

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

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APPLICANT'S ANSWER TO PROPOSED NEW CONTENTIONS  
BASED ON FINAL ENVIRONMENTAL IMPACT STATEMENT

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), DTE Electric Company (“DTE”) hereby answers the “Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27” (“New Contentions”), dated February 19, 2013, filed by the Intervenors.<sup>1</sup> For the reasons discussed below, the proposed new contentions are late without good cause, do not meet the criteria for timeliness of contentions based on environmental review documents, and are otherwise inadmissible.

II. BACKGROUND

On September 18, 2008, DTE filed its application for a combined operating license (“COL”) for Fermi 3, to be located in Monroe County, Michigan. The COL application references the application for certification of the Economic Simplified Boiling Water Reactor

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<sup>1</sup> The “Intervenors” are: 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.

(“ESBWR”) design. The Nuclear Regulatory Commission (“NRC”) Staff issued the Final Design Approval and Final Safety Evaluation Report (“FSER”) for the ESBWR on March 9, 2011. The ESBWR design is now the subject of an ongoing design certification (“DC”) rulemaking in accordance with 10 C.F.R. Part 52.<sup>2</sup>

In LBP-09-16, dated July 31, 2009, the Atomic Safety and Licensing Board (“Board” or “Licensing Board”) admitted four contentions for hearing (Contentions 3, 5, 6, and 8). Later, in LBP-10-09, dated June 15, 2010, the Board admitted another contention for hearing (Contention 15). Three of the admitted contentions (Contentions 3, 5, and 6) have been resolved through motions for summary disposition.<sup>3</sup> Hearings on the remaining environmental contention (Contention 8) and the remaining safety contention (Contention 15) are scheduled for hearing later this year.

On December 12, 2012, the Board issued an Order (Modifying the Schedule) that established a schedule for filing new or amended contentions based on the Final Environmental Impact Statement (“FEIS”), which was published in January 2013.<sup>4</sup> On February 19, 2013, the Intervenor filed their motion to admit new contentions based on the FEIS.

### III. APPLICABLE LEGAL STANDARDS

Although Intervenor filed their New Contentions in accordance with the Scheduling Order, the timeliness and admissibility of the proposed contentions must still be evaluated in accordance with the Commission’s standards in 10 C.F.R. Part 2. In general, a

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<sup>2</sup> “ESBWR Design Certification; Proposed Rule,” 76 Fed. Reg. 16549 (Mar. 24, 2011).

<sup>3</sup> Order (Granting Motion for Summary Disposition for Contention 3), dated July 9, 2010 (unpublished); Order (Granting Motion for Summary Disposition of Contention 5), dated March 1, 2011 (unpublished); *see also* LBP-12-23 (granting Motion for Summary Disposition of Contention 6), dated November 9, 2012.

<sup>4</sup> The Draft Environmental Impact Statement (“DEIS”) was published in October 2011.

contention must be based on the COL application or other documents available at the time the hearing request and petition to intervene is filed.<sup>5</sup> The regulation provides that intervenors may file a new or amended environmental contention if there are data or conclusions in the DEIS or FEIS that “differ significantly from the data or conclusions in the applicant’s documents.”<sup>6</sup> Otherwise, a new contention may be considered only if: (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.<sup>7</sup>

New or amended contentions, including those based on the FEIS, also must meet the admissibility standards that apply to all contentions, which the Commission has said are “strict by design.”<sup>8</sup> As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine

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<sup>5</sup> 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available).

<sup>6</sup> 10 C.F.R. § 2.309(f)(2).

<sup>7</sup> 10 C.F.R. § 2.309(c)(1).

<sup>8</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

dispute exists with the applicant on a material issue of law or fact. Failure to comply with any of these requirements is grounds for the dismissal of a contention.<sup>9</sup>

#### IV. THE PROPOSED NEW CONTENTIONS ARE INADMISSIBLE

##### A. Contention 3 (Resubmitted) – Environmental Analysis of Effects of Low-Level Radioactive Waste

###### 1. Background

Contention 3 was first proposed and admitted by the Board in 2009.<sup>10</sup> Contention 3, as originally proposed, alleged that “[t]he COLA violates NEPA by failing to address the environmental impacts of the ‘low-level’ radioactive waste that [the licensee] will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment.”<sup>11</sup> Specifically, the Intervenor alleged that the Environmental Report (“ER”) failed to offer a viable plan for managing low-level radioactive waste (“LLRW”) because the disposal facility in Barnwell, South Carolina, no longer accepts Class B and Class C LLRW that is generated outside the Atlantic Compact Commission States of Connecticut, New Jersey, and South Carolina.<sup>12</sup> The Intervenor characterized their contention as a “contention of omission.”<sup>13</sup>

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<sup>9</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). “Mere ‘notice pleading’ does not suffice.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

<sup>10</sup> LBP-09-16 at 19-39.

<sup>11</sup> See “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 Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing,” at 37 (Mar. 9, 2009) (“Pet.”).

<sup>12</sup> *Id.* at 37-39, n.1.

In LBP-09-16, the Licensing Board found a portion of Contention 3 admissible as a “contention of omission” based on DTE’s “failure to acknowledge in the ER that it lacks an offsite disposal facility and to either explain its plan for storing such wastes onsite during the license term, or show that it has some alternative means of managing the wastes that will not require either an offsite disposal facility or extended onsite storage.”<sup>14</sup> As admitted, the narrowed contention of omission was limited to (1) the ER’s failure to acknowledge the closure of Barnwell to out-of-compact waste; and (2) the ER’s failure to (a) address the need for, and the environmental consequences of, long-term storage of Class B and C waste at the Fermi 3 site, or (b) demonstrate that long-term storage at the Fermi 3 site will not be necessary.

Subsequently, the Board granted summary disposition on Contention 3.<sup>15</sup> The Board found that Contention 3 was moot because DTE had amended the ER to explain the plans for managing Class B and C wastes if an offsite facility was not available to accept such wastes.<sup>16</sup> The Board noted that the Intervenors had disputed the adequacy of the new plan described in the revised ER, but rejected those arguments because they were not made as part of a new contention challenging the adequacy of the LLRW management plan described in the ER revision. The Intervenors also did not file a new contention alleging inadequacies in the LLRW management plan at Fermi 3 following publication of the DEIS.

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<sup>13</sup> *Id.* at 44.

<sup>14</sup> LBP-09-16 at 25-26, 35.

<sup>15</sup> Order (Granting Motion for Summary Disposition of Contention 3), dated July 9, 2010.

<sup>16</sup> *Id.* at 5.

## 2. Timeliness

The Intervenors are now attempting to raise issues that could have been raised based on the revised ER or the DEIS. Perhaps most significantly with respect to timeliness of the resubmitted Contention 3, there are no material differences between the DEIS and FEIS discussions of the Fermi 3 LLRW management plan. Citing pages 6-14 and 6-15 of the FEIS, the Intervenors challenge the NRC Staff's assessment of LLRW impacts. But, as the "revision bars" in the margin of the FEIS indicate, there were no substantive changes to the discussion of LLRW handling at Fermi 3.<sup>17</sup> There is no new or different information or conclusion in the FEIS relative to the DEIS that could form the basis for a timely contention. Resubmitted Contention 3 is therefore untimely.

## 3. Admissibility

Even if it were timely, resubmitted Contention 3 is not admissible. The Intervenors assert that the combined license application ("COLA") does not "contem-plate [*sic*] any but 'temporary' onsite storage of Class B, C and greater-than-C wastes" and complain that "[t]he facility will prepare waste for routine shipment to a disposal site throughout Fermi's entire operating life after the first decade, despite the fact that no such disposal site is currently available, let alone guaranteed available in future decades."<sup>18</sup> The Intervenors state that this is a "contention of omission."<sup>19</sup>

But, there is no omission. The revised ER and FEIS describe how, in the absence of an offsite disposal facility for Class B and C waste generated at Fermi 3, DTE would store

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<sup>17</sup> Compare DEIS at 6-14 to 6-15 to FEIS at 6-14 to 6-15.

