

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman  
Kristine L. Svinicki  
William C. Ostendorff  
Jeff Baran

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In the Matter of )  
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)  
DTE ELECTRIC COMPANY ) Docket No. 52-033-COL  
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(Fermi Nuclear Power Plant, Unit 3) )  
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CLI-15-01

**MEMORANDUM AND ORDER**

Today we rule on the Atomic Safety and Licensing Board's request to review, *sua sponte*, issues relating to the environmental impacts of the proposed transmission-line corridor for Fermi Unit 3.<sup>1</sup> For the reasons set forth below, we deny the Board's request for *sua sponte* review. In addition, we deny Intervenors' petition for review of the Board's dismissal of Contention 23, also relating to transmission-corridor environmental impacts.<sup>2</sup>

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<sup>1</sup> LBP-14-9, 80 NRC \_\_ (July 7, 2014) (slip op.).

<sup>2</sup> *Intervenors' Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Oct. 6, 2014) (Petition). 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.

## I. BACKGROUND

This proceeding concerns DTE's combined license application to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor (ESBWR) on the Fermi site in Monroe County, Michigan.<sup>3</sup> Intervenors sought a hearing and originally proposed fourteen contentions; the Board granted a hearing and admitted four of those contentions.<sup>4</sup> Since their entry into the proceeding in July 2009, Intervenors have proposed several additional contentions, including Contention 23, their challenge to the NRC Staff's compliance with the National Environmental Policy Act of 1969 (NEPA) as it pertains to the anticipated environmental impacts of the proposed transmission line corridor for Fermi Unit 3, the subject of our decision today.

Intervenors first proposed Contention 23 after the Staff issued the draft Environmental Impact Statement (EIS) for DTE's application.<sup>5</sup> Later, after the Board dismissed the contention

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<sup>3</sup> See Detroit Edison Company; Notice of Hearing, and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for Fermi 3, 74 Fed. Reg. 836 (Jan. 8, 2009).

<sup>4</sup> The Board admitted Contentions 3, 5, 6, and 8. LBP-09-16, 70 NRC 227, 306 (2009). In three separate opinions, the Board granted summary disposition of Contentions 3, 5, and 6 in favor of DTE. See Order (Granting Motion for Summary Disposition of Contention 3) (July 9, 2010) (unpublished); Order (Granting Motion for Summary Disposition of Contention 5) (Mar. 1, 2011) (unpublished); LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6). After an evidentiary hearing, the Board ruled on the merits of Contention 8 in favor of the NRC Staff and ruled on the merits of a new admitted contention pertaining to quality assurance, Contention 15, in favor of DTE. LBP-14-7, 79 NRC 451 (2014). In a separate decision, we denied Intervenors' petition for review of the Board's ruling on the merits of Contention 15. See CLI-14-10, 80 NRC \_\_\_ (Dec. 16, 2014) (slip op.).

<sup>5</sup> See *Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24* (Jan. 11, 2012), at 1-2, 41-52 (Original Contention 23).

as late, Intervenors resubmitted Contention 23 in response to the Staff's final EIS.<sup>6</sup> The Board again dismissed the contention as late.<sup>7</sup> In Contention 23, both as originally proposed and resubmitted, Intervenors challenged the adequacy of the Staff's consideration of the environmental impacts of building new transmission lines for Fermi Unit 3.<sup>8</sup>

Although the Board did not admit Contention 23, it found some merit to Intervenors' arguments.<sup>9</sup> In its first ruling dismissing the contention, the Board suggested that the contention might have been admissible if not for its tardiness and recommended that the Staff consider Intervenors' concerns when preparing the final EIS.<sup>10</sup> In its second ruling, the Board again found the contention to be unjustifiably late, but it reiterated its view that Intervenors had raised "a substantial . . . issue that might have been admissible had it been timely filed."<sup>11</sup> The Board further observed that the adequacy of the Staff's review of transmission-corridor impacts might be appropriate for the Board's consideration *sua sponte*, pursuant to 10 C.F.R. § 2.340(b).<sup>12</sup> The Board thus sought briefing from the parties on the appropriateness of the Board's taking

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<sup>6</sup> See LBP-12-12, 75 NRC 742, 776-80 (2012); *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* (Feb. 19, 2013), at 2, 21-53 (Resubmitted Contention 23).

