

**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 REPLY BRIEF OF PETITIONER BEYOND NUCLEAR

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PETITIONER’S CIRCUIT RULE 28(a)(7) CLAIM TO LEGAL STANDING

The Federal Respondents stated in their Brief that they have no objection to the legal standing of Beyond Nuclear to litigate this appeal, despite having not complied with Circuit Rule 28(a)(7) because Petitioner’s brief did not set forth a basis for its claim of standing. Fed. Resp. Br. 2-3. Petitioners thank the Federal Respondents for their courtesy, but to correct an inadvertent mistake, Petitioner Beyond Nuclear asserts that it satisfies the Article III standing requirements for membership organizations established in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) (organization has standing where its members would have standing to sue in their own right, the interests in the case are germane to the organization’s institutional interests, and the case does not require the participation of individual members).

First, as demonstrated by the standing declaration of Colin Keith Gunter (Standing Addendum Exh. 1), the Petitioner represents an individual member who satisfies the three elements of standing—injury-in-fact, causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). Mr. Gunter lives within a 50-mile radius¹ of the Fermi 3

¹The NRC uses a 50-mile “proximity presumption” as a shortcut for determining standing. The presumption rests on the NRC finding, in construction permit and operating license cases, that persons living within the roughly 50-mile

nuclear reactor site and is concerned about NRC's failure to consider the environmental impacts of the proposed plant, its planned 29-mile transmission corridor, and the problems with Quality Assurance dating to 2007-2008. *See, e.g.*, Declaration of Colin Keith Gunter, ¶¶ 5-7 (Addendum Exh. 1). The NRC's failure to require an adequate Quality Assurance program and Environmental Impact Statement addressing the 29-mile Transmission Corridor constitutes an injury to Mr. Gunter's interests. *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 567 (D.C. Cir. 2007). If NRC were required to fully consider the NRC's issuance of the Combined Operating License and Record of Decision, and more specifically, to require a comprehensive quality assurance program at DTE for Fermi 3 and to undertake an Environmental Impact Statement for the 29-mile transmission line corridor associated with Fermi 3, Mr. Gunter's concerns would be adequately remedied. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7 (1992) (redressability requirement relaxed for procedural injuries). Accordingly, Mr. Gunter has standing to sue in his own right.

Second, this case involves interests germane to Petitioner Beyond Nuclear's

radius of the facility "face a realistic threat of harm" if a release from the facility of radioactive material were to occur. *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC __ (Oct. 13, 2009) (slip op.at 6-7).

institutional interests. Petitioner Beyond Nuclear respectively requests the Court to take judicial notice of the fact that Petitioner was an active public interest intervenor in this matter when it was litigated before the agency. The record before the agency reveals that Beyond Nuclear co-sponsored some 26 separate contentions and resubmissions of several contentions. Beyond Nuclear also filed public comments on the Draft Environmental Impact Statement.

Finally, none of the claims asserted here, nor the relief requested, requires the individual participation of Colin Keith Gunter in the suit. Accordingly, Petitioner Beyond Nuclear has standing.

ARGUMENT

I. COMBINED REPLY TO BRIEF OF RESPONDENTS U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES AND ANSWERING BRIEF FOR INTERVENOR-RESPONDENT DTE ELECTRIC COMPANY ON TRANSMISSION CORRIDOR AND FEIS SUPPLEMENTATION CONTROVERSIES

A. Introduction

The Nuclear Regulatory Commission Staff and DTE Energy assert two main procedural obstacles to inclusion of the 29-mile-long Transmission Corridor (“TC”) in the Draft and Final Environmental Impact Statements (“DEIS” and FEIS”) for the Fermi 3 nuclear power plant. These supposed obstacles are: untimely filing of the TC contention per 10 C.F.R. § 2.309(c)(1); and NRC