<sup>18</sup> New Contentions at 8.

<sup>19</sup> *Id.* at 11.

Class B and C waste on-site. The revised ER and FEIS also discuss the environmental consequences of extended on-site storage. For example, DTE developed a Solid Waste Management System for Fermi 3 that accommodates storage of up to ten years of packaged Class B and C waste.<sup>20</sup> The FEIS further explains that, if necessary, additional waste minimization measures could be implemented to reduce or eliminate the generation of Class B and C waste.<sup>21</sup> If additional storage capacity for Class B and C wastes were to become necessary, the FEIS explains that DTE could construct a new storage facility.<sup>22</sup> Thus, contrary to resubmitted Contention 3, the FEIS describes how DTE will manage Class B and C wastes on-site, including the environmental consequences of extended on-site storage and the environmental consequences of constructing additional storage.<sup>23</sup> Because the FEIS fully describes the environmental and radiological consequences of LLRW management at Fermi 3, even in the absence of offsite disposal capacity, there is no omission. Resubmitted Contention 3 fails to raise a genuine dispute and is inadmissible.

*B. Contention 13 (Resubmitted) – Need and Demand for Power from the Fermi 3 Nuclear Power Plant*

1. Background

This is the third time that the Intervenors have attempted to admit Contention 13. In the original Contention 13, the Intervenors claimed that the ER did not include data that

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<sup>20</sup> FEIS at 6-14.

<sup>21</sup> *Id.* The waste minimization measures would provide additional time for offsite disposal capability to be developed or additional on-site capacity to be added.

<sup>22</sup> *Id.*

<sup>23</sup> The FEIS also acknowledges that DTE could enter into a commercial agreement with a third-party contractor to process, store, own, and ultimately dispose of low-level waste generated as a result of Fermi 3 operations. *Id.*

reflected the economic downturn in Michigan.<sup>24</sup> The Intervenors argued that the analysis in the ER regarding the need for power was premised on Michigan’s 21st Century Plan, which purportedly “forms the core data projections in the ER supporting endless growth in electrical consumption and the ‘need’ for Fermi 3.”<sup>25</sup> The Intervenors also argued that, since the data in the report was gathered in 2006, the information “has been overtaken by history.”<sup>26</sup>

The Board found that the original Contention 13 did not provide factual or expert support sufficient to demonstrate a genuine material dispute with the application.<sup>27</sup> The Board explained that, contrary to the Intervenors’ claim, the ER analysis of the need for power accounted for economic conditions in Michigan that might reduce the growth in demand, acknowledged sources of uncertainty (*e.g.*, business cycles and economic conditions), and recognized that energy efficiency and conservation may also reduce the need for power.<sup>28</sup> The Board therefore denied admission of Contention 13.

The Intervenors resubmitted Contention 13 following publication of the DEIS. The Board first found the resubmitted Contention 13 to be untimely.<sup>29</sup> The Board explained that, while NRC regulations authorize new or amended contentions “if there are data or conclusions in the [DEIS] . . . that differ significantly from the data or conclusions in the applicant’s documents,” mere publication of the DEIS does not provide an opportunity to renew previously-

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<sup>24</sup> LBP-09-16 at 78.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 78-82.

<sup>28</sup> *Id.* at 81.

<sup>29</sup> LBP-12-12 at 14-15.

filed (and rejected) contentions. The Board also found that the Intervenor did not show that the information contained in the DEIS was “not previously available.”<sup>30</sup>

The Board also found resubmitted Contention 13 inadmissible. The Intervenor had contended that need for power analysis in the DEIS overestimated energy demand and thus overstated the need for Fermi Unit 3 because it “relie[d] entirely on the Michigan Public Service Commission (“MPSC”) [21st Century Plan], a 2006 energy planning report that was prepared before the recession.”<sup>31</sup> But, the Board explained that the NRC Staff addressed the issue of uncertainty with regard to the 21st Century Plan in the DEIS. Because the Intervenor did not point out how this treatment of the 21st Century Plan was inadequate, the Board found that Contention 13 did not satisfy the contention admissibility criteria.

## 2. Timeliness

Resubmitted Contention 13 remains untimely. The Intervenor offer nothing new. The information relied upon by the Intervenor either was previously available or is not materially different from information previously available. Nor have the Intervenor’s issues changed. The Intervenor allege, as they did twice before, that the need for power discussion improperly relies on the 21st Century Plan.<sup>32</sup> And, they argue once again that the FEIS overestimates energy demand and thus overstates the need for Fermi Unit 3.<sup>33</sup> Because the ER and the DEIS both relied on the 21st Century Plan, resubmitted Contention 13 could have been filed in essentially the same form previously. The mere act of publishing the FEIS does not

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<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.* at 16.

<sup>32</sup> New Contentions at 12.

<sup>33</sup> *Id.* at 13.

create an opportunity to renew previously-filed (and rejected) contentions, essentially arguing again that the ER and the NRC Staff are still wrong. The contention therefore is untimely.

The Intervenors make an effort to justify the untimely filing of Contention 13 by referencing a new section in the FEIS.<sup>34</sup> But, this effort fails for two reasons. First, in Section 8.2.4, *Reassessment of the MPSC Plan Based on Current Data*, the NRC Staff performed a confirmatory review of the 21st Century Plan to determine whether its demand projections remained relevant following the economic recession.<sup>35</sup> The NRC Staff concluded that “the original assessment made by the [21st Century] Plan is still representative of the potential for future growth in electricity demand in the DTE Service Area.”<sup>36</sup> The NRC Staff therefore determined that “the original need for power assessment performed for the DEIS is still valid,” and that no revisions to the analysis or the conclusions were necessary.<sup>37</sup>

Second, the Intervenors again failed, as the Board explained in LBP-12-12, to show that the information contained in the FEIS was “not previously available.” This finding required by 10 C.F.R. § 2.309(c)(1) is related to the *total previous unavailability* of information.<sup>38</sup> Here, the 2010 Reliability *First* Long-Term Reliability Analysis (“LTRA”) that underlies the NRC Staff’s confirmatory analysis in Section 8.2.4 of the FEIS was published in

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<sup>34</sup> *Id.* at 13-14.

<sup>35</sup> FEIS at 8-19.

<sup>36</sup> *Id.* at 8-20.

<sup>37</sup> *Id.*

<sup>38</sup> *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

October 2010. The report was therefore available even before the Intervenor resubmitted Contention 13 following publication of the DEIS.<sup>39</sup>

Because resubmitted Contention 13 does not rely on the differences between the DEIS and the FEIS or on information that was previously unavailable, it is untimely.

### 3. Admissibility

Even if the Board finds that a portion of resubmitted Contention 13 is timely, the Intervenor nevertheless fail to raise a genuine dispute with the FEIS. In Contention 13, the Intervenor assert that, “[e]ven as it composed the Final EIS, the NRC Staff persisted in its pattern of choosing out-of-date forecasts.”<sup>40</sup> The Intervenor claim that the new discussion in the FEIS relied on the 2008 NERC LTRA rather than more recent assessments. This is false. The FEIS (at 8-19) makes clear that the NRC review team’s confirmatory analysis was based on ReliabilityFirst’s 2010 LTRA (not the 2008 NERC LTRA). And, the discussion in Section 8.2.4 specifically focuses on the LTRA projections from 2010 to 2019.<sup>41</sup> This directly contradicts the Intervenor’s basis for resubmitted Contention 13, which alleged that the NRC Staff decided “to freeze the forecast analysis at 2008.” To the extent that Contention 13 was based on the NRC Staff’s alleged use of outdated NERC analyses, the contention fails to demonstrate a genuine dispute with the FEIS.

