

December 14, 2009

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

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

* * * * *

**Second Supplemental Petition of Beyond Nuclear, Citizens for
Alternatives to Chemical Contamination, Citizens Environmental
Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club,
Keith Gunter, Edward McArdle, Henry Newman, 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 for Admission of a New Contention on
ESBWR Quality Assurance, and for Partial Suspension
of COLA Adjudication**

1. Introduction

Pursuant to 10 C.F.R. § 2.309, Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newman, 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, Petitioners-Intervenors herein ("Petitioners"), request and move the Atomic Safety and Licensing Board (ASLB) to admit a newly-discovered contention concerning quality assurance problems in the ESBWR reactor design process in the combined operating license proceeding for Fermi, Unit

No. 3.

2. Description of the Proceeding

This proceeding concerns the application for a combined license ("COL") filed pursuant to 10 CFR Part 52 Subpart C by Detroit Edison Company ("DTE") on September 18, 2008 and supplemented thereafter. The application was accepted for docketing by the NRC on November 24, 2008. All of the Petitioners have been accorded either representational standing through their members, or they have individual standing. *Detroit Edison Company* (COLA for Fermi Unit 3), LBP-09-16, ___NRC ___, slip op. at 7-9 (July 31, 2009).

In accordance with 10 CFR 52.55(c), DTE has referenced a reactor type for which there is a pending design certification before the NRC, embodied in the ESBWR design control document ("DCD"). See COL original application for Fermi, Unit 3.

3. Proposed Contention No. 16

General Electric-Hitachi Nuclear Energy ("GEH"), the partnership which is designing the Economic Simplified Boiling Water Reactor ("ESBWR") (the planned reactor design for Fermi 3) is alleged to have violated NRC quality assurance requirements. If proven, these violations would have implications for the Design Control Document ("DCD") for the ESBWR which is incorporated by reference into the Combined Operating License Application ("COLA") for Fermi 3.

The GEH quality assurance violations and any remedy which might be ordered will have to be addressed and encompassed not only by GEH, but ultimately by the Quality Assurance Program which is mandated for Fermi 3's owner, Detroit Edison ("DTE"), the Applicant, to establish. The NRC Staff determined in mid-2009 that the quality assurance oversight of Fermi 3 planning was not governed by a DTE program meeting the requirements 10 C.F.R. Part 50, Appendix B and that those staff concerns brought into question the quality of the overall Fermi 3 COLA. DTE will have to see that the quality assurance specifications set by GEH are followed in the planning and construction of Fermi 3.

A recent NRC Office of Inspector-General ("OIG") report has identified inadequacies in quality assurance-related management and

oversight, and potentially-inadequate translations of foreign-language engineering reports and communications into English for use in the NRC staff's new reactor program. Consequently, the OIG believes that "there is no way to verify that the QA review coordination has occurred, nor that all the QA portions of the standard review plan technical chapters have been fully satisfied."

Quality assurance problems, some of them major, are cropping up in this array of manufacturer, utility and regulator around the ESBWR reactor design. Consequently, Petitioners request and move the ASLB and Commission to suspend design activities related to use of the ESBWR design by DTE until the quality problems at GEH are resolved, the quality assurance program design problems at DTE have been corrected, and the NRC Office of New Reactors staff charged with review and approval of new COLAs have been certified by an objective overseer to having improved quality assurance review of COLAs to the expectations of the OIG and NRC regulations, namely 10 CFR Part 50, Appendix B.

a. Background of GEH Quality Assurance Violations

In a "Notice of Violation"¹ dated November 12, 2009, the NRC staff cited General Electric-Hitachi for several regulatory violations:

> That the GEH QA program has failed to provide procedural guidance for managing its centralized computer database and that GEH is currently using multiple databases for which no management procedure exists;

