

July 9, 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 A REPLY ON CONTENTION 8

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), The Detroit Edison Company (“Detroit Edison”) files this motion for leave to file a reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 8 (Eastern Fox Snake),” dated July 2, 2012 (“Response in Opposition”).<sup>1</sup> In their response, the Intervenors introduce new bases and arguments that were not included in Contention 8 as admitted. Because Detroit Edison has not yet had an opportunity to respond to this new material, Detroit Edison requests leave to file a reply for the narrow purpose of responding to the new issues raised by the Intervenors for the first time in their Response in Opposition.<sup>2</sup> For the sake of efficiency and the convenience of the

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<sup>1</sup> Detroit Edison has consulted with the Intervenors and the NRC Staff prior to filing this motion, as required by 10 C.F.R. § 2.323(b). The NRC Staff does not take a position at this time and will respond in due course. The Intervenors indicated that they oppose the motion.

<sup>2</sup> As the Board noted previously, a motion for leave to reply is an appropriate procedural vehicle for addressing new information and arguments raised for the first time in a response to a summary disposition motion. *See* LBP-11-14, “Memorandum and Order Denying Summary Disposition of Contentions 6 and 8; Denying in Part and Granting in Part Motion to Strike,” 22 at n. 108 (May 20, 2010), *citing Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-3, 67 NRC 85, 97-103 (2008); *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide fuel Fabrication

Licensing Board and parties, the reply identifying the new bases and responding to those new bases is attached to this motion.

### DISCUSSION

While there is normally no right to a reply to a response to a motion for summary disposition, permission to reply may be granted where “the moving party demonstrates that it could not have reasonably anticipated the arguments to which it seeks leave to reply.”<sup>3</sup> Here, Detroit Edison requests leave to file a reply because it could not have anticipated that Intervenor’s Response in Opposition would raise issues not previously identified in this proceeding and that are otherwise outside the scope of the contention.

As summarized and admitted by the Board, Contention 8 is a contention under the National Environmental Policy Act (“NEPA”) alleging that the ER fails to adequately assess Fermi 3’s impacts on the fox snake.<sup>4</sup> The Board admitted the portion of Contention 8 alleging that the ER fails to propose mitigation measures related to the fox snake.<sup>5</sup> In response to a subsequent summary disposition motion filed by Detroit Edison and based, in part, on a mitigation plan developed for the fox snake, the Board concluded that Detroit Edison “addressed two of the issues that led the Board to admit Contention 8: it has acknowledged the presence of

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Facility), LBP-05-4, 61 NRC 71, 78 (2005) (request to file reply to summary disposition answer was granted where Applicant alleged that the Intervenor’s answer made statements that mischaracterized the MOX facility’s seismic design).

<sup>3</sup> 10 C.F.R. § 2.323(c); *see 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.”).

<sup>4</sup> LBP-09-16 at 62.

<sup>5</sup> *Id.*

the species at the site and developed alternatives that appear intended to reduce impacts to the species.”<sup>6</sup> The Board also concluded that there remained a “an unresolved conflict between the opinion of MDNR and that of DTE concerning the impact of Fermi Unit 3 construction activities on the eastern fox snake and the need for mitigation of those impacts.”<sup>7</sup> Resolution of this sole remaining aspect of Contention 8 was the addressed in Detroit Edison’s summary disposition motion.

However, in their Response in Opposition, the Intervenors introduce a number of new issues that were not included in Contention 8, as admitted, or addressed in Detroit Edison’s Motion for Summary Disposition. For example, the Intervenors raise, for the first time, an issue related to MDNR’s compliance with Michigan law, claiming that “The MDNR Permit Is Substantively Void” and that it “has no legitimacy.”<sup>8</sup> And, even though the mitigation plan was available prior to Detroit Edison’s first summary judgment motion and before issuance of the DEIS, the Intervenors are now making, for the first time, arguments regarding MDNR’s ability to enforce compliance with the mitigation plan.<sup>9</sup> The Intervenors also introduce new arguments regarding hypothetical land contamination at the wetland mitigation site.<sup>10</sup> Because Intervenors have now introduced new arguments — on topics that are far afield from the bases for the Intervenors’ original contention — and because Detroit Edison could not have reasonably

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<sup>6</sup> LBP-11-14 at 19.

<sup>7</sup> *Id.*

<sup>8</sup> Response in Opposition at 7-8, 10.

<sup>9</sup> *Id.* at 8, 14.

<sup>10</sup> *Id.* at 5.

anticipated these arguments, there is good cause for granting leave for Detroit Edison to file a reply.

CONCLUSION

For the above reasons, Detroit Edison respectfully requests that the Board grant this motion and allow a reply.

