

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of:)	
)	Docket No. 52-033-COL
The Detroit Edison Company)	
(Fermi Nuclear Power Plant, Unit 3))	May 30, 2013
)	

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**INTERVENORS' REBUTTAL STATEMENT
OF POSITION ON CONTENTION 15**

I. Introduction

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and pursuant to 10 C.F.R. § 2.1207(a)(1) and the Licensing Board’s “Order (Granting Motion for Extension of Time for Submission of Testimony for Adjudication of Contention 15, and Modifying the Schedule)” dated March 29, 2013, hereby submit their Rebuttal Statement of Position on Contention 15. This Rebuttal Statement is supported by testimony from Arnold Gundersen filed May 30, 2013, entitled “Rebuttal Testimony of Arnold Gundersen Supporting Intervenors’ Contention 15: DTE COLE Lacks Statutorily Required Cohesive QA Program.” For the reasons specified below, Intervenors insist that the Quality Assurance activities of Detroit Electric Company (“DTE” or “Applicant”) do not satisfy the requirements of the Atomic Energy Act and regulations promulgated pursuant to it, and that as a result, Contention

¹In addition to Beyond Nuclear, the Intervenors 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.

15 should be resolved in favor of Intervenors.

II. Burden of Going Forward With Evidentiary Production

As Intervenors acknowledged in their initial filing, the burden of going forward on Contention 15 rested on them. *Private Fuel Storage, L.L.C.* (ISFSI), LBP-05-12, 61 NRC 319, 326 (2005), *aff'd Private Fuel Storage, L.L.C.* (ISFSI), CLI-05-19, 62 NRC 403 (2005). They did so with the initial testimony of nuclear engineer Arnold Gundersen, who detailed with documents and analysis the spotty path of quality assurance activities dating from 2007. Without rehashing the initial Gundersen testimony, Intervenors introduced sufficient evidence to establish a *prima facie* case through a qualified expert that there were facts in the record to “erode the confidence the NRC can reasonably have in, and create substantial uncertainty about the quality of, the work that is tainted by the alleged QA violations.” LBP-10-09 at pp. 29-30, citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984) (quoting that board’s scheduling order).

The burden then shifted to DTE, which was obliged to provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the combined operating license (COL). *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983).

The Licensing Board earlier in this case articulated its expectations and which party must carry the respective burdens of evidence, as follows:

[W]hile perfection in the applicant’s QA program is not required, once a pattern of QA violations has been shown, the license applicant has the burden of showing that the license may be granted notwithstanding the violations.

LBP-10-09 at pp. 29.

Intervenors moved the ““real issue . . . beyond the question of what deficiencies existed in the applicant’s . . . quality assurance program to the question whether the applicant can demonstrate that [its verification efforts] verify the correctness of the . . . design.” *Id.* at 30.

Compliance with the Commission’s regulations is a touchstone for reasonable assurance. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 340 (2007), *aff’d*, CLI-09-07, 69 NRC 235, 263 (2009). 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).

III. Discussion Of The Evidence On Rebuttal

The positions of DTE and the NRC Staff on Contention 15 are quite comparable and are epitomized in this passage from the “NRC Staff Rebuttal Statement of Position for Contention 15:”

The Fermi 3 QAPD was put into place when the Fermi 3 COL application was filed on September 18, 2008, and governs work by the Applicant’s personnel after that date. See Lipscomb Direct Testimony at A17-A18. Testimony filed by the Intervenors does not appear to challenge the Fermi 3 QAPD, but rather focuses on activities occurring before the Fermi 3 COL application was filed and thus before the Fermi 3 QAPD was in effect. Prior to that date, other QA programs applied to safety-related activities supporting development of the Fermi 3 COL application. These other programs are described in Staff direct testimony, see *id.* at A18, and, as explained there as well as in the Staff rebuttal testimony summarized below, the Intervenors fail to show that any pre-application QA activities resulted in safety concerns or failure to comply with NRC regulations.

Id. at 3 (May 30, 2013).

But to the contrary, Intervenors demonstrated in their initial testimony that when the Fermi 3 Licensing Project was commenced in 2007, there was no firm decision as to which reactor type (ABWR or ESBWR) would be built, nor was there even a firm decision about the

location of that new reactor at the existing Fermi complex. Gundersen Initial Testimony (hereinafter “A.G.”) A28, pp. 26. The apparent object to be accomplished by commencing geological assessment drilling under auspices of Fermi 2 was to avoid quality assurance oversight by Fermi 3 Licensing Project QA staff of B&V. A,G. A29 p. 26. Gundersen discovered that in 2007 - during the period for which DTE insists it cannot be held accountable - construction of monitoring wells for hydrology investigation and core-boring activities for site characterization occurred at the proposed Fermi 3 site, but that programs for the nearby operating Fermi Unit 2 for access, work control, and contractor oversight were used to account for that site work on Fermi 3. A.G. A18 p. 10. There is no indication that use of the Fermi 2 QA Program was analyzed or approved by any DTE personnel connected with or managing the Fermi 3 project, nor by any personnel connected with or managing the Fermi 3 project via Black & Veatch. This includes the Owners Engineer (OE), which is also a Black & Veatch subsidiary located in a separate city and department. A.G. A19, p. 11.