<sup>7</sup> Licensing Board Memorandum and Order (Denying Intervenors' 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) (Apr. 30, 2013), at 21 (unpublished) (Second Board Ruling).

<sup>8</sup> Compare Original Contention 23 at 41-52, with Resubmitted Contention 23 at 21-53.

<sup>9</sup> See LBP-12-12, 75 NRC at 776-80; Second Board Ruling at 22-23.

<sup>10</sup> LBP-12-12, 75 NRC at 776, 780.

<sup>11</sup> Second Board Ruling at 23.

<sup>12</sup> See *id.*

review of the issues raised in Contention 23 on its own motion.<sup>13</sup> Intervenors supported *sua sponte* review; DTE and the Staff opposed it.<sup>14</sup>

As it considered the parties' views on *sua sponte* review, the Board proceeded to hearing on Intervenors' then-pending admitted contentions and issued an initial decision ruling on those contentions in favor of the Staff and DTE.<sup>15</sup> The Board returned to the *sua sponte* issue shortly thereafter. In LBP-14-9, the Board determined that the issues raised in Contention 23 merited *sua sponte* review.<sup>16</sup> In accordance with section 2.340(b), the Board requested our approval to undertake that review.<sup>17</sup>

We now have before us the briefs that we invited from the parties in response to the Board's *sua sponte* request,<sup>18</sup> as well as a motion from the Nuclear Energy Institute (NEI) to file

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<sup>13</sup> *Id.* at 23-24.

<sup>14</sup> *Intervenors' Memorandum in Support of Sua Sponte ASLB Referral of Transmission Line Corridor NEPA Compliance Issue* (May 30, 2013); *Applicant's Brief Opposing Sua Sponte Review of Environmental Impacts in the Offsite Transmission Corridor* (May 30, 2013); *NRC Staff Response to Board Order Concerning Proposed Sua Sponte Review of Contention 23* (May 30, 2013).

<sup>15</sup> *See supra* note 4.

<sup>16</sup> LBP-14-9, 80 NRC at \_\_\_ (slip op. at 4).

<sup>17</sup> *Id.* at \_\_\_ (slip op. at 16-17, 58).

<sup>18</sup> *Applicant's Opposition to Sua Sponte Consideration of Transmission Corridor Issues* (July 28, 2014) (DTE Brief); *NRC Staff Response to Commission's Order Inviting Comments on the Board's Request for Approval to Conduct Sua Sponte Review of Contention 23 (Transmission Lines)* (July 28, 2014) (NRC Staff Brief); *Intervenors' Motion for Commission Approval of LBP-14-09 (Memorandum Determining that Issues Related to Intervenors' Proposed Contention 23 Merit Sua Sponte Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval)* (e-mailed July 28, 2014 and re-filed on July 30, 2014); *Applicant's Reply Brief Opposing Sua Sponte Consideration of Transmission Issues* (Aug. 7, 2014); *NRC Staff Reply to Other Parties' Pleadings Related to the Board's Request for Approval to Conduct Sua Sponte Review of Contention 23 (Transmission Lines)* (Aug. 7, 2014); *Intervenors' Corrected Reply Memorandum in Support of Motion for Commission Approval of LBP-14-09* (Aug. 8, 2014) (Intervenors' Reply Brief). Intervenors apparently experienced technical difficulties that (continued . . .)

a brief as *amicus curiae* in this matter.<sup>19</sup> Also pending before us is Intervenor's petition for review of the Board's dismissal of Contention 23.<sup>20</sup> It makes sense for us to review first whether the Board properly dismissed the contention to determine whether the transmission-corridor impacts issue is litigable in the traditional sense—as a contested matter between the parties—

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(. . . continued)

prevented their use of the agency's e-filing system on July 28, 2014. They e-mailed their reply on July 28, 2014, and then properly re-filed the document on July 30, 2014. Although they did not request leave to file their reply out of time, we note that counsel for Intervenor also filed the same day a declaration that detailed these technical difficulties in the context of a separate filing in this proceeding. See *Intervenor's Motion for Enlargement of Time to Reply in Support of Petition for Review* (July 30, 2014); see also *Intervenor's Reply to DTE Answer Opposing Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at n.1; *Intervenor's Reply to NRC Staff Answer to Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)* (July 30, 2014), at n.1. We therefore will consider Intervenor's reply for good cause shown. The same is true for Intervenor's re-filed reply dated August 8, 2014 (in which only the caption appears to have been corrected from what was filed on August 7, 2014). *But see* CLI-14-10, 80 NRC at \_\_\_ (slip op. at 10 n.41) (observing that failure to comply with agency procedural rules could result in disciplinary action).