The Intervenor also argue more broadly that the FEIS reliance of the 21st Century Plan is improper because “[n]either the 21st Century Plan nor the now-dated LTRA

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<sup>39</sup> The Intervenor argue that the NRC Staff relied on a 2008 North American Electric Reliability Corporation (“NERC”) LTRA even though more recent analyses were available. Pet at 14. But, the NRC Staff in fact relied on ReliabilityFirst’s 2010 LTRA. FEIS at 8-19. A contention based on either document would be untimely.

<sup>40</sup> New Contentions at 14.

<sup>41</sup> FEIS at 8-20; Figure 8-7.

have properly accounted for the 2008 economic recession in their forecasts, and they cannot reasonably be considered to be ‘responsive to forecasting uncertainties’ in light of electricity market conditions since their preparation.”<sup>42</sup> But, these same arguments were rejected previously by the Board because the need for power analysis “accounts for economic conditions in Michigan that might reduce the growth in demand, acknowledges sources of uncertainty, and recognizes that energy efficiency and conservation may also reduce the need for power.”<sup>43</sup> The FEIS, like the ER and the DEIS before it, addresses the issue of uncertainty with regard to the 21st Century Plan.<sup>44</sup> And, in Section 8.2.4, the NRC Staff reassesses the analysis in light of more recent information, including information from independent system operators that post-dates the 2008 economic recession.<sup>45</sup> Because Intervenors have not pointed out how this treatment of the 21st Century Plan is inadequate, resubmitted Contention 13 is inadmissible.

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<sup>42</sup> New Contentions at 19.

<sup>43</sup> LBP-12-12 at 16.

<sup>44</sup> A need for power assessment necessarily entails forecasting power demands in light of substantial uncertainty. Because of the importance of a utility’s duty to provide adequate and reliable service to the public, need for power assessments are inherently conservative. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 365-68 (1975); *see also Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978) (“Given the legal responsibility imposed upon a public utility to provide at all times adequate, reliable service—and the severe consequences which may attend upon a failure to discharge that responsibility—the most that can be required is that the forecast be a reasonable one in the light of what is ascertainable at the time made.”).

<sup>45</sup> The NRC Staff’s need for power analysis may accord forecasts and studies prepared by expert, independent agencies “great weight” and may give “heavy reliance” to those forecasts and studies absent a showing they contain a “fundamental error.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-490, 8 NRC 234, 240-241 (1978); 68 Fed. Reg. 55905, 55909 (Sept. 29, 2003) (“in considering the need for power as part of the NEPA process, the NRC does not supplant the States, which have traditionally been responsible for assessing the need for power generating facilities, their economic feasibility and for regulating rates and services”).

The Intervenors also fail to identify a material dispute on an issue relevant to the need for power analysis in the FEIS. The Intervenors question the need for Unit 3 solely on the basis of reduced demand for power during the last several years, primarily as the result of the economic recession. But, “[a] short-term reduction in demand is not sufficient to necessitate an accounting in [an EIS] for that changed demand. The longstanding position of the Commission is that ‘inherent in any forecast of future electric power demands is a substantial margin of uncertainty.’”<sup>46</sup> Thus, fluctuations in demand that may occur over a period of several years, such as changes brought about by an economic recession, are not a sufficient ground for challenging the need for power analysis under the Commission’s interpretation of National Environmental Policy Act (“NEPA”) requirements.<sup>47</sup> This is insufficient to support an admissible contention.<sup>48</sup>

The Intervenors also fail to recognize that the need for power analysis does not rely solely on increasing demand. The Intervenors repeatedly argue that “demand” for electricity has declined and that annual average electricity sales have decreased.<sup>49</sup> However, the purpose of the proposed reactor is (1) to generate approximately 1535 MW(e) of baseload electricity; (2) to compensate for the future retirement of existing, aging baseload generating units and the diminishing availability of baseload generation capacity in the Midwest Independent System Operator (“MISO”) service area; and (3) to provide price stability by minimizing the importation

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<sup>46</sup> *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-79-5, 9 NRC 607, 609 (1979) (internal citations omitted).

<sup>47</sup> *Calvert Cliffs 3 Nuclear Project* (Calvert Cliffs 3), LBP-10-24, 72 NRC \_\_, \_\_ (slip op. at 32) (Dec. 28, 2010).

<sup>48</sup> *See South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC \_\_, \_\_ (slip op. at 1) (Jan. 7, 2010) (affirming Board’s decision to deny the admission of the contention that called for a more detailed “need for power” analysis than the NRC requires).

<sup>49</sup> New Contentions at 12.

of power into the DTE service area.<sup>50</sup> The need for power analysis in the FEIS confirmed that the planning effort in the 21st Century Plan extends beyond supply-side projections for construction of conventional generation, transmission, and distribution systems to consider a full complement of both supply-side and demand-side projections.<sup>51</sup> For example, the FEIS recognizes that power from Fermi 3 would largely offset the projected loss of generating capacity in the Southeast Michigan Planning Area due to unit retirements and, further, that new baseload capacity will be needed to preserve adequate reserve margins, irrespective of reductions in demand resulting from energy conservation programs or changes to power import/export conditions affecting the DTE service area.<sup>52</sup> The bases provided for Contention 13 — changes in demand, declining sales, and declining growth expectations — are therefore irrelevant to the need for baseload power to offset retiring units or reduce transmission congestion.

Finally, resubmitted Contention 13 does not raise a material issue because it does not dispute the FEIS conclusion that the methodologies used in developing the 21st Century Plan are acceptable. The FEIS states (as did the ER and the DEIS) that the Michigan 21st Century Plan satisfies the NRC’s evaluation criteria of being (1) systematic; (2) comprehensive; (3) subject to confirmation; and (4) responsive to forecast uncertainty.<sup>53</sup> This is consistent with

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<sup>50</sup> FEIS at 1-10, 8-1 to 8-2; DEIS at 1-10, 8-2; *see also Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) (holding that the NRC may adopt “baseload energy generation” as the purpose behind a new nuclear project); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-354 (1975) (concluding that the need for a new unit can be based on a showing that the nuclear plant is needed as a substitute for plants that burn fossil fuels).

<sup>51</sup> FEIS at 8-25.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 8-12 to 8-14; ER at Sections 8.0 and 8.1; DEIS at Section 8.1.3.1 and 8.4; *see also* NUREG-1555, at 8.1-2 (explaining the evaluation criteria).

NRC precedent and practice, which permits affected States, regions, or Independent System Operators (“ISOs”) to prepare the initial need for power evaluation (rather than the applicant).<sup>54</sup> Because the Intervenor has not provided any basis to challenge the NRC’s conclusions regarding application of those criteria to the 21st Century Plan, resubmitted Contention 13 is immaterial.

Because the Intervenor is demanding a more precise forecast of the need for power than the Commission has determined is required by NEPA, and because they have failed to address other aspects of the need for power, resubmitted Contention 13 does not address a material issue. And, in any event, Contention 13 does not provide sufficient factual support for a genuine dispute with the FEIS. Resubmitted Contention 13 is inadmissible.

