

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

ASLBP No. 09-880-05-COL-BD01

May 23, 2014

MEMORANDUM AND ORDER

(Denying Intervenors' Motion for Admission of Proposed Contention 13 and for Supplementation of the Final Environmental Impact Statement)

On October 29, 2013, one day before the start of the evidentiary hearing on Contentions 8 and 15, Intervenors filed a "Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention 13 for Adjudication, and for Supplementation of the Final Environmental Impact Statement" ("the Motion").¹ The Board denied the request to suspend the licensing hearing on the first day of the hearing.² We now deny the remainder of the Motion.

I. Brief Procedural Background

This is Intervenors' fourth attempt to have the Board admit a contention concerning, in whole or in part, the need for the power to be generated by Fermi Unit 3. The original version of Contention 13 was asserted among the initial contentions in 2009.³ Intervenors raised four issues: (1) the cost of a new nuclear facility, (2) the need for power analysis in the Applicant's

¹ Motion for Suspension of Licensing Hearing, for Admission of Proposed Contention 13 for Adjudication, and for Supplementation of the [FEIS] (Oct. 29, 2013) [hereinafter Motion].

² See Tr. at 279–80 (J. Spritzer).

³ See REFILED Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing at 109–22 (Apr. 21, 2009).

Environmental Report (“ER”), (3) the consideration of energy efficiency in the ER, and (4) the consideration of alternative energy sources in the ER.⁴ In LBP-09-16, the Board separately analyzed each of these issues, concluding that all four issues were inadmissible because Intervenors did not provide factual or expert support to demonstrate a genuine material dispute with the application.⁵

The second version of Contention 13 was based upon the publication of the Fermi 3 DEIS.⁶ The DEIS version of Contention 13 reargued issues two, three, and four with respect to the DEIS, and Intervenors provided a declaration and report by a consultant to the Sierra Club, Ned Ford.⁷ In LBP-12-12, the Board rejected the DEIS version of Contention 13 as untimely, concluding that Intervenors failed to demonstrate that the DEIS contained new data, new conclusions, or information that was “not previously available” as required under 10 C.F.R. § 2.309(f)(2)(i).⁸ The Board also noted that Intervenors “could have submitted (and indeed did submit) this contention upon publication of Applicant’s ER.”⁹

The third version of Contention 13 was based upon the FEIS. Intervenors asserted, as they had previously, that the need for power analysis in the FEIS failed to meet NEPA requirements because it relied on the Michigan Public Service Commission’s 21st Century Electric Energy Plan (“21st Century Plan”), a 2006 energy planning report that was prepared “before the Great Recession” and therefore “failed to anticipate the dramatic consequential reduction in electricity demand.”¹⁰ The Board found that the third version of the contention was

⁴ See id. at 111–22.

⁵ See LBP-09-16, 70 NRC 227, 298–304 (2009).

⁶ See Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 at 10–22 (Jan. 11, 2012).

⁷ See id.; see also id., Attach. 2, Decl. of Ned Ford, Intervenors’ Expert Witness (Jan. 11, 2011); id., Attach. 3, Fermi 3: A Critique of the Resource Options Comparing Fermi 3 to Efficiency and Renewable Generation (Jan. 11, 2012).

⁸ See LBP-12-12, 75 NRC 742, 755–56 (2012).

⁹ Id.

¹⁰ Motion for Resubmission of Contention 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of the New Contentions 26 and 27 at 13 (Feb. 19, 2013).

inadmissible for the same reasons as the previously rejected versions, and also because the Intervenor's reading of the FEIS was factually incorrect.¹¹

In the instant motion, Intervenor's resubmit proposed Contention 13 in an attempt to challenge the need for power analysis for a fourth time. On November 25, 2013, the NRC Staff and DTE submitted answers to the motion.¹² Intervenor's replied to the answers on December 2, 2013.¹³

II. Legal Standards

New and amended contentions must satisfy two sets of regulations to be admissible: the timeliness standards in 10 C.F.R. § 2.309(c)(1) and the general contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

a. Timeliness Standards

New or amended contentions may be filed after the initial filing period only if the presiding officer determines that a participant has demonstrated good cause by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.¹⁴

In this case, we established a 30-day deadline for filing timely new contentions based on the publication of the FEIS or other new information.¹⁵

¹¹ Licensing Board Memorandum and Order (Denying Intervenor's Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) at 17–19 (Apr. 30, 2013) (unpublished) [hereinafter Apr. 30 Order].

