

July 14, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO INTERVENORS'
PETITION FOR REVIEW OF LBP-14-07

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July 14, 2014

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I. INTRODUCTION

On May 23, 2014, the Atomic Safety and Licensing Board (Board) issued a Partial Initial Decision in the above captioned proceeding, ruling on the merits of two admitted contentions. The Board found in favor of the staff of the United States Nuclear Regulatory Commission (Staff) on Contention 8 concerning the Staff's analysis of environmental impacts to the eastern fox snake, and in favor of DTE Electric Company (DTE or Applicant) on Contention 15 concerning the Applicant's compliance with NRC requirements governing quality assurance.¹ With respect to Contention 15, the Board held that "DTE's QA efforts during the pre-application period satisfied Appendix B requirements so that there is reasonable assurance that the data used in the design of Fermi 3 is of high quality" and that there is "reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety because the Applicant has provided satisfactory evidence of a fully implemented QA program

¹ *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-14-07, 79 NRC __ (slip op.) (May 23, 2014).

governing the design, construction, and operation of Fermi 3 in conformity with all relevant NRC regulations.”²

On June 17, 2014, the Intervenor in this proceeding³ filed a petition for review of the Board’s Order with respect to Contention 15.⁴ However, for the reasons described below, the Petition for Review fails to either fully address the requirements for a petition for review or to meet the Commission’s high standards for reversing a Board decision. Therefore, the Petition for Review should be denied.

II. BACKGROUND

By letter dated September 18, 2008, the Applicant submitted a combined license (COL) application (Application or COLA) for one ESBWR advanced boiling water reactor to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2, in Monroe County, Michigan.⁵ The ESBWR design is the subject of an NRC rulemaking under Docket No. 52-010.

On March 9, 2009, the Intervenor filed a Petition for Leave to Intervene, which included 14 contentions, in the Fermi 3 COLA proceeding.⁶ Following oral argument, the Board found that the Intervenor had standing in this proceeding and had filed four

² *Id.* at 39-40.

³ Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, 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 (collectively, Intervenor).

⁴ See Intervenor’s Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance), (June 17, 2014) (Petition for Review), ADAMS Accession No. ML14169A491.

⁵ Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008), ADAMS Accession No. ML082730763.

⁶ See REFILED Petition of Beyond Nuclear, et al. for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Apr. 21, 2009), ADAMS Accession No. ML091110726.

contentions that were admissible in part.⁷ On November 6, 2009, the Intervenor filed a Supplemental Petition for Admission of a Newly Discovered Contention, which included a quality assurance (QA) contention numbered as Contention 15.⁸ As originally submitted, Contention 15 stated that

[DTE] has failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and maintain a quality assurance program since March 2007 when it entered into a contract with [B&V] for the conduct of safety-related [COL] application activities and to retain overall control of safety-related activities performed by B&V. DTE further has failed to complete any internal audits of QA programmatic areas implemented for Fermi 3 COLA activities performed to date. And DTE has also failed to demonstrate trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi 3 project in March 2007.⁹

After considering a series of additional pleadings concerning this contention,¹⁰ the Board admitted a reformulated version of Contention 15 that read as follows:

Detroit Edison (DTE) failed to comply with Appendix B to 10 C.F.R. Part 50 to establish and implement its own quality assurance (QA) program when it entered into a contract with Black and Veatch (B&V) for the conduct of safety-related combined license (COL) application activities and to retain overall control of safety-related activities performed by B&V. This violation began in March 2007 and continued through at least February 2008. Further, DTE failed to complete internal audits of QA

⁷ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227 (2009). Contention 8 (eastern fox snake) was one of the original admitted contentions. The other three were resolved at the summary disposition phase.

⁸ Supplemental Petition for Admission of a Newly Discovered Contention, and for Partial Suspension of COLA Adjudication (Nov. 6, 2009), ADAMS Accession No. ML093100678.

⁹ *Id.* at 2-3.

¹⁰ Applicant's Response to Proposed Supplemental Contention (Dec. 1, 2009), ADAMS Accession No. ML093350555; Staff Answer to Supplemental Petition (Dec. 1, 2009), ADAMS Accession No. ML093350825; Intervenor's Combined Reply in Support of Supplemental Petition for Admission of a Newly-Discovered Contention (Dec. 8, 2009), ADAMS Accession No. ML093430001; NRC Staff Motion for Leave to Reply to Intervenor's Combined Reply in Support of Supplemental Petition (Dec. 18, 2009), ADAMS Accession No. ML093520974; Applicant's Response to NRC Staff Motion for Leave to Reply (Dec. 23, 2009), ADAMS Accession No. ML093570320; Intervenor's Motion for Leave to File a Surreply in Support of Supplemental Petition for Admission of a Newly Discovered Contention (Jan. 4, 2010), ADAMS Accession No. ML100050001; Applicant's Response to Intervenor's Reply (Jan. 11, 2010), ADAMS Accession No. ML100110537; Applicant's Response to Intervenor's Motion for Leave to File a Surreply (Jan. 15, 2010), ADAMS Accession No. ML100151727.

programmatic areas implemented for the Fermi 3 COL Application, and DTE also has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi Unit 3 project in March 2007.

