IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 15-1173

BEYOND NUCLEAR,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

Respondent,

DTE ELECTRIC COMPANY,

Intervenor.

PETITION FOR REVIEW OF FINAL ADMINISTRATIVE ACTION
OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

FINAL OPENING BRIEF OF PETITIONER BEYOND NUCLEAR

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner Beyond Nuclear, which intervened in the Combined Operating License application proceeding for Fermi Nuclear Power Plant, Unit 3 before the U.S. Nuclear Regulatory Commission, hereby requests that oral argument be held in this agency review because, applying the standards of F.R.A.P. Rule 34(a)(2), (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided, and (c) the Court's decisional process would be significantly aided by oral argument.

This case challenges the NRC Commission's rejection of a licensing board recommendation of *sua sponte* consideration of a proposed contention, as well as the Commission's direct rejection of that contention on review. Beyond Nuclear also challenges the Commission's affirmation, upon review, of dismissal of a contention on quality assurance following an adjudication hearing.

The Commission's decisions were legally controversial, implicate NEPA and Atomic Energy Act interpretation, and oral argument is imperative for a merits decision.

STATEMENT OF JURISDICTION

The U.S. Nuclear Regulatory Commission ("NRC") rulings cited below are final orders that are reviewable by this Court under 42 U.S.C. § 2239, 28 U.S.C. § 2342, and 5 U.S.C. § 702. Pursuant to 28 U.S.C. § 2344, Petitioner Beyond Nuclear timely filed its Petition for Review within sixty days of the NRC's issuance of the "Combined License and Record of Decision," 80 Fed. Reg. 26,302 (May 7, 2015) (JA 87-88) and the "NRC Commission Memorandum and Order CLI-15-13" (Apr. 30, 2015) (JA 543-580), the Commission's final rulings in the Combined Operating License ("COL") proceeding for Fermi 3, Docket No. 50-233-LR. Petitioner filed its Petition for Review on June 19, 2015.

This appeal involves claims arising under two laws, (1) the National Environmental Policy Act of 1969, as amended ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and implementing regulations of the Council on Environmental Quality, and (2) the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*. Judicial review is sought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which authorizes judicial review of all federal agency actions.

Venue is proper under 28 U.S.C. § 2343 because the Respondent NRC is a federal agency which transacts business and/or maintains offices within the District of Columbia, within the geographical jurisdiction of the D.C. Circuit. The

Court has subject matter jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final orders of the NRC relating to the issuance of licenses. 28 U.S.C. § 2342; 42 U.S.C. § 2239.

ISSUES PRESENTED FOR REVIEW

1. Did the Nuclear Regulatory Commission ("NRC") improperly deny admission of Contention 23, in which Petitioner claimed that the 29-mile-long, 300 foot wide transmission corridor connecting the proposed Fermi 3 nuclear power plant to the national power grid must be included and analyzed within the Final Environmental Impact Statement ("FEIS") for Fermi 3? Did the Commission Staff's determination not to include NEPA analysis of the transmission corridor in the FEIS comprise a new circumstance and thus the proper subject of a timely-submitted contention?

2. Did the NRC abuse its discretion and violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, when it declined to accept a *sua sponte* referral from the Atomic Safety and Licensing Board ("ASLB") wherein the ASLB recommended that the transmission corridor be fully addressed within the Fermi 3 FEIS?

3. Did the NRC improperly affirm the ASLB's ruling on Contention 15 that there are adequate assurances that past inadequacies within the Fermi 3 Quality

Assurance program and its management from the outset of planning and preparation for Fermi 3 have not corrupted the QA program for the plant? Related to that, did the Commission incorrectly find there to be "reasonable assurance" under the Atomic Energy Act, 42 U.S.C. §§ 2133(d) and 2232(a), that the Quality Assurance program for Fermi 3 ensures that construction and operation of Fermi 3 under a Combined Operating License will not be inimical to the health and safety of the public?

4. Did the NRC violate the Administrative Procedure Act by relying upon outdated information, incorrect assumptions, and faulty analysis, and rendering decisions as to Contention 23/the *sua sponte* referral, and Contention 15, which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706?

STATEMENT OF THE CASE

Petitioner Beyond Nuclear is a public interest organization which was an intervenor in the underlying NRC license renewal proceeding, captioned *In the Matter of DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), Docket No. 52-033-COL, in which proceeding the NRC Commission decisions under challenge here were made.

This proceeding commenced with the September 18, 2008, application of

DTE Electric Company, Intervenor for Respondent ("DTE") to the NRC for a Combined Operating License to construct and operate the Fermi Nuclear Power Plant, Unit 3 ("Fermi 3"), a GE-Hitachi Economic Simplified Boiling Water Reactor ("ESBWR") at a site in Monroe County, Michigan. Two units currently exist at the site: Unit 1, permanently shut down in 1972, and Unit 2, which has operated since 1988.

The NRC Staff docketed and accepted the application for review on January 8, 2009 and contemporaneously provided interested persons an opportunity to challenge the application in a contested proceeding under the Atomic Energy Act. Nineteen individuals and five environmental groups,[1] including Petitioner Beyond Nuclear ("Beyond Nuclear" or "Petitioner")[2] timely submitted a request for hearing and petition to intervene, along with fourteen proposed contentions. An

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[1]Besides Beyond Nuclear, the intervening groups were Citizens for Alternatives to Chemical Contamination, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan and the Sierra Club. The individuals included Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.

[2]From time to time in this Brief, there will be references to "intervenors," which is the group of intervening organizations and parties cited in fn. 1. Beyond Nuclear was one such intervenor in this group of Intervenors who litigated their challenges in common in the Combined Operating License case before the NRC.

Atomic Safety and Licensing Board ("ASLB") composed of three administrative judges granted the collective intervenors' request for hearing and admitted Contentions 3, 5, 6, and 8. Contention 3 pertained to the management of Class B and C low-level radioactive waste; Contention 5 involved hydrology at the Fermi site; Contention 6 concerned aquatic impacts from algae; and Contention 8 encompassed potential adverse impacts on the Eastern Fox Snake, a state-listed endangered species.

The ASLB granted summary disposition of Contentions 3, 5, and 6 in favor of DTE.[3] After an evidentiary hearing, the Board resolved Contention 8 in favor of the Staff. The Board also held a hearing on a new contention that concerned DTE's compliance with NRC quality assurance regulations, Contention 15A/B, which was resolved in favor of DTE.[4] The intervenors petitioned for review of the

[3] *See* ASLB "Order (Granting Motion for Summary Disposition of Contention 3)" (July 9, 2010) (unpublished) (Index 32); "Order (Granting Motion for Summary Disposition of Contention 5)" (Mar. 1, 2011) (Index 127); LBP-12-23, 76 NRC 445, 452 (2012) (among other things, granting summary disposition of Contention 6) (Index 279).

[4] LBP-14-7, 79 NRC 451, 454 (2014) (Index 749). *See generally* LBP-10-9, 71 NRC 493, 499 (2010) (Index 92).

ASLB's ruling on Contention 15A/B,[5] which the Commission ultimately denied.[6] No review was sought of any other licensing board decisions on admitted or non-admitted contentions.

Shortly after disposing of Petitioner's admitted contentions, the ASLB requested the Nuclear Regulatory Commissioners to hold an evidentiary hearing, *sua sponte*, on proposed Contention 23, which challenged the adequacy of the NRC Staff's Environmental Impact Statement discussions of the effects of building a new 29-mile-long transmission-line corridor for Fermi 3.[7]

The ASLB suggested that Contention 23 might have been admissible if not for its tardiness and recommended that the Staff consider the intervenors' concerns when preparing the final EIS.[8] Following issuance of the Final Environmental Impact Statement ("FEIS"), the ASLB again ruled the contention to be unjustifiably late, but noted that Intervenors had raised "a substantial . . . issue that

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[5]Intervenors' Petition for Review of LBP-14-07 (Ruling for Applicant on Quality Assurance)" (June 17, 2014) (JA 473-478).

[6]CLI-14-10, 80 NRC 157 (2014) (JA 520-529).

[7]LBP-14-9, 80 NRC 15, 37 (2014) (JA 652-688).

[8]LBP-12-12, 75 NRC at 776, 780 (JA 390, 394).

might have been admissible had it been timely filed."[9] The ASLB noted that the compliance of transmission-corridor impacts with NEPA might be appropriate for consideration *sua sponte*, pursuant to 10 C.F.R. § 2.340(b).[10] The ASLB solicited briefing from the parties on the appropriateness of the Board's reviewing the issues raised in Contention 23 on its own motion.[11] Intervenors supported *sua sponte* review; DTE and the Staff opposed it.[12]

In LBP-14-9, the ASLB determined that the issues raised in Contention 23 merited *sua sponte* review,[13] and pursuant to 10 C.F.R. § 2.340(b), the Board

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[9]"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, *etc.*) (Apr. 30, 2013), at 23 (unpublished) ("Second Board Ruling") (JA 6).

[10]*Id.*

[11]*Id*. at 23-24 (JA 6-7).