<sup>19</sup> *Motion of the Nuclear Energy Institute, Inc. for Leave to File Amicus Curiae Brief in Response to the Commission's July 11, 2014 Briefing Order* (July 28, 2014); *Amicus Curiae Brief of the Nuclear Energy Institute, Inc. in Response to the Commission's July 11, 2014 Briefing Order* (July 28, 2014). Our rules of practice permit persons who are not parties to file a brief *amicus curiae* "if a matter is taken up by the Commission under [10 C.F.R.] § 2.341 or *sua sponte*." 10 C.F.R. § 2.315(d). Although this rule does not squarely apply here, it is within our discretion to grant leave for participation as *amicus curiae*. See *Calvert Cliffs 3 Nuclear Project, LLC and UniStar Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 104 n.9 (2013). NEI's motion is unopposed, and we find that its brief would further contribute to the record. We exercise our discretion and consider NEI's brief.

<sup>20</sup> See generally *Petition*; *Order of the Secretary* (Sept. 10, 2014) (unpublished) (amending the deadline to file a petition for review of the Board's ruling on Contention 23 "[b]ecause the issues raised . . . in [that contention] are intertwined with the Board's [*sua sponte*] request"). DTE and the Staff oppose Intervenor's petition for review. *Applicant's Opposition to Petition for Review on Contention 23* (Oct. 31, 2014) (DTE Response to Petition); *NRC Staff Response to Intervenor's Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Oct. 30, 2014) (NRC Staff Response to Petition). Intervenor filed a reply. *Intervenor's Reply in Support of Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness* (Nov. 10, 2014) (Reply).

before turning to the Board's *sua sponte* request. Therefore, we rule on both Intervenors' petition for review and the Board's *sua sponte* request in today's decision.<sup>21</sup>

## II. DISCUSSION

### A. Intervenors' Petition for Review

We will grant a petition for review at our discretion, upon a showing that the petitioner has raised a substantial question as to whether

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error; or
- (v) any other consideration that we may deem to be in the public interest.<sup>22</sup>

Intervenors seek review of the Board's dismissal of the resubmitted version of Contention 23; they do not request review of the Board's dismissal of the contention as originally proposed.<sup>23</sup>

Intervenors claim that the Board erred when it found late the version of Contention 23 that was submitted in response to the Staff's final EIS.<sup>24</sup> Intervenors focus their argument on dicta in the Board's first ruling in which the Board recommended that the Staff consider

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<sup>21</sup> Intervenors expressed concern in their petition for review that we would treat their contention as "legally intertwined" with the Board's request. Petition at 11-13; Reply at 1-5. We clarify that we do not view the two matters as legally intertwined but rather factually (and procedurally) intertwined. Although we address both matters in this decision, we consider them separately.

<sup>22</sup> 10 C.F.R. § 2.341(b)(4)(i)-(v).

<sup>23</sup> See Petition at 1. We discuss both Board decisions here, however, for completeness.

<sup>24</sup> *Id.* at 2-3.

Intervenors' transmission-corridor claims when preparing the final EIS.<sup>25</sup> They assert that the Board's recommendation to the Staff constituted new information, a new "dispute" with the draft EIS, that cured the contention's lateness the second time around.<sup>26</sup> Intervenors also assert that language in the final EIS relating to the transmission corridor is materially different from that in the draft EIS. They argue that this language raises an issue suitable for a new contention.<sup>27</sup>

Intervenors acknowledge that they could have raised Contention 23 at the outset of this proceeding.<sup>28</sup> They assert that they purposely waited to see whether the Staff would supplement the analysis provided in DTE's environmental report at the draft EIS stage and that they again waited to see whether the Staff would take on the Board's recommendation in the final EIS. But our rules of practice require contentions to be raised at the earliest possible opportunity.<sup>29</sup> And although environmental contentions are, in essence, challenges to the Staff's compliance with NEPA, those contentions must be raised, if possible, in response to an applicant's environmental report.<sup>30</sup> Petitioners who choose to wait to raise contentions that

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<sup>25</sup> *Id.* at 2-3, 6-11.