regulation changes in 2007 that reclassified transmission corridors under “site preparation” and “preconstruction activity” and therefore beyond the Nuclear Regulatory Commission’s (NRC’s) regulatory reach. *See* Initial Brief of Federal Respondents (“Fed. Resp. Br.”) at 3, 7 (Petitioner raised issue “impermissibly late”); at 9 (transmission corridor is “‘preconstruction activity’ and thus not designated as a ‘connected action’”). DTE Electric Company cites 10 C.F.R. § 50.10(a)(2)(vii) and (c) to “exclud[e] transmission lines from the requirement for a combined license” and maintains that the NRC “will evaluate impacts of activities outside of NRC’s jurisdiction, such as offsite transmission lines, as part of its cumulative impacts analysis under NEPA,” according to NRC comments accompanying publication of the Limited Work Authorization (“LWA”) final rule at 72 Fed. Reg. 57,416, 57,421, 57,443 (Oct. 9, 2007). Answering Brief for Intervenor-Respondent DTE Electric Company (“DTE Br.”) at 7.

These regulations comprise superficial barriers which must yield to fulfillment of the Congressional intent underlying the National Environmental Policy Act (“NEPA”), that NEPA compliance must occur “to the fullest extent possible,” 42 U.S.C. § 4332. Moreover, the NRC’s regulatory segmentation policy must be reversed to include Fermi 3’s TC within the scope of the FEIS. Internal agency regulations cannot absolve the lead federal agency of the unfettered

responsibility of correcting an obvious deficiency in NEPA compliance. The NRC's decision to segment transmission line systems from atomic power plant projects for management or ownership reasons does not mean that transmission corridors and their environmental impacts may be segmented from analysis for direct impacts within the EIS. DTE's insistence that "NRC provided all of the input opportunities required by NEPA and the Atomic Energy Act. Nothing more was required" (DTE Br. 2) is contradicted by precedent.

B. Petitioner Anticipated and Tried to Avert NRC NEPA Violations

The Combined Operating License process for Fermi 3 spanned more than six years. Yet Petitioner Beyond Nuclear ("Beyond Nuclear") and associated intervenors were expected, as of March 2009 when they first moved to intervene, to predict that the NRC Staff would not follow the injunctions of bright-line NEPA law and conduct an Environmental Impact Statement (EIS) on the entire Fermi 3 project which included the plant complex on the shores of Lake Erie and the 29-mile-long Transmission Corridor planned to connect Fermi 3 to the national electrical grid.

Beyond Nuclear and others objected when the Staff failed to follow NEPA at the DEIS stage. Although Petitioner's motion to add a new contention was rejected, the Atomic Safety and Licensing Board ("ASLB") warned the NRC Staff

that “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.” “Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions),” LBP-12-12, 75 NRC 742, 779 (2012) (JA 393).

Left without a remedy, Beyond Nuclear and the other intervenors watched and waited, relying on the NRC Staff to follow the ASLB recommendation to include the TC. But with the publication of the FEIS, the Staff again declined to include the TC’s direct expected impacts in the scope of the document.² Beyond Nuclear again moved for a contention to correct the deficiency and was rebuked by the ASLB. But the Licensing Board requested permission from the Commission to take up the matter of compliance with NEPA . *See* Memorandum (Determining

²DTE excuses the Staff by saying, “Not knowing exactly what would be built or where, NRC necessarily made reasonable judgments concerning upper and lower bounds of environmental impacts using the best available information.” DTE Br. 2. DTE also offers the diversionary observation that “The NRC conducted a complete review of the environmental impact of transmission lines, *constrained only by the scope of presently available information about transmission line corridors.*” DTE Br. 17 (Emphasis added).

The NRC Staff insists that “because ITCTransmission had not announced the final route for the offsite corridor, it could only describe impacts and mitigation associated with the corridor based upon publicly available information and reasonable assumptions regarding the configuration likely to be used for the corridor.” Fed. Resp. Br. 10-11.

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 (2014) (JA 652-688), which was subsequently denied.

And now, at the brink of 2017, "DTE has not even planned the start of construction for Fermi 3, much less begun construction, at this time," (DTE. Br. 17), and the TC environmental impacts analysis is still incomplete.