Contention 15A: These deficiencies adversely impact the quality of the safety-related design information in the FSAR that is based on B&V's tests, investigations, or other safety-related activities. Because the NRC may base its licensing decision on safety-related design information in the FSAR only if it has reasonable assurance of the quality of that information, it may not lawfully issue the COL until the deficiencies have been adequately corrected by the Applicant, or until the Applicant demonstrates that the deficiencies do not affect the quality of safety-related design information in the FSAR.

Contention 15B: Although DTE claims that in February 2008 it adopted a QA program that conforms to Appendix B, DTE has failed to implement that program in the manner required to properly oversee the safety-related design activities of B&V. This demonstrates an ongoing lack of commitment on the part of DTE's management to compliance with NRC QA regulations. The NRC cannot support a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety until DTE provides satisfactory proof of a fully-implemented QA program that will govern the design, construction, and operation of Fermi Unit 3 in conformity with all relevant NRC regulations.¹¹

On April 17, 2012, the Applicant filed a motion for summary disposition of Contention 15.¹² The Staff filed its answer to the Summary Disposition Motion on May 7, 2012.¹³ However, the Board determined that summary disposition was not warranted.¹⁴

The Staff completed its technical review of the quality assurance (QA) aspects of the Fermi 3 COLA in 2011, and that review is documented in Chapter 17 of the Advanced Safety Evaluation Report (SER) With No Open Items.¹⁵ This SER chapter

¹¹ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-10-9, 71 NRC 493, 510-11 (2010).

¹² Applicant's Motion for Summary Disposition of Contention 15 (Apr. 17, 2012) (Summary Disposition Motion), ADAMS Accession No. ML12108A376.

¹³ NRC Staff Answer to Applicant's Motion for Summary Disposition of Contention 15 (May 7, 2012), ADAMS Accession No. ML12128A511.

¹⁴ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 NRC 445, 480 (2012).

¹⁵ ADAMS Accession No. ML112630120 (SER Chapter 17). This SER chapter was entered into evidence in this proceeding as Exhibit NRC S1.

was presented to the Advisory Committee on Reactor Safeguards (ACRS) on September 22, 2011, and released to the public on October 17, 2011. While the Final SER for the Fermi 3 COL Application has not yet been published, no substantive changes to Chapter 17 are anticipated in the Final SER.

All parties submitted their pre-filed direct testimony for Contention 15 on April 30, 2013,¹⁶ and their pre-filed rebuttal testimony on May 30, 2013.¹⁷ The NRC Staff also filed 23 exhibits with its testimony, and the Applicant filed 81. However, as discussed below, the Intervenors did not file any exhibits at that time. All parties filed their Proposed Findings of Fact and Conclusions of Law on January 21 and 22, 2014.¹⁸

As the Intervenors note in their Petition for Review, Contention 15 was initially based on an Inspection Report and Notice of Violation (NOV) that the NRC Staff issued

¹⁶ Initial Written Testimony of DTE Electric Company Witnesses Peter Smith, Stanley Stasek, Ronald Sacco, and Steven Thomas on Contention 15 (Apr. 30, 2013) (DTE Direct Testimony), ADAMS Accession No. ML13120A706; Prefiled Direct Testimony of Adrian Muñoz Sponsoring the Advanced Final Safety Evaluation for Chapter 17, "Quality Assurance", of the Fermi 3 Combined License Application Into Hearing Record (Apr. 30, 2013), ADAMS Accession No. ML13120A672; Prefiled Direct Testimony of Aida Rivera-Varona Sponsoring the Staff's Inspection Report and Notice of Violation, Dated October 5, 2009, and the Applicant's Response Thereto, Into Hearing Record (Apr. 30, 2013), ADAMS Accession No. ML13120A673; Written Direct Testimony of George A. Lipscomb Concerning the Staff's Review of the Fermi 3 Quality Assurance Program as it Relates to Contention 15 (Apr. 30, 2013) (Lipscomb Direct Testimony), ADAMS Accession No. ML13120A674; Testimony of Arnold Gundersen Supporting of Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (Apr. 30, 2013) (Gundersen Direct Testimony), ADAMS Accession No. ML13120A785.

