

February 17, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT'S MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY

MOTION FOR LEAVE

Pursuant to 10 C.F.R. § 2.323(a), the Detroit Edison Company hereby files this motion for leave to file a surreply and accompanying surreply.¹ On January 11, 2012, the Intervenor filed a "Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17-24" ("New Contentions"). The Detroit Edison Company and the NRC Staff filed answers on February 6, 2012.² On February 13, 2012, the Intervenor filed a reply.³ The Intervenor's reply includes a new basis and new supporting

¹ Detroit Edison has consulted with the Intervenor and the NRC Staff prior to filing this motion, as required by 10 C.F.R. § 2.323(b). The NRC Staff has no objection. Detroit Edison and the Intervenor were unable to reach an agreement on the motion.

² See "Applicant's Answer to Proposed New Contentions" ("Applicant Answer") and "NRC Staff Answer to Intervenor's Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24" ("NRC Staff Answer").

³ See "Reply in Support of 'Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24'" ("Intervenor Reply").

material that was not included in the contentions as originally filed.⁴ The new basis and new supporting material are discussed below. Because Detroit Edison has not yet had an opportunity to respond to this new basis or material, Detroit Edison requests leave to file a surreply for the narrow purpose of responding to the new issues raised by the Intervenors for the first time in their reply. For the sake of efficiency and the convenience of the Licensing Board and parties, the surreply identifying the new bases and responding to those new bases is incorporated herein.

APPLICANT'S SURREPLY

In the Intervenors' reply brief, they raised two new issues that had not been raised previously in support of proposed Contentions 22 and 23. Below, we respond to the new information and purported bases for the contentions.

A. Contention 22 is Inadmissible

In proposed Contention 22, the Intervenors challenge the Environmental Report ("ER") and Draft Environmental Impact Statement ("DEIS") evaluations of the consequences of transporting fuel that is beyond the 4% uranium-235 enrichment threshold addressed in 10 C.F.R. § 51.21.⁵ The proposed contention is characterized as a contention of omission because, according to the Intervenors, the ER and the DEIS do not adequately address the transportation

⁴ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. den. By Louisiana Energy Services, L.P.*, CLI-04-35, 60 NRC 619 (2004); see also *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1357 (1982) ("If an intervenor must make new factual or legal arguments in a reply, it should clearly identify the new material and explain why it did not anticipate the need for the material in the initial filing. If the explanation is satisfactory, the new material may be considered, but the other parties should be permitted to respond.").

⁵ New Cont. at 36. Section 51.52 resolves, by rule, the impacts associated with transport of fuel enriched to less than 4%. For fuel enriched beyond 4%, the applicant must provide a separate analysis.

or potential accident impacts of these shipments.⁶ Detroit Edison pointed out in its answer that, in addition to the contention being untimely, Section 6.2.1 of the DEIS in fact includes the transportation analysis required by 10 C.F.R. § 51.52(b).⁷

In their reply, the Intervenor note, for the first time, that the initial core for Fermi 3 would be enriched at only 2.08% rather than 4.6%.⁸ They assert the discrepancy between 2.08% and 4.6% is “neither disclosed, nor explained in the analysis.”⁹ Thus, the Intervenor are changing the basis of proposed Contention 22 from an omission of the analysis required by Section 51.52 to an omission of a discussion of the enrichment of the first core. However, this new basis does not support admission of Contention 22.

Any contention relating to fuel enrichment levels and transportation analyses should have been raised at the outset of this proceeding. The enrichment levels for fuel used at Fermi 3 did not change in the period of time between the ER and the DEIS. The DEIS does not provide the Intervenor with an opportunity to raise new issues that they did not think to raise initially. In any event, the fact that enrichment levels for the first core are less than enrichment levels for subsequent fuel loads does not in any way call into question the analysis in the DEIS. The DEIS states that fuel for Fermi 3 will be enriched “up to about 4.6 weight percent uranium-235.”¹⁰ This statement encompasses fuel enriched to only 2.08%. And, because the potential

⁶ *Id.*

⁷ Applicant Answer at 53-54, *citing* DEIS at 6-20.

⁸ Intervenor Reply at 19. The Intervenor state that Mr. Keegan learned of this fact two days before the Intervenor filed their new contentions, but do not indicate why they did not raise this issue until their reply.

⁹ *Id.*

¹⁰ DEIS at 6-19.

impacts of transporting fuel with higher levels of enrichment are greater than transporting fuel with lower levels of enrichment, the analysis in the DEIS is bounding. There is no omission and there is no genuine dispute on a material issue. The new basis for Contention 22 therefore does not support admitting the contention.

B. Contention 23 is Inadmissible

In Contention 23, the Intervenor argues that “the discussion of the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways.”¹¹ Detroit Edison explained in its answer that the proposed contention was untimely and also failed to meet the Commission’s strict admissibility criteria.¹² The DEIS addresses transmission related impacts for each resource category.¹³ In their Reply, the Intervenor references a new document not cited in their original contention — a comment letter on the Fermi 3 DEIS submitted by the U.S. Fish & Wildlife Service (“USFWS”), dated January 9, 2012. This new document does not support admitting proposed Contention 23.

The Intervenor correctly quotes the USFWS letter, which states that “construction of the transmission lines will require a separate section 7 consultation as it is considered a separate project by the [NRC].”¹⁴ But, this does not establish a genuine dispute with the DEIS on a material issue, nor does it raise any segmentation concerns under the National Environmental Policy Act (“NEPA”). Segmentation occurs when a large project is separated into smaller components, each involving action with less significant environmental effect, in

¹¹ New Cont. at 41.

¹² Applicant Answer at 56-63.

¹³ *See id.* at 61-62, *citing* DEIS at 7-7, 7-17, 7-19, 7-21, 7-22, 7-31, and 7-37.

¹⁴ Intervenor Reply at 20.

order to avoid the NEPA requirement that an EIS be prepared for all major federal actions.¹⁵ This is the opposite of what occurred here. The DEIS considers transmission-related impacts and the impacts of construction and operation of Fermi 3 in a single, comprehensive NEPA document. As a result, segmentation is simply not an issue. The new document cited by the Intervenor does not support admission of Contention 23.

CONCLUSION

For the above reasons, the Licensing Board should grant the motion for leave to file a surreply and deny admission of proposed Contentions 22 and 23.

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Dated at Washington, District of Columbia
this 17th day of February 2012

¹⁵ *City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983). Segmentation is not the mere recognition by an agency that other applications (and approvals) will be associated with activities considered in the DEIS. In fact, agencies are expected to include impacts associated with connected and cumulative actions in the DEIS even though they may be proposed by other entities and approved by other agencies. *See, e.g.*, 40 C.F.R. § 1508.7 (“‘Cumulative impact’ is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”).

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 17th day of February 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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