C. Contention 23 (Resubmitted/New) – Environmental Implications of the Transmission Corridor for Fermi 3

1. Timeliness

The Intervenor first submitted Contention 23 based on the DEIS.<sup>55</sup> The original Contention 23 alleged that “[t]he high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the [DEIS]” and asserted that the “the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient in a host of ways.”<sup>56</sup> The Board found the proposed contention to be untimely because

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<sup>54</sup> The U.S. Supreme Court has noted that there is little doubt that, under the AEA, State public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). And, under NEPA, the NRC may place heavy reliance on the judgment of local regulatory bodies charged with energy planning. *Rochester Gas and Electric Corporation* (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 388-389 (1978).

<sup>55</sup> LBP-12-12 at 42.

<sup>56</sup> *Id.*

it was not based on any new or materially different information presented in the DEIS.<sup>57</sup> Instead, the Board found that the Intervenor’s challenges could have and should have been made in response to the ER. The Board determined that each of the issues that comprised the subject matter of the contention was discussed in the ER, including the route of the transmission corridor and impacts on historic and cultural resources, endangered or threatened species, and wetlands and vegetation.<sup>58</sup>

The same deficiencies exist for resubmitted Contention 23. The Intervenor again provide an extensive recitation of sections in the FEIS evaluation of transmission lines that are supposedly deficient, including impacts to wetlands, transmission infrastructure footprint, mitigation measures, endangered species, preconstruction activities, and cultural resources.<sup>59</sup> But, rather than put forward any information to show how the FEIS analysis differs from that in the ER or the DEIS, the Intervenor merely reference a portion of the Licensing Board’s analysis in LBP-12-12. They never come to grips with the flaw — the absence of any new or materially different information — that rendered both the original and now the resubmitted Contention 23 untimely. In none of the various sub-issues do the Intervenor identify any new or different information in the FEIS relative to the DEIS or ER.<sup>60</sup>

According to Intervenor, resubmitted Contention 23 is timely because they “did not know what the NRC Staff’s response to being ordered to include the transmission corridor

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 42-43.

<sup>59</sup> New Contentions at 21-53.

<sup>60</sup> In one portion of resubmitted Contention 23, the Intervenor argue, wrongly it turns out, that the FEIS discussion of the transmission corridor differs from that in the DEIS. New Contentions at 27-28. As discussed below, the language in the FEIS is identical to the language in the DEIS.

within the FEIS would be prior to the availability of the FEIS in January 2013.”<sup>61</sup> But, the Board’s discussion in LBP-12-12 cannot convert this untimely contention into a timely one. The focus of the timeliness evaluation at this stage of the proceeding hinges on identification of materially different information in the FEIS from that previously available in the DEIS. The absence of a material change from the DEIS to the FEIS is not itself “new information” that can give rise to a new contention. Moreover, the Board’s discussion in LBP-12-12 was by no means an order to the NRC Staff. The Board did not (and indeed could not, in the absence of an admitted contention) direct the NRC Staff in the performance of its NEPA responsibilities.<sup>62</sup>

Because the statements challenged by the Intervenors do not involve data or conclusions in the FEIS that are new or materially different from those in the DEIS, resubmitted Contention 23 is untimely.

## 2. Admissibility

The Intervenors identify a number of sub-issues in resubmitted Contention 23. Some are listed in the section purporting to be a brief statement of the basis for the contention, while others are listed in the section supposedly containing the requisite statement of facts/expert opinion or the section covering information asserted to show a genuine dispute. This disjointed presentation makes it difficult to ascertain how (if at all) the Intervenors intend to satisfy each of the contention admissibility criteria. The Board and the parties “cannot be expected to go on a

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<sup>61</sup> *Id.* at 25.

<sup>62</sup> Although the Intervenors assert that “[t]he ASLB *sua sponte* ordered NEPA consideration within the Final EIS of the effects of construction and the as-built presence of transmission lines through and within the corridor,” a Licensing Board does not have jurisdiction over the NRC Staff’s non-adjudicatory functions. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004).

veritable scavenger hunt to find the missing pieces needed for an admissible contention.”<sup>63</sup> Ultimately, it is the responsibility of the Intervenors, not the Licensing Board, to provide the necessary information to satisfy the requirements for the admission of their contentions, including an explanation of the bases for those contentions.<sup>64</sup> Nevertheless, to ensure comprehensive treatment of the resubmitted Contention 23, each sub-issue is addressed below.

*i. Section 404*

The Intervenors argue that “the Corps of Engineers is a party to having piecemealed the findings it supposedly must have [sic] under § 404 of the Clean Water Act, 33 U.S.C. § 1344, into two (2) parts: NEPA and public interest factor reviews (although both are dubious based on the lack of fact-specific disclosures in the FEIS); and the findings which the Corps must render concerning least environmentally [damaging] practical alternatives (LEDPA), which findings will be made well after completion of the FEIS.”<sup>65</sup> And, Intervenors allege that the FEIS failed to discuss the environmental effects within “jurisdictional wetlands” known to be present in the transmission corridor.<sup>66</sup> This portion of Contention 23 is inadmissible.

First, as the Intervenors even acknowledge, there is no requirement that the Corps of Engineers’ Section 404 wetland permitting be concluded contemporaneously with the FEIS.<sup>67</sup>

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<sup>63</sup> *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, \_ NRC \_ (slip op. at 31).

<sup>64</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

<sup>65</sup> New Contentions at 25-26.

<sup>66</sup> *Id.* at 26.

<sup>67</sup> *Id.*

Nor is the adequacy of the Corps' permitting process within the scope of the COL proceeding, which is focused on the NRC's compliance with the Atomic Energy Act ("AEA") and NEPA. It is "not the province of the NRC (and thus [a] Board) to enforce another agency's regulations."<sup>68</sup> The issues raised in this part of Contention 23 are therefore outside the scope of this proceeding.

Second, the Intervenor fails to demonstrate a genuine dispute with the application regarding impacts to wetlands. Although the Intervenor complains that detailed wetland surveys in the transmission corridor have not yet occurred (New Contentions at 26-27), this does not mean that impacts to wetlands have been ignored. The FEIS discusses impacts to wetlands along the transmission corridor in the FEIS (at 4-44):

Approximately 93.4 ac of forested wetland occur within the expected transmission line corridor; most, if not all, would be permanently cleared of trees (Detroit Edison 2011a). These wetlands would be converted to scrub-shrub or emergent wetlands to maintain clearance for the conductors. No wetlands would be affected in the initial 18.6 mi of the route because adequate cleared corridor to accommodate the new transmission lines is already present. No wetlands are present in the area where the Milan Substation site would be expanded (Detroit Edison 2011a). The undeveloped western 10.8-mi section could require placing towers in wetlands that cannot be spanned (span distances usually cannot exceed 900 ft). The total potential permanent impact on wetlands from installation of all the towers is expected to be approximately 0.5 ac, based on the projected surface area needed to build tower foundations (Detroit Edison 2011a).

To the extent that the Intervenor is complaining about the absence of a final transmission corridor alignment in the FEIS, they again fail to demonstrate a dispute with the FEIS on a material issue. The FEIS contains a "bounding analysis" of potential wetland impacts from transmission corridor construction.<sup>69</sup> This analysis ensures that the environmental impacts

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<sup>68</sup> *Florida Power and Light* (Turkey Point Nuclear Generating Station), LBP-11-06, 73 NRC \_\_, \_\_ (slip op. at 97 n.102) (Feb. 28, 2011).

<sup>69</sup> *See* FEIS at 4-44 to 4-45, J-2 (noting that the Corps of Engineers could potentially identify additional practicable avoidance and/or minimization measures during its

of the transmission line on wetlands are not underestimated in the FEIS. The Intervenor provide no information or expert support to suggest that impacts would be greater than those identified in the FEIS. Therefore, the Intervenor have failed to raise a genuine dispute on a material issue.