¹² See NRC Staff Answer to the Intervenor's Motion for Admission/Reconsideration of Contention 13 (Nov. 25, 2013) [hereinafter NRC Staff Answer]; Applicant Response to Resubmitted Contention 13 (Nov. 25, 2013) [hereinafter DTE Answer].

¹³ Intervenor's 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 (Dec. 2, 2013) [hereinafter Reply].

¹⁴ 10 C.F.R. § 2.309(c)(1).

¹⁵ See Licensing Board Order (Scheduling Order) (Sept. 11, 2009) (unpublished).

b. General Admissibility Standards

Any new or amended contention must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). An admissible contention must: (i) provide a specific statement of the issue of law or fact to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the licensing action; (v) provide a concise statement of the alleged facts or expert opinions in support of the petitioner's position on the issue and on which the petitioner intends to rely at hearing; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with reference to specific disputed portions of the application.¹⁶ Failure to comply with any of these requirements is grounds for not admitting a contention.¹⁷

III. Parties' Positions

Intervenors seek to resubmit a fourth iteration of Contention 13:

The FEIS still does not contain the "hard look" required by NEPA or the Atomic Energy Act respecting need and demand for Fermi 3. It overestimates forecast demand for electricity through the decade of the 2020s, when Fermi 3 is planned to begin power generation. The FEIS relies on two flawed analyses of future demand, one of which predates and so does not account for the 2007-08 economic recession, and the other of which has consistently overestimated electrical consumption, belied by actual usage data, for every year since it was compiled. 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 baseload nuclear plant because they are based on inaccurate, irrelevant and/or outdated information.¹⁸

Intervenors argue that new information has become available concerning DTE's plans to reconsider a natural gas-fired facility and commercial-scale wind generators as an alternative to

¹⁶ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹⁷ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

¹⁸ Motion at 6.

early construction of Fermi 3.¹⁹ Specifically, Intervenor's point to a newspaper article published in the Monroe Evening News, dated October 24, 2013.²⁰ The article states that while DTE Energy is still seeking a federal license to build Fermi Unit 3, it "is studying the prospects of building a natural gas fueled plant first, given plummeting natural gas prices."²¹ The article quotes Ron May, DTE's vice president of major enterprise projects, as stating "I would suspect if we were going to go out and build something immediately, it would be gas," and that "I doubt if we'd build another coal plant but even before gas, we'd probably put in more wind turbines."²²

Additionally, the article reports that DTE "figures it will not need a new generating plant for at least five years, due to declining demand for electricity, further reduced by energy efficiency measures and new renewable sources of power, such as wind and solar projects."²³ But the article also reports that "DTE remains committed to getting a nuclear power plant license, although the company has not committed to build a nuclear plant"²⁴ and that "[g]etting a nuclear license gives the company that option, cuts the time to complete it and would come in handy if stiffer limits on carbon dioxide emissions are imposed on both coal- and gas-fired power plants."²⁵

The NRC Staff argues that the instant motion fails to meet section 2.309(c)(1) because Intervenor's do not demonstrate how the new information is materially different from previous information.²⁶ Staff also contends that the motion fails to meet section 2.309(f)(1) because Intervenor's do not demonstrate how the new information is material to the findings the Staff must make or constitutes a genuine dispute with the FEIS.²⁷ Staff asserts that Intervenor's fail to

¹⁹ See id. at 2.

²⁰ Id., Attach. 1, Charles Slat, Nuclear Plant on Back Burner?, MONROE EVENING NEWS, Oct. 24, 2013 [hereinafter Slat Article].

²¹ Id., Attach. 1 at 1.

²² Id.

²³ Id.

²⁴ Id. at 2.

²⁵ Id.

²⁶ NRC Staff Answer at 8.

²⁷ Id. at 7.

specify how any of the new information contradict any fact or assumption in the “need for power” analysis in the FEIS.²⁸

DTE also argues that the Motion does not satisfy section 2.309(c)(1) or section 2.309(f)(1).²⁹ DTE contends that the article does not reflect any change in DTE’s planning for Fermi 3 or the status of the project and that the instant motion largely resembles the previous three motions that have been denied.³⁰

In reply, Intervenors contend that the Motion meets sections 2.309(c)(1) and 2.309(f)(1) because Mr. May’s statements were not previously known and indicate that DTE’s plan no longer involves nuclear development but, instead, natural gas and wind power generation.³¹