Beyond Nuclear argued in its first brief that the NRC is legally obliged as the lead agency and permitting authority to comply fully with NEPA, irrespective of whether a litigant has brought the issue of NEPA noncompliance to the attention of the agency in a timely way. Opening Brief of Petitioner at 33 ("Petitioner's Br."). Beyond Nuclear argued further that "[t]he Board's independent responsibilities under NEPA 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). *Id.* at 38. This discretion, Petitioner urged, is part of the continuing obligation of the agency which persists after completion of the EIS to "take a 'hard look' at the environmental effects of their planned action, *even after a proposal has received initial approval*" (Emphasis added). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989).

In response, DTE cites to internal NRC guidance which urges the Staff where “impact information may be limited,” to go with whatever data it has. DTE Br. 17. DTE further alleges that the internal NRC guidance “is consistent with” 40 C.F.R. § 1502.22, a Council on Environmental Quality (“CEQ”) NEPA regulation which encourages FEIS drafting which is “based upon theoretical approaches or research methods generally accepted in the scientific community.” But the CEQ regulation is audaciously quoted out of context; before the agency can take up “theoretical approaches” (§ 1502.22(b)(1)), there must be a showing that “the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known. . . .” 40 C.F.R. § 1502.22(b). DTE produced no evidence that the determination of the precise route of transmission lines, getting land surveys, undertaking interagency consultations, and conducting the engineering work for this large-scale infrastructure project cannot be obtained or that the costs of doing so are “exorbitant.” The utility simply repeats that *ITC Transmission* is not owned by DTE and therefore is uncontrollable, without showing any genuine proof of that. Moreover, NRC failed to provide in the FEIS the explanation required by § 1502.22. The Staff did not show why it must substitute “theoretical approaches” for precise information about routing and environmental impacts, to-

wit:

([T]he agency shall include within the environmental impact statement:)

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

If §1502.22 was supposed to save the NRC from the multiple factual voids in the FEIS by transforming them into "theories," it failed of its purpose. DTE's excuse-making is diversionary and unreflective of the actual standards which govern the content of Environmental Impact Statements.

First, environmental information used by agencies in their NEPA decisionmaking is expected to "be of high quality." (40 C.F.R. § 1500.1(b)).³

Second, NRC guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations. *International Uranium (USA) Corp.*, CLI-00-1, 51 NRC 9, 19 (2000); *Southern Nuclear*

³Also, "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b).

Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3 65 NRC 237, 254 (2007). The NRC Staff did not properly complete the TC parts of the FEIS when it relied on an internal guidance to justify the fundamental voids of information appearing there. Guidance documents provide no excuse for avoiding the NRC's responsibility to adhere to the National Environmental Policy Act.

Third, the NRC's LWA regulations allowing transmission corridors to be segmented from the power plant project cannot relieve the NRC Staff from compiling an EIS which includes the direct environmental impacts of the TC within the EIS. The Atomic Energy Act does not transcend NEPA compliance. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-30 (3rd Cir. 1989) (Defendants may not rely on a finding of adequate protection of public health and safety under section 182(a) of the Atomic Energy Act to preclude the need for further consideration under NEPA). This is because the NRC must comply with NEPA "to the fullest extent, unless there is a clear conflict of *statutory authority*." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original).

The ASLB's memorandum supporting *sua sponte* referral explained this doctrine. 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 (2014) (JA 652-688).

In it, the ASLB observed (*footnotes are ASLB's*) as follows:

But an agency's narrowed construction of its statutory authority, as distinct from an express prohibition by Congress, may not be used to limit the agency's obligations under NEPA.⁴ 'NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply 'to the fullest extent possible.'⁵ 'The Supreme Court has explained that this statutory directive was 'neither accidental nor hyperbolic.'⁶ Thus, courts have held that NEPA obligations supplement existing statutory authority and 'must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.'⁷ In short, absent clear conflict an agency cannot interpret its way out of its NEPA responsibilities.

(Emphasis in original) (JA 667-668).

⁴*Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (distinguishing agency NEPA responsibilities in situations where "an agency has 'no ability' because of lack of 'statutory authority' to address the impact" with situations where an agency "is only constrained by its own regulation from considering impacts").

⁵*Ctr. for Biological Diversity*, 538 F.3d at 1213 (quoting *Forelaws on Bd. v. Johnson*, 743 F.2d 677, 683 (9th Cir.1985)). See also *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) (quoting House and Senate Conferees, who inserted the "fullest extent possible" language into NEPA, to say that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance").