[12]"Intervenors' Memorandum in Support of *Sua Sponte* ASLB Referral of Transmission Line Corridor NEPA Compliance Issue (May 30, 2013) (Index 334); "Applicant's Brief Opposing *Sua Sponte* Review of Environmental Impacts in the Offsite Transmission Corridor" (May 30, 2013) (Index 549); "NRC Staff Response to Board Order Concerning Proposed *Sua Sponte* Review of Contention 23" (May 30, 2013) (Index 421).

[13]"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)," LBP-14-09, 80 NRC 15 (July 7, 2014) (JA 652-688).

requested the Commission to undertake that review.[14]

The Commission then invited briefing from the parties,[15] and granted the Nuclear Energy Institute leave to file a brief *amicus curiae.*[16]

Intervenors also filed a petition for review of the Board's dismissal of Contention 23,[17] which was opposed by the other parties.[18]

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[14]*Id.* at 69-70 (JA 687-688).

[15]"Applicant's Opposition to *Sua Sponte* Consideration of Transmission Corridor Issues" (July 28, 2014) (DTE Brief) (Index 745); "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) (Index 746); "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)" (July 30, 2014) (Index 751); "Applicant's Reply Brief Opposing *Sua Sponte* Consideration of Transmission Issues" (Aug. 7, 2014) (Index 75); "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) (Index 754); "Intervenors' Corrected Reply Memorandum in Support of Motion for Commission Approval of LBP-14-09" (Aug. 8, 2014) (Intervenors' Reply Brief) (Index 756).

[16]*"Amicus Curiae* Brief of the Nuclear Energy Institute, Inc. in Response to the Commission's July 11, 2014 Briefing Order" (July 28, 2014) (Index 747).

[17]"Intervenors' Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness" (Oct. 6, 2014) (JA 15-20).

[18]*See generally* Petition; Order of the Secretary (Sept. 10, 2014) (Index 712) (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 opposed Intervenors'

The Commission ultimately denied the petition for review and the ASLB's request for *sua sponte* review, and determined that the environmental impacts of the transmission corridor were among the issues appropriate for resolution in the Commission's statutory uncontested proceeding convened on February 4, 2015.[19] The Commission decided not to order the NRC Staff to supplement the FEIS with analysis of transmission corridor impacts.[20]

Beyond Nuclear timely appealed the Commission's terminal "Memorandum and Order" (CLI-15-13) to this Court via its June 19, 2015 Petition for Review. Briefing was held in abeyance until the present while the Court decided *New York v. NRC,* Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) ("*New York II"*), to which Beyond Nuclear was a party by reason of the pursuit of a contention in the Fermi 3 COL proceeding which challenged the lawfulness of

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petition for review. "Applicant's Opposition to Petition for Review of Contention 23" (Oct. 31, 2014) (DTE Response to Petition) (Index 951); "NRC Staff Response to Intervenors' 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) (Index 950). Intervenors replied, "Intervenors' 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) (Index 956).

[19]CLI-15-1, 81 NRC 1 (Jan. 13, 2015) (JA 530-542).

[20]"Memorandum and Order," CLI-15-13 (April 30, 2015) (JA 571-572, 574-575).

the NRC's Continued Storage of Spent Nuclear Fuel Final Rule, 70 Fed. Reg. 56,238 and the supporting Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 70 Fed. Reg. 56,263 (both Sept. 19, 2014).

With the Court's ruling on the merits of that case, *State v. U.S. Nuclear Regulatory Commission,* 14-1210, 14-1212, 14-1216, 14-1217 (D.C. Cir. June 3, 2016), the stay on briefing in the present petition for review proceeding was dissolved and the matter is now before the Court on its merits.

STATEMENT OF THE FACTS

A. Contention 23 - Sufficiency of NEPA Coverage of Transmission Corridor and *Sua Sponte* Review by Nuclear Regulatory Commission

1. Background of Contention 23

On October 6, 2014, Beyond Nuclear and the other intervenors petitioned the Commission for review of the ASLB's "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" (April 30, 2013), wherein (at JA 4-5) the ASLB dismissed Intervenors' Contention 23. By Contention 23 the intervenors sought inclusion of the 29-mile power line transmission corridor within the Final Environmental Impact Statement for the Fermi 3 COLA proceeding. The ASLB

denied admission of Contention 23 on the ground of untimeliness but acknowledged that, but for the untimeliness of its submission, the contention would be admissible for adjudication.

The intervenors[21] sought to have the NRC Staff address the environmental impacts of the transmission line corridor extending some 29 miles from the regional grid to the Fermi 3 plant within the NEPA documents for Fermi 3. They asserted that DTE had not included any meaningful environmental assessment of the transmission line corridor in its Environmental Report and that the Staff had mirrored that failing in the DEIS and FEIS. The transmission corridor occupies 1,069 acres and will be 29 miles long by several hundred feet wide, with three industrial 345 kilovolt (kV) lines strung on dozens of towers. Intervenors argued that the corridor was improperly segmented or partitioned from the Fermi 3 project. They had expected that the NRC Staff would rectify the omissions of key information about the corridor in the DEIS. But the Staff failed to cover the corridor in depth when it published the DEIS. Consequently, the intervenors filed a "Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 Through 24" (January 11, 2012) (JA

[21]"Intervenors" includes Beyond Nuclear whenever the term is used in this Brief. See fn. 2 *infra.*

372-384) raising a new Contention 23.

The ASLB rejected admission of Contention 23 but observed (LBP-12-12, June 21, 2012) (JA 390) at pp. 44-45 that, "Although Contention 23 is untimely, it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS." The ASLB echoed the intervenors' allegations that substantial construction will take place in undeveloped wetlands, forests, and grasslands, that there would be potential impacts to threatened and endangered species, and that maintenance of the transmission corridor will continue to affect wetlands and other environmental resources after construction is completed. The ASLB ruled that there is a strong likelihood that the transmission corridor had been "segmented" from the power plant project, and stated that the NRC cannot use the claim of "preconstruction activity" to argue that environmental impacts from the corridor fall outside NRC authority. (JA 392).

a. Voluminous EIS Evidence of Incomplete NEPA Analysis of the Transmission Corridor

Beyond Nuclear and the other intervenors documented these critical omissions from the DEIS and FEIS:

- Jurisdictional wetlands were not delineated, so appear on no maps. At

FEIS Apx. F, p. F-54 (JA 353) appears the admission that, "Wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands." At FEIS p. 4-44 (JA 198), "A conceptual transmission line corridor has been identified, but wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands." Apx. J, p. J-2 of the FEIS (JA 367). DTE expects changes to the site plan "as a consequence of the USACE[22]-identified LEDPA [Least Environmentally Damaging Practicable Alternative policy]" which "would result in fewer adverse impacts on waters of the United States than identified in the Final EIS." Consultations with the Corps are thus incomplete.

- The physical footprint of the Milan substation, where Fermi 3 would connect to the national grid, will be enlarged by four or more times, to perhaps 20 acres, but the expected change in its footprint is not firm, so the FEIS contains no details as to what changes would occur as a consequence.

- The routes of the three 345kV lines through the corridor are not fixed. DTE "expects that the proposed new transmission line would be built within the existing Fermi 2 transmission corridor for approximately 18.6 mi extending outward from the Fermi site boundary" and "that the remaining 10.8 mi, extending

[22]U.S. Army Corps of Engineers.

to the Milan Substation, would be built within an undeveloped right-of-way (ROW) possessed but not yet used by ITCTransmission." FEIS p. 2-10 (JA 156).

● The lack of a fixed route makes it impossible to evaluate the Staff's claim that it has set the upper and lower bounds of risk to natural resources, animals and plants underneath the huge commercial transmission lines and associated tower infrastructure.

● There are many admissions of incomplete or missing documentation and rank noncompliance with the Endangered Species Act, such as FEIS Apx. F p. F-45 (JA 350):

> ITCTransmission has not conducted systematic terrestrial and aquatic surveys for the Fermi 3 lines. Instead, the BA[23] relies on information about the possible occurrence of endangered or threatened species in counties crossed by the transmission lines from FWS[24] records (FWS 2011a) and the Michigan Natural Features Inventory (MNFI) (MNFI 2007a).

And at FEIS Appendix F, p. F-47 (JA 351):

> ITCTransmission has not conducted systematic aquatic surveys for the Fermi 3 lines. Instead, the BA relies on information about the possible occurrence of endangered or threatened species in counties crossed by the transmission lines from FWS records (FWS 2011a) and the MNFI (MNFI 2007a).

Then, at pp. F-53-54 (JA 352-353):

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[23]BA = Biological assessment.

[24]U.S. Fish and Wildlife Service.

> Thus, the routes and corridor boundaries shown in Figure 2-5 are considered provisional and subject to change (Detroit Edison 2011a). Field surveys for Federally listed threatened and endangered species or species that are candidates for Federal listing have not yet been conducted in the proposed corridors. . . . Wetland delineation surveys have not yet been conducted to determine the precise locations and extent of wetlands.

