what decision
3 we issue and there seems to be a significant gap
4 between what's stated in the language I read earlier
5 -- this is from DTE 15, your answer to question 21.
6 There are no QA requirements that apply prior to
7 submittal of a COL application; that is, before a
8 company is an applicant. I would think if that became
9 the general perception throughout the regulated
10 community, that would be a fairly significant matter.
11 What the staff is telling us is something different,
12 namely, they do apply, at least within what is
13 referred to as licensing space, although perhaps not
14 exactly in the same way they apply post-application.

15 MR. TYSON SMITH: Well, I actually don't
16 think it would be significant. I think there's
17 perhaps a little ambiguity around what "requirements"
18 means. And in that context, in response to that
19 question, I think it was clear that we were talking
20 about enforceable, enforceability. Can you issue an
21 NOV? That's not to say that there weren't
22 expectations or requirements that that information be
23 of high quality. And you demonstrate the information
24 is of high quality by applying an Appendix B Program
25 to the work activities that are being performed, the

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1 site investigation activities. And that's exactly
2 what DTE did here by delegating the responsibility for
3 executing the program to B&V and retaining
4 responsibility for the quality of that information.

5 JUDGE BARATTA: I'm a little concerned
6 about the way you're throwing around the word
7 "responsibility" there, because the Appendix B really
8 says the applicant may delegate to others such as
9 contractors, agents or consultants the work of
10 establishing and executing a Quality Assurance
11 Program, not the responsibility.

12 MR. TYSON SMITH: I'm sorry, I did
13 misspoke. We delegated the work, not the
14 responsibility.

15 JUDGE BARATTA: And I'll also refer to
16 your rebuttal statement position, because you made the
17 same error there in that you stated that -- delegated
18 to Black and Veatch the responsibility for
19 establishing and executing a QA Program. And this is
20 on -- I think it's page 10 of your rebuttal statement.
21 And then go on to say DTE retained overall
22 responsibility of the program.

23 MR. TYSON SMITH: Well, I have no reason
24 to doubt that that's what that says, and that's
25 certainly a misstatement. It should be delegated

1 the --

2 JUDGE BARATTA: Authority.

3 MR. TYSON SMITH: -- authority to perform
4 that work, not the responsibility. That's clearly not
5 what we intended and not what we did.

6 CHAIRMAN SPITZER: Let me ask you the same
7 question I asked Mr. Lodge earlier: This is again
8 referring to our decision admitting the Contention 15,
9 or more precisely 15A or 15B in LBP-10-09, and we're
10 quoting from the Diablo Canyon Appeal Board decision:
11 "Perfection in plant construction and the facility
12 construction Quality Assurance Program is not a
13 precondition for a license under either the Atomic
14 Energy Act or the Commission's regulations. What is
15 required instead is reasonable assurance that the
16 plant as built can and will be operated without
17 endangering the public health and safety."

18 Would you agree that's the standard we
19 should apply in --

20 MR. TYSON SMITH: Absolutely.

21 CHAIRMAN SPITZER: -- making our decision
22 on Contention 15?

23 MR. TYSON SMITH: Yes, Your Honor.
24 Absolutely.

25 CHAIRMAN SPITZER: All right. So I take

1 your client's position the dispute about the meeting
2 of Appendix B is kind of a tempest in a teapot and we
3 really should just look to see if the data overall is
4 satisfactory to meet the reasonable assurance
5 standard. And if so, move on?

6 MR. TYSON SMITH: That's exactly right.
7 I mean we certainly believe that what we did met
8 Appendix B and that we delegated authority to perform
9 the work and retained responsibility for that work.
10 But again, the touchstone is whether the information
11 in the COLA, safety-related information was of high
12 quality and there's reasonable assurance that the
13 plant can be designed and built and operated relying
14 on that information. And we believe that you
15 absolutely have that confidence in this information
16 here.

17 And you get that confidence by looking in
18 part at the measures and requirements that B&V applied
19 from its Appendix B Program to the site investigation
20 activities. And we heard on the implementation side
21 from Mr. Thomas that B&V developed detailed
22 geotechnical work plans, they developed detailed
23 nuclear procedures, they trained personnel and their
24 subcontractors, they used qualified personnel, they
25 assigned a geotechnical expert or a geologist to every

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1 drill rig to record data and to provide oversight of
2 drilling activities, they collected data in a boring
3 log in accordance with project instructions and they
4 kept appropriate records and cores. You know, then on
5 the QA oversight side, from Mr. Sacco's side, you
6 heard that they performed surveillances of the field
7 work and that they performed audits of COL activities
8 in support of eh Fermi 3 project.