¹⁷ Written Rebuttal Testimony of DTE Electric Company Witnesses Peter Smith, Stanley Stasek, Ronald Sacco, and Steven Thomas on Contention 15 (May 30, 2013), ADAMS Accession No. ML13150A426; Written Rebuttal Testimony of George A. Lipscomb Concerning the Staff's Review of the Fermi 3 Quality Assurance Program as it Relates to Contention 15 (May 30, 2013), ADAMS Accession No. ML13150A363; Rebuttal Testimony of Arnold Gundersen Supporting of Intervenors Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program (May 30, 2013), ADAMS Accession No. ML13150A419.

¹⁸ NRC Staff Proposed Findings of Fact and Conclusions of Law for Contentions 8 and 15 (Jan. 22, 2014), ADAMS Accession No. ML14022A285; DTE Electric Company's Proposed Findings of Fact and Conclusions of Law (Jan. 21, 2014), ADAMS Accession No. ML14021A132; Intervenors' Refiled Proposed Findings of Fact and Conclusions of Law on Contention 15 (Quality Assurance) (Jan. 22, 2014), ADAMS Accession No. ML14022A286.

to DTE on October 5, 2009.¹⁹ As reflected in the Board's ruling on Contention 15, the testimony and exhibits submitted in this proceeding document the resolution of the issues identified in this NOV, which the NRC Staff addressed through both the agency's enforcement process and through Requests for Additional Information (RAIs) submitted to the Applicant as part of the licensing process.²⁰ However, the Board's findings correctly emphasize that Contention 15 relates primarily to the adequacy of the QA controls that were in place while safety-related subsurface investigations were conducted at the Fermi 3 site prior to submission of the Fermi 3 COL application and determining whether NRC QA requirements in Appendix B to 10 C.F.R. Part 50 have been met.²¹ The Board concluded that all Appendix B requirements had been met, and ruled in favor of the Applicant.²²

III. LEGAL STANDARDS

Commission regulations in 10 C.F.R. § 2.341 establish that a

petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or

¹⁹ See Petition for Review at 8-9. See also NRC Inspection Report 05200033/2009-201 and Notice of Violation (Oct. 5, 2009) (October 2009 NOV), ADAMS Accession No. ML092740064. This document was entered into evidence in this proceeding as Exhibit NRC S2.

²⁰ See *Fermi*, LBP-14-7, 79 NRC at ___ (slip op. at 35-38).

²¹ *Id.* at 24-35.

²² *Id.* at 40.

- (v) Any other consideration which the Commission may deem to be in the public interest.²³

Furthermore, 10 C.F.R. § 2.341(b)(5) provides that “[a] petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer.”²⁴ In the event that a petition for review relies on facts not previously raised before the presiding officer, the Petitioner must explain why they were not raised.²⁵

It has long been established that “Licensing Boards are the Commission’s primary fact-finding tribunals.”²⁶ In the absence of clear factual or legal error, the Commission has repeatedly declined to reverse Board decisions involving detailed findings of fact based on extensive records and expert testimony.²⁷ In particular, the Commission has denied review when a petition for review is based on a claim that “the Board improperly weighed the evidence”²⁸ or that the Board accorded greater weight to one party’s evidence than to another’s.²⁹ The Commission has stated that it is “disinclined” to review the underlying factual issues of a case *de novo* “where a Board

²³ 10 C.F.R. § 2.341(b)(4)(i)-(v).

²⁴ 10 C.F.R. § 2.341(b)(5)

²⁵ *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005).

²⁶ *Northern Indiana Public Serv. Co.* (Bailly Generating Station, Nuclear 1), ALAB-303, 2 NRC 858, 867 (1975). See also *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972) (rejecting the argument that the Appeal Board should conduct *de novo* reviews of Licensing Board decisions and make independent findings of fact).

²⁷ See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 675-76 (2008); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 422-23 (2006); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NR 370, 388 (2001).

²⁸ *Oyster Creek*, CLI-08-28, 68 NRC at 676.

