

**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)	December 27, 2013
(Fermi Nuclear Power Plant, Unit 3))	
)	

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**INTERVENORS' POST-HEARING MOTION FOR RECONSIDERATION
FOR ADMISSION OF EXCLUDED INTERVENOR EXHIBITS ON CONTENTION 15**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter "Intervenors"), by and through counsel, and request the Atomic Safety and Licensing Board to reconsider admission of certain excluded exhibits which Intervenors proffered for the record in the litigation of Contention 13.

15. Intervenors specifically request the ASLB to admit into the record Intervenors' Exhibits INTS 034, INTS 035, INTS 037 through INTS 049, and INTS 064.

1. Background

In the weeks before the October 30-31, 2013 adjudication of Contention 15, the parties moved for admission of exhibits. The above-enumerated exhibits were excluded by the ASLB's order² because they were submitted for the record on the weekend of October 5-7, just after the

¹In 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"Order (Ruling on Staff Objections to Intervenor Exhibits," ASLBP No. 09-880-05-COL-BD01, p. 3.

October 4, 2013 deadline set by the Board for filing of exhibits. In its order, the ASLB stated:

The Staff objects to all of Intervenors' exhibits filed after the October 4, 2013 deadline (INTS 034-035, 037-049, 064). Despite multiple extensions of time and the Board's declaration that "[n]o additional extensions will be granted," the Intervenors still failed to file all of their exhibits by October 4, 2013. The Board therefore will not allow these late-filed exhibits to come into evidence, *unless the Board determines during the evidentiary hearing that their admission is essential to permit the Board to adequately evaluate the evidentiary record.* (Emphasis supplied)

On October 31, 2013 at the close of hearing, counsel for Intervenors orally moved the ASLB to receive the hitherto-excluded exhibits into the record, urging that they were necessary for adequate evaluation of the evidentiary record. Transcript 10/31/2013 p. 649 (hereinafter "10/31 Tr."). The ASLB granted leave for Intervenors to file a written motion "as soon as possible" after the hearing. Owing to other major litigation demands, this filing on December 27, 2013 is the earliest time Intervenors' counsel has had to compile the arguments, yet again, that the previously-excluded exhibits are relevant.

2. Argument

In closing argument on October 31, counsel for Intervenors repeatedly pointed to places in their expert, Arnold Gundersen's, prefiled direct examination testimony (specifically, Gundersen's 4/30/2013 testimony, pp. 24-37), where Gundersen relied on the excluded exhibits as documentary evidence of his points. At 10/31 Tr. 650-651, for example, Intervenors discuss Exhibit INTS 037, a 2010 internal DTE slide show on the last slide of which appears the damning (to DTE) statement that "If we could wind the clock back, establish a formal Quality Assurance Program much earlier, implement a procurement procedure before the first contract is issued, do not document procedural requirements until they are already complete." Gundersen stressed that this exhibit proves that DTE "recognized that its lack of a QA program had created

organizational chaos.” Gundersen prefiled testimony 4/30/2013 (“Gundersen 4/30”) p. 35.

Exhibit INTS 038, cited by Gundersen at 4/30 p. 25, is a critical internal DTE email admission by a DTE witness that a QA audit could be “sidestepped.” Exhibit INTS 041, also discussed in closing (10/31 Tr. 655), is an internal email revealing considerable confusion over whom in DTE’s structure was overseer of QA; Exhibit INTS 044, an email depicting internal uncertainty at DTE over where to “envelop” quality assurance for Fermi 3, is discussed at 10/31 TR. 655-656.

Gundersen mentioned INTS 039, minutes of a Detroit Edison Combined License Application Kickoff Meeting (Apr. 4, 2007) in his prefiled testimony to show the uncertainty of location of the Fermi 3 reactor site and need for site drillings to determine adequacy of geology (Gundersen 4/30 p. 26). Exhibit INTS 040, an internal DTE email in October 2007, depicts the early uncertainty of Fermi 3’s precise site location and implicates the geological core drilling samples taken shortly thereafter under Fermi 2’s QA program . Gundersen 4/30 p. 26.

Gundersen points to INTS 042, an internal email directed to Peter W. Smith as evidence of DTE’s knowledge that it had primary QA responsibility (Gundersen 4/30 p. 28).

Gundersen cited INTS 045 and INTS 049 to show that “titles in text do not match titles on Org Chart; no one assigned in QA function.” Gundersen 4/30 pp. 31, 32) (comparing DTE’s February 2008 QAPD with Nuclear Development Project Organization, Procedure Number NDP-NP 1.1, Rev. 0 (Feb. 4, 2008)). He identified INTS 047, a DTE-B&V email in March 2008, to prove his point that “DTE’s QA manager had no understanding of what types of QA reviews were in his jurisdiction,” and that DTE was actively asking B&V to advise DTE as to what type of reviews DTE needed to perform in order to meet COLA requirements. Gundersen

4/30 p. 34. Gundersen discussed INTS 046, a January 2008 email between DTE's witness Peter Smith and a man named Allen, also at DTE, to illustrate that "DTE planned a *self-executing* QA program and had no intention of hiring QA professionals." Gundersen 4/30 p. 34. He cited INTS 048 to support the point that "During the summer of 2009, the NRC issued a series of emails noting considerable problems with the QA Program at DTE Fermi 3, but in this August 2009 powerpoint, "at the same time the NRC identified that Fermi 3 did not have a viable QA program, the August 4, 2009 PowerPoint prepared by DTE clearly identifies that DTE firmly believed that its QA 2 organization had authority and responsibility in the COLA process." Gundersen 4/30 pp. 35-36.

CONCLUSION

All of the aforementioned exhibits - indeed, every substantive exhibit relied on by Intervenors' expert Gundersen in his public testimony - was a document disclosed either by the NRC Staff, or by DTE. None of these exhibits were secrets nor were they a surprise because Gundersen's prefiled testimony which identified these exhibits was filed in April and May 2013, months before the adjudication. Yes, Intervenors were technically a few days late in submitting these exhibits for the record in early October 2013. But the NRC Staff underwent a 10-day federal government shutdown after that, and argued no prejudice flowing from Gundersen's reliance in his live, trial testimony on the evidentiary foundation formed in his prefiled direct testimony by those exhibits. Those exhibits are a central part of the evidence on which Gundersen's expert conclusions as to DTE's nonexistent QA program are based.

Intervenors urge that they have shown justification why the board should determine, as it suggested in its prehearing order, that the admission of these exhibits is "essential to permit the

Board to adequately evaluate the evidentiary record.” This litigation should be resolved on its merits, not on technical objections to exhibits, the existence of which was wholly disclosed to the objecting parties months before trial.

WHEREFORE, Intervenors pray the ASLB reconsider, again, the excluded exhibits, and that it reverse its prior exclusionary orders and receive them into the evidentiary record.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “INTERVENORS’ POST-HEARING MOTION FOR RECONSIDERATION FOR ADMISSION OF EXCLUDED INTERVENOR EXHIBITS ON CONTENTION 15” was served upon the following via deposit in the NRC’s electronic information exchange this 27th day of December, 2013:

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