9 So I think in light of all this the
10 interveners' concerns with a hypothetical
11 whistleblower or speculation regarding a hypothetical
12 retaliation, you know, there's no basis in fact or in
13 the record for any of that. You know, there's no
14 actual incident here. DTE and B&V, they're
15 established nuclear companies and they have in place
16 exactly the sort of programs that the interveners
17 claim are necessary.

18 And Mr. Gundersen talked a lot about a
19 tear in the fabric of QA, but he hasn't pointed to
20 single stitch here that's in need of repair. You
21 know, at this stage of the proceeding, you know, we
22 need to have more than mere speculation. There's no
23 evidence to suggest that DTE or B&V have acted
24 inappropriately toward any of their employees or any
25 of their contractors. And, you know, frankly it

1 borders on the slanderous to suggest that these
2 companies would sacrifice quality, jeopardize the COLA
3 or their nuclear safety culture or do anything else
4 that might risk the public.

5 I guess lastly with respect to the ongoing
6 work, the Contention 15B piece, DTE has implemented a
7 Quality Assurance Program description for the Fermi
8 project that meets NRC requirements and satisfies
9 industry standards. There's no serious challenge to
10 the adequacy of the ongoing QA Program. The
11 interveners' witnesses appear to have completely
12 misunderstood the evolution of the QAPDs applied to
13 this project and the changes in titles and
14 responsibilities that are clearly laid out in various
15 revisions of the QAPD. They're addressed in our
16 testimony, our initial testimony and our rebuttal
17 testimony, and there's no indication of any
18 internalization of that response.

19 And Mr. Gundersen, hasn't evidenced any
20 recent experience with QA, much less NQA-1-1994 and
21 doesn't appear to have a lot of insight into how
22 Appendix B is applied in the real world. You know,
23 for instance it's industry practice, standard practice
24 in the industry to rely on audits performed under
25 another Appendix B Program. I think also Mr.

1 Gundersen's claims of deficiencies in the safety-
2 related COL information or in the current program,
3 they lack credibility when he doesn't even bother to
4 read the NRC staff's safety evaluation of the Fermi 3
5 QAPD. This is what lays out the NRC staff's basis for
6 accepting the information that's in the application
7 and for concluding that there is reasonable assurance
8 in the quality of that information.

9 In the end, I think focusing on the issues
10 in the contention, the preponderance of the evidence
11 as supported by the NRC staff and DTE witnesses
12 supports a finding that safety-related information in
13 the COL is reliable, it's of high quality and that
14 there's reasonable assurance that the Fermi 3 QA
15 Program has been, can be and will be implemented in
16 accordance with NRC regulations and the applicable
17 QAPD. Accordingly, we believe the Board should
18 resolve Contention 15 in favor of DTE. Thank you.

19 CHAIRMAN SPITZER: Thank you, counsel.

20 JUDGE BARATTA: Whoa, wait a minute.

21 CHAIRMAN SPITZER: Oh, sorry.

22 JUDGE BARATTA: I want to ask you the same
23 question I asked everybody else. From a legal
24 standpoint "retain responsibility," what does that
25 mean? That's in Appendix B under "Organization."

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1 It's the third sentence down.

2 MR. TYSON SMITH: Sure. I mean, as you
3 noted, you know, the regulations explicitly allow
4 delegation. And that's not only delegation of the
5 execution of the program. It's also delegation of
6 establishment of the QA Program. And so if you can
7 delegate establishment of the QA Program, that means
8 I think that a full-blown QA Program is not a
9 prerequisite to delegation. Right? There's nothing
10 in NQA-1 or an Appendix B to suggest that you have to
11 have a -- that equates retaining responsibility to
12 having a full-blown Appendix B Program, or having a
13 full-blown QAPD. So, you know, at bottom what I think
14 that means is that DTE is the entity that remains
15 responsible for the information that's in the COL
16 application.

