

November 25, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO THE INTERVENORS' MOTION  
FOR ADMISSION / RECONSIDERATION OF CONTENTION 13

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC) hereby answers the Intervenor's<sup>1</sup> Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention 13, and for Supplementation of the Final Environmental Impact Statement.<sup>2</sup> Because the Licensing Board denied the Intervenor's Motion for Suspension at the hearing on October 30, 2013,<sup>3</sup> Staff's response is limited to the Intervenor's proposed reconsideration of Contention 13.

For the reasons more fully set forth below, proposed Contention 13 should not be admitted. The Intervenor has not satisfied the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) in that the Intervenor has not demonstrated that the issues raised are material to the findings the NRC must make, nor have Intervenor shown that a genuine dispute

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<sup>1</sup> Intervenor includes Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, the Sierra Club, and various individuals (collectively, Intervenor).

<sup>2</sup> Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention No. 13, and for Supplementation of the Final Environmental Impact Statement (October 29, 2013) [Intervenor's Motion].

<sup>3</sup> Official Transcript of Proceedings of the Nuclear Regulatory Commission, Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3) Evidentiary Hearing at 279 - 280 (October 30, 2013) ADAMS Accession No. ML13308C409.

exists on a material issue of fact or law. Furthermore, to the extent the proposed contention is based on information that was previously available in the Staff's Draft Environmental Impact Statement (DEIS)<sup>4</sup> or Staff's Final Environmental Impact Statement (FEIS),<sup>5</sup> it fails to meet the timeliness requirements of 10 C.F.R. § 2.309(c).

#### PROCEDURAL BACKGROUND

On September 18, 2008, the Detroit Edison Company (Applicant) submitted an application (Application) for a combined license (COL) for one ESBWR advanced boiling water reactor, designated as Unit 3, to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2, in Monroe County, Michigan.<sup>6</sup> The Fermi 3 COL application includes an Environmental Report (ER), as required by 10 C.F.R. § 51.50(c).

On March 9, 2009, Intervenor filed a Petition for Leave to Intervene in the COL proceeding, along with 14 contentions (Intervention Petition). On April 3, 2009, the NRC Staff filed its answer to the Intervention Petition (Staff Answer to Intervention Petition). Following oral argument, the Licensing Board ruled to admit the Intervenor as parties to this proceeding. *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227 (2009). Proposed Contention 13 is an amended version of an earlier Contention 13 that was submitted with the Intervention Petition and deemed inadmissible by the Licensing Board.<sup>7</sup> See Intervention Petition at 109-22; *Fermi*, LBP-09-16, 70 NRC at 297-304. In the original version of Contention 13, the Intervenor raised four distinct issues: (1) the cost of a new nuclear facility,

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<sup>4</sup> Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105 (October 2010).

<sup>5</sup> Final Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105 (January 2013).

<sup>6</sup> Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008), ADAMS Accession No. ML082730763.

<sup>7</sup> Intervenor Petition for Leave to Intervene (March 9, 2009) (Intervention Petition).

(2) the need for power analysis in the Applicant's ER, (3) the consideration of energy efficiency in the Applicant's ER, and (4) the consideration of renewable energy sources in the Applicant's ER.

On October 28, 2010, the NRC Staff and the U.S. Army Corps of Engineers (USACE) published the DEIS. On January 11, 2012, the Intervenor filed a motion for Leave to Late-File Amended and New Contentions (Late Filing Motion) along with a Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Jan. 11, 2012).<sup>8</sup> On February 6, 2012, NRC Staff and the Applicant each filed answers opposing the Late Filing Motion and the newly proposed and / or resubmitted new contentions.<sup>9</sup> On June 21, 2012, the Licensing Board granted the Late Filing Motion, denied the Motion to Admit with regards to Contentions 10 and 13, and deferred ruling on proposed Contentions 20 and 21.<sup>10</sup>

On January 16, 2013, the FEIS for the Fermi 3 COL was published and made available to the public.<sup>11</sup> On February 19, 2013, Intervenor filed a motion, among other things, seeking resubmission of Contentions 13.<sup>12</sup> On March 18, 2013, Staff filed an answer opposing the

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<sup>8</sup> Intervenor Motion for Leave to Late-File Amended and New Contentions (January 11, 2012); Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Jan. 11, 2012) ("DEIS Contentions").

<sup>9</sup> NRC Staff Answer to Intervenor's Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Feb. 6, 2012) [hereinafter "NRC Staff Answer"]; Applicant's Answer to Proposed New Contentions (Feb. 6, 2012).

<sup>10</sup> *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 73 NRC 742 (2012).

<sup>11</sup> Final Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG-2105 (January 2013).