> Engineering Operating Procedure (EOP) 30-5.00, "Supplier Design Services Document Review," Revision 10, dated March 20, 2009, required GEH engineers and/or managers performing receipt inspections to verify that "all necessary inputs were correctly identified and applied" in design packages received from suppliers and to document this review. However, the EOP failed to inform quality staff at GEH that "all necessary inputs were correctly identified and applied" in design

¹ADAMS ML093090440 (copy attached).

packages received from suppliers and NRC inspectors found that the GEH engineers who performed receipt inspections of calculations had varying interpretations of the intent of this statement, and as such, were implementing the requirement inconsistently. In particular, GEH did not perform an adequate review of the work performed by Empresarios Agrupados Internacional, S.A. (EA) between October 2007 and October 2008 to justify EA's continued status as an approved supplier;

> Inspectors found that a corrective action request (CAR) concerning radiation shielding was not properly identified as a Significant Condition Adverse to Quality (SCAQ) and given priority for investigation and notification of management, and that consequently there was thus no identification of causal factors, no independent root cause investigation, and no extent of condition delineated. The NRC has declared that "[t]he error could have had a serious effect on worker safety given the potential for a personnel overexposure in the event of a fuel drop accident, and the significant increase in the radiation zoning designation for the upper drywell had a significant negative effect on operations by no longer permitting continuous operations in the upper drywell during refueling operations and restricting access to this area."

The aforementioned identified errors appear to violate the ESBWR Design Control Document, 26A6642BW, Rev. 5, Tier 2, Chapter 17, Quality Assurance, ADAMS ML081820631.

GE-Hitachi has a history of quality assurance difficulties. In

March 2009, GEH was cited by the NRC for six (6) QA violations² for failing to perform an evaluation when another GEH organization indicated that a software problem had impacted their use of the code; for failing to document the justification or rationale for the use of a particular version of a non-Level 2 code during an alternate calculation to verify original calculations and developer's assumptions; for failing 75% of the time, according to one sampling, to respond to engineering computer problems within the 30-day limit; for not having an adequate corrective action program for Level 1 software code errors nor being able to provide the NRC Inspection Team documentation that showed where errors in Level 1 codes were processed through either the General Electric Nuclear Energy's (GENE) Corrective Action Report (CAR) process or the GEH software Corrective Action Program (CAP); for not having GEH NQA audit plans for 2006 and 2007 to ensure that a representative sample of GEH's quality system elements and all 18 criteria of 10 CFR Part 50, Appendix B, are audited and for not including specific criteria in its checklists which caused a failure to adequately document the basis of audit findings to support audit conclusions.

GEH responded serially to the March 2009 NOV, and by September 2009 the quality violations had been cleared up. Then in November 2009, the pending, different violations were cited by the NRC Staff.

b. Background of DTE Quality Assurance Problems

DTE, as the project owner ultimately responsible for overall

²ADAMS ML090790473.

quality assurance in the planning, construction and operation of Fermi 3 according to NRC regulations, failed in 2007-2008 to comply with Appendix B to 10 CFR Part 50, and may be noncompliant at the present. DTE further has failed since hiring its principal contractor, Black & Veatch (B&V) in 2007, and may be continuing to fail, to retain overall control of safety-related COL activities performed by B&V. DTE has further failed to complete any internal audits of QA programmatic areas implemented for Fermi 3 COLA activities performed to date and has failed to document trending of corrective actions to identify recurring conditions adverse to quality since the beginning of the Fermi 3 project in March 2007. As currently constituted, DTE's quality assurance program may not be capable of identifying, nor meaningfully assessing for site-specific purposes, the implications of General Electric-Hitachi quality assurance mistakes on the ESBWR design.

Arnold Gundersen, a nuclear engineer consulted by Petitioners to assist in identifying regulatory omissions and noncompliance, documents the weaknesses of the existing DTE QA program in his "Declaration of Arnold Gundersen" ("Gundersen Declaration") which was previously filed in this case on December 9, 2009 in support of Petitioners' Contention No. 15 and which Petitioners incorporate fully herein by reference and reallege in support of this contention.