17 And from a policy perspective what this
18 mean is the NRC doesn't want to have to go and
19 identify which of, you know, any number of vendors
20 performing work at a site was responsible for an
21 error. And the NRC doesn't want to have to bring
22 enforcement against contractors for work done for an
23 NRC licensee or an applicant, nor does the NRC want to
24 have to argue with the licensee over whether it or a
25 contractor was responsible for the work. I mean

1 ultimately the NRC wants a single point of contact who
2 is indisputably responsible for the information. And,
3 you know, for the Fermi 3 project DTE was that entity,
4 or as Ms. Carpentier put it, where the buck stops.
5 They're the one who are responsible for the
6 application. They're the ones who, you know, bear the
7 burden of the complete and accuracy requirements and
8 they're the ones whose application and hopefully
9 license is ultimately issued.

10 JUDGE BARATTA: Just to correct things,
11 it's the Atomic Energy Act that makes the licensee
12 responsible, okay, not the NRC.

13 MR. TYSON SMITH: Correct.

14 JUDGE BARATTA: Through its enforcement of
15 the Act, it does.

16 MR. TYSON SMITH: Correct.

17 JUDGE BARATTA: No, I could on for another
18 three hours if you want. I mean -- no.

19 (Laughter.)

20 JUDGE BARATTA: Boy, he's anxious to get
21 out of here.

22 (Laughter.)

23 CHAIRMAN SPITZER: All right. I think we
24 are done with any questions related to legal argument.
25 Are there any housekeeping matters we need to address

1 before we adjourn?

2 MR. LODGE: Your Honor, our housekeeping
3 matter is you indicated we would have a few moments to
4 rebut.

5 CHAIRMAN SPITZER: Oh, I'm sorry.

6 MR. LODGE: Thank you. I appreciate it.

7 CHAIRMAN SPITZER: Thank you for reminding
8 me.

9 MR. LODGE: In Appendix B it says, quote,
10 "As used in this appendix, 'quality assurance'
11 comprises all those planned and systematic actions
12 necessary to provide adequate confidence that a
13 structure, system or component will perform
14 satisfactorily in service." We believe that tandems
15 in with the 10 CFR 50.2 definition of "applying." And
16 applicant is an entity applying for a license.
17 Despite what the NRC staff claims, they're not in the
18 middle. They're clearly on the side --
19 interpretatively speaking, they're on the side of DTE
20 in this debate that there are no QA requirements that
21 apply prior to submittal of a COL application.

22 The problem here is that we -- and I hate
23 to find myself quoting Donald Rumsfeld, but we really
24 don't know what we don't know. It's easy to call the
25 interveners' assertions mere speculation when

1 whistleblowers have not stepped forward. It's easy to
2 call it mere suspicion when there have not been
3 material false statements. It's a little surprising
4 that the NRC staff has also not treated with any
5 particular seriousness the fact that it was eight to
6 nine months after submission of the COLA before they
7 noticed or it came to their attention that there was
8 no on-paper QA Program that seemed to be functioning
9 at DTE, and that that somehow is not taken with any
10 particular seriousness, that it was not red flagged
11 nor brought to their attention in the 60-day
12 acceptance period after the COLA was submitted in
13 September 2008. What you have is the troubling
14 possibility of setting a precedent that allows faith-
15 based quality assurance.

16 Mr. Gundersen and we have discussed at
17 some length how could this have turned out
18 differently? In 2009 and '10 if Detroit Edison had
19 said you're right, we screwed up and rolled up their
20 collective sleeves and through their contractors and
21 their staff invested adequate time to truly
22 investigate and verify the backfill effort, then none
23 of this would be here. There would be audits that you
24 would not have some lurking suspicion because of the
25 fact that statutory protections seem not to have been

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1 in place. There wouldn't be this unfortunate and we
2 believe ludicrous and; I think Judge Baratta summed it
3 up well, appalling interpretation of what the
4 attachment of any legal responsibility seems not to
5 happen until the application is actually in hand.

6 We believe that faith-based quality assurance cannot
7 be allowed nor tolerated, and in fact it would
8 contradict 50 years of regulatory experience and 50
9 years of NRC oversight.

10 Judge Baratta, I was thinking about your
11 question about interpreting responsibility, and there
12 are alternate systems and means of establishing
13 quality assurance. One would be to enormously staff
14 up the NRC so that it in effect becomes the quality
15 assurance function of the industry. That isn't the
16 route that Congress nor administrators with the NRC
17 have chosen, however the route is essentially one that
18 focuses a lot on self-regulation and self-reporting.
19 And that is a more complex fabric indeed.