²⁹ *In the Matter of David Geisen*, CLI-10-23, 72 NRC 210, 241 (2010) (“Such weighing of evidence and testimony is inherent in, and at the very heart of, adjudicatory fact-finding—an area where we have traditionally deferred to our licensing boards.”).

has weighed arguments presented by experts and rendered reasonable, record-based findings,³⁰ and that it will overturn Board factual findings only in the event of “clearly erroneous” findings that are “not even plausible in the light of the record viewed in its entirety.”³¹ Under this high standard of review, the Commission will defer to a Board’s finding of fact “unless there is a strong reason to believe that in a particular case a Board has overlooked or misunderstood important evidence.”³²

IV. DISCUSSION

In their Petition for Review, the Intervenor make three distinct claims. First, they argue that the Board erred to their prejudice in failing to admit certain exhibits that the Intervenor claim were filed “one (1) day late.”³³ Second, they assert that the Board made incorrect factual findings and “ignored the greater weight of evidence” in ruling for the Applicant on Contention 15.³⁴ Finally, they argue that the Board’s finding for the Applicant amounts to a “*de facto* granting of an exemption or waiver of NRC regulations,” a claim they make not with respect to any regulation in the Code of Federal Regulations, but rather with respect to a quality assurance program template developed by the Nuclear Energy Institute (NEI).³⁵ As discussed below, these claims do not meet the standards for Commission review set forth in 10 C.F.R. § 2.341 or in Commission case law. Accordingly, the Petition for Review should be denied.

³⁰ *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 697 (2006).

³¹ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

³² *Id.*

³³ Petition for Review at 2.

³⁴ *Id.*

³⁵ *Id.* at 3, 24.

A. The Intervenors Were Not Prejudiced by the Board's Decision Not to Admit Untimely Exhibits.

The Intervenors' first claim is that the Board "wrongly excluded" several Intervenor exhibits that were filed "one (1) day late." However, this claim inaccurately portrays the Board's determinations with respect to the Intervenors' exhibits and does not raise a legitimate issue for Commission review. As the sequence of events related below indicates, the Intervenors were granted multiple opportunities to file their exhibits, including multiple extensions of deadlines they agreed to or even proposed themselves. When they ultimately filed several exhibits after the Board's final pre-hearing deadline for submitting exhibits, some of those were rejected as untimely, but the Board indicated that it would consider admitting even those 16 exhibits to the extent it needed to do so to develop the evidentiary record.³⁶ Following the hearing, the Board gave the Intervenors a second opportunity to argue for admission of these rejected exhibits and rejected them for a second time, explaining that they were not needed for the evidentiary record.³⁷ The following history concerning these exhibits illustrates the extent to which the Board went to ensure that the Intervenors were given every possible opportunity to present their case and were not prejudiced by procedural hurdles.

On December 12, 2012, the Board issued an order setting the schedule for the evidentiary hearing on Contentions 8 and 15.³⁸ All parties made their filings on Contention 8, including all exhibits, on the dates in the Board's December 12, 2012,

³⁶ Licensing Board Order (Ruling on Staff Objections to Intervenor Exhibits) (Oct. 23, 2013) (unpublished) (Pre-Hearing Board Order Rejecting Exhibits), ADAMS Accession No. ML13296A535.

³⁷ Licensing Board Order (Adopting Transcript Corrections, Denying Intervenors' Post-Hearing Motion for Admission for Excluded Exhibits, and Closing the Record) (Feb. 4, 2014) (unpublished) (Post-Hearing Board Order Rejecting Exhibits), ADAMS Accession No. ML13276A488.

³⁸ Licensing Board Order (Modifying the Schedule) (Dec. 12, 2012) (unpublished), ADAMS Accession No. ML12347A050. This order established a due date of March 29, 2013, for filing direct testimony on both contentions, and a due date of April 29, 2013, for filing rebuttal testimony. *Id.* at 2.

Order. On March 27, 2013, two days before the due date in the Board's Order, the Intervenor filed a motion for a one-month extension of time for all parties to file testimony on Contention 15.³⁹ The Board granted this motion on March 29, 2013, the original due date for direct testimony, and established new due dates of April 30, 2013, for direct testimony and May 30, 2013, for rebuttal testimony.⁴⁰ The Applicant and NRC Staff filed their testimony and exhibits related to Contention 15 on the dates established in the Board's March 29, 2013, Order. However, the Intervenor filed only their testimony on those dates and did not include exhibits.

At a prehearing teleconference on September 16, 2013, the Board noted certain problems with exhibits and directed the parties to correct them within 10 days.⁴¹ The Board subsequently issued an order setting September 26, 2013, as the deadline for filing corrected exhibits.⁴² On September 26, 2013, the Intervenor filed a motion to extend the September 26 deadline to October 1, 2013.⁴³ On their own requested due date of October 1, 2013, and before the Board ruled on their first extension request, the Intervenor filed a second motion requesting an extension of the October 1 due date to

³⁹ Motion for Extension of Time for Submission of Testimony for Adjudication of Contention 15 (Mar. 27, 2013), ADAMS Accession No. ML13086A423.