IV. Board Ruling

On its face, this latest version of the contention merely repeats Intervenors earlier arguments.³² Intervenors maintain, however, that they have discovered new and materially different information to support Contention 13 and that the latest version was filed within thirty days of the availability of that new information. Thus, Intervenors claim to have satisfied the requirement of the Board’s scheduling order that a new contention be filed within thirty days of when the new information on which it is based first becomes available.³³

We conclude that the Board’s reasoning in rejecting the ER-based Contention 13, the DEIS-based Contention 13, and the FEIS-based Contention 13 applies equally to the latest version of Contention 13 and that it is therefore inadmissible.³⁴

First, we agree with the Applicant and the Staff that, while the newspaper article itself is new, it does not contain information that is materially different from that previously available.

²⁸ Id. at 9.

²⁹ DTE Answer at 6–8.

³⁰ See id.

³¹ See Reply at 2–7.

³² See generally LBP-09-16, 70 NRC at 297–304 (2009); LBP-12-12, 75 NRC at 755–58 (2012); Apr. 30 Order at 13–19.

³³ Motion at 4.

³⁴ See supra note 32.

The FEIS acknowledges that DTE is considering power generation options other than nuclear.³⁵ Mr. May's statements to that effect therefore add nothing new to the information available in the FEIS itself. In fact, DTE has consistently acknowledged that the decision to build Fermi 3 depends on the economic conditions in Michigan and has recognized that energy efficiency and conservation may also reduce the need for power.³⁶

Second, we also agree with the Applicant and the Staff that the latest version of Contention 13 fails, like its predecessors, to identify a genuine dispute with the application on a material issue. For example, in the instant motion, Intervenor's argue that the "Need for Power" discussion in the FEIS improperly relies on the 21st Century Plan and that the FEIS overestimates energy demand and thus overstates the need for Fermi Unit 3.³⁷ We have previously rejected both of these arguments – first because Intervenor's did not identify an issue affecting the need for power or a source of uncertainty that was not considered in the ER,³⁸ and subsequently because the Intervenor's failed to take into account material that the Staff included in the DEIS concerning the 21st Century Plan.³⁹

Intervenor's also assert that, even as the NRC Staff composed the FEIS, Staff "persisted in its pattern of choosing out-of-date forecasts."⁴⁰ We specifically rejected this argument in our April 30 Order, highlighting that the FEIS plainly states that it is based on a 2010 forecast, not an out-of-date 2008 forecast.⁴¹ Once again, we reject this argument for the same reasons we rejected it last time. Additionally, the Commission has stated that

while a discussion of need for power is required, the Commission is not looking for burdensome attempts by the applicant to precisely identify future market

³⁵ See DTE Answer at 6 (citing FEIS at D-21, D-122, D-124, and D-130).

³⁶ LBP-09-16, 70 NRC at 302 (citing Environmental Report at 8-25 to 8-29, 8-32 to 8-38); see also LBP-12-12, 75 NRC at 757.

³⁷ Motion at 10–12.

³⁸ See LBP-09-16, 70 NRC at 301–02.

³⁹ See LBP-12-12, 75 NRC at 756–57; see also Apr. 30 Order at 18.

⁴⁰ Motion at 8.

⁴¹ See Apr. 30 Order at 19 ("The FEIS plainly states: 'The review team's reassessment is based on ReliabilityFirst's 2010 Long Term Resource Assessment, hereafter the LTRA (RFC 2010).'" (quoting FEIS at 8-19)).

conditions and energy demand, or to develop detailed analyses of system generating assets, costs of production, capital replacement ratios, and the like in order to establish with certainty that the construction and operation of a nuclear power plant is the most economical alternative for generation of power.⁴²

In sum, the fourth iteration of Contention 13 is inadmissible because it suffers from deficiencies analogous to those that led the Board to reject the three previous versions of Contention 13. Because Contention 13 is inadmissible, the request for supplementation of the FEIS is moot. The Board accordingly denies Intervenors' Motion.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

Ronald M. Spritzer, Chairman
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Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE
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Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 23, 2014

⁴² S.C. Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 18 (2010) (quoting Nuclear Energy Institute; Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003)).

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NUCLEAR REGULATORY COMMISSION

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(Fermi Nuclear Power Plant, Unit 3))
)
(Combined License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Intervenors' Motion for Admission of Proposed Contention 13 and for Supplementation of the Final Environmental Impact Statement)** have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-033-COL

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[Original signed by Clara Sola]
 Office of the Secretary of the Commission

Dated at Rockville, Maryland
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