Additionally, Gundersen found that a “combination of a separate unapproved corporate entity (Fermi 2) and two non-nuclear vendors with non-nuclear QA programs were used to attempt to satisfy the nuclear QA commitments required to provide essential seismic and structural information for licensing process applied to the COLA.” A.G. A21 p. 12.

Thus, notwithstanding the posturing of DTE and the NRC Staff, Intervenors have, indeed, shown “that any pre-application QA activities resulted in safety concerns or failure to comply with NRC regulations.”

In Gundersen’s rebuttal testimony submitted on behalf of Intervenors (hereinafter “A.G.Rebuttal”), Gundersen points out that DTE argues in the alternative respecting the point in

time when it assumed quality assurance oversight: that there are “no QA requirements that apply prior to submittal of a COL application - that is, before a company is an ‘applicant.’ Rather, implicitly, the prospective applicant must conduct activities that are important to safety (particularly safety-related site investigation activities) in a manner such that the quality can be demonstrated to support the eventual application.” DTE Initial Statement of Position p. 10 (April 30, 2013). According to Gundersen, “DTE is claiming to know what 10 CFR 50 Appendix B implied in its second sentence while claiming a plain language interpretation in its first sentence.” A.G. Rebuttal A7 p. 5. He suggests that the regulation “‘implicitly’ made DTE the applicant when they notified the NRC of their intent to apply. Accordingly, DTE became the applicant on February 15, 2007, at the time DTE notified the NRC of its intent to apply for a COLA for Fermi Unit 3.” *Id.*

After reviewing thousands of pages of QA material, Gundersen attested on rebuttal that “DTE’s QA programs, policies, and procedures that were in effect on September 17, 2008 remained identical to the programs, policies, and procedures that became effective on September 18, 2008,” and that “DTE made no announcement to its employees or contractors that its status had changed on September 18, 2008, and that 10 CFR 50 Appendix B now suddenly applied when previously it did not.” A.G. Rebuttal A9 p. 6.

Gundersen buttresses his assertions of DTE’s convenient ambiguity by pointing out that

If DTE’s plain language interpretation of Appendix B is accepted by the NRC and this Atomic Safety and Licensing Board (ASLB), it indicates that 10 CFR 50 Appendix B, 10 CFR §52.4, 10 CFR §52.5, 10 CFR §52.6, and 10 CFR §21 also would not apply to any information generated on the DTE Fermi 3 COLA project between February 15, 2007 and September 18, 2008. The integrity of all the critical safety related information provided in the Applicant’s COLA is no longer assured, and there can be no reasonable assurance that the quality of any information submitted in this COLA process meets 10 CFR standards for nuclear **applicants** or **Applicants** [DTE’s reference], contractors,

consultants, and/or licensees. In my professional opinion as a nuclear engineer, there is no legal difference between *applicant* as identified by the 10 CFR and *Applicant* with a capital ‘A’ as claimed by DTE. Moreover, if the NRC allows such a distinction to stand, the entire legal framework assuring nuclear safety is placed in jeopardy.

(Emphases original). A.G. Rebuttal A11 pp. 10-11.

From his investigation, Gundersen concludes:

First, if the NRC staff is correct in its agreement with the DTE assertion that QA did not apply prior to the September 2008 filing of the DTE Fermi 3 COLA because DTE was not the “Applicant”, then it is also true that any DTE contractor or employee could engage in deliberate misconduct and could intimidate a whistleblower without repercussion to the contractor or protection for the whistleblower. Moreover, since 10 CFR §52.4, 52.5, and 52.6 as well as Part 21 also do not apply to the Fermi 3 COLA, then the NRC may not assume that any documents, studies, materials, designs, or verbal discussions are truthful and accurate. Regulators and the public have no assurances that any possible design flaws and/or site study flaws were accurately reported and corrected due to the fact DTE was not the “Applicant”. To assure the integrity of the COLA process, the NRC has created 10 CFR §52.4, 52.5, and 52.6 and Part 21 and Appendix B. These stringent legal requirements do in fact apply precisely because this “Applicant” is an applicant to *design, fabricate, construct, and operate a nuclear power plant*.