At ¶ 19 of the Declaration, Gundersen cites an opinion of the NRC quality assurance staff that "[at] this time [June 4, 2009], the application is not providing an applicant's QA program for these

activities as required by 52.79(a)(25).³ On June 8, 2009, the same staffer noted: "The application is not providing an applicant's QA program for design activities in support of the application as required by 52.79(a)(25). This issue puts into question the quality of the overall application." Gundersen Declaration ¶ 27, citing ADAMS ML092210051.

Then, on June 10, 2009, NRC reactor operation engineer Mark Tonacci observed that DTE had no quality assurance program in place for design and engineering: "They do not have a Fermi QA program for design - that is why they did not send it to you. They decide if the work is safety related and if it is send it to Black and Veatch and use the B&V program." *Id.* ¶ 25, citing ADAMS ML092210050. And the very next day, QA staffer Rivera-Verona pointed out that:

However, the Reg Guide 1.206 is very clear that the FSAR should also clearly delineate those QA functions that are implemented within the applicant's QA organization and those that are delegated to other organizations. In addition, the Reg guide states that the FSAR should describe how the applicant will retain responsibility for, and maintain control over, those portions of the QA program delegated to other organizations. Based on the application and the phone calls we have done with DTE, there is no description of how they are maintaining this responsibility and under which program. The Reg Guide clearly states that the FSAR should identify the responsible organization and the process for verifying that delegated QA functions are effectively implemented. Also, based on the calls we have had, DTE has to rely on others for verification of implementation. (Emphasis supplied)

Gundersen Declaration ¶ 28, citing ADAMS ML092210049.

DTE's glaring QA defects at Fermi 3 propelled John A. Nakoski, Chief of the Quality and Vendor Branch 2, Division of Construction Inspection & Operational Programs, Office of New Reactors, to conclude

³Aida Rivera-Verona email, ADAMS ML092050293.

on June 23, 2009 that:

[I]t is not evident that the FSAR provides for a QA program that governs the design activities performed in support of the FSAR. . . . the staff determined that the oversight provided by DTE was not governed by a DTE QA program meeting the requirements of Appendix B. . . . These concerns will be assessed during an inspection, but in any case, are of sufficient concern at this time that they might question the quality of the overall application.

Gundersen Declaration ¶ 31, citing ADAMS ML091671550.

On October 5, 2009, the NRC Staff formally cited DTE⁴ for these violations of NRC quality assurance requirements:

> For DTE's failure to establish and implement a Fermi 3 QA program between March 2007, when the initial contract was placed with B&V for the conduct of safety-related COL activities, until February 2008, and retain overall control of these activities as required by Criterion II, "Quality Assurance Program," of Appendix B;⁵

> For DTE's failure to establish a Fermi 3 QA program, causing the issuance of an inadequate purchase order and ineffective procurement control of contract services to Black & Veatch for COL application activities, including (1) the inadequate safety classification of the safety-related B&V COL application and owner's engineering (OE) contracts, and (2) the failure to impose adequate QA requirements and specify a sufficient statement of work in the OE Contract for QA oversight activities performed by B&V.

> For DTE's failure to establish a Fermi 3 QA program causing a

⁴NRC Inspection Report 05200033-09-201 and Notice of Violation to Detroit Edison Company, ADAMS ML092740064.

⁵As the quotations from NRC Staff correspondence, *infra*, indicate, this violation likely is continuing in nature, down to the present.

lack of documented evidence to support the qualification of B&V for COL application and OE contract activities, and the failure of DTE to perform an annual supplier evaluation to assess B&V performance;

> For DTE's failure to complete any internal audits of QA programmatic areas implemented for the Fermi 3 project.

> For DTE's failure to document the trending of corrective actions to identify recurring conditions adverse to quality in the time period since the Fermi 3 project began.

