UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission

In the Matter of:	)	
		Docket No. 52-033-COL
DTE Electric Company	)	
		July 30, 2014
(Fermi Nuclear Power Plant, Unit 3)	)	

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INTERVENORS' REPLY TO NRC STAFF ANSWER TO PETITION FOR REVIEW OF LBP-14-07 (RULING FOR APPLICANT ON QUALITY ASSURANCE)[1]

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[1]The original of this Reply was emailed to the NRC Hearing Docket, counsel for DTE Electric and the NRC Staff on July 28, 2014.

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Intervenors Beyond Nuclear, *et al.*[2] (hereinafter "Petitioners"), by and through counsel, hereby reply to the NRC Staff's Answer to the Petition for Review of LBP-14-07. Intervenors reply to two points: (1) the Staff's assertion that Intervenors belatedly raised the argument[3] that DTE must to seek an exemption following the process set forth in 10 C.F.R. § 50.12 only after the filing of the Petition for Review; and (2) that Intervenors "incorrectly assert[] that deviations from NEI templates require exemptions under 10 C.F.R. § 50.12. . . ." Staff Answer at 17.

I. Timely Invocation of 10 C.F.R. §50.12

The concept of DTE having excepted itself from the 10 C.F.R. Part 50, Apx. B quality assurance requirements was the focus of Intervenors' case.[4] The NRC Staff's abandonment of its

[2]In addition to Beyond Nuclear, the Intervenors-Petitioners include: Citizens for Alternatives to Chemical Contamination, Citizens Environment 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.

[3]DTE made no timeliness objection to the invocation of 10 C.F.R. § 50.12 in its Answer.

[4]Intervenors' expert, Arnold Gundersen, found that DTE was deviating from the NEI template, dubbing it an "exception." Gundersen testified, "They (DTE) say applicants are using a template --

2009 enforcement action concerning the lack of DTE quality assurance ("QA") oversight during 2007-September 2008 precluded imposition of the obligations of 10 C.F.R. § 50.12. This remained the formal stance of the regulator until the Atomic Safety and Licensing Board ("ASLB") adjudicated Contention 15 in 2013. The post-NOV position of the NRC Staff was that the 2007-2008 shortcomings of DTE were not susceptible of enforcement action, because DTE ostensibly was not an "applicant."[5]

Intervenors' expert, Arnold Gundersen, testified that

> My third major concern previously presented to the ALSB regards Detroit Edison's original filing for its original COLA for Fermi Unit 3, in which it should have alerted the NRC that it had taken exception to the NEI approved reporting relationship for its QA function. DTE did not notify the NRC in its original COLA filing for Fermi 3, that it had arbitrarily chosen to modify the NEI approved reporting relationship approved by NRC for this new generation of reactors.

"Testimony of Arnold Gundersen Supporting Intervenors' Contention 15: DTE COLA Lacks Statutorily Required Cohesive QA Program," INTS 068 at 21. Intervenors have insisted throughout this proceeding that DTE was an "applicant" for a combined operating license throughout the pre-COLA 2007-2008 period, and that the NRC Staff's 2009 reversal of that shared interpretation was incorrect. Ultimately, the ASLB rather anomalously, agreed:

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applicants using the template must address conformance with the NRC's regulatory guidance by including a commitment to applicable regulatory guides or by providing an alternative or to be reviewed by the NRC staff. So I think that's recognition by DTE that there was an obligation that when you deviate from the template you're required as they say to provide an alternative or exception to be reviewed by the NRC staff." Tr. p. 389 (120/253 of .pdf).

[5]"The Nuclear Regulatory Commission (NRC) has reviewed your response and has determined that Detroit Edison (DECo) was not an applicant prior to September 18, 2008. While DECo must demonstrate compliance with Appendix B in order to receive a COL from the NRC, the NRC cannot issue a Notice of Violation for actions or omissions occurring before it submitted the Fermi Unit 3 (Fermi 3) COL application to the NRC. Therefore, Violation A of the Notice of Violation dated October 5, 2009 (Initial Notice) is withdrawn and the NRC records will be amended to reflect this change." Exh. DTE 086 (NRC response to DTE answer to Notice of Violation, April 27, 2010).

> . . . Appendix B permits DTE to delegate the work of establishing and executing the QA program, provided that it retained responsibility for the program. Accordingly, the factual dispute that the Board must resolve is whether DTE in fact retained responsibility for the QA program during the pre-application period.

LBP-14-07 at 38. The ASLB's concurrence with Intervenors meant for the first time since the Staff's surrender to DTE's interpretation of "applicant" in 2009 that Appendix B's quality assurance requirements were obligatory upon DTE throughout the 2007-2008 period. The anomaly was the ASLB's conclusion that the issue of when DTE was an "applicant" was irrelevant to its merits ruling.