Moreover, at p. F-56 (JA 354), jurisdictional wetlands are admittedly unidentified: "According to FWS's National Wetland Inventory mapping, the identified transmission route crosses about 30 wetlands or other waters that *may* be regulated by the USACE and MDEQ[25] (FWS 2010)." (Emphasis supplied). And at p. F-67 (JA 355) is an unequivocal admission that no field surveys will take place until the following takes place: "[o]nce final routes have been determined, ITCTransmission is expected to conduct on-the-ground field surveys for each line. . . ."

At FEIS Apx. F, p. F-68 (JA 356), "The Indiana bat has been observed in Washtenaw and Wayne counties (MNFI 2007a), and this species *might* occur in suitable habitat along the transmission line corridor." (Emphasis supplied). At p. F-70 (JA 357) "It is not known whether suitable stream habitat or populations of the snuffbox mussel occur along the proposed offsite transmission line corridor." At p. F-75 (JA 362), "if Detroit Edison and ITCTransmission (1) conduct surveys to identify whether the eastern massasauga rattlesnake or its habitat occur along or

[25]Michigan Department of Environmental Quality.

adjacent to the proposed transmission line corridors, [. . .], the review team concludes that operation of the Fermi 3 transmission lines would have no effect on the eastern massasauga rattlesnake."

Similarly at p. F-76 (JA 363), "if Detroit Edison and ITCTransmission (1) conduct surveys to identify whether the Eastern prairie fringed orchid occurs along or adjacent to the proposed transmission line corridors, [. . .], the review team concludes operation of the Fermi 3 transmission lines may affect, but would not likely adversely affect, the Eastern prairie fringed orchid."

And at Apx. F, p. F-77 (JA 364), "It is not known whether suitable stream habitats for, or populations of, the snuffbox mussel occur along the proposed transmission line corridor." At p. F-85 (JA 365),

> Habitat along the offsite transmission line corridor has not been surveyed for potential Indiana bat habitat and it is possible suitable habitat currently exists. Because Detroit Edison can avoid adverse impacts, building the proposed transmission lines may affect, but is not likely to adversely affect, the Indiana bat. The eastern massasauga rattlesnake could occur within the transmission line corridor.

The Fish and Wildlife Service heavily criticized DTE in the FEIS:

> You have also made a determination of effects for the 29.4 miles of proposed transmission lines associated with the project. *We are not able to concur with your effects determinations for the proposed transmission lines at this time. Your evaluation indicates that terrestrial and/or aquatic surveys for listed species will be conducted once the location of the transmission line corridors have been finalized. We will defer concurrence*

> *with your determinations until corridor locations are finalized and we have reviewed the results of future surveys.*

(Emphasis supplied). FEIS Apx. F, pp. F-21 to F-23 (JA 346-348).

- The lack of Endangered Species Act compliance means that mitigation arrangements for harms to endangered plants and animals have not been developed and so do not appear in the FEIS.

- While temporary disruption of perhaps 143 acres in the corridor is expected during construction, there are no details of the disruptions nor the potential permanence of those acts. The FEIS mentions periodic clear-cutting of trees and vegetation beneath the unmapped transmission lines and the use of herbicides to retard regrowth, but there are no details beyond the bare mention.

- Historic and cultural resources surveys are incomplete. At pp. 4-100 through 4-102 of the FEIS (JA 213-215) are repeated admissions which establish the incomplete nature of National Historic Preservation Act ("NHPA") compliance.

b. The USEPA's Repeated Urgings to Include the Transmission Corridor In the EIS as Direct Impacts of the Construction of Fermi 3

As if the innumerable admissions against interest within the DEIS and FEIS weren't enough, the U.S. Environmental Protection Agency weighed in at both stages pursuant to its authority under § 309(a) of the Clean Air Act (42 U.S.C. §

7609(a)).[26] The USEPA commented at the DEIS stage as follows:

> . . . EPA is concerned about the amount of habitat lost in the transmission corridor and due to the proposed expansion of the Substation, at 1,069 and 21 acres, respectively. As outlined under *Transmission Corridor and Substation,* EPA views these developments as connected actions. Therefore, estimated impacts should be considered when preparing mitigation plans. This includes wetlands mitigation ratios.
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> ***** ***** ***** *****
>
> **Transmission Lines and Substation**
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> EPA understands that NRC analyzes impacts from the lengthening of the transmission lines and expansion of the Milan Substation as cumulative impacts and outside the scope of the COL permit application and accompanying NEPA document. ***However, per NEPA, EPA views these actions as connected to the granting of the license and, therefore, should be analyzed as direct impacts as a result of the proposed-action.*** The Draft EIS even acknowledges the connectedness of the building of Fermi 3 and the expansion of the Substation on page 3-17, lines 21-31, among other locations: "The 350-ft-by-ft-500-ft Milan Substation may be expanded to an area about 1000 ft by 1000 ft to accommodate the Fermi 3 expansion (Detroit Edison 2011b)." ***Therefore, because the lengthening of the transmission lines and the expansion of the Substation are only necessitated by granting the COL license for Fermi 3, the Final EIS should analyze impacts from these two actions as direct impacts.***
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> **Recommendation:** The Final EIS should analyze the construction of the transmission lines and the expansion of the Substation as actions part of the

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[26]Per § 309, the USEPA Administrator "shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any . . (2) newly authorized Federal projects for construction and any major Federal agency action. . . to which section 4332(2)(C) of this title applies. . . . Such written comment shall be made public at the conclusion of any such review."

> proposed action; any unavoidable impacts should be accounted and mitigated for.

(Emphasis added). U.S. Environmental Protection Agency ("USEPA") comment letter, ML12023A034 (January 10, 2012).

At the FEIS stage, the USEPA further advised:

> Comment 0078-31 pertains to impacts as a result of the construction and maintenance of the transmission lines and substations. While EPA appreciates the addition of Appendix M as a reference, ***we reiterate our previous comment that impacts resulting from the construction and maintenance of the new transmission lines and substations should be considered as direct impacts and mitigated for as part of the proposed project.*** Total impacts are estimated to be over 1000 acres of habitat, including over 93 acres of impacts to forested wetlands.

(JA 692) (Emphasis supplied). Notably, forested wetlands are especially critical habitat for endangered species, such as the Eastern Fox Snake. USEPA comment letter, ML13063A434 (February 19, 2013). USEPA maintained that the transmission corridor and Milan substation are indispensable to the operation of the power plant and, therefore, should be analyzed as direct impacts as a result of the proposed action.

On petition for review of the dismissal of Contention 23, the Commission held that "Because Intervenors have not demonstrated a substantial question warranting review of the Board's dismissal of their contention, we deny their petition for review." CLI-15-01, 81 NRC 1, 8 (JA 537).

2. Background of Sua Sponte *Review Determination*

The ASLB on its own motion requested the Commission's approval to review two issues *sua sponte*:[27]

(1) "Whether 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) "Whether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative impact review, satisfied NEPA's hard look requirement."

The ASLB answered "yes" to the first question, and "no" to the second. The ASLB found that there is a strong likelihood that NEPA compliance respecting the transmission corridor had been "segmented" from the power plant project, and that the NRC as a regulatory agency cannot credibly maintain that even if the transmission corridor construction falls in the category of "preconstruction activity," that environmental impacts from that activity fall outside NRC authority:

> It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the new nuclear power plant. If that is true, the

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[27]CLI-15-01 at 9 (JA 537).

> transmission corridor lacks independent utility (*i.e.*, it is a connected action) and must be fully evaluated in the FEIS, though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. The NRC's obligations under NEPA include evaluating all environmental effects of the proposed action (including connected actions) that it has the authority to prevent. Even though the NRC does not license construction or operation of the transmission corridor, it has the authority to deny the license for Fermi Unit 3 if, for example, the total environmental costs of the new reactor and connected actions exceed the benefits. Denial of the license would effectively prevent harmful environmental impacts resulting from construction and operation of the transmission corridor, given that its sole purpose appears to be transmitting electrical energy generated by Fermi Unit 3.

"Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions)," LBP-12-12 (June 21, 2012) pp. 47-48 (JA 393-394). Although the ASLB found that the intervenors stated no good explanation for waiting until the DEIS stage to object, it held that ultimate responsibility for compliance with NEPA lies with the Commission, and recommended "that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS." *Id.* (JA 394).

The ASLB later found that the transmission corridor includes habitat for the Eastern Fox Snake, a state-threatened reptile species that was the subject of Contention 8:

> [T]he review team concludes that the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi

> site *and transmission line corridor would be SMALL to MODERATE* . . . . The potential for MODERATE impacts is limited to possible adverse effects on the eastern fox snake.

(Emphasis supplied). "Memorandum and Order (Denying Motion for Reconsideration of the Board's Order Denying Second Motion for Summary Disposition of Contention 8)," ASLBP No. 09-880-05-COL-BD01 (January 30, 2013), p. 5 (citing p. 4-47 of FEIS) (JA 735).