<sup>12</sup> Intervenor Motion for Resubmission of Contentions 3 and 13, For Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27 (February 19, 2013) ("FEIS Contentions").

motion.<sup>13</sup> On April 30, 2013, the Board issued an order, among other things, denying the Intervenor's motion for resubmission of Contention 13.<sup>14</sup>

On October 29, 2013, Intervenor filed the present motion - which for the fourth time sought admission of proposed Contention 13.<sup>15</sup>

## DISCUSSION

### I. LEGAL STANDARDS

#### A. Requirements for New or Untimely Contentions

NRC regulations require that petitioners base contentions on documents available at the time the initial petition is filed. See 10 C.F.R. § 2.309(f)(2). However, petitioners may amend contentions or submit new contentions after the deadline for submitting an initial petition if they can demonstrate good cause by showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1)(i)-(iii). The Commission has emphasized that standards for filing new or amended contentions are "stringent," and that even contentions that satisfy these requirements must still meet the strict standards for contention admissibility under Section 2.309(f)(1).

*AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260-61 (2009) (internal citations omitted).

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<sup>13</sup> NRC Staff Answer in Opposition to Intervenor's Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27 (Mar. 18, 2013).

<sup>14</sup> See Licensing Board Memorandum and Order (Denying Intervenor's Motion for Resubmission of Contention 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (April 30, 2013) ("April 2013 Order").

<sup>15</sup> Intervenor's Motion at 1.

B. General Requirements for Contention Admissibility

In addition to satisfying the requirements for new or untimely contentions described above, proposed Contention 13 must also satisfy the general admissibility requirements governing all contentions submitted in NRC proceedings. The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f)(1) of the Commission's Rules of Practice.

These requirements may be summarized as follows. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The Commission has emphasized that the rules on contention admissibility are "strict by design."<sup>16</sup> Failure to comply with any of these requirements is grounds for the dismissal of a contention.<sup>17</sup>

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<sup>16</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

<sup>17</sup> 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating

IV. PROPOSED CONTENTION 13

Intervenors now resubmit and seek to have admitted thrice rejected proposed Contention 13, wherein Intervenors again challenge the need for power analysis. Intervenors Motion at 5 – 9. In resubmitting proposed Contention 13, the only change the Intervenors have made from the previously rejected proposed contention is the addition of the word “still” to the first sentence. The proposed contention now reads:

The FEIS “*still*”<sup>18</sup> does not contain the “hard look” required by NEPA or the Atomic Energy Act respecting need and demand for Fermi 3. It overestimates forecast demand for electricity through the decade of the 2020s, when Fermi 3 is planned to begin power generation. The FEIS relies on two flawed analyses of future demand, one of which predates and so does not account for the 2007-08 economic recession, and the other of which has consistently overestimated electrical consumption, belied by actual usage data, for every year since it was compiled. The FEIS analyses of need for power, energy alternatives and cost/benefit analysis are consequently skewed and grossly inaccurate, falsely justifying the need for a new baseload energy plant because they are based on inaccurate, irrelevant and/or outdated information.

Intervenors Motion at 5. As discussed below, proposed Contention 13 is essentially identical to the three earlier filed and rejected proposed contentions which challenged the need for power, all labeled proposed Contention 13.

The first version of proposed Contention 13 was submitted with the Intervention Petition and deemed inadmissible by the Licensing Board. See Intervention Petition at 109-22; *Fermi*, LBP-09-16, 70 NRC at 297-304.

The second version of proposed Contention 13 was submitted following publication of the Fermi 3 DEIS. DEIS Contentions at 10-22. The Board rejected the DEIS version of proposed Contention 13 as untimely, stating that while NRC regulations permit the filing of new or amended contentions “if there are data or conclusions in the [DEIS] . . . that differ significantly from the data or conclusions in the applicant’s documents,” the publication of the DEIS does not

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Station), CLI-06-24, 64 NRC 111, 119 (2006).

<sup>18</sup> *Emphasis added.*

“simply provide[ ] an opportunity to renew previously-filed (and rejected) contentions.” LBP-12-12, 75 NRC at 756.

Finally, in the third (FEIS) version of proposed Contention 13, the Intervenor again concentrated on the need for power analysis. Intervenor asserted, as they had done previously, that the need for power analysis in the FEIS failed to meet NEPA requirements because it relied on the Michigan Public Service Commission (MPSC) 21<sup>st</sup> Century Electric Energy Plan (21<sup>st</sup> Century Plan), a 2006 energy planning report that was prepared “before the Great Recession” and therefore “failed to anticipate the dramatic consequential reduction in electricity demand.” FEIS Contentions at 13. The Board found that the third version of the contention was inadmissible for the same reasons as the previously rejected versions, as well as on the additional grounds that the Intervenor’s reading of the FEIS was factually incorrect. April 2013 Order at 17 - 19.

Staff Response: Proposed Contention 13 does not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) in that the Intervenor has again failed to demonstrate that the issues raised are material to the findings the NRC must make and have not shown that a genuine dispute exists on a material issue of fact or law. Furthermore, to the extent the proposed contention simply repeats previously-rejected claims or is not materially different from information that was previously available (in the FEIS or otherwise), it fails to meet the timeliness requirements of 10 C.F.R. § 2.309(c).