*ii. Disparate Assertion of Transmission Infrastructure Footprint*

Intervenor argue that there is “a dispute of fact between the [ER] and the DEIS and FEIS, upon which Intervenor should be allowed to resubmit their previous Contention 23.”

The Intervenor first cite the FEIS (at 2-46), which states:

For a portion of this eastern 18.6-mi segment of the proposed route, reconfiguring existing conductors may allow for the use of existing transmission infrastructure without the need for building additional transmission infrastructure.

For comparison, the Intervenor assert that the “comparable/analogous statement on this issue” in the DEIS (at 3-17) is as follows:

By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.

They allege these statements reflect “a change of direction by the NRC Staff” that “took place somewhere between publication of the DEIS and the FEIS.”<sup>70</sup> But, this is misleading. The Intervenor are actually comparing statements in different sections of the FEIS and DEIS.<sup>71</sup> The DEIS discussion at 2-45 is identical to that in the FEIS at 2-46:

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evaluation that could result in the USACE-identified least environmentally damaging practicable alternative (“LEDPA”) having fewer adverse impacts on waters of the United States than DTE’s proposed LEDPA and explaining that any subsequent changes to the proposed site plan and/or activities as a consequence of the USACE-identified LEDPA would result in fewer adverse impacts on waters of the United States than identified in the FEIS) (emphasis added).

<sup>70</sup> New Contentions at 28.

<sup>71</sup> And, in any event, the statements, while worded different, say the same thing.

For a portion of this eastern 18.6-mi segment of the proposed route, reconfiguring existing conductors may allow for the use of existing transmission infrastructure without the need for building additional transmission infrastructure.

Likewise, the discussion in the FEIS at 3-18 is the same as that in the DEIS at 3-17:

By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.

This “apples-to-apples” comparison confirms the absence of any new or materially different information in the FEIS that could support a timely contention. And, it also highlights the lack of any dispute with the FEIS. While the Intervenors argue (incorrectly as it turns out) that the NRC Staff changed its position between the DEIS and the FEIS, there was in fact no change in position and therefore no basis for an admissible contention.

iii. *‘Preconstruction’ segmentation of transmission corridor from FEIS*

The Intervenors argue that the NRC Staff has “intentionally failed to integrate the transmission line impacts into the FEIS, despite being ordered to do so by the ASLB.”<sup>72</sup> The Intervenors assert that “[t]he NRC Staff remains stuck at its DEIS arguments and rationales, which the ASLB has firmly ruled were not persuasive in light of its finding of unacceptable segmentation under NEPA of the transmission corridor from the plant construction and licensing.” But, in addition to being untimely, this portion of proposed Contention 23 fails to demonstrate a genuine dispute with the FEIS on a material issue.

As an initial matter, ITC*Transmission*, which is not affiliated with DTE, owns and operates the transmission system in southeastern Michigan. The offsite portions of the proposed Fermi 3 transmission system and associated corridors therefore would be owned and operated by

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<sup>72</sup> New Contentions at 29.

ITCTransmission.<sup>73</sup> DTE has no control over the construction or operation of the offsite transmission system.<sup>74</sup> But, this is not a case where the FEIS ignores transmission impacts because they involve entities and agencies other than DTE or the NRC. As required by NEPA, the FEIS discusses transmission-related impacts regardless of which entity seeks or reviews the necessary permits or approvals related to construction and operation of offsite transmission lines.

The FEIS describes the environmental attributes of the transmission corridor in Chapter 2, including land use,<sup>75</sup> terrestrial and wetland ecology,<sup>76</sup> aquatic ecology,<sup>77</sup> and historic and cultural resources.<sup>78</sup> Chapter 4 discusses impacts of construction on the transmission corridor, including land use,<sup>79</sup> terrestrial and wetland ecology,<sup>80</sup> aquatic ecology,<sup>81</sup> and historic and cultural resources.<sup>82</sup> Chapter 5 discusses the impacts of operation of the transmission lines on land use,<sup>83</sup> terrestrial and wetland ecology,<sup>84</sup> aquatic ecology,<sup>85</sup> air quality,<sup>86</sup> and non-

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<sup>73</sup> FEIS at 3-18.

<sup>74</sup> *Id.*

<sup>75</sup> FEIS at 2-10.

<sup>76</sup> *Id.* at 2-45, 2-61.

<sup>77</sup> *Id.* at 2-79, 2-82, 2-126.

<sup>78</sup> *Id.* at 2-208 to 2-209.

<sup>79</sup> *Id.* at 4-8.

<sup>80</sup> *Id.* at 4-29, 4-45.

<sup>81</sup> *Id.* at 4-51 to 4-53.

<sup>82</sup> *Id.* at 4-100 to 4-102.

<sup>83</sup> *Id.* at 5-3 to 5-4.

<sup>84</sup> *Id.* at 5-22, 5-27.

<sup>85</sup> *Id.* at 5-41 to 5-43.

radiological health.<sup>87</sup> The NRC also specifically addressed transmission-related impacts in Chapter 7, *Cumulative Impacts*. For example, the FEIS considered cumulative impacts of transmission lines on land use,<sup>88</sup> terrestrial and aquatic resources,<sup>89</sup> historic and cultural resources,<sup>90</sup> and non-radiological health impacts.<sup>91</sup> All of these impacts are summarized in Appendix M, *Environmental Impacts from Building and Operating Transmission Lines Proposed to Serve Fermi 3*.

The Intervenor has not pointed to any specific impacts in the transmission corridor that were allegedly overlooked. Nor have they argued that the impacts in any resource area were understated. They have offered no tangible information, no experts, and no substantive affidavits to challenge the adequacy of the FEIS discussion. As a result, the Intervenor has failed to raise a genuine dispute with the FEIS and this aspect of Contention 23 should be denied.

The Intervenor's charges of "unacceptable segmentation" also lack support.<sup>92</sup> Segmentation embraces the situation where a Federal agency subdivides what would otherwise be regarded as a single, integrated Federal action into separate, smaller Federal actions for the purpose of avoiding compliance with NEPA, or otherwise minimizing the apparent impact of the

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<sup>86</sup> *Id.* at 5-100 to 5-101.

<sup>87</sup> *Id.* at 5-104.

<sup>88</sup> *Id.* at 7-7.

<sup>89</sup> *Id.* at 7-18 to 7-21.

<sup>90</sup> *Id.* at 7-31 to 7-33.

<sup>91</sup> *Id.* at 7-37.

<sup>92</sup> New Contentions at 29.

integrated Federal action. Here, the FEIS explains that, while preconstruction activities, including offsite transmission lines, are outside the scope of NRC regulatory authority, they are nevertheless considered in the EIS in the context of cumulative impacts.<sup>93</sup> The Intervenor cite no legal authority for the proposition that this is improper under NEPA. And, the Commission has specifically explained that its definition of “construction” (distinguishing “pre-construction”) does not constitute unlawful “segmentation” that would result in noncompliance with NEPA.<sup>94</sup> Because the NRC considered the activities at the Fermi site and those in the transmission corridor together, the FEIS eliminates segmentation concerns.

*iv. Discussion of pre-operational impacts during construction phase*

In this portion of resubmitted Contention 23, the Intervenor argue that “there is no meaningful discussion of pre-operational impacts during construction” and assert that “[t]he thrust of the FEIS sections which mention the transmission corridor at all are speculative and do not reflect commitment to construction, much less to compliance with NEPA.”<sup>95</sup> But, the Intervenor do not explain what pre-operational impacts are alleged to be overlooked in the FEIS. Obviously, some impacts discussed in the FEIS are limited to the operational phase (*e.g.*, impacts from noise while energized, electrical fields, and corridor maintenance), but this does not mean that other impacts were omitted from the discussion of construction and pre-construction impacts (*i.e.*, pre-operational impacts). And, as noted above, the fact that the

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<sup>93</sup> FEIS at 1-6 to 1-7, E-41, and E-56.

