

January 6, 2014

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER OPPOSING INTERVENORS' POST-HEARING  
MOTION FOR RECONSIDERATION OF EXCLUDED EXHIBITS ON CONTENTION 15

The NRC staff (Staff) hereby responds to Intervenor's December 27, 2013 "Motion for Reconsideration of Excluded Intervenor Exhibits on Contention 15" (Motion) pursuant to 10 CFR § 2.323(c). The Staff previously explained its objections to admitting into evidence INTS 034, INTS 035, INTS 037 through INTS 049 and INTS 064 in its October 7, 2013 "Staff Objections to Intervenor Exhibits for Contention 15" (Objections). The Staff reiterates these objections regarding timeliness and also requests that the Atomic Safety and Licensing Board (Board) reject the Motion because the Intervenor has not demonstrated that the excluded exhibits are essential to permitting the Board to adequately evaluate the evidentiary record for Contention 15.

BACKGROUND

The Board established October 4, 2013 as the final deadline<sup>1</sup> for the Intervenor to submit exhibits to be considered for admission at the evidentiary hearing for Contentions 8 and 15. The Intervenor filed INTS 034, INTS 035, INTS 037 through INTS 049 and INTS 064 after this deadline at various times on October 6 and 7, 2013.

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<sup>1</sup> As described in detail in the Staff's Objections, this final deadline was set by the Board after Intervenor had made two extension requests following the original September 26, 2013 deadline. See Objections at 1-2.

On October 7, 2013, the Staff filed its Objections, which the Intervenors replied to (Reply) on October 18, 2013. The Board subsequently excluded these exhibits in its “Order Ruling on Staff Objections to Intervenor Exhibits” (Order) on October 23, 2013, “unless the Board determines during the evidentiary hearing that their admission is essential to permit the Board to adequately evaluate the evidentiary record.” Order at 3. On October 31, 2013, at the evidentiary hearing, the Board instructed that Intervenors should “file a motion as soon as possible after the hearing” if they wished to revisit the admissibility of the excluded exhibits. On December 27, 2013, Intervenors filed their Motion requesting reconsideration of the Board’s exclusion of INTS 034, INTS 035, INTS 037 through INTS 049 and INTS 064.<sup>2</sup>

#### DISCUSSION

The Staff opposes the Intervenors’ Motion because they have not met the standard, set out by the Board in its October 23, 2013 Order excluding INTS 034, INTS 035, INTS 037 through INTS 049 and INTS 064, of demonstrating that the exhibits are essential for the Board to adequately review the evidentiary record. *Id.* In addition, the Staff reiterates its previously raised challenges to the timeliness of these exhibits. See *generally* Objections. As the Board noted regarding these exhibits, “[d]espite 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.” Order at 3. For these reasons the Board should reject Intervenors’ Motion.

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<sup>2</sup> In addition to the untimeliness concerns, the Staff identified additional problems with INTS 044, 046, 048, and 049. The Staff noted in its Objections that INTS 048 and 049 were filed in an unreadable format. Intervenors have refiled these exhibits to correct this. The Staff also noted in its Objections that INTS 044 was not referenced in Arnold Gunderson’s prefiled testimony. In their October 18, 2013 Reply, the Intervenors acknowledged this, requested withdrawal of INTS 044, and declared their intention to file a new exhibit to take its place. Reply at 8. Finally, the Staff noted in its Objections that INTS 046, which was captioned “E-mail from Charles E. Miller, Detroit Edison, to David B. Harwood, Detroit Edison (Jan. 16, 2008),” was not referenced in Arnold Gunderson’s prefiled testimony. In their Reply, the Intervenors responded that that INTS 046 was referenced in the prefiled testimony as “DTE-0659.” Reply at 9. Although the Intervenors’ conflicting and confusing marking conventions made it difficult to discern, the Staff acknowledges that the untimely filed INTS 046 was referenced in prefiled testimony.

In their Motion, the Intervenor summarily discuss the content of a number of exhibits excluded by the Board's Order, but they do not explain why these exhibits are essential for the Board to adequately evaluate the evidentiary record. Several other previously excluded exhibits (INTS 034, 035, 043, and 064) are not discussed at all; their exclusion should not, therefore, be reconsidered. Though Intervenor describe some of their exhibits as "critical" or "central" or identifying something that "DTE firmly believed," the substance of their Motion casts no light on how remarks of DTE employees in a presentation or in emails bear on the ultimate question in this case—whether all safety-related activities have been performed consistent with quality assurance provisions in Appendix B. The exhibits cited by the Intervenor do not contribute to the factual record regarding quality assurance for safety-related activities because they do not support any argument in testimony that specific safety-related activities were not performed consistent with Appendix B. For this reason, they are peripheral to the issues in Contention 15 and not essential for the Board to adequately evaluate the evidentiary record.

Rather than being essential to addressing material compliance issues, the excluded exhibits that the Intervenor discuss in their Motion appear directed at inviting inferences based on innuendo and unsupported statements. For example, INTS 037 is an internal DTE slideshow that Intervenor claim includes a "damning (to DTE) statement" proving the non-existence of DTE's QA program. Motion at 2. But this slideshow is a discussion of organizational "lessons learned," and it does not have any bearing on the merits of the Intervenor's position or on any factual or legal issue related to Contention 15. *See id.* Thus, while the exhibits may be tangentially related to the subject matter of Contention 15, they are not essential to adequately evaluating the evidentiary record because they do not include specific information calling into question

the adequacy of Black and Veatch's and DTE's quality assurance for safety related activities.

Finally, the Staff also notes that the timing of Intervenors' Motion—filed 57 days after the close of the evidentiary hearing—is not consistent with the Board's request at the hearing that such a motion be filed as soon as possible or the NRC's Rules of Practice, which provide that "[a]ll motions must be made not later than ten (10) days after the occurrence or circumstance from which the motion arises. 10 CFR § 2.323(a)(2). Especially in light of the parties' focus on the approaching January 21 deadline for filing proposed findings of fact and conclusions of law, the lateness of the Intervenors' motion should not be allowed to generate unnecessary uncertainty about the content of the record.

CONCLUSION

For the reasons discussed above, Intervenor's Motion should be dismissed. The excluded exhibits were not filed in a timely manner, even after the Intervenor was granted the extensions they requested, and they are not essential for the Board to adequately evaluate the evidentiary record concerning quality assurance for safety-related activities during the pre-application phase and after the application was submitted. Accordingly, there is no reason for the Board to reverse its prior decision concerning these exhibits.

Respectfully Submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 6<sup>th</sup> day of January, 2014

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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF ANSWER OPPOSING INTERVENORS' POST-HEARING MOTION FOR RECONSIDERATION OF EXCLUDED EXHIBITS ON CONTENTION 15", has been filed through the E-Filing system this 6th day of January 2014.

**/Signed (electronically) by/**  
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Dated at Rockville, Maryland  
This 6th day of January, 2014