The Board in LBP-14-07 attributed an "intermediate" position to the NRC Staff, between DTE's denial of "applicant" stature at all until September 2008, and Intervenors' insistence that "applicant" status under 10 C.F.R. part 50, Apx. B required existence of in-house QA oversight by DTE over its contractors. The Staff's "intermediate" position, construing the ASLB's LBP 14-07 findings, is that DTE actually was an "applicant" from 2007 because it had to "retain responsibility" to oversee QA, "that DTE was not required to have its own in-house QA Program during the pre-application period, but that it had to assure that all safety-related COLA activities were performed consistently with the QA requirements of Appendix B." LBP-14-07 at 24.

But this is not a view to which the Staff subscribed at the adjudication.[6] The ASLB's "intermediate" view ignores the strident testimony of NRC's Lipscomb that,

[6]The NRC's lead witness Lipscomb stoutly and inconsistently maintained (Tr. p. 605, lines 17 - 18) that "the applicant is not an applicant until they apply," and that (Tr. p. 591, lines 11 - 13) "Detroit Edison is not required to have a Quality Assurance Program in place prior to the date of their application" (a position which the Chair of the ASLB found to be "very, very troubling," *id.* line 15, but one which Lipscomb repeated). Lipscomb responded later (Tr. p. 593, lines 8 - 9), "they were not required to have a Quality Assurance Program in place" and that (Tr. p. 604, lines 1 - 3) "the umbrella of the Appendix B Program doesn't have to be in place prior to that application."

> Well, Black and Veatch is a vendor, so we do not approve the QA Programs for vendors. There are some circumstances, for instance like General Electric-Hitachi, which is a vendor and also an applicant, which might be a -- a separate issue. But Black and Veatch being a vendor, we do not approve their Quality Assurance Programs. We -- we review and approve as part of a licensing decision the applicant's program, in which case Detroit Edison. We do not approve Black and Veatch as a vendor.

(Tr. pp. 623, lines 17-25.) The facts show that in 2007 through September 18, 2008, neither DTE nor the NRC Staff exercised QA approval authority over the vendors used in the Fermi 3 planning, beginning with Black & Veatch. Compounding the ASLB's inaccurate characterization of the "intermediate" position is that, even as the Staff criticizes Intervenors (incorrectly) for arguing that the NEI QA template is a binding regulatory obligation, the *Staff accepted evidence, not of DTE's active, hands-on QA oversight during 2007-2008, but only of DTE's assurance that it had read reports of Black & Veatch's QA compliance that were compiled by another "voluntary," non-compulsory, industry evaluation program - from readings which occurred only in 2009.*

So the ASLB found that DTE retrospectively was an "applicant" throughout the disputed period, insisted that DTE still had to show adequate quality assurance guarantees commencing with the inception of the Fermi Licensing Project in 2007 - and then accepted *post hoc* reading and acceptance of reports from a voluntary compliance program as oversight. And only now, at the Petition for Review stage after vindication of their point, have Intervenors had the chance to point out the noncompliance with § 50.12. Despite evidence at adjudication that the historic implementation of Appendix B requires an in-house QA program prior to submission of a COLA,[7] the Fermi 3 licensing board found no exception and identified the key issue to ascertain

[7]Including testimony that in some 250 previous license applications, the DTE approach was never suggested, and the example of Black & Veatch being overseen by an in-house QA program during

the meaning of "retain responsibility." Now that the public finally knows that DTE was an "applicant," it is invoking 10 C.F.R. §50.12 to require DTE to properly bear the burden of proving that an exemption from Apx. B will not decrease public health and safety.

II. Making the Voluntary Into an Enforceable Regulatory Commitment

Intervenors do not insist that the NEI quality assurance template is an enforceable regulation. Intervenors pointed out (Petition for Review at 24-25) that their expert, Arnold Gundersen, found that DTE's decision to outsource QA - departing from the widely-used NEI template - was significant and added to misunderstandings within the Fermi 3 project organization over the utility's QA role in the pre-application stage. When Intervenors stated (Petition for Review at 24) that "DTE has never sought, nor attained, an exemption from the applicability of the NEI's QAPD template, NEI-06-14A, Rev. 5," what they meant was that DTE committed to follow the NEI template, then abruptly changed course and notified no one, which, as Gundersen noted, is what triggered the initial NOV citation to DTE by the Staff in 2009. When it departed from its commitment to follow the NEI template, DTE was not violating the template, but was violating its 10 C.F.R. Apx. B, II responsibility as applicant for a COL to oversee QA with an in-house program and to properly communicate to the NRC the true state of its QA activities at all times.

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the River Bend nuclear plant planning stage, which occurred contemporaneously to DTE's Fermi Licensing Project. The first version of the River Bend Final Safety Analysis Report (FSAR) clearly says that Entergy, the utility which was the COLA applicant,was "responsible for the establishment and execution of the quality assurance program during the design, construction and operations phases of RBS Unit 3," Exh. INTS 071, compared to the unprecedented outsourcing to Black & Veatch by DTE.

Respectfully submitted,

/s/ Terry J. Lodge

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' REPLY TO NRC STAFF ANSWER TO PETITION FOR REVIEW OF LBP 14-07 (RULING FOR APPLICANT ON QUALITY ASSURANCE)" were served by me upon the parties to this proceeding via the NRC's Electronic Information Exchange system this 30th day of July, 2014.

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