The October 2009 NOV citations remain open and pending as of this date. While it is conceded that DTE is not responsible for QA failings by GEH, it will fall to DTE to construct and operate Fermi 3's expected ESBWR reactor in line with quality assurance protocols set by GEH. The current state of the QA art at Fermi does not inspire confidence that such will happen smoothly.

c. The NRC Inspector-General Criticisms of Quality Assurance As Undertaken by NRC Staff

The NRC Staff's regulatory activities on matters of quality assurance in new reactor licensing have been authoritatively criticized. The NRC's Office of Inspector-General on November 16, 2009, issued *OIG-10-A-02, Audit of NRC's Quality Assurance Planning for New Reactors*,⁶ a report on the NRC's QA staff functions within the Office of New Reactors.

The OIG report contains two salient conclusions (p. ii):

The coordination among NRO branches of QA reviews during the combined license application review process, when it occurs, is informal. Sections of the standard review plan specify that the responsible technical reviewer will coordinate the

⁶ADAMS ML093200575.

applicable QA reviews with the NRO's QA branches. However, this coordination is not clearly defined and there is no process in place to ensure that it occurs. Consequently, there is no way to verify that the QA review coordination has occurred, nor that all the QA portions of the standard review plan technical chapters have been fully satisfied.

The Inspector-General expressed worry over the NRC's oversight of applicant and licensee QA programs because there is not:

[A] review for accurate document translations, and NRC has not fully assessed the impact of translated document quality on QA oversight. Consequently, NRC and its new nuclear power plant applicants and licensees could be relying on inaccurate translations. Furthermore, the accuracy of translated documents used for design, construction, and operation of new nuclear power plants could be called into question.

Id. p. ii. The OIG observes that (p. 3) "[m]any nuclear vendors are now foreign-based companies and oversight of these foreign-based companies can present new challenges, such as overcoming cultural and language barriers as well as technical standards for parts fabrication." Since Hitachi is an active co-venturer with General Electric, it is logical to assume that the OIG's concern embraces the quality aspects of ESBWR reactor design.

After reviewing the OIG audit and items related to DTE's Fermi 3 QA efforts in the COLA process, nuclear engineer Gundersen concluded (Declaration, ¶ 65) that:

. . . Detroit Edison's laxity in organizational reporting relationships and the reduced role of QA at DTE Unit 3 compared to the industry standard articulated by NEI are areas that the NRC should have reviewed according to federal statute as delineated in the Code of Federal Regulations. Apparently, breakdowns within the NRC's review staff may have also contributed to the existing QA problems on the DTE Fermi Unit 3 docket.

Gundersen proceeds to explain the longtime weaknesses in quality assurance management in the U.S. nuclear industry. See Gundersen

Declaration ¶¶ 66-71.

4. Applicability of Late Contention Filing Standards

Petitioners have previously been accorded standing in this COLA proceeding by the assigned Atomic Safety and Licensing Board. Once their standing to proceed as parties has been recognized, the legal barriers to the types of contentions which might be raised by Petitioners are reduced. Environmental plaintiffs may be accorded standing to pursue multiple inadequacies under environmental laws in order to exact the maximum degree of compliance. *Sierra Club v. Adams, supra*, 578 F.2d at 391-93; see also *Iowa Indep. Bankers v. Bd. of Governors*, 511 F.2d 1288, 1293-94 (D.C. Cir. 1975). "Once a genuine case or controversy has been established for standing purposes, nothing in Article III should limit the theories that can be spun out of the 'common nucleus of operative fact.'" 13A Wright & Miller, Federal Practice and Procedure § 3531.16 at 109 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d. 218 (1966)).

The basis for this contention - the NRC Notice of Violation - was discovered only on November 12, 2009 by Petitioners in a routine review of the NRC's ADAMS online document archive. The NRC Notice of Violation dated November 12, 2009 was deposited into ADAMS on that day.

