

**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) January 13, 2014
(Fermi Nuclear Power Plant, Unit 3))
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)

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**REPLY IN SUPPORT OF INTERVENORS’ POST-HEARING MOTION
FOR RECONSIDERATION OF ADMISSION
OF EXCLUDED INTERVENOR EXHIBITS ON CONTENTION 15**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and reply in support of their December 27, 2013 request that the Atomic Safety and Licensing Board reconsider admission of certain excluded exhibits which Intervenors proffered for the record in the litigation of Contention 15.

Response as to Timeliness of Motion Filing

The motion for reconsideration was timely proffered, orally, on October 31, 2013 at closing argument - well within the 10-day rule. Oral motion-making is acceptable according to the motion rule.² Intervenors’ rationale for reconsideration - also stated in the October 31 record - is what was filed later in written form. The assertion by the NRC Staff (“NRC Staff Answer

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.

²See 10 C.F.R. § 2.323(b).

Opposing Intervenor's Post-Hearing Motion" p. 4) that "the lateness of the Intervenor's motion should not be allowed to generate unnecessary uncertainty about the content of the record" is inefficacious. Proposed findings are written from the perspective of the ASLB; the NRC Staff and DTE Energy undoubtedly will deftly include words of exclusion in their proposed findings.

Response as to Essentiality

Respecting the requirement imposed by the ALSB that Intervenor's show admission of the exhibits "is essential to permit the Board to adequately evaluate the evidentiary record," the exhibits reveal much about the feckless corporate culture of DTE Energy, which undertook a "licensing project" and not a "plant construction project." Intervenor's demonstrated in their case-in-chief that the "licensing project" is being accomplished in a haphazard and probably least-cost manner, even unto providing DTE's slide show recriminations over failing to have complied with quality assurance requirements.

The exhibits, and the references to them which are woven into Arnold Gundersen's expert reports, bespeak a lack of an adequate quality assurance program for many months at the critical outset of the licensing project. The cited exhibits, besides proving this void, also tend to provide proofs of the unreliability or unwillingness of DTE Energy to adhere to the strict requirements for new plant development. DTE's "if we had to do it all again" slideshow expresses good intentions which are arguably not supported by proofs of subsequent events.

The integrity or character of a licensee's management personnel bears on the Commission's ability to find reasonable assurance that a facility can be safely operated. Lack of either technical competence or character qualifications on the part of a licensee or applicant is sufficient grounds for the revocation of a license or the denial of a license application. In making

determinations about character, the Commission may consider evidence bearing upon the licensee's candor, truthfulness, willingness to abide by regulatory requirements, and acceptance of responsibility to protect public health and safety. The issue of character is a proper matter for inquiry in a license transfer proceeding. *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25 (1993). *See also Piping Specialists, Inc.* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 156, 163, n.5 (1992); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 189 (1999). The Commission may consider evidence of licensee behavior having a rational connection to safe operation of the facility and some reasonable relationship to a licensee's candor, truthfulness, and willingness to abide by regulatory requirements and accept responsibility to protect public health and safety. *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985). By these measures, the exhibits are relevant. They back up, in multiple and graphic ways, Gundersen's expert conclusions that a finding of confidence in DTE's ability to proceed with construction and operation of Fermi 3 is not warranted.

The NRC Staff, itself, concedes that the exhibits are "tangentially related" to Intervenors' case. However, the Staff then argues the whopper that "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." Staff Answer pp. 3-4. Evidence is admissible if it is relevant, material, reliable and not repetitious. 10 C.F.R. §§ 2.337(a), 2.711(e) (formerly § 2.743(c)). Intervenors' exhibits are thus relevant, material, and they prove a practice or pattern of DTE's managerial indifference at best, or incompetence at worst, on matters of quality assurance.

DTE Energy, which registered zero objections prior to adjudication to the admissibility

of the exhibits, newly contends (“Applicant’s Response to Intervenors’ Motion to Reconsider” p. 3) that the exhibits “do not support the inferences claimed, and do not address the quality of the information in the Fermi 3 license application.” Such a naked assertion, made in response to a procedural motion, calls upon the Board to evaluate the exhibits as a means of testing of the credibility of Arnold Gundersen’s expert findings. Effectively, DTE makes an argument for admission of the exhibits, in order to meaningfully assess the weight to be accorded Gundersen’s testimony.

CONCLUSION

The Commission standard of “clear error” for overturning Board factual findings is quite high, particularly with respect to intricate factual findings based on expert witness testimony and credibility determinations. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26-27 (2003); *also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 174 (2005) (Commission defers to a Board’s disclosure-related factual findings, and will reverse only if the findings are “clearly erroneous” (quoting 10 C.F.R. § 2.786(b)(4)(i) [the present 10 C.F.R. § 2.341(b)(4)(I)]). For this reason alone, considerations of justice suggest that all of the evidence that has been proffered by Intervenors should be received into the record and considered. 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. 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 reverse its prior exclusionary orders and

receive Intervenors' excluded exhibits into the evidentiary record.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “REPLY IN SUPPORT OF 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 13th day of January, 2014:

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