⁶*Flint Ridge Dev. Co.*, 426 U.S. at 787.

⁷*Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Since the NRC “possesses the power to act on whatever information might be contained in an EIS” about the Transmission Corridor (quoting *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008)--such as to deny permission for it to be used--the TC must be included within the EIS. The 2007 LWA regulation change at 10 C.F.R. § 50.10(a)(2)(vii) and (c) was promulgated under the Atomic Energy Act. *See* 72 Fed. Reg. 57,416. Because NEPA does not conflict with the AEA, *Limerick Ecology Action v. NRC*, 869 F.2d at 729-30, the NRC must fully comply with NEPA and that means it must include the Corridor’s direct impacts in the FEIS.

Otherwise, the NRC has not accomplished the “hard look” required to be taken of potential environmental consequences by preparing an EIS prior to any “major Federal action[] significantly affecting the quality of the human environment.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). “[A]n agency takes a sufficient hard look when it obtains opinions from its own experts, *obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised.*” *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (emphasis added). The “hard look” undisputably did not happen in this case. The Fermi 3 FEIS treatment of the TC is loaded with mentions of missing

consultations about threatened and endangered species and their critical habitats, nondisclosure of the precise routing of the transmission lines, nonidentification of specific wetland and water course involvement and damage, uncertainty about the expanded footprint from infrastructure transmission equipment, imprecise plans for ground clearance and long-term herbicide usage, and missing cultural and historical surveys.

DTE not only has no evidence to rebut Petitioner's showing, but agrees to the seriously incomplete information. Neither the NRC (as author of the NEPA document) nor DTE before it (as author of the underlying Environmental Report) have "examined the relevant data," nor have they "articulated an adequate explanation for its action." *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992). It is not an adequate explanation for inaction for the NRC and DTE to hide behind claimed procedural failings of the Petitioner and other intervenors. NEPA places an obligation directly upon the agency to comply with NEPA in these circumstances, which cannot be dislodged by sub-statutory procedural regulations.

C. The NRC's Mandatory Hearing Was Used to Unveil a Supplemental FEIS From Which All Public Participation Was Precluded

At Fed. Resp. Br. 21-22, the NRC Staff explains that the Commission undertook a remarkable reversal of its long-held legal position that the direct

environmental impacts within the TC are excluded from consideration in the DEIS and FEIS. The Staff states that despite the fact that “building transmission lines is not within NRC’s regulatory authority,” that the U.S. Army Corps of Engineers, as a cooperating agency in Fermi Unit 3’s NEPA review, “considered [transmission corridor impacts] to be within the direct impacts of the Fermi Unit 3 project.”

Consequently, the NRC staff supposedly then considered the direct impacts of the proposed action. *Id.* at 21. But as of February 4, 2015 when the mandatory hearing was convened by the Commission, ITC *Transmission* as owner of the project still had not proposed where the towers and lines would be located, so the Commission deemed the Staff analysis “the best information available.” (CLI-15-13, 81 NRC 555, 584 (2015) (JA 572).

By changing its view to including the poorly-documented impacts within the TC as direct and not merely cumulative impacts at the mandatory hearing, the Commission undertook to supplement the FEIS. The public is expressly forbidden from participation in the mandatory hearing.⁸ Yet the Commission reversed itself

⁸“The mandatory hearing, which is required by section 189a of the AEA, does not involve public participation. . . .”. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11 at 4, fn. 17 (April 16, 2012); *see also Exelon Generation Co, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 49 (2005) (“The scope of the Intervenors’ participation in adjudications is limited to their admitted contentions, *i.e.*, they are barred from participating in the uncontested portion of the hearing. Any other

on a major NEPA sticking point and then proceeded to approve the Supplemental FEIS without any prior notice to the public, circulation of the supplemented document to other federal agencies for comment as required by NEPA, nor notification and opportunity extended to the public to comment. 10 C.F.R. § 51.72 (supplemental EIS to be prepared and noticed in the same manner as draft EIS); 10 C.F.R. § 51.73 (request for public comments required on “any supplement” to an EIS); 10 C.F.R. § 51.74 (requires circulation of supplemental EIS to federal agencies and notification via news releases to media of availability for comment and place for obtaining or inspecting a draft environmental impact statement supplement).

