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

In the Matter of:	)	
		Docket No. 52-033
The Detroit Edison Company	)	
(Fermi Nuclear Power Plant, Unit 3)		December 2, 2013
	)	

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INTERVENORS' REPLY IN SUPPORT OF MOTION FOR SUSPENSION OF LICENSING HEARING, FOR ADMISSION OF PROPOSED CONTENTION 13 FOR ADJUDICATION, AND FOR SUPPLEMENTATION OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT

Now come Intervenors Beyond Nuclear, *et al.*[1] (hereinafter "Intervenors"), by and through counsel, and reply in support of their "Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention 13 for Adjudication, and for Supplementation of the Final Environmental Impact Statement."[2] Intervenors agree that that portion of the Motion which sought a suspension of the licensing hearing has become moot and reply as to other aspects.

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

[2]This is Intervenors' fourth attempt at filing this memorandum. On Monday, December 2, 2013, the day it was due, Intervenors' counsel attempted to timely file this memo at approximately midday, but discovered that his certificate for adjudicatory filings was out-of-date, owing to recent NRC upgrades. Counsel for Intervenors immediately attempted, repeatedly, to apply for a new certificate, but without success, and early in the afternoon hours of December 2, 2013, emailed a copy of the foregoing memo to counsel for DTE and the NRC Staff, explaining the difficulty. The attempted email delivery to Marcia Carpentier of the NRC office of legal counsel subsequently was returned as undeliverable. Counsel apologizes to the Atomic Safety and Licensing Board and counsel for the parties for any inconvenience.

NRC Staff and DTE Focus on Claimed Timeliness Issue
While Ignoring the Obligatory Consideration of Alternatives Under NEPA

The NRC Staff and DTE Energy ("DTE") have ignored the NEPA obligation to account accurately for distinctions among alternatives to the proposed project within the Final Environmental Impact Statement ("FEIS"). That obligation continues beyond completion of the FEIS, and supplementation may be required if two conditions are present: (1) a major federal action has yet to occur, and (2) new information bearing on the ongoing major federal action raises signif-icant questions that have not been previously addressed about the ongoing action's impact on the human environment. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

By the October 24, 2013 Monroe Evening News article which revealed current consideration by DTE of natural gas-fired power generation and commercial-scale wind generators as an alternative(s) to construction of Fermi 3, and the slideshow identified in Intervenors' earlier filing, DTE has announced to the utility finance industry that nuclear power generation has been shelved as an option to meet future power demand. DTE has signaled repeatedly in recent weeks that it is abandoning the "preferred alternative" of nuclear. The purpose of the COLA proceeding is to ascertain whether DTE (or its proxy) have satisfactorily presented a plan for construction of a new nuclear power plant. The NEPA component of licensure is aimed at considering whether the need and demand projections for power can best be met via the nuclear option. The FEIS answer to that inquiry so far has been that nuclear is the preferred option.

But the now-undisputed statements of DTE's vice-president of major enterprise projects, Ron May,[3] and the previously-identified slide show have foretold the fate of Fermi 3. The

[3]"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."

"heart" of the FEIS - the discussion of alternatives[4] - has just been rendered obsolescent by the Applicant. That is what Intervenors meant when, in their October 29, 2013 Motion, they asserted:

> The FEIS analyses of need for power, energy alternatives and cost/benefit analysis are consequently skewed and grossly inaccurate, falsely justifying need for a new base-load nuclear plant because they are based on inaccurate, irrelevant and/or outdated information. (p. 6)
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> ***** ***** ***** *****
>
> The clumsy economics articulated in the FEIS, and now contradicted by statements of knowledgeable DTE executives, directly affect meaningful consideration of alternatives to building the nuclear plant. Until the matter of demand is realistically addressed, there cannot be meaningful discussion of preferable alternatives. If, under NEPA, the Commission finds that environmentally preferable alternatives exist, then it must undertake a cost-benefit balancing to determine whether such alternatives should be implemented. (p. 14)

The upshot of the new information enumerated by Intervenors is that the NRC Staff, as preparer of the FEIS, is charged with nowledge that the existing FEIS discussion of environmentally preferable alternatives is no longer "meaningful." However, a review of the Staff and DTE responses to the pending Motion reveals those parties' utter failure to grasp this point. A term search of the NRC staff's Answer shows that other than repeating Intervenors' own use of the word "alternative," the Staff makes no use of the term, and so fails to acknowledge the obligatory supplementation of the FEIS that has been triggered. Nor does DTE in its Answer mention or discuss Intervenors' point about the now-flawed alternatives discussion in the FEIS,

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[4]The "heart" of an EIS is a rigorous evaluation of alternatives. *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008); 40 C.F.R. § 1502.14 (requires that the EIS "rigorously explore and objectively evaluate all reasonable alternatives"). This is not merely a paperwork exercise or a process for explaining choices already made; rather, it is an "action-forcing device" that must be integrated into agency decision-making. *Oregon Natural Desert Ass'n,* 531 F.3d at 1121; *see also* 40 C.F.R. §§ 1500.1(a),(c), 1502.1, 1502.2(g).

apart from parroting a couple phrases from Intervenors' Motion which contain the word "alternative."

The presumption in the FEIS is that "[t]he purpose and need for the proposed project identified in Section 1.3.1 of this EIS is to provide for additional large baseload electricity-generating capacity to address Michigan's expected future peak electric demand." FEIS, ADAMS ML12307A176, p. 9-3.