Respectfully submitted,

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July 9, 2012

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NUCLEAR REGULATORY COMMISSION

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(Fermi Nuclear Power Plant, Unit 3)	)	

REPLY TO RESPONSE IN OPPOSITION  
TO SUMMARY DISPOSITION OF CONTENTION 8

INTRODUCTION

The Detroit Edison Company (“Detroit Edison”) hereby submits this reply to “Intervenors’ Response in Opposition to Applicant’s Motion for Summary Disposition of Contention 8 (Eastern Fox Snake),” dated July 2, 2012 (“Response in Opposition”). As described below, the Intervenors’ response includes new arguments that were not part of Contention 8 as admitted. These arguments are outside the scope of Contention 8 and, in any event, fail to demonstrate a genuine dispute with the Fermi 3 Draft Environmental Impact Statement (“DEIS”). The Board should grant summary disposition on Contention 8.

DISCUSSION

In their Response in Opposition, Intervenors impermissibly attempt to expand the scope of Contention 8 by providing new bases — without addressing the criteria for late-filed or amended contentions and without demonstrating that the new issues are within the scope of the proceeding as currently defined by the admitted Contention 8.

The Intervenors argue, for the first time, that Michigan Department of Natural Resources (“MDNR”) has conducted a “shallow, checklist review” that reflects “the sorry state

of the art of environmental regulation in Michigan.”<sup>11</sup> The Intervenors also allege a supposed absence of a “viable enforcement mechanism” to ensure that the mitigation will take place.<sup>12</sup> But, these issues were not raised in Contention 8, as admitted, nor can they reasonably be considered within the scope of this proceeding. The conduct of MDNR’s review is beyond the jurisdiction of NRC adjudicatory bodies.<sup>13</sup> The Licensing Board should not entertain what is, in effect, a collateral attack on the MDNR process — a matter over which the NRC is devoid of jurisdiction.<sup>14</sup> Similarly, to the extent that the Intervenors are challenging MDNR’s ability (or willingness) to sanction Detroit Edison for failing to meet its commitments in the mitigation plan, the matter is outside the scope of the proceeding, which is limited to compliance with NRC regulations.<sup>15</sup>

Other new issues raised by the Intervenors in their response are outside the scope of the admitted Contention 8 and fail to create a genuine dispute with the DEIS. For example, the Intervenors baldly assert that “unusual levels of acidity, carcinogenic and toxic byproducts of coal, such as mercury, radiation and other chemicals must be presumed to be present in the soil

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<sup>11</sup> Response in Opposition at 7-8.

<sup>12</sup> *Id.* at 8.

<sup>13</sup> *See Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

<sup>14</sup> *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Although the NRC has appropriately recognized the MDNR review of the mitigation plan in the DEIS, that fact does not somehow authorize the Board to independently assess the manner in which MDNR conducted its review.

<sup>15</sup> In any event, there is no basis for presuming that Detroit Edison will neglect its responsibilities to implement mitigation measures or fail comply with the terms of MDEQ permits. *See* “Affidavit of Peter W. Smith,” dated June 11, 2012, at ¶9 (explaining that Detroit Edison will implement the mitigation plan during construction).

[at the wetland mitigation site].”<sup>16</sup> The Intervenor also allege that “[r]epurposing agricultural land as reptile habitat is rather experimental.”<sup>17</sup> But, an answer to a motion for summary disposition is not an opportunity for the Intervenor to raise new issues that they failed to voice previously.<sup>18</sup> And, the Intervenor in any event provide no basis for their new complaints and have produced nothing in the way of expert support.<sup>19</sup> Their arguments are merely speculation.<sup>20</sup> To avoid summary disposition, the Intervenor must “counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation” and cannot rely on “mere allegations or denials.”<sup>21</sup> A conclusory statement by counsel in a legal pleading is wholly inadequate to establish a genuine dispute at the summary disposition stage.<sup>22</sup>

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<sup>16</sup> Response in Opposition at 5.

<sup>17</sup> *Id.*

<sup>18</sup> As the Commission has explained, there would be no end to NRC licensing proceedings if intervenors could disregard the NRC’s timeliness requirements every time they “realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

<sup>19</sup> In contrast, Detroit Edison and the NRC Staff provided detailed affidavits from technical experts, including a herpetologist, an environmental scientist, and an ecologist.

<sup>20</sup> Unsupported and inadequately probative evidence is insufficient to defeat a motion for summary disposition. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

<sup>21</sup> *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977).

<sup>22</sup> The lack of any expert support is highlighted by the Intervenor’s use of questions to make their case. *See, e.g.*, Response in Opposition at 5 (“What if the toxic nature of the mitigation land inhibits or even destroys relocated snakes?”).

## CONCLUSION

For the foregoing reasons, the Licensing Board should grant the motion for summary disposition and resolve summary disposition in favor of Detroit Edison and the NRC Staff.

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this 9th day of July 2012



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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S MOTION FOR LEAVE TO FILE A REPLY ON CONTENTION 8" and "REPLY TO RESPONSE IN OPPOSITION TO SUMMARY DISPOSITION OF CONTENTION 8" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 9th day of July 2012, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons.

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