This petition filing is timely made following discovery of the underlying events, and further comports with the requirements of 10 C.F.R. §2.309(f)(2)(i-iii) as follows:

(i) The information upon which the amended or new contention is based was not previously available

The quality assurance violations about which GE-Hitachi was notified on November 12, 2009 were not located in the ADAMS record prior to November 12, 2009. Although there were prior quality assurance violations brought to GEH's attention, these appear to have been resolved in September 2009 and while provided as history herein and proof of quality problems, it is the quality assurance violations of November 12, 2009 which have prompted this filing.

(ii) The information upon which the amended or new contention is based is materially different than information previously available

The quality assurance violations expressed in the NRC Staff's November 12, 2009 GEH NOV are entirely different in nature from the March 25, 2009 set of violations charged against GEH. Moreover, at the time of Petitioners' initiation of Contention No. 4 concerning the ESBWR reactor (filed March 9, 2009), any earlier QA citations were unrelated to the November 12 NOV.

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information

Petitioners have timely brought their Motion within thirty (30) days of discovery of the basis for the contention.⁷ The quality assurance violations alleged in the November 12 NOV differ from the representations submitted in the DCD which was incorporated by reference into the COLA.

5. Arguments in Support of Admissibility of Contention No. 16

⁷The 30th day following addition of the November 12, 2009 NOV to ADAMS was December 12, 2009, which fell on a Saturday. According to 10 C.F.R. § 2.306(a), "[t]he last day of the period so computed is included unless it is a Saturday or Sunday. . . ." Therefore, the filing of this Supplemental Petition is timely on the first business day following December 12, 2009, which is December 14, 2009.

a. Initial Contention of Incomplete ESBWR Reactor Design Was Rejected

In their original, March 9, 2009 Petition for Leave to Intervene, Petitioners submitted Contention No. 4, in which they asserted that the ESBWR nuclear reactor chosen by the DTE for Fermi Unit 3 is yet to be completed, accepted or certified, and that the Commission should suspend the proceeding "pending completion of the NRC review of the ESBWR reactor design and the obligatory design certification rulemaking." The Petitioners then claimed that allowing the licensing process to proceed before the ESBWR design were finalized would deprive them of a "fair and meaningful opportunity for a hearing on the Fermi COLA," in violation of the Atomic Energy Act, the Administrative Procedure Act, NEPA, and NRC regulations, and that the uncertainties associated with an uncertified nuclear reactor design would cause a denial of their due process rights. *Id.* at 45-46.

This Board held that it would "not admit Contention 4 because it impermissibly challenges an existing Commission regulation and is directly contrary to Commission precedent," citing 10 C.F.R. § 52.55(c). *Detroit Edison Company* (COLA for Fermi Unit 3), LBP-09-16, ___NRC ___, slip op. at 40 (July 31, 2009).

b. Contention No. 16 on ESBWR QA Should Be Admitted For Adjudication

Petitioners urge that Contention No. 16 be admitted for adjudication and either be held in abeyance pending the outcome of the ESBWR reactor design rulemaking, or alternatively, added to the other issues for ASLB adjudication without being held in abeyance.

i. Argument for Admission/Holding in Abeyance

Pursuant to the recently issued Commission policy statement on new reactor licensing, a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. See "Conduct of New Reactor Licensing Proceedings; Final Policy Statement," 73 Fed.Reg. 20,963, 20,972 (Apr. 17, 2008) ("New Reactor Licensing Policy Statement"). Hence in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and at a minimum hold that contention for adjudication, if it is otherwise admissible.