And the “best information available” has kept accruing even after the Combined Operating License was issued. An April 2015 Supplemental Biological Assessment reveals that the Northern Long-Eared Bat (*Myotis septentrionalis*), a candidate for endangered status under the Endangered Species Act, was listed as

result would contravene the objectives of our ‘contention’ requirements”).

Indeed, the NRC Staff maintains (Resp. Br. 2, fn. 8) that Beyond Nuclear may not contest the findings in CLI-15-13, 81 NRC 555 (2015), which is the Commission’s final order granting the Fermi 3 Combined Operating License because “Beyond Nuclear was not a ‘party,’ for Hobbs Act purposes, to CLI-15-13 because CLI-15-13 documents the Commission’s final decision on the ‘mandatory’ hearing (i.e., the uncontested portion of the licensing proceeding) for Fermi Unit 3, and participation in mandatory hearings is limited to the license applicant and the NRC staff.”

threatened on April 2, 2015 (80 FR 17973). Critical habitat for the species has not yet been formally proposed within the Transmission Corridor because the potential transmission line corridor has not been surveyed, but “It is likely . . . that suitable roosting habitat occurs within the western 10.8-mi segment of the potential corridor.” Assessment at 17, 19 (Index 1092).

Such significant new information has direct implications for the development of the Transmission Corridor’s industrial power lines, the clearance of vegetation, the disruption of water resources, eradication or damage to architectural or historical resources, and more. It represents serious change warranting treatment as a Supplemental FEIS. But the public was completely barred from participation in it.

Perhaps the Commission’s act of supplementing the FEIS was undertaken to establish a defense against Beyond Nuclear’s evidence of missing NEPA compliance. In any event, supplementation under circumstances which preclude advance public notice, interagency participation and public comment on the supplementation compounds the procedural harms already caused Petitioner and its members. The Commission’s significant reversal on the scope of the FEIS necessitates reversal and remand to the Commission to follow its established NEPA regulations.

II. COMBINED REPLY TO BRIEF OF RESPONDENTS U.S. NUCLEAR REGULATORY COMMISSION AND UNITED STATES AND ANSWERING BRIEF FOR INTERVENOR-RESPONDENT DTE ELECTRIC COMPANY ON QUALITY ASSURANCE DEFICIENCIES

The evidence on Contention 15 shows that DTE conducted its very first audit of Black & Veatch only in 2009 to the Nuclear Procurement Issues Committee (“NUPIC”) only *after* the Combined Operating License Application has been submitted by DTE on September 18, 2008, and that it delegated quality assurance (“QA”) auditing responsibility to NUPIC. This is evidence that DTE did not comply with 10 C.F.R. Part 50 Apx. B. Appendix B(I) states, pertinently:

The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall *retain responsibility* for the quality assurance program. . . . The quality assurance functions are those of (1) assuring that an appropriate quality assurance program is established and effectively executed; and (2) verifying, such as by checking, auditing, and inspecting, that activities affecting the safety-related functions have been correctly performed.

(Emphasis added). DTE did not demonstrate at hearing where it delegated only execution of QA, and not responsibility, to Black & Veatch in the relevant 2007-2008 time period. The utility did not prove that it “retained responsibility” for QA. Nor did DTE verify the “checking, auditing, and inspecting” that it ostensibly performed prior to reviewing NUPIC’s reports for the first time in 2009.

DTE not only did not “retain responsibility,” it “delegated” it only in

retrospect. The question of whether DTE was allowed to have either an in-house, or a “delegated,” program prior to September 18, 2008 is not the point; DTE had not assumed any quality assurance responsibility *at all* prior to September 18, 2008.

A 1.5 year period with effectively no Applicant oversight of QA raises legitimate doubts and should negate a finding of “reasonable assurance.” Considerable data was collected during that time, on seismic safety, hydrology of the area, and geology of the site.. None of that data, so foundational for Fermi 3, literally, is quality assured. Yet DTE and the NRC Staff claim that there is “substantial evidence” to justify the Commission’s conclusion.