<sup>94</sup> 72 Fed. Reg. 57416, 57416 “Limited Work Authorizations for Nuclear Power Plants; Final Rule” (October 9, 2007); *see also id.* at 57427-57428 (explaining that the NRC’s approach to preconstruction is not illegal segmentation under NEPA). This aspect of the proposed contention therefore also represents an impermissible challenge to the NRC’s regulations contrary to 10 C.F.R. § 2.335.

<sup>95</sup> New Contentions at 30.

precise location of the transmission corridor is not yet final does not mean that the FEIS is necessarily deficient. To the contrary, the FEIS includes a bounding discussion of transmission line impacts. Having failed to identify any specific portion of the FEIS that is deficient, this portion of resubmitted Contention 23 is inadmissible.

v. *Dispersion of transmission corridor impacts discussion throughout FEIS*

The Intervenors also allege that “[d]iscussions of the transmission corridor impacts are scattered widely in the FEIS – a practice that has been found to be a symptom of violation of NEPA.”<sup>96</sup> But, the Intervenors fail to identify any impacts that are missing or overlooked in the FEIS as a result of the organization of the document. In fact, they acknowledge the FEIS discussion of transmission-related impacts in the FEIS. Because the FEIS discusses transmission-related impacts in detail (as did the DEIS) and because the Intervenors have pointed to no impacts that were overlooked or not considered in the FEIS, this aspect of resubmitted Contention 23 is inadmissible.

The Intervenors also point to no authority to suggest that transmission-related impacts must be written-up in any particular fashion. The FEIS discusses transmission impacts in a consistent and logical fashion in order to ensure comprehensive treatment. The FEIS framework is consistent with the format of the NRC’s Standard Review Plan and FEISs in other COL proceedings.<sup>97</sup> The Intervenors’ views of what the regulatory requirements ought to be (but are not) cannot support an admissible contention.

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<sup>96</sup> *Id.* at 31.

<sup>97</sup> *See generally* NUREG-1555, “Environmental Standard Review Plan”; *see also* NUREG-1939, “Final Environmental Impact Statement for Combined Licenses for Virgil C. Summer Nuclear Station Units 2 and 3.” Following the convention used for other impacts, the FEIS identifies the affected environment in Chapter 2, the proposed activity

vi. *All aspects of the transmission corridor remain in play*

In this portion of Contention 23, the Intervenor argue that “[e]verything remains in play” because “[t]he route of the transmission lines will be brand new, and subject to change, until well after the FEIS stage.”<sup>98</sup> According to the Intervenor, DTE’s “‘expectations’ of the route and its effects do not substitute for actual knowledge.”<sup>99</sup> But, the FEIS specifically considers impacts in the transmission corridor based on the information available, as required by NEPA.<sup>100</sup> And, the Intervenor have not provided any expert support to establish a genuine dispute with the FEIS regarding reasonably anticipated impacts.<sup>101</sup> Bare assertions of supposed impacts cannot support an admissible contention.

Moreover, with respect to the Intervenor’s unsupported allegation that “wetlands and associated habitat of, for example, the Eastern Fox Snake could be eradicated by ITC Transmission without notification to the public,” they are raising an issue outside the scope of

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in Chapter 3, construction impacts in Chapter 4, operational impacts in Chapter 5, and the cumulative impacts in Chapter 7.

<sup>98</sup> New Contentions at 32.

<sup>99</sup> *Id.*

<sup>100</sup> The approach used in the FEIS is consistent with the Environmental Standard Review Plan, NUREG-1555 at § 4.1.2, which provides:

In some cases transmission lines may be constructed and operated by an entity other than the applicant. In such cases, impact information may be limited and the reviewer should proceed with the assessment using the information that can be obtained.

<sup>101</sup> The Intervenor mention potential impacts from the temporary construction “laydown” areas, use of herbicide on the transmission corridor, and impacts on livestock from electromagneticism. New Contentions at 33-34. In addition to being untimely, there is no expert opinion or documentary evidence that would call into question the analysis in the FEIS.

this proceeding.<sup>102</sup> *ITCTransmission*, which owns and operates the offsite portions of the proposed Fermi 3 transmission system and associated corridors, is responsible for compliance with federal or State requirements related to endangered species.<sup>103</sup> And, *ITCTransmission* must obtain all necessary permits and approvals for activities in the transmission corridor, including appropriate consultation with other agencies and public participation. But, regardless of which entity is ultimately responsible for transmission-related activities, the FEIS discusses all impacts from transmission-related activities, as required by NEPA.<sup>104</sup>

vii. *Segmentation inhibits planning and disclosure of mitigation measures*

The Intervenors allege that “[w]ith surprising alacrity, the NRC Staff admits to allowing segmentation of the transmission corridor from the remainder of the Fermi 3 project.”<sup>105</sup> But, as discussed above, there is no segmentation concern where, as here, the NRC has considered in the FEIS both the activities at the Fermi site and those in the transmission corridor. The mere fact that *ITCTransmission*, not DTE, has responsibility for separately (and at a later time) obtaining the necessary permits and ensuring appropriate consultation for the transmission lines does not render the FEIS invalid. The requirements of other agencies as

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<sup>102</sup> New Contentions at 32.

<sup>103</sup> FEIS at 3-18, 4-44, 4-55, 4-56.

<sup>104</sup> *See, e.g., id.* at 2-45, 2-61, 4-29, 4-45, 4-51 to 4-53, 7-18 to 7-21 (discussing transmission impacts).

<sup>105</sup> New Contentions at 34. Of course, the NRC Staff “admits” to no such thing. The NRC Staff clearly explains that it considered impacts in the offsite transmission corridor in the FEIS.

applied to an inchoate future application by a third party are beyond the scope of this proceeding.<sup>106</sup>

The Intervenor also assert that “[t]he nondisclosure within the FEIS of mitigation efforts aimed at the transmission corridor grossly violates NEPA.”<sup>107</sup> But, in addition to being untimely, the Intervenor fail to acknowledge (much less genuinely dispute) the discussion of mitigation in the transmission corridor. For example, *ITCTransmission* indicated that it will follow industry standards for best management practices, including sediment and erosion control.<sup>108</sup> And, the FEIS concludes that no additional mitigation beyond that required by environmental permits or used by *ITCTransmission* would be warranted.<sup>109</sup> Because the Intervenor have not specifically disputed the transmission-related mitigation discussed in the FEIS or otherwise indicated that the NRC Staff’s overall evaluation of transmission-related impacts would change, there is no dispute with the FEIS on a material issue.

*viii. Endangered Species Act consultation*

The Intervenor argue that “DTE has not undertaken an Endangered Species Act [“ESA”] consultation or biological assessment respecting the transmission corridor.”<sup>110</sup>

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<sup>106</sup> *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

<sup>107</sup> New Contentions at 35.

<sup>108</sup> *See, e.g.*, FEIS at 5-3 to 5-4.

<sup>109</sup> *See, e.g., id.* at 4-9, 4-15, 4-21, 4-30, 4-44, 4-45, 4-53, 4-54 to 4-60, 4-125, 4-128, 5-4, 5-26 to 5-27, 5-41 to 5-42, 5-45 to 5-52, 5-104, 5-107, 5-143 to 5-146 (discussing measures to mitigate impacts in transmission corridor). Both the USACE and MDEQ require compensatory mitigation for the unavoidable loss of wetlands that are regulated by these agencies. *Id.* at 4-25.