Beyond Nuclear and the other intervenors relied on the NRC Staff to follow the ASLB recommendation that the FEIS cover the environmental impacts of construction and maintenance of transmission lines within the corridor. When the Staff's response was, instead, to not supplement the DEIS with serious analysis of the transmission corridor in the FEIS, the intervenors moved again for admission of Contention 23. "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," ML13050A935 (February 19, 2013) pp. 21-53 (JA 397-432). They urged admission of Contention 23 either as a new contention under 10 C.F.R. §2.309(f)(2) because the ASLB had admonished the Staff to include the corridor in the FEIS and the Staff refused, which was new information, materially different from that previously available; or alternatively, that there was a dispute of fact between the Environmental Report ("ER") and the

DEIS, which should have allowed Petitioners to resubmit Contention 23 at the FEIS stage. The ASLB rejected the arguments. "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, etc." (April 30, 2013) at p. 22-23 (JA 4-5). But the Board reiterated that Contention 23 "raises a substantial NEPA issue that might have been admissible had it been timely filed," and that the issue raised by Contention 23 was still appropriate for evaluation under 10 C.F.R. § 2.340(b) for *sua sponte* consideration. *Id.* at 23.

Subsequently, the ASLB did order *sua sponte* consideration of the transmission corridor under NEPA. "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)," LBP-14-09, 80 NRC 15, 69-70 (July 7, 2014) (JA 687-688).

The Commission decided, however, that:

> 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.

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> 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. The first issue proposed for review would therefore appear to be moot.

CLI-15-01 at 9, 10 (JA 538-539).

B. Contention 15 - Lack of Reasonable Assurance of QA

On June 17, 2014, the intervenors filed "Intervenors' Petition for Review of LBP 14-07 (Ruling for Applicant on Quality Assurance)" (JA 473-478) for review of LBP 14-07, the "Partial Initial Decision (Ruling on Contentions 8 and 15)" (JA 631-651) in the Fermi 3 COLA proceeding. The ASLB had ruled in favor of DTE on May 23, 2014 on Contention 15 and its subparts (A) and (B), which challenged quality assurance ("QA") arrangements for Fermi 3 preceding and post-dating the submission of the COL application on September 18, 2008.

The intervenors contended that the ASLB ignored important evidence of DTE's failure to timely establish and maintain a QA effort from 2007 forward and that the ASLB conclusion (LBP-14-07 at 38) that "Appendix B permits DTE to delegate the work of establishing and executing the QA program" had been associated with such poor oversight that it effectively exempted or waived NRC regulations applicable to DTE for such an unprecedented QA program model. (JA

478).

Contention 15A/B arose from the intervenors' 2009 filing of a "Supplemental Petition for Admission of a Newly Discovered Contention (Supplemental Petition)" (Index 77). Contention 15 was reformulated by the ASLB and admitted on June 15, 2010 "Order (Ruling on Proposed Contentions 15 and 16)," LBP-10-09 pp. 17-18 (Index 92).

Intervenors were motivated to file Contention 15 following the NRC Staff's citation of DTE for a Notice of Violation (NOV) in October 2009. DTE was accused of failing to comply with the QA requirements of 10 C.F.R. Part 50, Appendix B by failing to establish and implement a Fermi Unit 3 QA program between March 2007 (when DTE initially contracted with Black & Veatch ("B&V") for the conduct of COL QA activities for Fermi Unit 3) and February 2008, and failing to retain overall control of contracted COL QA activities as required by Criterion II of Appendix B. This allegedly resulted in inadequate control of procurement documents and ineffective control of contract services performed by B&V. The NRC also cited DTE for failing to perform internal audits of QA programmatic areas implemented for Fermi 3 COL activities and for failing to document trending of DTE's corrective action reports.

In Contention 15A the intervenors argued that the NRC may not issue a

combined license for Fermi Unit 3 until DTE either corrects the information obtained from B&V's site investigation activities or demonstrates that its quality was not affected by the violation.[28] In Contention 15B, they challenged DTE's general commitment to comply with NRC quality assurance regulations and asserted that the NRC cannot issue a license until DTE demonstrates that it has adopted and implemented a sufficient quality assurance program.[29] The factual dispute over whether DTE exercised proper oversight of its contractor allowed the ASLB to deny DTE's Motion for Summary Disposition of Contention 15.[30]

Contention 15 was litigated in a two-day adjudication hearing on October 30-31, 2013. There was considerable disagreement as to when DTE became an "applicant," which would ostensibly establish the point at which DTE was responsible for QA of the Fermi 3 Licensing Project. In more than 250 previous NRC license applications, the utility company applicant was responsible to implement a fully functional QA program prior to filing its application, according to NRC Staff. (Hearing transcript ("Tr."), p. 622, lines 17-25) (JA 79).

DTE hired B&V to serve as its QA general contractor because of B&V's

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[28]"Memorandum and Order," CLI-14-10, 80 NRC 157, 160 fn. 8 (JA 523).

[29]*Id.*

[30]LBP-12-23 (Index 280).

work at the River Bend Station (Louisiana) proposed nuclear plant. Unlike DTE, evidence showed that Entergy, the COL applicant utility, and not B&V was "responsible for the establishment and execution of the quality assurance program during the design, construction and operations phases of RBS Unit 3." Exh. INTS 071 (JA 727).

The NRC Staff's legal counsel admitted (a judicial admission) that DTE had no quality assurance program compliant with 10 C.F.R. Part 50, Appendix B from February 2007 through September 2008. (Tr. p. 683, line 10 - p. 684, line 8) (JA 80).

The intervenors maintained at adjudication that because of improper establishment and implementation of the Fermi QA program, safety-related information in the Final Safety Analysis Report ("FSAR") is unreliable and should not be used to support the licensing decision because it is based in whole or in part on tests, investigations, or other safety-related activities performed by Black & Veatch, DTE's contractor, during the period when DTE had neither established nor implemented its own Appendix B QA program to govern those activities. LBP-10-09 (JA 640-642).

DTE insisted at trial that it was not required to have an Appendix B program in place prior to submitting the formal September 2008 COL application to the

NRC. DTE claimed that it had delegated its QA responsibilities to B&V and that QA responsibilities were divided between two different B&V divisions with responsibility for the QA program given to one while all the Fermi 3 Licensing Project Engineering was assigned to a separate B&V division.

During the period in which DTE denies that it was an "applicant" (February 15, 2007 to September 18, 2008), engineering activities were conducted, such as geological boring for core samples to determine where at the Fermi complex in Michigan to site the foundation for Fermi 3. Intervenors' expert, nuclear engineer Arnold Gundersen, testified that "confusion and lack of organizational control reigned within Detroit Edison for years prior to the COL application submittal and to this day" and that "[t]hese early QA problems are the root cause of the current site characterization issues that continue to plague the 'Fermi 3 Licensing Project.'" Exh. INTS 068 p. 8 (direct examination) (JA 711). DTE QA efforts from 2007-2009 were "inadequate," "do not follow the statutory authority of the Code of Federal Regulations," and "it is implausible that the Atomic Safety and Licensing Board would be able to assure the public that it has reached the requisite conclusion of 'adequate confidence'" that Fermi 3 will satisfactorily perform its service function. *Id.* at pp. 9-10 (JA 712-713).

At the inception of the Fermi 3 Licensing Project in 2007, there had been no

decision as to which reactor type (Advanced Boiling Water Reactor or ESBWR) would be built, nor the location of that new reactor at the existing Fermi complex. Exh. INTS 068 p. 26 (JA 721). The 2007 core drilling was carried out under the auspices of the adjacent Fermi 2 power plant's QA program and not Fermi 3's, evidently to avoid quality assurance oversight by B&V's Fermi 3 QA staff. Exh. INTS 068 p. 26 (JA 721). There was no knowledge or approval by any DTE personnel managing the Fermi 3 project, nor by any B&V personnel connected with or managing the Fermi 3. Exh. INTS 068 p. 11 (JA 714).

Gundersen attested that a "combination of a separate unapproved corporate entity (Fermi 2) and two non-nuclear vendors with non-nuclear QA programs were used to satisfy the nuclear QA commitments required to provide essential seismic and structural information for the licensing process applied to the COLA." Exh. INTS 068, p. 12 (JA 715).

Considerable correspondence within DTE and between DTE and B&V personnel in 2007-2008 shows that DTE management knew the company was supposed to be the primary overseer of QA for the Fermi 3 Licensing Project. Exh. INTS 068 pp. 16-18 (JA 716-718). But a goal of the Fermi 3 Licensing Project was to have a "self-executing" QA plan, a practice disfavored by the NRC. *Id*. p. 34 (JA 725). DTE's Quality Assurance Program Description ("QAPD") of

February 2008 did not appear, as required, on DTE's organizational chart. *Id.* pp. 31-34 (JA 722-725). Instead, the chart showed a position for a Nuclear QA Oversight Quality Assurance Program. *Id.* p. 33 (JA 724). This title was not addressed in the QAPD, and according to the key in the chart, the entire organization had yet to be hired in 2008. Furthermore, the QAPD stated that on a daily basis the Nuclear QA Oversight Quality Assurance Program was to report to the Manager of the Nuclear Development Program, whose first responsibility was Project Schedule Development & Coordination. According to the organizational chart, no independent reporting relationship existed between QA and higher levels of DTE management. Exh. INTS 068, p. 34 (JA 725). Gundersen testified that an email between two DTE managers, Smith and Allen, in January 2008 made it "clear that DTE planned a self-executing QA program and had no intention of hiring QA professionals." *Id.* p. 34 (JA 725).

Even after the QAPD was published in February 2008, DTE management still did not understand its organizational responsibilities concerning quality assurance oversight. Incredibly, a DTE executive asked B&V in January 2008 what type of reviews DTE needed to perform in order to meet COLA requirements. Exh. INTS 068 pp. 34-35 (JA 725-726).

Even DTE concurred that its QA program was poorly-managed. In response

to the NRC's 2009 Notice of Violation, DTE assembled a powerpoint slide presentation in September 2010 which lamented:

> If we could wind the clock back:
> – Establish a formal Quality Assurance program much earlier
> – Implement a procurement procedure before the first contract is issued
> – Do not document procedural requirements until they are already complete.

Exh. INTS 068 p. 35 (JA 726).

At trial, the NRC Staff claimed that it learned DTE had delegated its QA responsibilities to B&V only after the 2009 NOV was written. But DTE had put the agency on notice in 2007[31] that "Black & Veatch has overall responsibility for preparation of the Fermi COLA and B&V and its principal subcontractors will be governed by Black & Veatch QA requirements."

Intervenors' expert concluded that there was no DTE Fermi 3 QA program in place in 2009 to determine which items were safety-related, and which were not, in order to refer safety-related work to B&V in mid-2009. Exh. INTS 007 at 10 (JA 706). This conclusion, based on documentary evidence, was ignored by the ASLB in its fact-finding.

At closing argument in 2013, DTE's counsel admitted that DTE argued in

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[31]Exh. DTE000047 (JA 731), "Voluntary Response to RIS 2007-08: Plans for the Submittal of a Combined License Application for the DTE Energy Fermi Site."

briefing that in 2007-08 DTE delegated to Black and Veatch the "responsibility" for establishing and executing the QA Program. (Tr. p. 698, lines 17- 24) (JA 82). NRC Staff witness George Lipscomb maintained (Tr. p. 605, lines 17 - 18) (JA 73) that "the applicant is not an applicant until they apply," and that (Index 65, Tr. p. 591, lines 11 - 13) "Detroit Edison is not required to have a Quality Assurance program in place prior to the date of their application." The Chair of the ASLB found the latter statement to be "very, very troubling," *id.* line 15. Lipscomb later contradicted himself by testifying, "Well, Appendix B applies pre- and post-application." (Tr. p. 606, lines 3-4) (JA 74).

Only in 2009 did DTE undertake a required QA audit of Black & Veatch. LBP-14-07, 79 NRC 451, 481 (2014) (JA 645). Despite DTE's claims that it "retained responsibility," the critical safety-related work product of B&V as the designated contractor for QA was not contemporaneously verified by the DTE, as the supposed principal. Although lacking a functioning Appendix B program at the time, and having only a belated DTE audit of B&V's efforts throughout the seminal 2007-2008 benchmarking period, the ASLB still ruled there was "reasonable assurance" that the core drillings associated with the foundation of Fermi 3 met nuclear quality assurance criteria for construction of safety-related

components.[32]

SUMMARY OF ARGUMENT

Contention 23

Despite conspicuous shortfalls and failings by the NRC Staff to obtain, generate and disclose information and agency approvals about the transmission line corridor for Fermi 3 in the Draft and Final Environmental Impact Statements for the plant, NEPA compels compliance. The FEIS needs to be considerably supplemented to account for expected environmental damage to the 29-mile-long, 300' wide transmission corridor slated to connect the Fermi to the national electrical grid.

The NRC is legally obliged as the permitting authority here to comply fully with NEPA, irrespective of whether a litigant has brought the issue of NEPA noncompliance to the attention of the trier of fact in a timely way. Beyond Nuclear made repeated attempts to file a proposed contention to cover the transmission corridor in the Draft, and later, the Final EIS's. Both times the intervenors were refused because of claimed untimeliness.

Even if Contention 23 were filed technically out of time, there was time -

[32]DTE agreed that the subsurface investigations were safety related or supported safety related information. LBP-14-07, 79 NRC 451, 480 (JA 644) citing DTE's Smith testimony.

several years - to coply with NEPA and draft a legally-supportable EIS.

The ASLB twice warned, but did not order, the NRC Staff to address transmission corridor impacts. When the warnings were ignored, the ASLB, recommended to the Commission that Contention 23 be litigated on the Commission's own motion. The Commission, however, found the factually unsupported mentions of the corridor in the FEIS to be "comprehensive." The NRC's independent responsibilities under NEPA[33] require it to raise environmental issues not raised by a party.

Alternatively, Contention 23 should have been admitted because there were issues of fact as between the ER, DEIS and FEIS treatment of the transmission corridor, including the repeated refusals of the Staff to supplement the EIS and differences in the NEPA documents as to what infrastructure would be replaced in the corridor. A petitioner may file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement that differ significantly

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[33]The Supreme Court imposes upon agencies such as the NRC a continuing duty to adhere to NEPA:

> . . . NEPA . . . require[s] that agencies take a "hard look" at the environmental effects of their planned action, *even after a proposal has received initial approval* . . . . Application of the 'rule of reason' thus turns on the value of the new information to the still-pending decision-making process.

(Emphasis supplied). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989).

from the data or conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2).

Contention 15

The Atomic Energy Act requires that the NRC find there is "reasonable assurance" that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). The "touchstone" of reasonable assurance is "compliance with the Commission's regulations." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 N.R.C. 327, 340 (2007).

Petitioner and the other intervenors produced evidence sufficient to raise legitimate doubt as to whether the plant can be operated safely. They proved there were gaps and complete abdications by DTE Electric Company of its responsibility to commence and supervise a quality assurance function with proper independence of management of the Fermi 3 construction planning effort.

The Commission did not hold DTE to its burden of proof. DTE departed from bright-line industry standards for quality assurance management and oversight without a shred of public scrutiny and secretly proceeded for two years into pre-application and post-application planning without a QA program. The omissions were so stark that under other circumstances DTE would have been required to seek a formal exemption from the NRC's QA regulations.

ARGUMENT

Assignment of Error No. 1: The Commission Erred When It Declined to Approve Contention 23 for *Sua Sponte* Litigation by the Atomic Safety and Licensing Board

The Commission's praise for the Staff's "comprehensive analysis of transmission-corridor impacts throughout" the FEIS suggests that notwithstanding its disclaimer, the Commission was "commenting on the sufficiency of the Staff's review." That conclusion, as revealed in the Statement of Facts, is grossly contradicted by Beyond Nuclear's recitation of multiple glaring omissions of critical information that one would expect to find in an Environmental Impact Statement.

Beyond Nuclear proposes that *sua sponte* review should have been approved by the Nuclear Regulatory Commissioners.

Atomic safety and licensing boards have the power to raise, *sua sponte,* any significant environmental or safety issue in operating license hearings. 10 C.F.R. § 2.340(a); *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Units 1, 2& 3), ALAB-319, 3 NRC 188, 190 (1976). ASLBs have an affirmative responsibility to review materials filed before them to determine whether the parties have previously raised such an issue. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

In an initial decision, the presiding officer, in addition to ruling on the admitted contentions, shall:

> make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, *inter alia*, the provisions of §§ 2.323 and 2.341.

10 C.F.R. § 2.340(a); *Consol. Edison Co. of N.Y., Inc*. (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-85-8, 21 NRC 516, 519 (1985).

The Board's independent responsibilities under NEPA[34] may require it to raise environmental issues not raised by a party. *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). The ASLB's task encompasses the review of claimed NEPA compliance by the NRC

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[34]The Supreme Court imposes upon agencies such as the NRC a continuing duty to adhere to NEPA:

> . . . NEPA . . . require[s] that agencies take a "hard look" at the environmental effects of their planned action, *even after a proposal has received initial approval* . . . . Application of the 'rule of reason' thus turns on the value of the new information to the still-pending decision-making process.

(Emphasis supplied). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989).

Staff in NEPA documents.[35] The ASLB has this prerogative especially where an issue is excluded from the proceeding because it has not been properly raised, rather than because it has been rejected on its merits. *Cleveland Elec. Illuminating Co., supra*. The power should be exercised sparingly and only in extraordinary circumstances, where the Board concludes that a serious safety or environmental issue remains. *Tex. Util. Generating Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-24, 14 NRC 614, 615 (1981); *Carolina Power & Light Co.* (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985).

A. Exclusion Of Transmission Corridor Analysis From FEIS Comprises A 'Serious Matter' for Sua Sponte *Consideration*

The dearth of NEPA scrutiny of the anticipated environmental effects from construction activity induced by Fermi 3 in the transmission corridor - detailed in the Statement of Facts, *infra* - is strong evidence that the requisite "hard look" required by NEPA is missing from the Fermi 3 FEIS. "To comply with NEPA's 'hard look' requirement, an agency must adequately identify and evaluate environmental concerns." *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir. 1997). "In order to raise a substantial environmental issue, a party need

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[35]In *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) the Commission stated that "The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications."

not show that the proposed project will have significant adverse impacts. . . . It must show only that the project may have such impacts." *La. Wildlife Fed'n v. York*, 761 F.2d 1044, 1052 (5th Cir. 1985).

By any measure, the expected disruptions which construction of Fermi 3 would induce in the transmission corridor themselves would comprise "major federal action" under NEPA. An EIS is required for "major Federal actions significantly affecting the quality of the human environment." NEPA, 42 U.S.C. § 4332(2)(c). The test for "major Federal action" and "significantly affecting" is the criterion of "significance." 40 C.F.R. § 1508.27. The degree of environmental impact (adverse environmental consequences) determines significance.

"Significance" involves "intensity", which (at 40 C.F.R. § 1508.27(b)) "refers to the severity of impact" - *i.e.*, that environmentally negative consequences may occur as the project proceeds. The contemplated erection of new transmission cable towers, or expansion of existing ones, with associated ground clearance of trees and other vegetation, potential construction in wetlands, bulldozing and use of pesticides, all across a 29-mile distance, reflects intense activity with significant adverse physical consequences to the environment.

The concept of "major federal action" encompasses projects which require a federal permit or approval. *Maryland Conservation Council v. Gilchrist,* 808 F.2d

1039, 1042 (4 th Cir. 1987) (need for at least one federal approval renders construction of a highway to be a major federal action). If a federal permit is a prerequisite for a project with expected adverse impacts on the environment, issuance of that permit constitutes "major federal action." *See Jones v. Gordon*, 792 F.2d 821, 827-29 (9th Cir. 1986); *Port of Astoria v. Hodel*, 595 F.2d 467, 478-79 (9th Cir. 1979). For example, the issuance of a permit under § 404 of the Clean Water Act is deemed a "major federal action" under NEPA. It is certainly possible that § 404 would be invoked in relation to some of the construction in the Fermi 3 corridor if wetlands are affected. *See, e.g. , Tillamook County v. U.S. Army Corps of Eng'rs,* 88 F.3d 1140, 1142 (9th Cir. 2002); *Stewart v. Potts,* 996 F.Supp. 668, 672 (S.D. Tex. 1998).

NEPA's twin objectives are to ensure that the federal agency "consider[s] every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in its decision-making process." *Earth Island Inst. v. U.S. Forest Serv*., 442 F.3d 1147, 1153–54 (9th Cir. 2006); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Thus, "NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken*. . . . " (Emphasis supplied). 40 C.F.R. § 1500.1(b).

B. Excluding the Transmission Corridor from EIS Coverage Violates NEPA and Causes Procedural Injury To The Public

The substance of NEPA is to protect against procedural injury to a plaintiff. "[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." NEPA procedures seek to minimize the risk of future harm by "influenc[ing] the decision-making process; [their] aim is to make government officials notice environmental [and other] considerations and take them into account." *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). Cases of procedural injury require "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S.Ct. 1438, 1453 (2007).

Procedural injury occurring by violation of NEPA has a further implication. NEPA's emphasis on "the importance of coherent and comprehensive up-front environmental analysis. . . ensure[s] informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Blue Mtns. Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1216 (9th Cir. 1998). The purpose of NEPA is to ensure that agencies do not make uninformed - as opposed to unwise - decisions. *Robertson v. Methow Valley*

Citizens Council, 490 U.S. 332, 348 (1989).

Beyond Nuclear and its members suffered procedural injury by the Staff's failure to include the adverse, expected transmission corridor environmental effects in the Draft and Final Environmental Impact Statements for Fermi.

The Commission upbraided the ASLB in its ruling (CLI-15-01, JA 539) for improperly attempting, *sua sponte*, to challenge the NRC's Limited Work Authorization Rule, which excludes transmission lines from the construction activities that require NRC approval before being undertaken. "We would not allow a litigant to challenge a rule in an NRC adjudicatory proceeding absent a showing of special circumstances; we likewise will not allow the Board to do the same." *Id.*

The Commission confused its regulatory definition of "construction" with the scope of the Fermi 3 plan for purposes of NEPA review, and consequently allowed segmentation of practically, if not legally, interrelated parts of the larger power plant project. "[W]hen determining the contents of an EA or an EIS, an agency must consider all 'connected actions,' 'cumulative actions,' and 'similar actions.' 40 C.F.R. § 1508.25(a); *see also, e.g.*, *Am. Bird Conservancy, Inc. v. FCC,* 516 F.3d 1027, 1032, 380 U.S.App. D.C. 102 (D.C. Cir. 2008) (reviewing the agency's application of the regulations in its preparation of an EA); *Allison v.*

Dep't of Transp., 908 F.2d 1024, 1031, 285 U.S.App. D.C. 265 (D.C. Cir. 1990) (reviewing the agency's application of the regulations in its preparation of an EIS)." *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, 753 F.3d 1304, 1314 (D.C. Cir. 2014).

The Commission's insistence that the ASLB was raising an improper challenge to a regulation via *sua sponte* review is misplaced. Although the 29-mile transmission corridor construction project does not require NRC approval, that does not change the fact that the corridor is the *sine qua non* of the Fermi 3 power plant plan. The corridor may not thus avoid NEPA scrutiny by exclusion from the NRC's definition of "construction."

Actions taken by the NRC under the Atomic Energy Act and NEPA are subject to review under the Administrative Procedure Act. The Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n,* 869 F.2d 719, 728 (3d Cir.1989). The courts are charged with the "limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97, 76 L.Ed.2d 437 (1983).

"Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons[.]" *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,* 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (internal citation omitted). "[W]e defer to the agency's construction of . . . its own regulation, unless it is plainly erroneous or inconsistent with the regulation." *Beazer East, Inc. v. U.S. E.P.A., Region III,* 963 F.2d 603, 606 (3d Cir.1992).

The NRC abused its discretion when it rejected the Licensing Board's authoritative 60-page findings which recommended, *sua sponte*, adjudication of whether the undocumented and unanalyzed adverse environmental impacts of construction within Fermi's proposed 29-mile transmission corridor should be included in the NEPA compliance for Fermi 3. The Commission repudiated the agency's ultimate responsibility for NEPA compliance by accusing the ASLB of creating a contention supposedly challenging NRC regulations. Scoping for purposes of writing an Environmental Impact Statement looks at the actual interrelated components of the project and ignores the legal firewalls used to delineate the agency's regulatory jurisdiction.

The Commission's rejection of the *sua sponte* recommendation was arbitrary and capricious and must be reversed.

Assignment of Error No. 2: The Commission Erred When It Declined to Treat the NRC Staff's Refusal to Avoid Segmentation of the Transmission Corridor from the Fermi 3 Plant Project as 'New Information' Supporting a Contention

Beyond Nuclear, as an intervenor before the ASLB, timely raised the issue of Contention 23 at the DEIS and, later the FEIS, stages. The intervenors timely brought their motions. At the FEIS stage, they relied on the ASLB's advice to the NRC Staff following DEIS publication to cause the Staff to cover the transmission corridor in the FEIS.

Further, Petitioner demonstrated, following publication of the FEIS, that there was a dispute of fact between the FEIS and the Environmental Report ("ER") over reconfiguration of electrical lines in the corridor and the consequent reuse of existing transmission towers. In the ER, DTE predicted there might be a need to construct additional towers and infrastructure to accommodate Fermi 3 electrical lines. In the FEIS, by contrast, the NRC Staff hinted that no new construction would take place. The contrasting positions taken by DTE and the NRC Staff represented by the different wording in the FEIS should be seen as a response to the ASLB's warning about NEPA compliance following DEIS publication. The FEIS pronouncement about transmission corridor infrastructure is factually unexplained and a departure from earlier predictions, and it supports the argument that Contention 23 should have been admitted.

A. Contention 23 Should Have Been Admitted as a New Contention When the NRC Staff Repudiated the ASLB's Recommendation to Not Segment the Transmission Corridor from the Power Plant

In its 2012 ruling (LBP-12-12) denying admission of Contention 23 at the DEIS stage, the ASLB found that NEPA would be violated by failing to address impacts to the transmission corridor within the DEIS and recommended that it might consider making a *sua sponte* referral to the Commission. LBP-12-12, 75 NRC 742, 776, 780 (JA 390, 394). The ASLB recommendation to the NRC Staff, coupled with the Staff's inaction on the suggestion, constituted "new information" that was "materially different from that previously available" that identified a dispute of law between DTE's Environmental Report ("ER") and the NRC Staff's DEIS which the NRC Staff was strongly "recommended" to cure. The Board's ruling in LBP-12-12 was "materially different information" that the intervenors, including Beyond Nuclear, believed would coerce NEPA compliance regarding the transmission corridor in the FEIS. The Staff's refusals to follow the clear implications of the ASLB's suggestion themselves amount to new information and warrant admission of Contention 23.

The ASLB's recommendations to the Staff supplied the basis for the intervenors' second motion to admit Contention 23 at the FEIS stage, as new, "materially different information" per 10 C.F.R. § 2.309(f)(2)(ii). *Entergy Nuclear*

Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 820 (2005) ("Something obviously is different than nothing. . . ." *Id.).*

B. Different Assertions of Reuse of Transmission Towers in the Corridor from ER to FEIS Created a Dispute of Fact for an Admissible Contention

The intervenors urged that there were disparate assertions concerning the anticipated adverse environmental effects in the transmission corridor as between the ER and the DEIS which created a dispute of fact for an admissible contention. The intervenors resubmitted Contention 23 based on the claimed existence of a dispute of fact among the ER, the DEIS and the FEIS.

In the FEIS (at 2-46) it 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.

In the DEIS, the comparable/analogous statement on this issue was:

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

DEIS at 3-17 (JA 733). And in the Environmental Report (at 3-17) appears this passage:

> The first 18.6 mi of transmission lines (going west and north from Fermi) would be installed alongside the 345-kV lines that are already in

> place (Figure 3-8). By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.

In the ER, DTE stated that placement of additional transmission infrastructure "may be necessary" despite reconfiguration of conductors and use of existing towers. In the DEIS, the NRC Staff said new lines could use existing towers, but that new transmission infrastructure "may be necessary." Then, in the FEIS, the NRC Staff asserted that reconfigured existing conductors may allow for the use of existing transmission infrastructure "without the need for building additional transmission infrastructure." The latter assessment apparently was rendered upon new data not disclosed in the FEIS. There is no explanation of that change of position, and there is a paucity of descriptive information in either the ER or the Environmental Impact Statements about the anticipated transmission lines. So, citing no specifics, the NRC Staff claimed that instead of further disruption within the transmission corridor, there will be less. The Staff's FEIS position on the prospects for construction in the transmission corridor differs from DTE's conclusion in the ER without the provision of any supportive data or other explanation as to how this distinction occurred.

NRC regulations state that a petitioner may, post-Environmental Report, " . . . file new contentions if there are data or conclusions in the NRC draft or final

environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2); *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), LBP-10-24 at 7 (December 28, 2010). "This provision tempers the restrictive effect of the agency's requirement that NEPA contentions be filed based on the ER by allowing petitioners or intervenors to challenge significantly different data or conclusions that appear for the first time in a NRC Staff NEPA document." *Id.* at 7. Notably, "data *or* conclusions" in the FEIS may differ significantly from those in the ER; both need not do so. A contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue (*e.g.*, the need for power) is the same as that in the ER or DEIS, if the FEIS relies on significantly different data than the ER or DEIS to support the determination. The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER. *Id.* at 7.

Also, the provision refers to "conclusions," so even if the FEIS's ultimate conclusion on a particular issue is the same as that in the ER or DEIS, FEIS sub-conclusions might be challenged if they differ significantly from sub-conclusions in the ER or DEIS. *Id.* at 7.

Moreover, if the intervenors fail to show that the FEIS contains new data or conclusions that differ from those in the DEIS, § 2.309(f)(2) allows a new contention to be filed with leave of the presiding officer upon a showing that (i) the information upon which the amended or new contention is based was not previously available; (ii) the information upon which the amended or new contention is based is materially different than information previously available; and (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information. *Id.*

And if the filing of a proposed new contention is not authorized by any provisions of § 2.309(f)(2), then it still may be evaluated under § 2.309(c). Even if a petitioner is unable to show that the NRC Staff's NEPA document differs significantly from the ER, it "may still be able to meet the late filed contention requirements." *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC*, LBP-10-24 at 8, citing *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). Similarly, if a contention based on new information fails to satisfy the three-part test of § 2.309(f)(2)(i)-(iii), it may be evaluated under § 2.309(c). LBP-10-24 at 8.

The inconsistent speculation about reuse of existing transmission corridor towers between the ER and the FEIS should have comprised the opening for

admission of Contention 23 and it was arbitrary for the ASLB and ultimately the full Commission to reject the inconsistencies as a ground to admit Contention 23.

Under the Administrative Procedure Act, the Court may "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n,* 869 F.2d 719, 728 (3d Cir.1989). The courts must review agency action "to determine whether the agency conformed with controlling statutes." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). There were substantial procedural reasons here, and the Commission's ruling against Beyond Nuclear should be reversed.

Assignment of Error No. 3: The Commission Erred When It Declined to Reverse the ASLB's Finding of 'Reasonable Assurance' of the Adequacy of the Fermi 3 Quality Assurance Program

The intervenors challenged the ASLB's ruling on the merits of Contention 15A/B in favor of DTE Electric Company. The Commission denied their Petition for Review.

The Commission will grant a petition for review discretionarily, 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 deemed to be in the public interest. 10 C.F.R. § 2.341(b)(4)(i)-(v).

The ASLB recognized that the effect of a pattern of QA violations is not necessarily to show that particular safety-related information is false, but to erode the confidence the NRC can reasonably have in, and create substantial uncertainty about the quality of, the work that is tainted by the alleged QA violations. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-763, 19 NRC 571, 576 (1984) (cited by the Fermi 3 ASLB in LBP-10-09, 71 NRC 493, 519 (2010) (JA 625). This is the heart of the "reasonable assurance" decision the NRC must make. The Atomic Energy Act and NRC implementing regulations require a finding of "reasonable assurance" that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). The reasonable assurance finding is not equal to "beyond a reasonable doubt," *North Anna Envtl. Coal. v. NRC,* 533

F.2d 655, 667-68 (D.C. Cir. 1976). The "touchstone" of reasonable assurance is "compliance with the Commission's regulations." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 N.R.C. 327, 340 (2007).

If there is evidence "sufficient to raise legitimate doubt as to whether the plant can be operated safely," a ruling in favor of the applicant may be denied. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344-1345 (1983). This standard applies also to an applicant's design quality assurance program. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F.2d 26, 29 (1986) .

In ruling on Beyond Nuclear's Petition for Review, the Commission asserted that it was loathe to disturb the findings made by the ASLB and that there were competing views of the evidence such that it could accept the ASLB's findings. CLI-14-10, 80 NRC 157, 162-163 (JA 525-526). In so doing, the Commission ratified the ASLB's refusal to consider undisputed evidence which should have seriously eroded confidence in the Fermi 3 QA effort.

The ASLB considered the principal factual dispute to be whether DTE in

fact retained responsibility for the QA program during the pre-application period of 2007-2008. Considerable evidence demonstrated that the "responsibility" retained by DTE was produced only by hindsight. The intervenors' evidence conclusively showed that there was no discernible DTE QA program in place at any level of staffing during the 2007-08 period, or that if there were one, it did not comply with Appendix B, and that there was poor institutional understanding on DTE's part of the role of QA in the Fermi 3 preparation.

A. Undisputed Evidence of Historical Lack of QA Program

The ASLB ignored the testimony of intervenors' expert that "after the geotechnical work had already begun in April 2007, Black & Veatch attempted to backfill the certifications of their non-nuclear contractors." It gave no weight to the undisputed fact (Exh. INTS 068 at 18 (JA 718)) of "a three-month long gap from April 2009 through June 20, 2009 during which Detroit Edison admits that it had no personnel in charge of Quality Assurance" and intervenors' expert's conclusion that the "lack of any Detroit Edison personnel assigned to the Fermi Unit 3 design and engineering process, makes any and all quality assurance work performed during this three-month period suspect as well as not in compliance with federal law." *Id.* Moreover, in its DTE May 10, 2010 request for additional information (RAI) responses to the Staff, DTE admitted that for thirteen months,

from March of 2008 to April of 2009, its QA Department actually reported directly to the Director of Nuclear Development (a conflict of interest for the Director), and from April 2009 to June 2009, QA reported to no one in any chain of command. (Exh. INTS 068 at 20, JA 719). Intervenors' expert also attested to an email evidencing the specific intention by a DTE executive, Peter Smith, a DTE witness, to evade QA oversight. A March 22, 2007 email stated that Smith "thinks he can sidestep the QA audit . . . ." (Exh. INTS 068 at 25-26 (JA 720-721)).

The Board noted, but attributed little significance to, evidence that the alternative QA management structure it blessed had, in fact, not worked. At LBP-14-07, 79 NRC 451, 484 (JA 648), the Board observes that "DTE did not dispute revised Violation A, acknowledging that it 'failed to sufficiently document a review of the Black & Veatch, Overland Park, Kansas (B&V) 10 CFR 50 Appendix B QA program, which would typically include the basis for qualifying the B&V QA program, thereby assuring that B&V was qualified to perform safety-related Fermi 3 COL activities.'" Despite its finding that theoretically QA could be properly managed during the pre-application period in 2007-08 by means of a contractor with a qualifying QA plan, the Board ignored proof that it didn't work out for the Fermi 3 Licensing project. DTE got around to reviewing the paperwork to qualify the B&V's 2008 working arrangements and work product only in 2009,

when DTE had finally established some in-house functioning QA staff.