Quality assurance concerns about the ESBWR design are of central importance in the COLA. The DCD (now in its 6th revision as part of the Fermi 3 COLA) is expressly incorporated into the COLA. The NRC Inspector-General has defined this relationship between design and quality assurance:

The final safety analysis report must include a description of the applicant's QA program to be applied to the design, fabrication, construction, and testing of the structures, systems, and components of the facility. Part 52 references the QA program requirements, which are described in Part 50, Appendix B, *Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants* (Appendix B). Appendix B applies to all activities affecting safety-related functions of structures, systems, and components that prevent or mitigate the consequences of accidents that could cause undue risk to the health and safety of the public. QA comprises all planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. A QA program includes elements such as procedures, recordkeeping, inspections, corrective actions, and audits.

OIG Audit report, pp. 2-3. Thus quality assurance concerns about

design might be assigned to the rulemaking, but the ASLB must assess the outcome of that rulemaking to ensure that the QA contentions raised by Petitioners were fully addressed.

ii. Adjudication of Contention No. 16
Should Be Granted Without Reservation

Alternatively, Petitioners contend that in light of the additional evidence they have pled beyond the mere fact that the ESBWR remains nonfinal, the ASLB has subject matter jurisdiction to convene a trial on the merits of Contention No. 16. Contention No. 16 should be admitted for adjudication because Petitioners seek remedy of that there be quality assurance adherence to Commission regulations. Petitioners do not challenge existence of the Commission regulation, but instead, seek adherence to it.

10 C.F.R. § 52.55(c) states:

(c) An applicant for a construction permit or a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted.

Allowing a COLA to reference an incomplete and unapproved reactor design at one's own risk contradicts the policy objectives of 10 C.F.R. Part 52 and allows an essentially artificial framework to govern the content of the COLA insofar as certification of the as-yet incomplete and uncertified ESBWR design is *presumed*, notwithstanding the unknown effects on the DCD or the implications for quality assurance, construction, systems and other considerations at the Fermi site. *See, Druid Hills Civic Association, Inc., v. Federal Highway Administration*, 772 F. 2nd 700, 709 11th Cir. (1985), ("[W]e must recognize . . . 'that [NEPA] mandates that no agency limit its

environmental activity by the use of an artificial framework. . . .'" quoting *Sierra Club v. Morton*, 510 F.2d 813, 818-819 (5th Cir. 1975)) (citations omitted).

NRC Chairman Gregory B. Jaczko has counseled against the piecemeal regulatory approach of in moving reactor design certification rulemaking proceedings and COLA adjudications in parallel but non-intersecting tracks. In *Moving Safety and Security to the Front Edge of Design*, his prepared remarks given on October 8, 2009 at a workshop on small- and medium-sized nuclear reactors (NRC Document No. S-09-28), Chairman Jaczko advised:

One licensing process lesson that we can learn, from the ongoing new reactor design certification and combined license reviews, is that *timely and effective licensing reviews not only require the regulator to be ready, but it also requires the applicant to be ready.* Prospective applicants, whether they are seeking a design certification, a design approval, or a combined license, need to ensure that their design is sufficiently complete to support a licensing review. ***The application needs to be complete when it is initially submitted to the NRC.*** (Emphasis supplied)

The ESBWR reactor design - as incorporated into the Fermi 3 project - does not afford timely or effective licensing review to the public or, indeed, the NRC Staff.

Petitioners admit that in *Progress Energy Carolina, Inc.*, (Shearon Harris Nuclear Power Plant, units 2 and 3), CLI-08-15, slip op. June 23, 2008) the NRC denied a motion to postpone a hearing on the ground that the reactor certification rulemaking had not been completed, relying on 10 CFR § 52.55(c). However, the regulation does not address whether a COLA adjudication may proceed on the basis of an applicant's reference to an incomplete reactor certification rulema-

king, but only says an applicant that references an uncertified reactor design does so at its own risk. The NRC decision notes that contentions related to incomplete applications are "commonplace" in NRC adjudications but then refuses to accept the obvious: that an application containing reference to an in-progress reactor design scheme cannot by any definition be considered "complete" so long as there is no reactor design certification rule. To permit the COLA adjudication to proceed in light of this lack of completion mocks the NRC's regulatory requirements. The COLA should either be subjected to an adjudicatory hearing on all issues, including the ESBWR design certification application that is incorporated by reference into the COLA, or the adjudication on the COLA must be delayed until the rulemaking on the ESBWR is complete.

