

January 6, 2014

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'S RESPONSE TO INTERVENORS'  
MOTION TO RECONSIDER EXCLUSION OF UNTIMELY EXHIBITS

On December 27, 2013, the Intervenor filed "Intervenor's Post-Hearing Motion for Reconsideration for Admission of Excluded Intervenor Exhibits on Contention 15" ("Motion for Reconsideration"), which requests that the Board reconsider its decision to deny admission of certain of the Intervenor's exhibits related to Contention 15. Specifically, the Intervenor requests that the Board admit Intervenor's Exhibits INTS 034, INTS 035, INTS 037 through INTS 049, and INTS 064. For the reasons discussed below, the Board should deny the Intervenor's request. The Intervenor's motion is untimely and should not be considered. But, in any event, the Intervenor has provided no basis for reconsideration of the Board's prior decision excluding the untimely exhibits.

First, the Intervenor's motion is too late. Under 10 C.F.R. § 2.323, a motion must be filed within ten days of the action for which reconsideration is requested. Here, the Intervenor is seeking reconsideration of the Board decision, dated October 23, 2013, denying admission of the Intervenor's exhibits.<sup>1</sup> That decision was issued more than two months ago. Even if the Board's statement at the October 31, 2013 hearing — that the Intervenor could "file

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<sup>1</sup> Order (Ruling on Staff Objections to Intervenor Exhibits), dated October 23, 2013.

a motion as soon as possible after the close of the hearing”<sup>2</sup> — is considered to have “reset” the clock for calculating the timeliness of a motion, the Intervenor still waited 57 days to file their motion. The Intervenor’s claim that due to “other major litigation demands, this filing . . . is the earliest time Intervenor’s counsel has had to compile the arguments, yet again, that the previously-excluded exhibits are relevant.” But, that is not a sufficient justification for the lengthy delay.<sup>3</sup> The fact that a party has other obligations or fewer resources than others does not relieve the party of its hearing obligations, particularly where, as here, the motion is only five pages long and, in the Intervenor’s words, merely *compiles* earlier arguments.<sup>4</sup> The motion should be denied as untimely.<sup>5</sup>

The Intervenor’s motion also fails to address the standards for reconsideration of a prior Board decision. According to 10 C.F.R. § 2.323, motions for reconsideration may not be filed except upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. The Intervenor did not attempt to address this standard. Instead, they merely

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<sup>2</sup> See Tr. at 650 (CHAIRMAN SPRITZER: Well, let me suggest this: I don’t think it’s a good idea to spend your closing argument talking about exhibits that we have declined to admit. Or if you want to revisit that issue, you can file a motion as soon as possible after the close of the hearing.).

<sup>3</sup> Motion for Reconsideration at 2.

<sup>4</sup> *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598, 599 (1982).

<sup>5</sup> The Intervenor’s delay in filing this motion is prejudicial. The parties have been preparing their proposed findings of fact and conclusions of law with references to admitted exhibits during the entire time that the Intervenor has delayed filing this motion. The Intervenor should not be permitted to substantially augment the body of exhibits in this proceeding at this late date — especially since the tardiness that led to the exhibits being excluded and the failure to seek reconsideration until now were within the sole control of the Intervenor.

repackaged earlier arguments that the exhibits were relevant and that no prejudice flowed from the tardiness of their exhibits. But, rearguing the merits of the earlier Board decision (*i.e.*, the relevance and tardiness of the exhibits) does not meet the standard for reconsideration. And, the Intervenors downplay the extent of their earlier tardiness. As the Board explained in its decision excluding the exhibits: “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.”<sup>6</sup> The Intervenors have failed to show an error in the Board’s analysis meriting reconsideration.

Finally, the Intervenors have failed to show that admission of the excluded exhibits is essential to an evaluation of the evidentiary record by the Board. The Board has before it the Intervenors’ pre-filed direct and rebuttal testimony, as well as their statements of position. The Board also heard from the Intervenors’ counsel and witness during the oral hearing. In arguing for reconsideration, the Intervenors are asking the Board to draw unsupported inferences from the excluded exhibits, such as a self-critical presentation and out-of-context emails. But, none of the excluded exhibits are themselves critical to understanding the Intervenors’ arguments, nor do the exhibits contain facts that are essential to a complete record. In fact, the exhibits on their face do not support the inferences claimed,<sup>7</sup> and do not address the quality of the information in the Fermi 3 license application. As a result, the Intervenors have not demonstrated that the testimony and other admitted exhibits are insufficient for the Board to understand their position or evaluate the merits of Contention 15.

For the above reasons, the Intervenors’ motion should be denied.

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<sup>6</sup> October 23rd Order at 3 (emphasis added).

<sup>7</sup> *See, e.g.*, DTE Rebuttal Testimony on Contention 15, dated May 30, 2013, at ¶¶24-38.

Respectfully submitted,

/s/ signed electronically by

David A. Repka

Tyson R. Smith

Winston & Strawn LLP

1700 K Street, NW

Washington, DC 20006

Bruce R. Maters

Jon P. Christinidis

DTE Electric Company

One Energy Plaza

Detroit, Michigan 48226

COUNSEL FOR DTE ELECTRIC  
COMPANY

Dated at Washington, District of Columbia  
this 6th day of January 2014

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In the Matter of:

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO INTERVENORS’ MOTION TO RECONSIDER EXCLUSION OF UNTIMELY EXHIBITS” in the above captioned proceeding have been served via the Electronic Information Exchange this 6th day of January 2014.

Respectfully submitted,

/s/ signed electronically by  
Tyson R. Smith  
Winston & Strawn LLP  
1700 K Street, NW  
Washington, DC 20006

COUNSEL FOR DTE ELECTRIC  
COMPANY