⁴⁰ Licensing Board Order (Granting Motion for Extension of Time for Submission of Testimony for Adjudication of Contention 15, and Modifying Schedule) (Mar. 29, 2013) (unpublished), ADAMS Accession No. ML13088A196.

⁴¹ Tr. at 240-41. The Intervenor agreed that they could "easily" file within that time. *Id.* at 241.

⁴² Licensing Board Order (Summarizing Pre-Hearing Conference) (Sept. 20, 2013) (unpublished), ADAMS Accession No. ML13276A488.

⁴³ Intervenor's Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony With Exhibit References (Sept. 26, 2013), ADAMS Accession No. ML13270A000. This motion was filed after 11:00 p.m. on the due date, thereby precluding any possibility of a Board ruling before the deadline.

October 4, 2013.⁴⁴ In their October 1 filing, the Intervenors noted that they had filed approximately thirty exhibits as of October 1 and had an additional twenty to file.⁴⁵

On October 3, 2013, the Board issued an order granting both of the Intervenors' extension requests, establishing close of business on October 4 as the final deadline for exhibit filing, and indicating that "[n]o additional extensions will be granted."⁴⁶ The Board also clarified that it did not intend to permit entirely new exhibits, but that it might allow admission of exhibits previously referenced in the Intervenors' pre-filed testimony or statements of position.⁴⁷

On October 4, 2013, the Intervenors filed some new exhibits and withdrew some exhibits not previously cited in testimony. However, the Intervenors continued to file exhibits on October 6 and 7. The Board subsequently issued an order rejecting all exhibits filed after October 4, 2013, unless the Board determined "that their admission is essential to permit the Board to adequately evaluate the evidentiary record."⁴⁸

At hearing on October 30, 2013, the Intervenors moved orally to have these exhibits admitted, and the Board rejected their oral motion but granted them the opportunity to file a written motion.⁴⁹ Several months after the hearing, the Intervenors

⁴⁴ Intervenors' Motion for Extension of Time for Submission of Exhibits and Prefiled Testimony With Exhibit References (Oct. 1, 2013), ADAMS Accession No. ML13275A021.

⁴⁵ *Id.* at 2.

⁴⁶ Licensing Board Order (Granting Intervenors' Motions for Extension of Time, Requesting List of Objections from the NRC Staff, and Explaining Board Procedure in the Event of a Continued Government Shutdown) (Oct. 3, 2013) (unpublished), ADAMS Accession No. ML13276A488.

⁴⁷ *Id.* at 2.

⁴⁸ Pre-Hearing Board Order Rejecting Exhibits at 3.

⁴⁹ Tr. at 299, 709-710.

filed a written motion for reconsideration of the Board's rejection of these exhibits.⁵⁰ The Board rejected this motion, indicating that it had reviewed the exhibits in question and found "that they would not add anything of significance to the record" and that they were "not essential to the Board's evaluation of the evidentiary record."⁵¹

The Board's decision to exclude the exhibits was not prejudicial to the Intervenors' interests because the exhibits themselves were not technical documents bearing on the factual issues in the contention. The excluded exhibits were e-mails and PowerPoint presentations from which the Intervenors' expert quoted in order to make claims about what he viewed as "organizational chaos" within the Fermi QA program and the state of mind of specific individuals involved with it. However, the Board's resolution of Contention 15 relied on an extensive factual record that appropriately focused on documentation of the quality assurance program and its implementation, and thus did not depend on claims related to states of mind. The Board—after examining the exhibits for their probative value—therefore correctly concluded that the rejected exhibits did not contribute to the evidentiary record.⁵²

In sum, the Board's decision to reject these exhibits was fully justified not only by the Intervenors' repeated failures to file their exhibits despite multiple deadline extensions, but by the Board's factual determination that the documents were not significant to the record. The Board's rejection of the exhibits therefore does not constitute a prejudicial procedural error,⁵³ and the Intervenors' request for their admission and a reevaluation of the Board's decision should therefore be denied.

⁵⁰ Intervenors' Post-Hearing Motion for Reconsideration of Excluded Intervenor Exhibits on Contention 15 (Dec. 27, 2013), ADAMS Accession No. ML13361A249.

⁵¹ Post-Hearing Board Order Rejecting Exhibits at 5.

⁵² See *id.* at 5.

⁵³ See 10 C.F.R. § 2.341(b)(4)(iv).

B. The Intervenors' Argument Regarding the Board's Factual Findings Does Not Demonstrate Any Clear Error in the Board's Ruling.