<sup>110</sup> New Contentions at 37-38. As will be discussed in more detail below, the biological assessment does in fact address potential impacts to endangered species in the

According to the Intervenor, the “absence of any consultations yet between DTE and the U.S. Fish and Wildlife Service and the Michigan Department of Natural Resources leaves the FEIS critically incomplete and as a practical matter leaves mitigation up to a contractor – ITC Transmission – which is not a party to these proceedings and which has not participated in any way in securing regulatory approvals which are disclosed within the FEIS.”<sup>111</sup> But, the Intervenor points to no requirement to conduct ESA consultation at this time. And, in fact, there is no such requirement.

Contrary to the Intervenor’s assertions, *ITC Transmission* is not a DTE contractor for the offsite transmission system.<sup>112</sup> *ITC Transmission* is a separate entity that owns and operates the transmission system in southeastern Michigan. DTE has no control over the construction or operation of the offsite transmission system.<sup>113</sup> Consequently, the Federal and State endangered species consultations associated with the transmission corridor will occur in conjunction with any proposal by *ITC Transmission*.<sup>114</sup> The FEIS notes this dynamic in correspondence from the U.S. Department of the Interior and the U.S. Fish and Wildlife Service

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transmission corridor. *See, e.g.*, FEIS at F-31, F-45 to F-48, F-53 to F-56, F-67 to F-71, F-74 to F-77, F-79 to F-80, and F-85 to F-87.

<sup>111</sup> New Contentions at 38.

<sup>112</sup> The Intervenor is also wrong to assert that *ITC Transmission* has not participated in the FEIS “in any way.” Information from *ITC Transmission* on transmission corridor impacts was used by the NRC during the NEPA process. *See, e.g.*, FEIS at 4-9, 5-4, 8-6.

<sup>113</sup> FEIS at 3-18.

<sup>114</sup> This contention is also untimely. The Intervenor could have, but did not, submit an admissible contention on this topic based on the DEIS. The discussion of the roles of DTE and *ITC Transmission* with respect to the transmission corridor in the DEIS and the FEIS are the same.

(“FWS”).<sup>115</sup> But, regardless, the NRC’s Biological Assessment (“BA”) in fact addresses impacts to Federally-listed and candidate species that could occur in the offsite transmission corridor.<sup>116</sup> The Intervenor do not provide any basis for a dispute with the discussion in the FEIS/BA regarding transmission-related impacts on protected species. This aspect of resubmitted Contention 23 is therefore inadmissible.

ix. *Number and location of high-voltage lines in corridor remains indeterminate*

The Intervenor argue that the FEIS is deficient because DTE is unable to confirm how many transmission lines will be strung, whether the corridor’s footprint can be minimized, and what the impacts will be on flora and fauna, including birds.<sup>117</sup> This sub-issue merely restates the Intervenor’s broad concern with the NRC Staff’s treatment of transmission corridor impacts.

As noted above, *ITCTransmission* has not yet announced a route for the offsite portion of the proposed new transmission line serving Fermi 3.<sup>118</sup> Accordingly, the description of the transmission line corridor presented in the FEIS is based on publicly available information and reasonable expectations of the configurations that *ITCTransmission* would use based on

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<sup>115</sup> See FEIS at F-14, F-23 (noting that construction of the transmission lines will require a separate Section 7 consultation as it is considered a separate project); see also *id.* at E-95 (noting that “[p]rior to building the transmission line, *ITCTransmission* would need to confer with FWS and MDNR to determine which federally listed and State-listed species could be affected by the development of the transmission line”).

<sup>116</sup> *Id.* at F-31, F-45 to F-48, F-53 to F-56, F-67 to F-71, F-74 to F-77, F-79 to F-80, and F-85 to F-87. This fatally undermines Intervenor’s assertion that “[t]here is no biological assessment [for the transmission corridor] included within the FEIS, merely a suggestion that one will be performed in the future.” New Contentions at 41-42.

<sup>117</sup> New Contentions at 42-43. This contention is also untimely. The same uncertainty regarding the transmission corridors existed in the ER and the DEIS.

<sup>118</sup> FEIS at 2-10.

standard industry practice.<sup>119</sup> The Intervenors have not demonstrated that this is improper nor have they specifically disputed the assessment of transmission impacts in the FEIS. Consequently, there is no basis for a dispute with the FEIS that could support an admissible contention.

*x. NHPA compliance in transmission corridor*

The Intervenors also allege that the NRC Staff fails to comply with the NHPA for the transmission corridor.<sup>120</sup> This aspect of resubmitted Contention 23 is substantively identical to proposed Contention 27. As a result, this alleged basis for an admissible contention will be addressed in response to proposed Contention 27.

*xi. Distinction between preconstruction and other activities for NEPA purposes*

The Intervenors argue, once again, that the FEIS is deficient because “the NRC does not consider ‘preconstruction’ activities to be within the scope of the COL application.”<sup>121</sup> The Intervenors argue that this contravenes 10 C.F.R. § 51.45, which directs consideration of preconstruction impacts. But, contrary to the Intervenors’ assertion, the FEIS does consider the impacts of preconstruction activities, including transmission related impacts, as required by NEPA and the NRC’s implementing regulations. Specifically, the FEIS explains that, “[b]ecause the preconstruction activities are not part of the NRC action, their impacts are not reviewed as a direct effect of the NRC action.”<sup>122</sup> Rather, the NRC explains, “impacts of the preconstruction

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<sup>119</sup> *Id.* at 2-45.

<sup>120</sup> New Contentions at 44-47.

<sup>121</sup> *Id.* at 47.

<sup>122</sup> FEIS at 1-7, 10-3.

activities are considered in the context of cumulative impacts.”<sup>123</sup> The FEIS then goes on to describe the environment affected by the transmission corridor in Chapter 2,<sup>124</sup> Chapter 4,<sup>125</sup> Chapter 5,<sup>126</sup> and Chapter 7.<sup>127</sup> The Intervenor has not pointed to any specific impacts in the transmission corridor that were allegedly overlooked. Nor have they argued that the impacts in any resource area were understated. The Intervenor has offered no tangible information, no experts, and no substantive affidavits to challenge the adequacy of the NRC Staff’s assessment of transmission-related impacts. As a result, the Intervenor has failed to raise a genuine dispute with the FEIS and this aspect of Contention 23 should be denied.

*xii. The issues of fact are manifest within the FEIS*

This final piece of resubmitted Contention 23 asserts that the Licensing Board ordered the NRC Staff to subject the transmission corridor to a NEPA analysis and that the resubmitted Contention 23 is timely because the NRC Staff ignored that order. Apart from the mistaken assertion that the Licensing Board “ordered” the NRC Staff to take any particular action, the FEIS does in fact address environmental impacts in the offsite transmission corridor. The Intervenor has not disputed the conclusions in the FEIS regarding those impacts. Consequently, this cannot support admission of resubmitted Contention 23.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2-10, 2-45, 2-61, 2-79, 2-82, 2-126, and 2-208.

<sup>125</sup> *Id.* at 4-8, 4-29, 4-45, 4-51 to 4-53, and 4-100.

<sup>126</sup> *Id.* at 5-3 to 5-4, 5-22, 5-27, 5-41 to 5-43, 5-100 to 5-101, and 5-104.

<sup>127</sup> *Id.* at 7-7, 7-18 to 7-21, 7-31 to 7-33, 7-37.

D. Contention 26 (New) – Endangered Species Act Consultation in the Transmission Line Corridor

1. Timeliness

Proposed Contention 26 is untimely. The Intervenor do not address the criteria for new contentions in 10 C.F.R. § 2.309(c)(1). Nor do they identify any information in the FEIS that was not available previously.

