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 DTE ANSWER OPPOSING 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 DTE Energy Company's ("DTE") "Answer Opposing Petition for Review of LBP-14-07."

I. Reply re Delegation of Appendix B Program to B&V

DTE maintains now, *post hoc*, that the Atomic Safety and Licensing Board ("ASLB") found as a matter of fact that DTE "contracted with B&V to perform safety-related activities that supported development of the Fermi 3 COLA, including site characterization, and that B&V personnel and subcontractors performed those activities under the B&V Appendix B/NQA-1 QA program." DTE Answer at 9. But as the ASLB itself noticed, DTE repeatedly asserted, in writing, that it delegated *responsibility to Black & Veatch* for QA oversight.[3] (Tr. p. 698, line 5 -

[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]JUDGE BARATTA: I'm a little concerned about the way you're throwing around the word "responsibility" there, because the Appendix B really says the applicant may delegate to others such as

p. 699, line 5). Far from "misspeaking," DTE's defense all along is that it was not a COL "applicant" throughout 2007 until September 18, 2008, and so had no "responsibility." The ASLB did not reconcile this now-inconvenient inconsistency with its ruling that DTE was, in fact, an "applicant" which had to "retain responsibility" from 2007 forward.

II. Reply as to NUPIC and DTE Audits

DTE also says that, "The Board acknowledged that the B&V QA program had been audited by the Nuclear Procurement Issues Committee ("NUPIC") prior to placement of the purchase order by DTE for site characterization services and that DTE performed its own subsequent audit of B&V in 2009." DTE Answer at 9. In this very statement, DTE affirms both that it conducted its very first audit of Black & Veatch only in 2009, *after* the COLA had been submitted on September 18, 2008, and that it delegated QA responsibility to NUPIC, more proof that the company did not comply with 10 C.F.R. Part 50 Apx. B. The same carefully-obscured theme appears later in DTE's brief.[4]

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contractors, agents or consultants the work of establishing and executing a Quality Assurance Program, not the responsibility.

MR. TYSON SMITH: I'm sorry, I did **misspoke.** We delegated the work, not the responsibility.

JUDGE BARATTA: And I'll also refer to your rebuttal statement position, because you made the same error there in that you stated that - delegated to Black and Veatch the responsibility for establishing and executing a QA Program. And this is on - I think it's page 10 of your rebuttal statement. And then go on to say DTE retained overall responsibility of the program.

MR. TYSON SMITH: Well, I have no reason to doubt that that's what that says, and that's certainly a **misstatement.** It should be delegated the –

JUDGE BARATTA: Authority.

MR. TYSON SMITH: -- authority to perform that work, not the responsibility. That's clearly not what we intended and not what we did.

(Emphasis added).

[4]DTE Answer at 12: "In this case and consistent with the plain language of Appendix B that allows delegation of the QA function, the record demonstrates that all pre-application work within the scope of the QA requirements (including site characterization) was performed under an established Appendix B QA program (B&V's) and that DTE had its own in-house QA program prior to accepting

Appendix B(I) states, pertinently:

> The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the quality assurance program. . . . The quality assurance functions are those of (1) assuring that an appropriate quality assurance program is established and effectively executed; and (2) verifying, such as by checking, auditing, and inspecting, that activities affecting the safety-related functions have been correctly performed.

Even now, DTE has not demonstrated where it delegated only execution of QA, and not responsibility, to Black & Veatch in the relevant 2007-2008 time period. Nor has DTE proven the verifica-tion - "checking, auditing, and inspecting" - that it performed prior to reviewing NUPIC's reports for the first time in 2009.

At the core of DTE's delegation problem is that it did not "retain responsibility." DTE "delegated" only in retrospect. Without its own QA function, DTE could not properly approve its vendors' QA programs. The NRC Staff's witness, George Lipscomb, stated that:

> 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.) DTE did not approve NUPIC as a vendor, either.

III. Response to No QA Errors Being Identified by Intervenors

DTE contends "The Intervenors at no point ever identified any work or any aspect of the COLA that was inadequate due to a lack of QA (or for any other reason)." DTE Answer at 12. That is another misstatement by DTE. At trial, Intervenors' expert Gundersen stated:

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any safety-related COLA work product from B&V."

JUDGE BARATTA: Okay. Is it possible for that to rehabilitate the data that was collected prior to 2008?

MR. GUNDERSEN: I thought a lot about that and I -- and I come back to that issue of the fabric including QA but also the whistleblower protection, the materially false statements, the oath and affirmation and Part 21. If you're not the applicant in one you're not the applicant on any of those. And without that web, without that fabric behind it I don't think that `07-`08 data can be reconstituted.

(Tr. p. 463 line 18 - p. 464 line 2.) The ASLB has ruled that, retrospectively, DTE was an "applicant" which was required to "retain responsibility" commencing in 2007. But the facts reveal that it did not. While in its Answer, p. 14, fn. 53, DTE "accepts this conclusion [that it was an "applicant" during the disputed period]," it urges that "the enforcement issue is irrelevant in the context of licensing," that "the difference among the parties is largely one of semantics," and that "DTE and the NRC Staff agree that data and information developed during the pre-application period must have been (and was in fact) collected in compliance with Appendix B." The *ipse dixit* conclusion that data "was in fact" collected in compliance with Appendix B does not suffice legally or factually to assuage concerns.

IV. The NUPIC Powerpoint Presentation

A troubling piece of evidence among several which reveal DTE's refusal to assume quality assurance responsibility in 2007-2008 is found in a "lessons learned" powerpoint slide presentation assembled by NUPIC - DTE's proxy QA auditor - in 2010. DTE says this presentation "was given to an industry group working on QA issues for new plants shortly after the NRC issued its initial QA notice of violation to DTE." DTE Answer at 12. It was compiled in January 2010, three months before the NRC Staff backed down on its NOV by agreeing that DTE was not an "applicant" in 2007-2008. During this period, NUPIC's slide said this:

If we could wind the clock back:
– Establish a formal Quality Assurance program much earlier

– Implement a procurement procedure before the first contract is issued
– Do not document procedural requirements until they are already complete.

Exh. INTS 037. On April 27, 2010, the NRC Staff ruled that DTE was not an "applicant,"[5] which the ASLB has now overturned. But before DTE was authorized by the Staff to avoid QA responsibility and was willing "discuss lessons-learned with the industry,"[6] the company agreed that it had no QA program at all during the disputed period.

The question is not whether DTE was allowed to have either an in-house, or a "delegated," program prior to September 18, 2008; it is whether DTE had assumed any quality assurance responsibility *at all* prior to September 18, 2008. The evidence says DTE had not.

The "touchstone" of reasonable assurance of adequate protection of public health and safety is "compliance with the Commission's regulations." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 N.R.C. 327, 340 (2007). But first, DTE must agree that it is an "applicant." If there is evidence "sufficient to raise legitimate doubt as to whether the plant can be operated safely," a ruling in favor of the applicant may be denied. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983). A 1.5 year period with effectively no Applicant oversight of QA unquestionably raises legitimate doubt and negates a finding of "reasonable assurance."

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[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).

[6]DTE Answer at 12.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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