Second, the Code of Federal Regulations is designed to protect public health and safety and the NRC is required to follow and enforce this statute. Such blatant misinterpretation of the Code of Federal Regulations by the NRC has already begun to set a dangerous precedent amongst other COLA applicants. Fairewinds has recently been informed that an employee working on the Bellefonte COLA was terminated after raising a safety concern. The NRC was notified about this alleged Whistleblower retaliation, and while the NRC simply expressed regret about the employee’s dismissal, it noted that no employee protections could be afforded because the formal COLA had not yet been submitted.

Finally, in my professional opinion as a nuclear engineer, there is no legal difference between *applicant* as identified by the 10 CFR and *Applicant* with a capital ‘A’ as claimed by DTE. Moreover, if the NRC allows such a distinction to stand, the entire legal framework assuring nuclear safety is in jeopardy.

(Emphases original). A.G. Rebuttal A16 pp. 13-14.

IV. Conclusion

The Licensing Board reckoned correctly that “Intervenors’ first argument is that safety-related information in the FSAR is unreliable and should not be used to support the licensing

decision because it is based in whole or in part on tests, investigations, or other safety-related activities performed by B&V during the period when DTE had neither established nor implemented its own Appendix B QA program to govern those activities.” LBP-10-09 p. 15. Intervenors have produced considerable evidence in support of that argument.

The Board further acknowledged Intervenors’ second argument to be that “given DTE’s history of QA violations and perceived lack of commitment to compliance with Appendix B requirements, the NRC cannot make the safety findings necessary to support issuance of the COL.” LBP-10-09 p. 15. Intervenors have provided convincing proofs of that argument.

The ASLB also noted that Intervenors also maintained “that DTE’s failure to comply with General Design Criteria #169 ‘suggests that DTE’s corporate management has little concern for nuclear quality assurance, as they allowed the situation to become serious for more than two (2) years, without intervening,’ and that ‘[b]y willingly and deliberately choosing not to comply with 10 CFR part 50 since the inception of the COLA proceeding, DTE cannot provide adequate assurance that Fermi 3 can ever comply.’” LBP-10-09 p. 16. Again, Intervenors have adduced proofs of DTE management attitudes circa 2007-2009 that critically undermine a reasonable factfinder’s ability to conclude that there are the requisite conclusion that there is an adequate assurance of safe operation of Fermi 3, once constructed.

As a result of improper establishment and implementation of a QA program for the Fermi 3 Licensing Project, safety-related information in the FSAR is unreliable and should not be used to support the licensing decision because it is based in whole or in part on tests, investigations, and/or other safety-related activities performed by Black & Veatch during the period when DTE had neither established nor implemented its own Appendix B QA program to govern those

activities. The quality assurance arrangements for proposed Fermi 3 were fatally flawed from the outset, and that those failings have current implications, in the form of quality concerns for the physical foundation of the planned atomic reactor.

10 C.F.R. § 52.79(a)(25) requires a genuine quality assurance program to be applied to the design and fabrication, construction, and testing of the structures, systems, and components of the facility. The regulation requires a QA program which genuinely applies the requirements of Appendix B to 10 CFR part 50, and shows how they have been and will be satisfied, as well as a discussion of how the quality assurance program will be implemented. That is not present in DTE's application papers.

Intervenors' evidence is quite "sufficient to raise legitimate doubt as to whether the plant can be operated safely," and consequently, a ruling in their favor is warranted. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983) . The current quality assurance efforts are hopelessly contaminated by the foundational years of project planning activity. The Licensing Board has no choice but to deny the combined operating license.

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ REBUTTAL STATEMENT OF POSITION ON CONTENTION 15” have been served by me upon the following persons via Electronic Information Exchange this 30th day of May, 2013:

Ronald M. Spritzer, Chair
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ronald.Spritzer@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAMail@nrc.gov

Michael F. Kennedy
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Michael.Kennedy@nrc.gov

Office of the Secretary

ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Randall J. Charbeneau
Administrative Judge
Atomic Safety and Licensing
Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Randall.Charbeneau@nrc.gov

Bruce R. Matters
Detroit Edison Company
One Energy Plaza, 688 WCB
Detroit, Michigan 48226
E-mail: matersb@dteenergy.com

David Repka, Esq.
Tyson R. Smith, Esq.
Counsel for the Applicant
Winston & Strawn, LLP
1700 K Street, NW

Washington, DC 20006-3817
E-mail: drepka@winston.com
trsmith@winston.com

Marcia Carpentier
Counsel for the NRC staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-4126 Marcia.Carpentier@nrc.gov

/s/ Terry J. Lodge
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors