

November 25, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
DTE ELECTRIC COMPANY)	Docket No. 52-033-COL
)	
(Fermi Nuclear Power Plant, Unit 3))	

APPLICANT RESPONSE TO RESUBMITTED CONTENTION 13

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), DTE Electric Company (“DTE”) hereby answers the “Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention 13 for Adjudication, and for Supplementation of the Final Environmental Impact Statement” (“Motion”), dated October 29, 2013, filed by the Intervenors.¹ The Licensing Board previously denied the motion to suspend the hearing² and, as a result, suspension of the hearing is not addressed further here. Contention 13 has previously been rejected by the Board on several occasions. For the reasons discussed below, there is no basis to reconsider the prior Board decisions now. Resubmitted Contention 13 remains untimely and inadmissible.

¹ The “Intervenors” are: Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

² See Tr. at 279 (Chairman Spritzer: “I can say for the judges we’re obviously here ready to go and we have no interest in postponing anything.”)

APPLICABLE LEGAL STANDARDS

The timeliness and admissibility of a proposed contention must be evaluated under the Commission's rules of practice. In general, a contention must be based on the COL application or other documents available at the time a hearing request is filed. Intervenors may file a new or amended environmental contention if there are data or conclusions in the DEIS or FEIS that "differ significantly from the data or conclusions in the applicant's documents."³ Otherwise, a new or amended contention may be considered only if: (1) the information upon which the contention is based was not previously available; (2) the information upon which the contention is based is materially different from that previously available; and (3) the contention has been submitted in a timely fashion based on availability of subsequent information.⁴

New contentions also must meet the admissibility standards that apply to all contentions. Those standards are "strict by design."⁵ Under 10 C.F.R. § 2.309(f)(1), a contention must contain: (1) a specific statement of the issue raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show a genuine dispute with the applicant on a material issue. Failure to comply with any of these requirements is grounds for dismissal of a contention.⁶

³ 10 C.F.R. § 2.309(f)(2).

⁴ 10 C.F.R. § 2.309(c)(1).

⁵ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁶ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

DISCUSSION

Contention 13 (Resubmitted) – Need and Demand for Power from the Fermi 3 Nuclear Power Plant

A. History of Contention 13

This is the fourth time that the Intervenors have attempted to admit Contention 13. In the original Contention 13, filed on March 9, 2009, the Intervenors claimed that the ER did not include data that reflected the economic downturn in Michigan.⁷ The Intervenors argued that the analysis in the ER regarding the need for power was premised on Michigan’s 21st Century Plan, which purportedly “forms the core data projections in the ER supporting endless growth in electrical consumption and the ‘need’ for Fermi 3.”⁸ The Intervenors also argued that, since the data in the report was gathered in 2006, the information “has been overtaken by history.”⁹

The Board found that the original Contention 13 did not provide factual or expert support sufficient to demonstrate a genuine material dispute with the application.¹⁰ The Board explained that, contrary to the Intervenors’ claim, the ER analysis of the need for power accounted for economic conditions in Michigan that might reduce the growth in demand, acknowledged sources of uncertainty (*e.g.*, business cycles and economic conditions), and recognized that energy efficiency and conservation may also reduce the need for power.¹¹ The Board therefore found no genuine dispute and denied admission of Contention 13.

⁷ LBP-09-16 at 78.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 78-82.

¹¹ *Id.* at 81.

The Intervenors resubmitted Contention 13 on January 11, 2012, following publication of the Draft Environmental Impact Statement (“DEIS”) in October 2011. The Board first found resubmitted Contention 13 to be untimely.¹² The Board explained that, while NRC regulations authorize 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,” mere publication of the DEIS does not provide an opportunity to renew previously-filed (and rejected) contentions. The Board concluded that the Intervenors failed to demonstrate that the information contained in the DEIS was “not previously available.”¹³

The Board also found resubmitted Contention 13 to still be inadmissible. The Intervenors had contended that need for power analysis in the DEIS overestimated energy demand and thus overstated the need for Fermi Unit 3 because it “relie[d] entirely on the Michigan Public Service Commission (“MPSC”) [21st Century Plan], a 2006 energy planning report that was prepared before the recession.”¹⁴ But, the Board explained that the NRC Staff addressed the issue of uncertainty with regard to the 21st Century Plan in the DEIS. Because the Intervenors did not point out how this treatment of the 21st Century Plan was inadequate, the Board found that Contention 13 did not demonstrate a genuine dispute and therefore did not satisfy the contention admissibility criteria.

The Intervenors proposed Contention 13 for a third time on February 19, 2013, following publication of the Final Environmental Impact Statement (“FEIS”) in January 2013. The Board again found resubmitted Contention 13 untimely insofar as it challenged the NRC

¹² LBP-12-12 at 14-15.

¹³ *Id.* at 15.

¹⁴ *Id.* at 16.

Staff's reliance on the 21st Century Plan, but found it timely to the extent it challenged the FEIS's new confirmatory calculations based on a forecast by the North American Electric Reliability Corporation ("NERC"), the Electric Long-Term Reliability Analysis ("LTRA"), because that analysis was introduced for the first time in the FEIS.¹⁵ However, the Board concluded that no aspect of Contention 13 was admissible because the Intervenors failed to raise a genuine dispute with regard to the LTRA analysis in the FEIS.

B. Resubmitted Contention 13

In the latest iteration of Contention 13, filed on October 29, 2013, the Intervenors rely on a newspaper article in the *Monroe Evening News*, dated October 24, 2013, as the basis for resubmitting Contention 13. The Intervenors claim that the article reveals plans by DTE Energy to reconsider a natural gas-fired facility and commercial-scale wind generators as an alternative to early construction of Fermi 3.¹⁶ According to the Intervenors, the article reflects "serious reconsideration" and shows that DTE is "actively rejecting" a new nuclear baseload plant.¹⁷ The Intervenors further assert that these statements somehow reflect a "pullback" from the project that is also reflected in a DTE press release and investor presentation that discuss electricity planning.¹⁸ As discussed further below, the rest of resubmitted Contention 13 raises issues that are nearly identical to the third version of Contention 13 filed on February 19, 2013.

¹⁵ Memorandum and Order (Denying Intervenors' 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) (slip op. April 30, 2013 at 18-19) ("April 30 Order").

¹⁶ Motion at 2.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

1. *Timeliness*

The newspaper article cited by the Intervenor does not reveal any information that is new or materially different from that previously available. Nor does it reflect any change in DTE's planning for Fermi 3 or the status of the project. Quite simply, there is no change, much less a rejection, "pullback," or "reconsideration" as asserted by Intervenor. In the article, Ron May, Senior Vice President – Major Enterprise Projects at DTE, reiterates DTE's commitment to obtaining a combined license for Fermi 3 as part of prudent planning for electricity supply. Mr. May described the same commitment in 2009 during the scoping process for Fermi 3. At that time, Mr. May also noted that DTE had not decided to build a nuclear power plant, but had applied for the license so that it retained the option for the future.¹⁹ Mr. May has also noted that other energy options also are being considered — both during the 2009 scoping meeting and in the recent newspaper article cited by the Intervenor.²⁰ The article does not reference any formal report, decision, or evaluation by DTE that would indicate a material change in DTE's approach to Fermi 3 or the FEIS need for power analysis.²¹ And, neither the press release nor the investor presentation cited by the Intervenor foreclose the possibility of Fermi 3 or show that new generation is unnecessary.

At bottom, the Intervenor point to no new or materially different information that could form the basis for a timely contention. The mere appearance of a newspaper article is not sufficient grounds for the late-filing of a contention about matters that have been known for a

¹⁹ FEIS at D-21, D-122, D-124, and D-130.

²⁰ *Id.*

²¹ *See AmerGen Energy Co., Inc.* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672 (2008) (noting "evidentiary shortcomings" of newspaper articles).

long time.²² This is especially true where the article reflects no real change in status. Contention 13 should therefore be denied as untimely.

2. *Admissibility*

Even if the Board were to find that a portion of resubmitted Contention 13 is somehow timely, the Intervenors nevertheless fail to raise a genuine dispute with the FEIS. The latest version of Contention 13 is nearly identical to that filed based on the FEIS. For example, the “Statement of Contention” in the fourth Contention 13 is the same as that for the third Contention 13 (except for use of an acronym).²³ The same can be said for the sections entitled “Brief Explanation of the Basis for the Contention,” “Demonstration that the Contention is Within the Scope of the Proceeding,” and “Demonstration that the Contention is Material to the Findings NRC Must Make to License Fermi 3.” In the section on supporting facts and opinion, the fourth Contention 13 cites the same LTRAs, the same forecasts by the U.S. Energy Information Administration, and the same DTE filings before the Michigan Public Service Commission.

In fact, the Intervenors simply repeat the same arguments previously rejected by the Board. For example, the Intervenors allege, as they did three times before, that the need for power discussion (whether in the ER, DEIS, or FEIS) improperly relies on the 21st Century Plan.²⁴ And, they argue once again that the FEIS (and the ER and DEIS before it) overestimates energy demand and thus overstates the need for Fermi Unit 3.²⁵ The Board has rejected both of

²² *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982).

²³ Compare Motion at 6 to February 19 Resubmitted Contention 13 at 12.

²⁴ Motion at 7-8.

²⁵ *Id.* at 10-12.

these arguments — first because the Intervenors did not “identif[y] an issue affecting the need for power or a source of uncertainty that was not considered in the ER”²⁶ and later because the Intervenors failed to take into account material that the Staff included in the DEIS.²⁷ The Intervenors also assert that, “[e]ven as it composed the Final EIS, the NRC Staff persisted in its pattern of choosing out-of-date forecasts.”²⁸ But, the Board specifically rejected this argument in their April 30 Order, noting that the FEIS plainly states that it was based on the 2010 LTRA, not the 2008 LTRA.²⁹ The Board explained that “an intervenor’s imprecise reading of a document cannot serve as the basis for an admissible contention.”³⁰ In the end, the Intervenors’ arguments have all been raised and rejected by the Board on multiple occasions.³¹

CONCLUSIONS

For all of the above reasons, the Intervenors’ resubmitted Contention 13 is untimely and inadmissible. The Board should deny Contention 13.

²⁶ LBP-09-16 at 81-82.

²⁷ LBP-12-12 at 16-17; April 30 Order at 18.

²⁸ *Id.* at 8.

²⁹ April 30 Order (slip op. at 18-19).

³⁰ *Id.*, citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

³¹ To the extent that the Board finds it necessary to specifically revisit the arguments raised previously by the Intervenors, DTE hereby incorporates by reference its response to the third iteration of Contention 13. See “Applicant’s Answer to Proposed New Contentions Based on Final Environmental Impact Statement,” dated March 18, 2013, at 7-15 (explaining that resubmitted Contention 13 was untimely and inadmissible).

Respectfully submitted,

 /s/ signed electronically by
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Dated at Washington, District of Columbia
this 25th day of November 2013

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT RESPONSE TO RESUBMITTED CONTENTION 13” in the above captioned proceeding have been served via the Electronic Information Exchange this 25th day of November 2013.

Respectfully submitted,

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