Conceptually, however, “substantial evidence” does not command so exalted a place in the hierarchy of proofs within the NRC as the term might suggest. Generally, ASLB findings may be rejected or modified if, after giving the Licensing Board’s decision the probative force it intrinsically commands, the record compels a different result. *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 811 (1986); *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). In fact, where the record would fairly sustain a result deemed “preferable” by the agency

to the one selected by the ASLB, the Commission may substitute its judgment for that of ASLB. *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-367, 5 NRC 92 (1977); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 402-405 (1976). “Substantial evidence” has an entirely different meaning outside the NRC’s quasi-judicial atmosphere. Because it cannot be reasonably assured that the Commission’s ruling is anything but expedient, in light of the considerable evidence of noncompliance with Appendix B, the Court should reverse and remand the Quality Assurance finding.

Respectfully submitted,

/s/ Terry J. Lodge

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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 4,324 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 “Opening Brief of Petitioners” 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

Exhibit 1, Declaration of Colin Keith Gunter

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

Beyond Nuclear, Inc.,)	Case No. 15-1173
)	
Petitioner,)	
)	
-vs-)	
)	
U.S. Nuclear Regulatory Commission)	
and United States of America,)	
)	
Respondents,)	
)	
and)	
)	
DTE Electric Co.,)	
)	
Intervenor.)	

DECLARATION OF COLAN KEITH GUNTER

Under penalty of perjury, I, Colan Keith Gunter, hereby declare as follows:

1. I make this declaration of my own personal knowledge. If called to testify as a witness, I could and would testify competently regarding its contents.

2. I am a current member of Beyond Nuclear, Inc. (“Beyond Nuclear”). I agree with Beyond Nuclear’s mission of advocacy against commercial nuclear power and in favor of long-term reliance on sustainable energy alternatives, and I believe my health and well-being depend upon the health of the environment in the region where I live. I have authorized Beyond Nuclear to pursue this lawsuit seeking review by the Court of Appeals of certain adjudicated and other adversary

decisions rendered by the Nuclear Regulatory Commission in administrative litigation concerning the Combined Operating License Application (“COLA”) for the proposed Fermi 3 nuclear power plant in Monroe County, Michigan. Intervenor DTE Electric Company is the protagonist of the COLA.

3. I have been a member of Beyond Nuclear since 2007, and as a member, my interests have been continuously represented by Beyond Nuclear since 2009 in a formal public intervention against the Fermi 3 COLA.

4. I live at 15784 Whitby, Livonia, Michigan. My home lies within fifty (50) miles of the proposed Fermi 3 nuclear power plant site. Fifty miles is the radius in which the U.S. Nuclear Regulatory Commission (“NRC”) presumes a nuclear reactor accident will cause harm to my health and safety.

5. I am concerned about the health and safety risks posed by the operation of Fermi 3 if it is built and commences operations. I am concerned that the operation of the plant could adversely affect my health and safety and the integrity of the environment in which I live. I am particularly concerned about the risk of the accidental release of radiation into the environment and the potential harm to groundwater and surface waters.

6. In order to ensure that the licensing decision for the proposed Fermi Unit 3 nuclear power plant protects my interests in a safe and healthy environment, I have authorized Beyond Nuclear to represent me in this petition for review of the NRC’s DTE Electric Company; Fermi Unit 3 Combined License and Record of Decision; Issuance, 80 Fed. Reg. 26,302 (May 7, 2015) and determinations made in five (5) underlying opinions issued by the assigned Atomic Safety and Licensing Board or the Commission.

7. If this Court reverses the NRC’s issuance of the Combined Operating License and Record of Decision, my concerns about the licensing of Fermi 3 would be lessened. Further, if this Court requires the NRC to require a comprehensive quality assurance program at DTE for Fermi 3, to undertake an Environmental Impact Statement for the 29-mile transmission line corridor associated with Fermi 3, and to make safety findings and conduct an adequate environmental analysis of the waste storage scheme for Fermi 3, my concerns may be redressed by this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

July 21, 2015
Date

Colan Keith Gunter
Colan Keith Gunter