The NRC's policy statement in CLI-08-15 also provides that licensing boards are not to accept contentions in individual COLA adjudications that are or are about to become the subject of a general rulemaking. 73 Fed.Reg. 20,972, citing *Duke Power Co.*, (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59 (1985) and *Potomac Elec. Power Co.*, (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 BEC 79(1974). However, neither of these cases related to a reactor certification rulemaking. In the *Duke Power* case issues regarding the environmental impact of transporting spent fuel to a repository were excluded from an adjudication because such transportation issues were subject to a parallel pending NRC rulemaking. Likewise, in *Potomac Elec. Power Co.*, it was determined that contentions regarding environmental impacts related to the uranium

fuel cycle would not be considered in an adjudication because they were being addressed in a separate rulemaking. The regulatory approach applied in *Duke Power Co.* and *Potomac Elec. Power Co.* is distinguishable from the requirements of Part 52 that preclude restriction on the scope of material issues that can be litigated in a COLA adjudication unless it relates to an ESP, a manufactured nuclear reactor license, or standard design rule. None of these apply to the Fermi 3 COLA. Moreover, *Duke Power Co.* and *Potomac Elec. Power Co.* predate the adoption of the COLA process and design certification regulatory scheme of Part 52.

The NRC's part 52 regulations differentiate adjudications and rulemakings. Under 10 C.F.R. § 52.85 a COLA is required to be the subject of a notice of hearing that requires either an informal or formal hearing under 10 C.F.R. § 2.310. On the other hand, a rulemaking is not the subject of a notice of hearing but instead is subject to a notice of a proposed rulemaking. 10 C.F.R. § 2.804. These are fundamentally different proceedings in terms of the opportunity for the Petitioners' participation. An adjudication anticipates an adversarial proceeding while a rulemaking does not. *Independent Bankers Association of Georgia v. Board of Governors of Federal Reserve System*, 516 F.2d 1206, 1215 (C.A.D.C. 1975).

The Fermi 3 COLA is not subject to the exceptions under 10 C.F.R. § 52.79(b) because this is not an Early Site Permit proceeding. Nor does the COLA qualify for exceptions under 10 C.F.R. § 52.79(d) that references a certified design rule nor 10 C.F.R. § 52.79(e) that references a licensed manufacturer reactor. Accordingly, since the

Fermi 3 COLA does not meet the requirements for the subject regulatory exceptions, all material licensing issues should be within the scope of the adjudication, including the reactor design. This is the case where the COLA references a reactor design that has received approval from NRC staff.

Proceeding with the COLA adjudication without a certified design rule which reflects quality assurance regulation by the NRC is that additional design changes resulting from the design certification rulemaking could lead to further changes in the COLA itself. Deficiencies in the reactor design or its quality assurance facets are likely to trigger collateral changes in technical specifications, quality assurance requirements and operational requirements of a site-specific nature (e.g., in DTE's quality assurance program). Under the NRC's rationale, these changes would then be beyond the scope of a COLA adjudication that may have already been completed.

WHEREFORE, Petitioners pray the Atomic Safety and Licensing Board admit their proffered Contention No. 16 into these proceedings. Further, Petitioners pray the ASLB partially suspend adjudication of the Fermi 3 COLA until the quality assurance failings of GEH, DTE, and the NRC Staff, and their concomitant effects on quality of the ESBWR design, have been fully resolved.

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December 14, 2009

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NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the "Second Supplemental Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, 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 for Admission of a New Contention on ESBWR Quality Assurance, and for Partial Suspension of COLA Adjudication" has been served on the following persons via Electronic Information Exchange this 14th day of December, 2009:

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