<sup>26</sup> *Id.* at 7-8.

<sup>27</sup> *Id.* at 8-11.

<sup>28</sup> *See id.* at 3-4, 6.

<sup>29</sup> *See* 10 C.F.R. § 2.309(b)(3)(i), (c). We amended our rules of practice in 2012, including the provision governing new or amended contentions in section 2.309(c). The standard for admitting a new or amended contention, however, was simplified rather than overhauled. *See* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012) (Part 2 Amendment). Both before and after the 2012 amendment, proponents of new or amended contentions were, and are, required to demonstrate "good cause" for their filing, which includes a demonstration that the information on which the new or amended contention is based is materially different from information previously available. *See* 10 C.F.R. § 2.309(c)(1)(i)-(iii); Part 2 Amendment, 77 Fed. Reg. at 46,571 (focusing the requirements on the factor given the most weight—"good cause").

<sup>30</sup> 10 C.F.R. § 2.309(f)(2); *see also* Part 2 Amendment, 77 Fed. Reg. at 46,566-67.

could have been raised earlier do so at their peril. They risk the possibility that there will not be a material difference between the application and the Staff's review documents, thus rendering any newly proposed contention on previously available information impermissibly late.<sup>31</sup>

Contrary to Intervenor's claims, the Board's recommendation to the Staff in its first decision did not create a new reference point for determining whether the information raised in the second iteration of Contention 23 was timely raised. Our rules of practice require a material difference between the information on which the contention is based and the information that was previously available—for example, a difference between the environmental report and the draft EIS or the draft EIS and the final EIS.<sup>32</sup> In both of its contention admissibility decisions the Board noted Intervenor's failure to point to any material difference between DTE's or the Staff's environmental documents. The Board was "satisfied that each of the issues that comprise the subject matter of the contention was discussed in the [Environmental Report]" and that "[t]he same issues were also reviewed in the [draft] EIS."<sup>33</sup> We see nothing that would cause us to disturb the Board's rulings on the timeliness of Contention 23 in this regard.

On appeal, Intervenor's point to language in the final EIS that they claim is materially different from information in the draft EIS.<sup>34</sup> But as the Staff and DTE point out, Intervenor's compare language from two distinct sections of the Staff's review documents.<sup>35</sup> When the same

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<sup>31</sup> See 10 C.F.R. § 2.309(c); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 492-94 (2012).

<sup>32</sup> 10 C.F.R. § 2.309(c), (f)(2); see also *Pilgrim*, CLI-12-10, 75 NRC at 488-89; *Pa'ina Hawaii, LLC*, CLI-10-18, 72 NRC 56, 87-88 (2010).

<sup>33</sup> Second Board Ruling at 21; see also *LBP-12-12*, 75 NRC at 775-76.

<sup>34</sup> See Petition at 8-11.

<sup>35</sup> NRC Staff Response to Petition at 13-14; DTE Response to Petition at 10-12.



sections of both documents are properly aligned, there is in fact no difference between the draft EIS and the final EIS, let alone a material difference.<sup>36</sup> Therefore, this claim must fail. Because intervenors have not demonstrated a substantial question warranting review of the Board's dismissal of their contention, we deny their petition for review.

**B. The Board's Request for *Sua Sponte* Review**

We turn now to whether issues pertaining to transmission-corridor environmental impacts should nevertheless be litigated in a contested proceeding before the Board. The Board specifically requests our approval to review two issues *sua sponte*:

- (1) “[w]hether the building of offsite transmission lines intended solely to serve . . . Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3”; and
- (2) “[w]hether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA's hard look requirement.”<sup>37</sup>

Section 2.340(b) sets forth the standard for *sua sponte* review in a combined license proceeding. With our express approval, a licensing board may make findings on a “serious safety, environmental, or common defense and security matter” not put into controversy by the

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<sup>36</sup> Compare “Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3” (Draft Report for Comment), NUREG-2105 (Oct. 2011), at 2-45, 3-17 (ADAMS accession no. ML13274A468 (package)) (DEIS), with “Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3” (Final Report), NUREG-2105, Vols. 1-4 (Jan. 2013), at 2-46, 3-18 (ML12307A172, ML12307A176, ML12307A177, and ML12347A202) (FEIS).