20 It is one that still has to rely on sweat
21 and insight and work at a very gritty level when
22 you're talking about quality assurance. You're
23 talking about tracking things from the beginning, not
24 a couple of years into it somebody ringing your bell
25 and bringing it to your attention that there seems to

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1 be a major problem here. The one distinction with the
2 Midland case is that there wasn't anything on paper,
3 as I believe you pointed out. The problem here is
4 that there wasn't really a functioning QA Program
5 until the utility was dragged kicking and screaming
6 into fulfilling the expectations. Thank you.

7 CHAIRMAN SPITZER: Very well. All right.
8 I think we have set forth -- I know we have set forth
9 in our previous orders the schedule for what comes
10 next; that is, the submission of transcript
11 corrections within 30 days of the availability of the
12 transcript. We don't have a precise day for
13 availability, but it's normally about five business
14 days or so. Thirty days after the availability of the
15 transcript for the corrections, post-corrections to
16 the transcript. I'm sure all counsel know this, but
17 transcript corrections do not include changing the
18 substance of testimony, only corrections to
19 typographical errors, misspelling of names, things of
20 that sort.

21 Forty-five days from the submission of the
22 transcript corrections; that is, a total of 75 days
23 from availability of the transcript would be when your
24 proposed findings of facts and conclusions of law are
25 due. And as I mentioned to Mr. Lodge earlier, if you

1 want to revisit that issue of the late exhibits that
2 we excluded, you may do so, although please --

3 MR. LODGE: Thank you.

4 CHAIRMAN SPITZER: -- keep it within a --
5 yes, make it brief and of course allow response from
6 the other parties --

7 MR. LODGE: Certainly.

8 CHAIRMAN SPITZER: -- if they want to file
9 one.

10 Is there anything else of a housekeeping
11 nature or procedural nature we need to take up now?

12 MS. CARPENTIER: We have a question about
13 the interveners' filing last Tuesday, and specifically
14 do you consider the 25-day period for answering the
15 contention in that order to have begun on Wednesday,
16 you know, the day following that submission, or are
17 you waiting for a separate filing of a contention?

18 CHAIRMAN SPITZER: I hadn't quite
19 truthfully thought about that. They haven't actually
20 filed a contention. I know they filed a motion to
21 admit a contention.

22 Is the contention set forth in your
23 filing, Mr. Lodge?

24 MR. LODGE: You know, I can't remember.
25 I believe it is.

1 JUDGE BARATTA: Yes, I read it and I
2 believe it is along with why it meets the criteria and
3 such.

4 CHAIRMAN SPITZER: Yes, we'll start from
5 Wednesday, the 25-day period. Needless to say,
6 Contention 13 is one we've already had a good deal of
7 briefing on already; that is earlier versions of it.
8 So if anybody needs an extension, we'll of course
9 consider that, but 25 days I would think would be
10 sufficient. If you think the definition of the
11 contention is insufficient, you can of course address
12 that in your responses.

13 MR. TYSON SMITH: Your Honor, there was
14 one additional exhibit that Judge Baratta had
15 mentioned that he would like to see in the record, and
16 that was the contract where it specifically lays out
17 the requirement that B&V perform services under
18 Appendix B. We will endeavor to submit a motion to
19 admit that middle of next week.

20 CHAIRMAN SPITZER: That would be fine.

21 JUDGE BARATTA: And to avoid any
22 proprietary, you can just excerpt. Just as long as
23 the clause there and maybe the -- enough information
24 to show that it is from the contract.

25 MR. TYSON SMITH: Okay. We will do that.

1 We will include that. We'll submit a motion with that
2 and we'll include an explanation about which pieces
3 are included.

4 CHAIRMAN SPITZER: Very well. Anything
5 further?

6 (No audible response.)

7 CHAIRMAN SPITZER: If not, we'll again
8 thank the county for --

9 MS. CARPENTIER: I was just going to say
10 no.

11 (Laughter.)

12 JUDGE BARATTA: Didn't want to cut you
13 off.

14 CHAIRMAN SPITZER: We should again thank
15 the county for making this facility available and for
16 providing security both during this evidentiary
17 hearing and earlier at the limited appearance session.

18 Thank you, counsel, and witnesses who are
19 still here. It's certainly been a very educational
20 and enlightening experience for me and I'm sure for
21 the other judges as well. Thank you.

22 We'll stand adjourned.

23 (Whereupon, the hearing was adjourned at
24 4:01 p.m.)

25