The Intervenors' second argument is that the Board made incorrect factual findings and "ignored the greater weight of evidence" in ruling for the Applicant on Contention 15.⁵⁴ This portion of the Petition merely recites a series of claims the Intervenors made at hearing—statements on which the Board has already ruled—and suggests that these claims support their disagreement with the Board's findings. However, a party's mere disagreement with the weight a Board gives to evidence in the record falls well short of the standard for justifying Commission review. As explained above, the Commission will overturn Board factual findings only in the event of "clearly erroneous" findings that are "not even plausible in the light of the record viewed in its entirety."⁵⁵ The evidentiary record in this proceeding extends to over two thousand pages of testimony and exhibits, and as explained below, the Intervenors fail to show the relevance of their evidentiary complaints about the record, let alone that any of the Board's findings are clearly erroneous.

First, the Intervenors assert that DTE had no in-house QA program for Fermi 3 prior to February 2008, in particular not in the summer of 2007 when subsurface investigations were performed at the Fermi 3 site to gather data that would be incorporated into the COL application.⁵⁶ However, as the Intervenors appear to acknowledge in their Petition for Review, this fact is not in dispute—all parties agree that this was the case, and the Board's ruling includes multiple factual findings related to this

⁵⁴ Petition for Review at 2.

⁵⁵ *Private Fuel Storage*, CLI-05-19, 62 NRC at 411.

⁵⁶ Petition for Review at 19, 21.

point.⁵⁷ Rather than relying on an in-house QA program staffed by DTE personnel, DTE contracted with Black & Veatch (B&V) to perform the subsurface investigations under B&V's QA program, which complies with Appendix B of 10 C.F.R. Part 50, and the Board's ruling also includes factual findings related to B&V's role.⁵⁸ As described in the Board's ruling, DTE maintained responsibility for QA related to B&V's work by observing their work on the Fermi 3 site, by hiring an owner's engineer to perform QA oversight, and by means of audits and surveillances.⁵⁹ In making its findings, the Board had full opportunity to consider the Intervenors' arguments and evidence (including those exhibits discussed the above that the Board did not find it necessary to admit), but concluded that the weight of the evidence favored the Applicant. The Intervenors disagree with the Board, but they present no information to demonstrate that this conclusion represents factual or legal error.

Second, the Intervenors claim that B&V employed subcontractors that did not have appropriate Appendix B QA programs.⁶⁰ The Board questioned the Intervenors' witness on this claim at hearing,⁶¹ and referenced the Applicant's written testimony as support for its finding that B&V's subcontractors also worked under the B&V Appendix B QA program.⁶² In addition, the NRC Staff and the Applicant provided an exhibit that included RAI responses related to the QA controls applied to work by B&V's

⁵⁷ *Fermi*, LBP-14-07, 79 NRC at ___ (slip op. at 30-32).

⁵⁸ *Id.* at 32.

⁵⁹ *Id.* at 32-34.

⁶⁰ Petition for Review at 21.

⁶¹ Tr. at 414.

⁶² *Fermi*, LBP-14-07, 79 NRC at ___ (slip op. at 32).

subcontractors.⁶³ Accordingly, the record reflects a well-supported factual basis for the Board's finding; the Intervenors were given an opportunity to address this issue at hearing, and the Board simply did not find that the weight of the evidence supported their position. In light of the credible documentation contradicting the Intervenors' claims, the Intervenors have not shown that the Board's finding was in error.

Third, the Intervenors assert that even after establishment of an in-house QA program, DTE experienced confusion regarding its QA program and gaps in staffing its QA positions, such that there were multiple overlapping titles for personnel with QA responsibilities and no DTE personnel at all in charge of QA for a period in 2009.⁶⁴ However, this assertion was disputed by the other parties, and both Staff and Applicant provided extensive testimony and exhibits describing the adequacy of DTE's in-house QA program. Furthermore, the Board questioned the Intervenors' witness at hearing, including on this point, and had ample opportunity to consider his testimony relative to the substantial factual evidence in the record concerning the establishment and oversight of DTE's QA program.⁶⁵ The Board nevertheless concluded that the Fermi 3 QA program that was in place when the COL application was submitted in September 2008 met all Appendix B requirements.⁶⁶ Considering the robust evidentiary record addressing the development, implementation, and adequacy of the Fermi 3 QA program, the Intervenors have not shown that the Board's finding was in error.

⁶³ Detroit Edison Company Response to NRC Request for Additional Information Letter No. 26, Related to SRP Section 17.5 (May 10, 2010), Attach. 1 at 5, 7-11, ADAMS Accession No. ML101320254. This document was submitted into evidence as Exhibit NRC S7 and as Exhibit DTE 000054.

⁶⁴ Petition for Review at 14, 21.