<sup>37</sup> LBP-14-9, 80 NRC at \_\_ (slip op. at 16).

parties.<sup>38</sup> This authority shall be used only in extraordinary circumstances.<sup>39</sup> We find that the two issues identified by the Board do not merit *sua sponte* review.

The Board appears to have focused on the distinctions between a direct impacts analysis and a cumulative impacts analysis, with the underlying conclusion that a cumulative impacts analysis will yield a shallower analysis than a direct impacts analysis. While that may be true in other cases, here the Staff has included what appears to be a comprehensive analysis of transmission-corridor impacts throughout the final EIS. Without commenting on the sufficiency of the Staff's review, we note that the Staff discussed transmission-corridor impacts in Chapters 2, 3, 4, 5, 9, and 10 of the final EIS, in addition to referencing those impacts in the cumulative impacts analysis in Chapter 7.<sup>40</sup>

The final EIS itself is a source of minor confusion. Despite the final EIS's introductory statement that preconstruction activities (which would include transmission-line development)

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<sup>38</sup> 10 C.F.R. § 2.340(b).

<sup>39</sup> *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22-23 (1998). The Board notes the absence of an express regulatory requirement that the authority for *sua sponte* review be used "sparingly" or in "extraordinary circumstances." LBP-14-9, 80 NRC at \_\_\_ (slip op. at 17-19). But our 1998 Policy Statement, which instructs boards to limit their use of *sua sponte* review, remains valid. Further, section 2.340(b) references the standard for Commission review in sections 2.323 and 2.341, both of which, we have held, require a heightened showing to prevent overuse, including a demonstration of "extraordinary circumstances." See 10 C.F.R. §§ 2.323(f), 2.341(f)(1) (governing referred rulings or certified questions that raise "significant and novel legal or policy issues" or issues whose early resolution "would materially advance the orderly disposition of the proceeding"); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant), CLI-12-13, 75 NRC 681, 685 (2012); *cf. Diablo Canyon*, CLI-12-13, 75 NRC at 687 (regarding the standard for interlocutory review). The Board correctly notes that "a request to engage in *sua sponte* review should not be undertaken lightly." LBP-14-9, 80 NRC at \_\_\_ (slip op. at 19).

<sup>40</sup> See FEIS at M-1 to M-2.

are not part of the proposed action and are discussed in the context of cumulative impacts,<sup>41</sup> the Staff further stated that it included “pertinent information related to . . . potential impacts from the transmission lines” as part of its “integrated evaluations of potential environmental impacts from the proposed Fermi 3 facilities.”<sup>42</sup> Consequently, the Board’s discussion as to whether development of the transmission corridor is a “connected action” under NEPA, while thorough, is inapposite.<sup>43</sup> The Board’s treatment of this issue does not acknowledge that the Staff did discuss the proposed transmission corridor in the final EIS, across multiple chapters, together with the impacts of constructing and operating Fermi Unit 3.<sup>44</sup> The first issue proposed for review would therefore appear to be moot.<sup>45</sup>

Moreover, much of the Board’s request fundamentally challenges the agency’s Limited Work Authorization Rule.<sup>46</sup> For example, the Board takes issue with the Staff’s classification of

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<sup>41</sup> FEIS at 1-7. The Board referenced this statement in its *sua sponte* request. See LBP-14-9, 80 NRC at \_\_ (slip op. at 15).

<sup>42</sup> FEIS at M-1.

<sup>43</sup> See LBP-14-9, 80 NRC at \_\_ (slip op. at 20-42).

<sup>44</sup> See, e.g., FEIS at 4-3 (explaining that due to its collaboration with the United States Army Corps of Engineers in the environmental review, “the combined impacts of . . . preconstruction and construction activities . . . are presented in [Chapter 4]” even though “the environmental effects of preconstruction activities on each resource area would be addressed as cumulative impacts normally presented in Chapter 7”).