The Intervenor has previously submitted three versions of proposed Contention 13, one challenging the Applicant’s ER at the outset of this proceeding; a second challenging the Staff’s DEIS; a third challenging Staff’s FEIS; and now a fourth challenging Staff’s FEIS for a second time. The Board deemed the initial version of the contention inadmissible for failing to meet the contention pleading standards of 10 C.F.R. § 2.309(f)(1), see *Fermi*, LBP-09-16, 70 NRC at 297-304, rejected the second version of the contention on timeliness grounds, LBP-12-12, 75 NRC at 755, and then applied the same findings in rejecting Intervenor’s third attempt to

have the proposed Contention 13 admitted. April 2013 Order at 13 - 19. These conclusions are equally applicable to the resubmitted proposed Contention 13.

As in prior submissions, the Intervenors have not satisfied the applicable legal standards of 10 C.F.R. §§ 2.309(c)(1) and (f)(1). Specifically, they have not shown how any “new” information is materially different from information previously available, nor how the allegedly new information is material to the findings the NRC staff must make or constitutes a genuine dispute with the FEIS.

The Intervenors’ claim of new information focuses on an October 2013 newspaper article:

On October 24, 2013, the Monroe Evening News revealed plans by DTE Energy to reconsider a natural gas-fired generator and commercial-scale wind generators as an alternative to early construction of Fermi 3. The first paragraph of the article, a copy of which is attached, states: DTE Energy still is seeking a federal license to build and operate a new nuclear plant, but is studying the prospects of building a natural gas fueled plant first, given plummeting natural gas prices. "I would suspect if we were going to go out and build something immediately, it would be gas," said Ron May, DTE's vice president of major enterprise projects. "I doubt if we'd build another coal plant but even before gas, we'd probably put in more wind turbines." This announcement reveals that DTE, as the applicant for a combined operating license (COL) for Fermi 3, is actively rejecting its preferred alternative of a new nuclear baseload plant. Inasmuch as this revelation reflects serious reconsideration by the Applicant, it is “significant new information” which requires supplementation of the FEIS ...[.]

Intervenors’ Motion at 2 - 3. The Intervenors further assert that this article is “consistent with other recent [Applicant] statements” in a press release and slide show from October 2013, which mention Applicant’s interest in renewable energy and natural gas production. Intervenors then proceed to repeat arguments from earlier versions of the contention asserting that Staff’s need for power analysis was flawed. Intervenors’ Motion at 5 – 9. However, they do not identify any additional facts or documents as ones that were not available at the time their previous versions of the contention were submitted.

Fundamentally, the Intervenors fail to specify how any of the asserted “new” Applicant statements, which allude in general terms to Applicant consideration of renewable energy sources or natural gas production, contradict any fact or assumption in the FEIS need for power



analysis. The Intervenor do not explain why these general statements reflect any change in demand for electricity in the region of interest, much less a change that would be material to an FEIS evaluation that already accounts for a range of demand projections. Accordingly, the Intervenor fail to show how this information is materially different from information previously available, let alone how it demonstrates a genuine dispute with the FEIS on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

Consequently, with respect to the remainder of the Intervenor's Motion, Contention 13 remains inadmissible for essentially the same reasons the Board found dispositive in rejecting the previous three versions. Because the Intervenor fail to explain how any "new" information is *materially* different than information previously available, the other arguments in the Intervenor's Motion, having already been considered and rejected by the Board, are both inadmissible and untimely. Intervenor claim that by overestimating the future demand for electricity, the FEIS overstates the benefits of constructing a new nuclear facility. Intervenor's Motion at 7 – 8. In response to previous versions of Contention 13, the NRC Staff explained that the Applicant's need for power analysis in the ER did, contrary to the Intervenor's assertions, take a variety of economic uncertainties into account and present several different projections of electricity demand based on different economic assumptions. Staff Answer to Intervention Petition at 98. The Licensing Board agreed, noting that both the ER and the 21<sup>st</sup> Century Plan took a number of uncertainties into account, "including business cycles and economic conditions." *Fermi*, LBP-09-16, 70 NRC at 302. In rejecting the contention, the Board observed that the Intervenor "provided some alleged facts suggesting the future need for power might be closer to the low-growth case identified in the ER," but have not "provided facts or expert opinion to indicate that the future need for power will likely fall below the low-growth case" or "identified an issue affecting the need for power or a source of uncertainty that was not considered in the ER." *Id.* As noted above, the Intervenor again fail to explain how the generalized "new" statements contradict any specific assumptions in the FEIS, nor how they

alter the Intervenor's arguments previously made and found inadmissible by the Board when they were directed to the ER, DEIS or FEIS, including with respect to Intervenor's challenges to reliance on the MPSC 21<sup>st</sup> Century Plan. As these challenges are thus ultimately the same claims that have already been raised and rejected three times in this proceeding, the Board should once again find them inadmissible.

CONCLUSION

For the reasons set forth above, proposed Contention 13 should be rejected. The proposed Contention No. 13 does not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) in that the Intervenor has not demonstrated that the issues raised are material to the findings the NRC must make nor have they shown that a genuine dispute exists on a material issue of fact or law. Furthermore, to the extent the proposed contention simply repeats previously-rejected arguments or is based on information that is not materially different from information previously available, it fails to meet the timeliness requirements of 10 C.F.R. § 2.309(c)(1).

Respectfully Submitted,

**/Signed (electronically) by/**

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This 25<sup>th</sup> day of November, 2013