⁶⁵ See Tr. at 446-50.

⁶⁶ *Fermi*, LBP-14-07, 79 NRC at __ (slip op. at 40).

Finally, the Intervenor's assert that problems with the subsurface investigations carried out in 2007 "are the root cause of the current site characterization issues that continue to plague the Fermi 3 Licensing Project."⁶⁷ Although the Intervenor's first alluded to such concerns at a pre-hearing teleconference in December 2012 and indicated that they would be amending Contention 15 to include these issues, they never did so.⁶⁸ In any event, in response to Board questions to the Applicant at hearing, the Applicant's witness testified that ongoing work related to seismic and geotechnical issues in the COLA was related to changes in the ESBWR design and to considerations related to the March 2011 accident at the Fukushima site in Japan, and that this work was not related to any problem with the subsurface investigations carried out in 2007.⁶⁹ The Board understandably did not make findings related to the ongoing review of the seismic and geotechnical analyses in the COL application, as that topic would be outside the scope of Contention 15. However, given the voluminous record on the development, implementation, and adequacy of the Fermi 3 QA program, the Intervenor's have not demonstrated that their general assertions about site characterization demonstrate clear error with respect to any findings the Board did make concerning the QA program.

In summary, the Intervenor's' assertions related to their second argument are merely issues on which the Board was able at hearing to compare the parties' expert testimony and exhibits to determine the facts, and the Board simply reached a conclusion different from the Intervenor's' position. In light of the Applicant and Staff documents described above, although the Intervenor's claim that they should have

⁶⁷ Petition for Review at 13.

⁶⁸ Tr. at 220.

⁶⁹ Tr. at 541-45.

prevailed based on the weight of evidence,⁷⁰ they do not demonstrate any clear error on the Board's part. Because these challenges to the Board's decision amount to a request for the Commission to subsume the Board's fact-finding function and review the factual record *de novo*, they do not demonstrate the existence of any substantial question concerning the considerations listed in 10 C.F.R. § 2.341(b)(4) that govern Commission review. Accordingly, the Petition should be denied with respect to the Intervenors' second argument.

C. The Intervenors' Argument Asserting a "De Facto" Exemption Was Not Raised At Hearing, Is Legally Incorrect, and Ignores the Record.

The Intervenors' third argument is that the Board's ruling amounts to a *de facto* granting of an exemption to NRC regulations, and that the ruling "deprived the public of notice and an opportunity to adjudicate the basis for such an unprecedented QA program model."⁷¹ According to the Intervenors, DTE should have requested an exemption under 10 C.F.R. § 50.12 because it did not follow an NEI QA template, NEI-06-14A, that has been endorsed by the NRC.⁷² This argument fails to meet the standard for Commission review for three reasons: it was not mentioned at hearing and was raised for the first time in the Petition for Review, it incorrectly asserts that deviations from NEI templates require exemptions under 10 C.F.R. § 50.12, and it disregards the extensive record developed in this proceeding regarding the use of NEI-06-14A and the Fermi 3 QA program more generally.

There are no references to exemptions or to 10 C.F.R. § 50.12 in the Intervenors' pre-filed testimony, statements of position, or proposed findings of fact and conclusions of law. According to the provisions of 10 C.F.R. § 2.341(b)(5), "[a] petition for review will

⁷⁰ Petition for Review at 2.

⁷¹ *Id.* at 3.

⁷² *Id.* at 24.

not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer.”⁷³ The Intervenor did raise issues related to NEI-06-14A; as discussed below, those issues were fully adjudicated before the Board. However, the Intervenor did not raise any exemption-related concern regarding the Applicant’s use of NEI-06-14A. This failure alone is sufficient reason for the Commission to reject this portion of the Petition for Review.

A more fundamental problem with the Intervenor’s argument is that their assertion that 10 C.F.R. § 50.12 applies to NEI templates is incorrect. By its own terms, 10 C.F.R. § 50.12 applies to exemptions from *regulations*.⁷⁴ Exemption from NRC regulations may be granted when they “[are] authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.”⁷⁵ Furthermore, “[t]he Commission will not consider granting an exemption unless special circumstances are present,” as “special circumstances” are defined in the regulation.⁷⁶ The Intervenor argues that an inquiry into whether “special circumstances” exist is needed here.⁷⁷ However, this argument fails to recognize that NEI templates are not NRC regulations.⁷⁸ Applicants for NRC licenses may reference NRC-endorsed NEI templates in their applications as one approach that the Staff has identified as

⁷³ 10 C.F.R. § 2.341(b)(5).

⁷⁴ 10 C.F.R. § 50.12(a).