<sup>45</sup> In any event, the Board apparently has already established a position on this issue—after briefing from the parties—that the transmission corridor is “connected” to the licensing decision for Fermi Unit 3. See LBP-14-9, 80 NRC at \_\_ (slip op. at 27-28) (opining, “based on the information . . . before the Board,” that the transmission corridor appears to be a proposed action and that it has “‘no discernible purpose’ apart from connecting Fermi 3 to the grid”). For these reasons, further litigation of this issue would not significantly inform the record on the “connected action” question.

<sup>46</sup> See, e.g., LBP-14-9, 80 NRC at \_\_ (slip op. at 30-41); see *generally* Final Rule, Limited Work Authorizations for Nuclear Power Plants, 72 Fed. Reg. 57,416 (Oct. 9, 2007) (Limited Work Authorization Rule).

the proposed transmission lines as a “preconstruction activity” rather than “construction.”<sup>47</sup> In the Limited Work Authorization Rule, however, we expressly excluded transmission lines from the delineated “construction” activities that would require NRC approval before being undertaken.<sup>48</sup> We would not allow a litigant to challenge a rule in an NRC adjudicatory proceeding absent a showing of special circumstances;<sup>49</sup> we likewise will not allow the Board to do the same.<sup>50</sup>

The Board’s second issue proposed for review, aside from its reference to cumulative impacts, is in essence a concern about the overall sufficiency of the Staff’s transmission-corridor analysis. But this is a potentially amorphous issue that does not appear to lend itself well to a contested proceeding, and the Board has not given us the benefit of a roadmap of what specifically would be litigated with regard to the Staff’s analysis. For example, the Board opines that the Staff must evaluate reasonable alternatives as well as measures to mitigate any detrimental environmental impacts.<sup>51</sup> But again, without making a sufficiency finding, the Staff discussed the proposed transmission corridor in its alternatives analysis (including alternative sources of electricity and alternative sites) and also discussed potential mitigation measures for constructing new transmission lines in its main analysis of the impacts of constructing and

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<sup>47</sup> LBP-14-9, 80 NRC at \_\_ (slip op. at 28-29).

<sup>48</sup> See 10 C.F.R. §§ 50.10(a)(2)(vii), 51.4 (defining “construction”); see also Limited Work Authorization Rule, 72 Fed. Reg. at 57,417 (requiring NRC authorization “only before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security”).

<sup>49</sup> See 10 C.F.R. § 2.335(a), (b).

<sup>50</sup> See LBP-14-9, 80 NRC \_\_ (slip op. at 31-32).

<sup>51</sup> See *id.* at \_\_ (slip op. at 23-25, 51).

operating Fermi Unit 3.<sup>52</sup> Our rules of practice are designed to avoid such an unfocused inquiry in contested proceedings.<sup>53</sup>

In February of this year, we will be holding the uncontested hearing on the *Fermi* combined license application. The uncontested hearing will provide us with an opportunity to review the sufficiency of the Staff's environmental (and safety) analyses. Given that the Board's request, at bottom, questions the sufficiency of the Staff's consideration of the environmental impacts of the proposed new transmission lines for Fermi Unit 3, the issue whether the Staff has taken a "hard look" at the environmental impacts of the transmission corridor is among the range of issues that are appropriately before us in the uncontested hearing.<sup>54</sup> Thus, as part of

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<sup>52</sup> See, e.g., FEIS at 4-60 (noting "that the small streams that would be crossed by the proposed transmission line corridor could be easily spanned without placing structures in stream channels and that [best management practices] would be implemented to protect water quality in streams during building activities"); *id.* at 9-7 (noting that "new transmission lines would be needed to deliver power from the alternative coal-fired plant and that these lines would be identical in both capacity and location to the lines being proposed to support Fermi 3"); *id.* at 9-87 (noting that "[e]nvironmental conditions along the transmission line corridor [for the alternative Belle River-St. Clair site] are similar to those of the site, with a mixture of cropland, wooded areas, and some wetlands").