First, as the NRC Staff explains in the FEIS, “[a]ll of the environmental impacts that are included in the BA were also included in the draft EIS.”<sup>128</sup> The Intervenor have identified no new or different information in the FEIS that could form the basis for a timely contention.

Second, the NRC Staff sent the BA, which includes a discussion of impacts in the transmission corridor, to the FWS for review and comment on March 30, 2012.<sup>129</sup> The FWS responded to the NRC on June 8, 2012.<sup>130</sup> Any concerns with the adequacy of the BA could have, and should have, been raised at that time.

Proposed Contention 26 is not based on any new data or conclusions in the FEIS and is therefore untimely.

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<sup>128</sup> FEIS at E-41. The BA is required by the ESA, not NEPA. Federal agencies are not required to include a BA prepared for a proposed action in an EIS. BAs and similar non-NEPA regulatory documents may or may not be included as part of the EIS, at the discretion of the action agency.

<sup>129</sup> Letter to S. Hicks, FWS, from A. Hsia, NRC, “Submittal of the Biological Assessment for the Proposed Enrico Fermi Nuclear Plant, Unit 3,” dated March 30, 2012 (ADAMS Accession No. ML120260586); FEIS at F-18 to F-20.

<sup>130</sup> Letter to A. Hsia, NRC, from S. Hicks, FWS, “Endangered Species Act Section 7 Consultation for the Fermi 3 Nuclear Power Plant, Monroe County, Michigan,” dated June 8, 2012 (ADAMS Accession No. ML12178A137); FEIS at F-21 to F-23.

## 2. Admissibility

In proposed Contention 26, the Intervenor's allege that the FEIS is deficient because it fails to consider new and significant information that is relevant to initiation and completion of ESA consultation between the NRC Staff and the FWS.<sup>131</sup> The Intervenor's allege that there "has not been a biological assessment conducted of the 1,069-acre proposed transmission corridor area to identify federally- and state-threatened and -endangered plant and animal species, nor has the requisite interagency consultation occurred."<sup>132</sup> In essence, the Intervenor's are alleging a contention of omission because "[t]here has been no federal [ESA] biological assessment of plant and animal species within the proposed transmission line corridor."<sup>133</sup> But, to the contrary, the BA, which is reproduced in Appendix F of the FEIS, does address plant and animal species within the proposed transmission corridor.<sup>134</sup> If a petitioner submits a contention of omission but the allegedly missing information is indeed in the FEIS, then the contention does not raise a genuine issue.<sup>135</sup>

Further, the Intervenor's do not provide any basis for a specific dispute with the discussion in the FEIS/BA regarding impacts in the transmission corridor. There is no tangible information, no expert support, and no substantive affidavit to challenge the adequacy of the NRC Staff's consultation. Consequently, proposed Contention 26 is inadmissible.

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<sup>131</sup> New Contentions at 53.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> FEIS at F-31, F-45 to F-48, F-53 to F-56, F-67 to F-71, F-74 to F-77, F-79 to F-80, and F-85 to F-87.

<sup>135</sup> *Florida Power & Light Co. (Turkey Point Plant Unit Nos. 3 & 4)*, LBP-90-16, 31 NRC 509, 521 n.12 (1990).

E. Contention 27 (New) – Historic Resource Investigation and Mitigation in the Transmission Line Corridor

1. Timeliness

In proposed Contention 27, the Intervenor's allege that the FEIS is inadequate with respect to consideration of historic and cultural resources in the transmission corridor.<sup>136</sup> This contention is similar to proposed Contention 26, but focused on compliance with the NHPA rather than the ESA. Proposed Contention 27 is untimely because the information upon which it is based was available in the DEIS. For example, the Intervenor's cite (New Contentions at 66) the FEIS discussion of the cultural resource investigation in the transmission corridor on page 2-208. The same text is found in the DEIS at page 2-206. The discussion of the results of the investigation in the FEIS is also the same as that in the DEIS.<sup>137</sup> Likewise, the NRC's conclusion in the FEIS (at 4-102) that the offsite proposed transmission line is outside the area of potential effect ("APE") is the same as that in the DEIS (at 4-100). Having failed to identify any new or different information in the FEIS, proposed Contention 27 is untimely.

2. Admissibility

Proposed Contention 27 is also inadmissible. The Intervenor's argue that "[t]he FEIS for Fermi 3 fails to satisfy the requirements of the [NHPA] because it does not address the effects upon historic and cultural resources of the planned development of infrastructure, and the destruction of natural land and water resources and viewsheds within the transmission line corridor."<sup>138</sup> This bald assertion cannot support an admissible contention.

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<sup>136</sup> New Contentions at 61.

<sup>137</sup> Compare FEIS, Section 2.7.3, *Historic and Cultural Resources within the Transmission Line Corridor* (2-208 to 2-209), to DEIS, Section 2.7.3, *Historic and Cultural Resources within the Transmission Line Corridor* (2-205 to 2-206).

<sup>138</sup> New Contentions at 62-63.

First, the FEIS does in fact discuss the impacts on cultural resources within the transmission line corridor.<sup>139</sup> This includes an assessment of impacts on viewsheds.<sup>140</sup> There is therefore no omission that could support a contention of omission.

Second, the Intervenor complain about the scope of the NHPA consultation for the offsite proposed transmission lines.<sup>141</sup> But, as the FEIS explains and according to 10 C.F.R. § 50.10(a)(2)(vii), transmission lines are not included in the definition of construction and are not an NRC-authorized activity.<sup>142</sup> Therefore, the NRC considers the offsite proposed transmission lines to be outside the NRC's APE and therefore not part of the NRC's consultation.<sup>143</sup> The Intervenor do not raise a genuine dispute regarding that determination.

Finally, to the extent that the Intervenor's proposed contention is based on asserted deficiencies in the NRC Staff's process for soliciting public participation pursuant to the NHPA (New Contentions at 69), the Intervenor's proposed contention fails to demonstrate a genuine dispute on a material issue. The NRC Staff fulfilled its NHPA responsibilities by following the process outlined in 36 C.F.R. § 800.8(c), including issuance of *Federal Register*

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<sup>139</sup> FEIS at 4-100 to 4-102; *see also id.* at 2-208-2-209 (discussing impacts to cultural resources in the transmission corridor in Section 2.7.3, *Historic and Cultural Resources within the Transmission Line Corridor*).

<sup>140</sup> *Id.* at 4-100 to 4-101.

<sup>141</sup> New Contentions at 66-67.

<sup>142</sup> FEIS at 4-102.

<sup>143</sup> *Id.*; *see also id.* at 2-212. Although the NRC considers the offsite proposed transmission lines to be outside the scope of its Section 106 consultation, the NRC Staff has nevertheless assessed the potential impacts as part of its NEPA analysis, as discussed above.

notices, public meetings, comment solicitations, and the DEIS.<sup>144</sup> The Intervenor's have offered no tangible information or expert affidavits to challenge the adequacy of the NRC Staff's NHPA consultation. Proposed Contention 27 is inadmissible.

V. CONCLUSIONS

For all of the above reasons, the Intervenor's' resubmitted and proposed new contentions are inadmissible and should be rejected.

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Dated at Washington, District of Columbia  
this 18th day of March 2013

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<sup>144</sup> See, e.g., 73 Fed. Reg. 75142, 75143 (Dec. 10, 2008) (“Pursuant to 36 CFR 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth on 36 CFR 800.3 through 800.6.”).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S ANSWER TO PROPOSED NEW CONTENTIONS BASED ON FINAL ENVIRONMENTAL IMPACT STATEMENT” in the above captioned proceeding have been served via the Electronic Information Exchange.

Respectfully submitted,

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this 18th day of March 2013