⁷⁵ 10 C.F.R. § 50.12(a)(1).

⁷⁶ 10 C.F.R. § 50.12(a)(2).

⁷⁷ See Petition for Review at 25.

⁷⁸ Rather, as described in the Staff’s safety evaluation for NEI-06-14, the template “can be used by applicants of 10 CFR Part 52 permits or licenses, as applicable, for establishing a quality assurance program that complies with Appendix B to Title 10 of the *Code of Federal Regulations* ... requirements.” Final Safety Evaluation for Technical Report NEI 06-14, “Quality Assurance Program Description,” Revision 9 (July 13, 2010) (SER for NEI-06-14), ADAMS Accession No. ML101800497, entered into evidence in this proceeding as Exhibit NRC S12. See also 10 C.F.R. Part 50, Appendix B, “Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants.”

acceptable, but they are not required to do so and are permitted to use other methods to meet NRC regulations. Because NEI templates themselves are not regulations, and because no regulation requires their use, 10 C.F.R. § 50.12 is simply inapplicable and the Intervenor's argument that an exemption is needed does not raise a legal issue for Commission review.

Finally, the Intervenor's arguments regarding NEI-06-14A, including their argument that they have been deprived of an opportunity to challenge the use of the template in the case of Fermi, ignore the fact that questions regarding the NEI template have already been adjudicated before the Board. The Intervenor has already raised challenges related to the NEI template before the Board (although without asserting that an exemption is required).⁷⁹ In explaining the basis for the Applicant's QA program, the Applicant and the Staff submitted substantial evidence for the record concerning the use of both the NEI template in question and the American Society of Mechanical Engineers (ASME) Standard NQA-1-1994, "Quality Assurance Requirements for Nuclear Facility Applications," on which the template is based.⁸⁰ The NEI template, the Staff's safety evaluation approving its use, and NQA-1-1994 were all entered as exhibits in this proceeding,⁸¹ and the Board's factual finding that QA for Fermi 3 was conducted in accordance with ASME Standard NQA-1-1994 was part of its overall legal conclusion that DTE complied with QA regulations in Appendix B to 10 C.F.R. Part 50.⁸²

⁷⁹ See Gundersen Direct Testimony at 5-6.

⁸⁰ See Lipscomb Direct Testimony at 5; DTE Direct Testimony at 51-53.

⁸¹ NEI 06-14A [Revision 7], "Quality Assurance Program Description" (August 2010), ADAMS Accession No. ML102370305, entered into evidence in this proceeding as Exhibit NRC S13; SER for NEI-06-14, Exhibit NRC S12; ASME NQA-1-1994 Edition, "Quality Assurance Requirement for Nuclear Facility Applications" (July 29, 1994), entered into evidence in this proceeding as Board Exhibit 1.

⁸² *Fermi*, LBP-14-07, 79 NRC at __ (slip op. at 33, 39).

In short, while the Intervenor's claim that an exemption is required in connection with the NEI template is both legally incorrect and untimely, the Intervenor had ample opportunity at hearing to challenge how NEI-06-14A was addressed in relation to Fermi 3, and did so, as reflected in both the evidentiary record and the Board's findings. Therefore, the Intervenor's argument that they have been "deprived ... of notice and an opportunity to adjudicate"⁸³ this issue is without merit.⁸⁴ As noted above, in the absence of clear factual or legal error, the Commission is disinclined to reverse Board decisions involving detailed findings of fact based on extensive records and expert testimony.⁸⁵ The Intervenor has failed to identify any clear factual or legal error regarding the applicability of NEI-06-14A, and the Commission should therefore deny the Petition on the Intervenor's third claim.

V. CONCLUSION

For the reasons set forth herein, the Petition for Review should be denied.

Respectfully submitted,

/signed (electronically) by/

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⁸³ See Petition for Review at 3.

⁸⁴ Indeed, NEI-06-14A was referenced extensively in the Staff's SER Chapter 17, and the Intervenor has therefore been aware that it was potentially relevant to Contention 15 since at least 2011. See Exhibit NRC S1, SER Chapter 17 at 17-3, 17-15, 17-16, 17-21, 17-22, 17-26, 17-27, 17-28, 17-30, and 17-31.

⁸⁵ See, e.g., *Oyster Creek*, CLI-08-28, 68 NRC at 675-76.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that the document entitled NRC STAFF'S ANSWER TO INTERVENORS' PETITION FOR REVIEW OF LBP-14-07, dated July 14, 2014, has been filed through the E-Filing system this 14th day of July, 2014.

/Signed (electronically) by/
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Dated at Rockville, Maryland
This 14th day of July, 2014