

**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))	January 11, 2012
)	
	;	
*	*	*
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**MOTION FOR LEAVE TO LATE-FILE
AMENDED AND NEW CONTENTIONS**

Now come Intervenors Beyond Nuclear, *et al.*¹ (hereinafter “Intervenors”), by and through counsel, and move the Licensing Board for leave to late-file their amended/resubmitted and new contentions, which have contemporaneously been tendered for record.

Intervenors this date have resubmitted former contentions and submitted new contentions, being mindful that they have erroneously let pass the 60-day deadline set in the scheduling order for this case (*i.e.*, 60 days after the unveiling of the DEIS, which would have made the 60-day deadline December 27, 2012). At this point, Intervenors are tendering these contentions 75 days after formal announcement of the DEIS, on January 11, 2012, the date of the close of the public comment period. Counsel inadvertently did not realize the deadline. He was preoccupied throughout the month of December with major filings in three other unrelated legal matters, two of which were due the week of December 27, 2011. The three court filings included a response

¹In addition to Beyond Nuclear, the Intervenors include: 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 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.

in opposition to summary judgment in a federal civil lawsuit, *Golembiewski v. Logie, et al.*, Case No. 3:11-cv-57 in the U.S. District Court of Northern Ohio, Western Division; a summary judgment opposition memorandum in *Stachura et al. v. City of Toledo, et al.*, Case No. CI 200506445 in Lucas County, Ohio Court of Common Pleas; and an objection to magistrate report in a cutting edge case, *Bond, et al. v. Ohio Board of Psychology*, Case No. Case No. 11 CV 004711 in Franklin County, Ohio Court of Common Pleas.

Counsel for Intervenors apologize to the Board and to the parties for this oversight, for which their counsel is solely to blame. Intervenors' counsel mistakenly confused the deadline for contention filing arising from the DEIS with the end of the DEIS public comment period. He discovered his error while reviewing NRC precedent cited in the accompanying motion and made that discovery only on January 11, 2012 in the afternoon hours, after which he immediately contacted opposing counsel to consult with them to ascertain whether they would object to the late filing. Counsel for DTE indicated that at this point, Applicant objects.

Counsel for Intervenors admittedly did not consult the scheduling order, and (incorrectly) remembered the term for raising new contentions at the DEIS stage as being coterminous with the public comment period.

The factors to be considered by the Board in case of a late filing are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the [petitioner's] right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the [petitioner's] property, financial or other interest in the proceeding;

- (iv) The possible effect of any order that may be entered in the proceeding on the [petitioner's] interest;
- (v) The availability of other means whereby the [petitioner's] interest will be protected;
- (vi) The extent to which the [petitioner's] interests will be represented by existing parties;
- (vii) The extent to which the [petitioner's] participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the [petitioner's] participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. §2.309(c)(1). In *Crow Butte Res., Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 549 (2009), the Commission upheld the Licensing Board's finding that the petitioner demonstrated "good cause" for its late filing. The Commission affirmed that "'[g]ood cause' is the most significant of the late-filing factors set out at 10 C.F.R. § 2.309(c).” *Id.* at 549 n.61. If good cause is not shown, the board may still permit the late filing, but the petitioner must make a strong showing on the other factors. *See Pac. Gas and Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 5–8 (2008).

Counsel admits imprudence was his fault and concedes that it may not constitute “good cause”. But new regulatory developments and the availability of new information may constitute good cause for delay in seeking intervention. *Duke Power Co.* (Amendment to Materials License SNM-1773 – Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 148-149 (1979). *See also Cincinnati Gas & Elec. Co.* (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 572-573 (1980). In the contention filing made this date, complicated factual and legal arguments are raised.

Intervenors had to consult expert witnesses and two NGO's with environmental law expertise, the Environmental Law and Policy Center and the Great Lakes Environmental Law Center. The contentions are raised in response to the Draft Environmental Impact Statement in this COL proceeding. The need for consultations with experts and expert legal counsel took extensive time involvement through much of the public comment period for the DEIS. Moreover, new information, especially on complicated utility economics issues, is presented by Intervenors in their proffered new contention motion filing. Much of the data relied upon and interpreted by Intervenors' expert is quite recent, and required experience in public utility economics and demand forecasting.

Returning to the late-filing factors, Intervenors state as to (ii) that they have been parties to this proceeding since March 2009 and have no particular reputation for dilatory tactics nor late filings. Intervenors have established, from the dozen or so individuals and 5 organizations, consider interest from a broad geographic area in the licensing proceeding (iii). An order precluding them from raising the proffered contentions at this point will leave them, as public intervenors, and the public they represent, with no options to gain satisfaction from the regulatory system (iv). Respecting factor v, there are no other means by which their interests might be protected, other than formulating public comments. As Intervenors are the only public intervenor parties, there are no other means within the COL whereby their interests will be protected (vi) by existing parties. Intervenors' participation will broaden the issues but will not necessarily delay progress toward adjudication, since the lateness at issue is 15 days (as against a 40 or 60 year operating life for the proposed nuclear power plant (vii). Finally, Intervenors' participation will, as it has already, may be reasonably expected to contribute positively and substantively to this

COL case and to develop a sound record (viii).

As the Board knows, it may give differing weight to the various factors.

The presumption, irrespective of Intervenor's errors, is that the lead agency on NEPA, especially at the DEIS stage, will adequately study the environmental issues which are engendered by the undertaking. *Crouse Corp. v. Interstate Commerce Comm'n*, 781 F.2d 1176 (6th Cir. 1986). NEPA imposes continuing obligations on lead agencies following completion of an environmental analysis to re-evaluate in light of new and significant information it receives which casts doubt upon a previous environmental analysis. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). Intervenor's submit that the loss of 15 days on the scheduling track is outweighed by the contributions they continue to make to this litigation.

Wherefore, Intervenor's respectfully pray the ASLB grant them leave to have considered their newly-filed contentions.

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January 11, 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “MOTION FOR LEAVE TO LATE-FILE AMENDED AND NEW CONTENTIONS” have been served on the following persons via Electronic Information Exchange this 11th day of January, 2012:

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