Respecting wind generation, the FEIS contains these statements, all of which are now suspect:

> "The review team concludes that pumped storage is not likely to be available as an energy storage mechanism to couple with wind energy." (FEIS p. 9-53).

> At FEIS p. 9-54:

> Further, the overall technical and economic feasibility of CAES [compressed air energy storage] is highly dependent on the existence of conveniently located appropriate geologic formations in which to store the compressed air. The review team is not aware of any evaluations of Michigan geology in areas of highest wind value for that purpose. Although CAES can enhance the value of wind as a source of baseload power, the review team concludes that the use of CAES in combination with wind turbines to reliably generate 1535 MW(e) net at an effective capacity factor of 92 percent in the Detroit Edison service territory is technically unproven at this time.
>
> For the preceding reasons, the review team concludes that wind power is not capable of supplying baseload capacity of 1535 MW(e) net and is therefore not a reasonable alternative to the proposed project.

> At FEIS p. 9-62:

> Nevertheless, it is conceivable that a combination of alternatives might be both technically feasible and environmentally preferable to the proposed action. There are many possible combinations of alternatives. As part of the license renewal process and pursuant to 10 CFR Part 54, NRC has already determined that comprehensive consideration of all possible combinations would be too unwieldy, given the purposes of the alternative analysis. However, the analysis of combinations of alternatives should be sufficiently complete to aid the Commission in its analysis of alternative sources of energy pursuant to NEPA.

> At FEIS p. 9-70:

> As discussed in Chapter 8, the review team concludes that the need for additional baseload power generation has been demonstrated. Also, as discussed earlier in this chapter, the review team concludes that the viable alternatives to the proposed action all would involve the use of fossil fuels (coal or natural gas). Consequently, the review team concludes that the proposed action results in the lowest level of emissions of GHGs among the viable alternatives.

In considering Intervenors' challenge to the adequacy of the need and demand discussion, and consequently, the discussion of alternatives in the FEIS, the Atomic Safety and Licensing Board must "'ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decision maker to take a hard look at environmental factors, and to make a reasoned decision.'" *All Indian Pueblo Council v. U.S.*, 975 F.2d 1437, 1445

(10th Cir. 1992) (internal quotations and citations omitted). The "requisite level of detail necessary" when describing an alternative is: "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Id.*, 975 F.2d at 1444 (citation omitted).

Here, the NRC Staff has not only failed to provide the requisite level of detail regarding environmental consequences, it apparently has been shown by DTE's acts to have understated the advantages of natural gas and wind as alternative sources of power *in lieu* of a new Fermi 3. NEPA imposes continuing obligations on the NRC to re-evaluate its environmental disclosures in light of new and significant information received which casts doubt upon a previous environmental analysis. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

The NEPA "hard look" requirement persists in the Fermi 3 undertaking and consequently, in the mandatory discussion of alternatives. "Some factual basis (usually in the

form of the Staff's environmental analysis) is necessary to determine whether a proposal 'involves unresolved con-flicts concerning alternative uses of available resources' - the statutory standard of Section 102(2)(E)." *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-85-34, 22 NRC 481, 491 (1985), quoting *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 332 (1981). The recent change of direction by DTE reflects that the proper "factual basis" is missing from the NRC Staff's analysis of need and demand in the FEIS.

Reply as to Timeliness

DTE suggests that there is nothing new about its vice-president's comments of October 24, comparing them with statements he made during the scoping phase in 2009. DTE cites *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-11, 15 NRC 348 (1982) for the proposition that 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 long time." But the information from DTE vice-president May has not been known for a long time. His scoping statements from 2009 discuss the range of alternatives that were being considered by DTE at the time. As of that time, DTE had not decided to build a nuclear power plant (FEIS p. D-22), but considered that the company needed a "baseload" plant and that "if we can make it effective, both in terms of cost and in terms of safe operation, which we believe we can, that those choices then would be over the longer term." FEIS pp. D-122 and D-130.

Contemporaneously to these trial balloons about maintaining an open mind, DTE was vigorously contending that a baseload facility, as opposed to incremental new power, was utterly necessary, and so, three times, DTE turned back Intervenors' challenges over need for the power

from proposed Fermi 3. And now, in 2013, the tone has shifted: DTE maintains that the first order of business is no longer nuclear development, but natural gas and wind as generation sources. That position is backed up by DTE's formal presentation to financiers and other statements which omit to mention Fermi 3 as being part of the mix for well more than a decade out. Hence the *Perry* principle is not germane here; the news in 2013 is commitment to an alternative or alternatives other than the vaunted preference since 2009. Fermi 3 is an also-ran among DTE's energy choices at the end of the NEPA and COLA processes, a fact which has been conveniently admitted only after the finalization of the FEIS, but for the two open, unrelated contentions that were adjudicated at the end of October.

WHEREFORE, for the above reasons, the objections of the NRC Staff and DTE Energy must be found not well-taken, and Contention 13, as re-proposed and amended, be admitted for adjudication.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "REPLY IN SUPPORT OF MOTION FOR SUSPENSION OF LICENSING HEARING, FOR ADMISSION OF PROPOSED CONTENTION 13 FOR ADJUDICATION, AND FOR SUPPLEMENTATION OF THE FINAL ENVIRONMENTAL IMPACT STATEMENT" have been served on the following persons via Electronic Information Exchange this 2nd day of December, 2013:

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