NRC quality assurance regulations at 10 C.F.R. Part 50, Apx. B, II, require that "[t]he applicant shall regularly review the status and adequacy of the quality assurance program." From this, it is obvious that DTE may not contract away all of its direct responsibility. In the face of an incoherent, occasionally-unstaffed QA program, where the executive staff on at least one occasion had to ask B&V for advice on how to conduct an assessment of QA performance, the Licensing Board did not hold DTE to its burden of proof and the Commission improperly affirmed the ruling. "Where the meaning of a regulation is clear, the regulatory language is conclusive, and the Board may not disregard the letter of the regulation; it must enforce the regulation as written." *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995), *rev'd on other grounds*, CLI-96-13, 44 NRC 315 (1996).

The ASLB's conclusion that DTE was not required to have an in-house Appendix B QA program throughout the pre-application period is so unprecedented that it should have been the subject of a formal exemption. The NRC and trade organization Nuclear Energy Institute ("NEI") have worked very closely to develop and agree upon a template for nuclear COL licensees. The standard template on which the Fermi 3 Quality Assurance Program Description ("QAPD")

is based, derives from NEI-06-14A, "Quality Assurance Program Description" (Index 840) established for use by COL applicants as a means to implement the applicable requirements and industry standards for QA programs. The NEI template, like the Fermi 3 QAPD, is based on the standards of NQA-1-1994. The NRC Staff has endorsed the NEI template.[36] The template supports the point that in the pre-application period an in-house QA capability was supposed to be staffed by DTE employees, and to be operable.

The intervenors' expert noted that in "Fermi 3 Licensing Project" dated December 8, 2009 (Exh. INTS 007 (JA 719)), DTE's decision to subcontract its QA function was a deviation from the NEI template because the NRC was not notified. This deviation from the NEI template added to the confusion within the Fermi 3 project organization. When it was finally identified by the NRC in mid-2009, this problem triggered the Notice of Violation (NOV), Exh. INTS 001 (JA 701-703). DTE has never sought, nor attained, an exemption from the applicability of the NEI's QAPD template, NEI-06-14A, Rev. 5. The formal procedure for attaining an exemption is enumerated in 10 C.F.R. § 50.12.[37] DTE has never been

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[36]NEI-06-14A, Revision 7, was issued in August 2010 (Exh. DTE000091, Index 842).

[37]§ 50.12 Specific exemptions.
(a) The Commission may, upon application by any interested person or upon

called to account for any "special circumstances" to justify a departure from the rule; it simply made its QA contractual arrangements. Granting of an exemption requires the presence of exceptional circumstances. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154, 1156 n.3 (1984). DTE short-circuited the process by contracting out to B&V and daring the NRC to do something about it. Were the formal process of obtaining an exemption

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its own initiative, grant exemptions from the requirements of the regulations of this part, which are--

(1) Authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security.

(2) The Commission will not consider granting an exemption unless special circumstances are present. Special circumstances are present whenever--

(i) Application of the regulation in the particular circumstances conflicts with other rules or requirements of the Commission; or

(ii) Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule; or

(iii) Compliance would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulation was adopted, or that are significantly in excess of those incurred by others similarly situated; or

(iv) The exemption would result in benefit to the public health and safety that compensates for any decrease in safety that may result from the grant of the exemption; or

(v) The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation; or

(vi) There is present any other material circumstance not considered when the regulation was adopted for which it would be in the public interest to grant an exemption. If such condition is relied on exclusively for satisfying paragraph (a)(2) of this section, the exemption may not be granted until the Executive Director for Operations has consulted with the Commission.

followed, DTE would have had to undergo a public procedure. Hobbs Act review is available in at least the Sixth and District of Columbia circuit courts, where a challenge involving Fermi might be taken. See *Kelley v. Selin,* 42 F.3d 1501 (6th Cir. 1995); *Shoreham-Wading River Cent. School Dist. v. NRC*, 931 F.2d 102 (D.C. Cir. 1991).

B. The Absence of 'Reasonable Assurance'

Indisputably, DTE delegated its QA function, wholesale, to B&V during the 2007-2008 time period and at certain points during that stretch, there were no staff quality assurance professionals whatsoever at DTE. For the ASLB to conclude, and for the Commission to have affirmed, that there were no egregious errors in the COL application or the design work performed pursuant to it, is specious. Notably, the NRC Staff has no regulatory control over quality assurance services performed by DTE's contractors, but only over DTE itself.

The array of evidence against a finding of reasonable assurance is daunting, from the confusion within DTE of the company's role in QA, to inconsistent organization chart status, to the unsupervised determination of features deemed safety-significant by B&V, down to the recriminations of the September 2010 slideshow and the failure by DTE to recognize QA's importance in the planning the a complex and inherently dangerous power plant; all of this warrants reversal

of the ASLB's decision. The public can believe in the regularity and reliability of various material and abstract parts of a nuclear power plant construction project only because of the presence of a competently-run QA program as the source of that credence.

Petitioners' evidence is "sufficient to raise legitimate doubt as to whether the plant can be operated safely," and consequently, a ruling in their favor is warranted. There being no "reasonable assurance" that ongoing quality assurance efforts for Fermi 3 are anything but hopelessly tainted by the Fermi 3 Licensing Project'sub-standard process, the Court should reverse the Commission's dismissal of Contention 15.

CONCLUSION

Petitioner Beyond Nuclear has demonstrated ample evidence and legal reasoning which require reversal of the Nuclear Regulatory Commission's final determinations of Contentions 15 A/B and Contention 23.

Petitioner prays the Court reverse the NRC and afford it the following relief:

- To vacate the Combined Operating License and associated Record of Decision for the Fermi Nuclear Power Plant, Unit 3;
- To reverse and remand Contention 23 to the Nuclear Regulatory Commission for further proceedings concerning preparation of supplemental Draft

and Final Environmental Statements to address the exclusion of the transmission corridor from NEPA consideration;

- To enjoin preconstruction activities involving the proposed Fermi 3 transmission corridor and the construction of the Fermi Nuclear Power Plant, Unit 3 pending a determination of appropriate NEPA compliance as to the transmission corridor, in order to avoid pre-commitment or bias of the determination of adequacy of NEPA compliance;

- Reversal of the Commission's decision on Quality Assurance and remand to the agency for a determination of remedial actions that can be taken to establish a record demonstrating reasonable assurance that quality concerns will be properly addressed in the coming phases of planning and construction of Fermi 3; and

- To grant Petitioner and its members such other and further relief as may be just and appropriate in the premises.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AS TO TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Wordperfect X4 word processing program and Times New Roman, 14 pt. type.

/s/ Terry J. Lodge
Counsel for Appellants

March 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Final Opening Brief of Petitioner Beyond Nuclear" was deposited by me this 1st day of March, 2017 with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered with the CM/ECF system and received service through that method.

/s/ Terry J. Lodge
Terry J. Lodge
Counsel for Petitioners

ADDENDUM

NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S. C. § 4332 - Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and

shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

ATOMIC ENERGY ACT

42 U.S.C. § 2133(d)
(d) Limitations

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. No license may be issued to an alien or any any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

42 U.S.C. § 2232(a)
(a) Contents and form

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may

determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license. In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued. The Commission may at any time after the filing of the original application, and before the expiration of the license, require further written statements in order to enable the Commission to determine whether the application should be granted or denied or whether a license should be modified or revoked. All applications and statements shall be signed by the applicant or licensee. Applications for, and statements made in connection with, licenses under sections 2133 and 2134 of this title shall be made under oath or affirmation. The Commission may require any other applications or statements to be made under oath or affirmation.

NUCLEAR REGULATORY COMMISSION REGULATION

10 C.F.R. § 50.57. Issuance of operating license.

(a) Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51, upon finding that:

(1) Construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and

(2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and

(3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and

(4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the

regulations in this chapter. However, no finding of financial qualification is necessary for an electric utility applicant for an operating license for a utilization facility of the type described in § 50.21(b) or § 50.22.

(5) The applicable provisions of Part 140 of this chapter have been satisfied; and

(6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.

(b) Each operating license will include appropriate provisions with respect to any uncompleted items of construction and such limitations or conditions as are required to assure that operation during the period of the completion of such items will not endanger public health and safety.

(c) An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section make a motion in writing, under this paragraph (c), for an operating license authorizing low-power testing (operation at not more than 1 percent of full power for the purpose of testing the facility), and further operations short of full power operation. Action on such a motion by the presiding officer shall be taken with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized. Before taking any action on such a motion that any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) of this section as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized. The Director of Nuclear Reactor Regulation will make findings on all other matters specified in paragraph (a) of this section. If no party opposes the motion, the presiding officer will issue an order in accordance with § 2.319(p) authorizing the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in paragraph (a) of this section and to issue a license for the requested operation.