<sup>53</sup> See 10 C.F.R. § 2.309(f)(1)(i)-(vi). The Board, to be sure, is not strictly bound by the contention admissibility rules when requesting approval to review issues *sua sponte*. But our contested proceedings must be governed by some level of specificity to ensure the proceeding is conducted efficiently, with fairness to all of the parties. Cf. Final Rule, Rules of Practice in Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,179 (Aug. 11, 1989) (amending the rules of practice to "ensure[] that the resources of all participants in NRC proceedings are focused on real issues and disputes among the parties").

<sup>54</sup> We reject Intervenors' argument that the uncontested hearing "is not a serious avenue of relief." Intervenors' Reply Brief at 10. As the Intervenors note, compliance with NEPA is the responsibility of the NRC. See Petition at 3, 6. In the uncontested hearing it is our duty to ensure, among other things, that we have adhered to our obligations under that statute. See 10 C.F.R. § 51.107(a). We therefore find the uncontested proceeding to be an appropriate venue in which to address the transmission-corridor issue.

this hearing, we will take the Board's concerns regarding examination of the environmental impacts of the transmission corridor in the final EIS under advisement.

### III. CONCLUSION

Intervenors have failed to raise a substantial question warranting review of the Board's dismissal of Contention 23. We therefore *deny* the petition for review. In addition, we *deny* the Board's request for *sua sponte* review. We will review the adequacy of the Staff's environmental review, including consideration of transmission-corridor environmental impacts, as part of the uncontested hearing.

IT IS SO ORDERED.

For the Commission

**NRC Seal**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 13<sup>th</sup> day of January, 2015.

## Concurring Opinion of Commissioner Baran

I concur in the result of the memorandum and order but write separately to respectfully express my disagreement with the majority's treatment of the Board's request for *sua sponte* review in section IIB. In my view, this portion of the opinion would benefit from a more tailored discussion of only those issues necessary to reach a decision. I do not believe it is necessary for the opinion to characterize the Board's request for *sua sponte* review as "fundamentally challeng[ing]" the Limited Work Authorization Rule, the Board as having "already established a position" on the question of whether the transmission corridor construction is a connected action under NEPA, or the requested review of the Staff's transmission corridor analysis as "potentially amorphous" and "unfocused." I also do not believe that it makes sense for the opinion to state that "the Staff has included what appears to be a comprehensive analysis of transmission-corridor impacts throughout the final EIS." This description of the Staff's analysis as "comprehensive" could leave readers with the impression that the Commission is prejudging the sufficiency of the final EIS in advance of the uncontested hearing. The juxtaposition of this description with the subsequent statement that the Commission is not "commenting on the sufficiency of the Staff's review" may also confuse readers.

For these reasons, this section of the memorandum and order could simply state:

With respect to whether the building of offsite transmission lines for Fermi Unit 3 qualifies as a connected action under NEPA, the Board's request for *sua sponte* review appears relevant only to determining if an analysis of the direct effects of such activities is warranted. However, the Staff examined the impacts of the proposed transmission corridor on land use, terrestrial ecology, aquatic ecology, historic and cultural resources, and nonradiological health in Chapters 2, 3, 4, 5, 9, and 10 of the final EIS, in addition to referencing those impacts in the cumulative impacts analysis in Chapter 7. Without commenting on the sufficiency of the review, there is no question that the Staff discussed the environmental impacts of the proposed transmission corridor in multiple chapters of the final EIS. Consequently, a *sua sponte* review by the Board of the legal question of whether a direct effects analysis was required is unnecessary. At their core,

both issues raised by the Board relate to the sufficiency of the Staff's consideration of the environmental impacts of the proposed new transmission corridor for Fermi Unit 3. The upcoming uncontested hearing is a natural time for the Commission to examine whether the staff has taken the requisite "hard look" at the environmental impacts of the transmission corridor in its final EIS.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 the foregoing **MEMORANDUM AND ORDER (CLI-15-01)** have been served upon the following persons by Electronic Information Exchange.

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Fermi Nuclear Power Plant, Unit 3, Docket No. 52-033-COL  
**MEMORANDUM AND ORDER (CLI-15-01)**

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[Original signed by Clara Sola \_\_\_\_\_]  
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Dated at Rockville, Maryland,  
this 14<sup>th</sup> day of January, 2015