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)

Now come Intervenors Beyond Nuclear, et al.¹ (hereinafter “Petitioners”), by and through counsel, and in response to the briefing opportunity ordered by the Secretary of the Commission, move for Commission approval of the assigned Atomic Safety and Licensing Board’s recommendation, 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).”

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¹In addition to Beyond Nuclear, the Intervenors-Petitioners include: Citizens for Alternatives to Chemical Contamination, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, Sierra Club (Michigan Chapter), Keith Gunter, Edward McArdle, Henry Newnan, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman.
MEMORANDUM IN SUPPORT

1. Background

On July 7, 2014, the assigned Atomic Safety and Licensing Board issued LBP-14-09, 80 NRC __ (July 7, 2014) (slip op.), “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)” (ML14188C420).

The ASLB had raised a question in its Order of April 30, 2013:

whether Intervenors’ proposed Contention 23, although untimely filed, was appropriate for sua sponte Board review pursuant to 10 C.F.R. § 2.340(b). Contention 23 alleged that the NRC Staff’s Draft and Final Environmental Impact Statements for the Fermi Unit 3 project failed to adequately evaluate the environmental impacts of the new, 29-mile high-voltage transmission line corridor that will be constructed to serve the Project. The ASLB determined that two issues arising from the contention merited sua sponte review:

(1) Whether the building of offsite transmission lines intended solely to serve the new 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.

(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

2“Licensing Board 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),” at 22–24 (Apr. 30, 2013) (unpublished).
requirement.

The ASLB thus requested that the Commission approve the Board’s determination that *sua sponte* review is warranted pursuant to § 2.340(b).

By order dated July 11, 2014, the Commission invited the parties to submit their views in initial briefs due July 28, 2014, with responsive briefs due by August 7, 2014. This Motion is Intervenors’ initial briefing, taken in response to that Order.

**2. Intervenors’ Motion**

Intervenors move the Commission to adopt the ASLB’s legal and factual determinations embodied within LBP-14-09 as the Commission’s order. In support of their motion, they incorporate by reference and reallege all factual and legal arguments and findings contained in LBP-14-09. Intervenors reserve the right, having presented their direct case via this Motion, to reply in further support of it by August 7, 2014.

Intervenors further state the following considerations necessitate approval of the ASLB recommendation for an order requiring the NRC Staff to undertake evaluation of the environmental impacts of the new high-voltage transmission line corridor that will be constructed to serve the Project, either as a Supplement to the Final Environmental Impact Statement for Fermi 3, or as a redraft of the FEIS.

In support of the considerations raised below, Intervenors incorporate by reference their previous filings in this matter, including all iterations of Contention 23 (both as originally filed, and as re-submitted) [Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24, at 41, Beyond Nuclear, *et al.*, (Jan. 11, 2012) (ML12012A278), posted online at http://www.beyondnuclear.org/st
The essential question Intervenors’ Contention 23 asked was who is responsible for enforcing NEPA? DTE had neglected to include any meaningful environmental assessment of the transmission line corridor in its ER. Intervenors assumed incorrectly, as it turned out, that NRC staff would simply rectify this omission from DTE’s ER. However, NRC staff validated DTE’s indifference to NEPA compliance by likewise neglecting to add analysis of the transmission corridor. Once Intervenors realized that the corridor would again be omitted, this time from the NRC staff’s DEIS, they acted by filing Contention 23. Intervenors raised the same contention again following NRC’s issuance of the FEIS, which again neglected the transmission corridor’s environmental impacts, despite the ASLB warning to the Staff when the panel rejected Contention 23 as untimely.

4. *Sua Sponte* Consideration of the Corridor Under NEPA Is Obligatory

Intervenors bring many passages of LBP-14-09 to the Commission’s attention.

At p.7-9/60 [on the .pdf counter], the ASLB’s discussion underscores the fact that the
2007 Limited Work Authorization (LWA) rule change [72 Fed. Reg. at 57426] upended a 35-year-old NRC (and AEC before that) environmental protection policy (1972 to 2007). [37 Fed. Reg. 5745, 5748 (Mar. 21, 1972)]. The NRC’s “aggressive approach to its environmental responsibilities in the context of transmission line siting” dated back to 1974 [Detroit Edison Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980) (footnote and citations omitted) (quoting Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm’n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) and 42 U.S.C. § 4331(b)], and was upheld and validated not only by an ASLB Appeal panel, but also by the 6th Circuit U.S. Court of Appeals, the jurisdiction of which includes Michigan, where DTE’s existing Fermi nuclear power plant installation is situated. Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3), ALAB-247, 8 AEC 936 (1974); Detroit Edison Co. v. NRC, supra, 630 F.2d at 451 and 42 U.S.C. § 4331(b)). If NRC staff’s violation of NEPA requirements at Fermi 3 is allowed to stand in 2014, it will, ironically enough, serve to undermine and reverse the “aggressive” NRC environmental protection policy regarding transmission line impacts established 40 years earlier, at another proposed new Detroit Edison nuclear power plant, at Greenwood in 1974.

At p.9/60 (of the .pdf counter), the ASLB summarized NRC staff’s stated position as: “Thus, the building of transmission lines to serve a nuclear power plant is no longer classified as a construction activity and no longer requires authorization from the NRC. The agency’s NEPA regulations (10 C.F.R. Part 51) also exclude the building of transmission lines from the definition of “construction.” [10 C.F.R. § 50.10(a)(2)(vii), and § 51.4(1)(ii)(G)]. Intervenors object to NRC Staff’s position, which contradicts its Atomic Energy Act and NEPA mandates to protect public health, safety, and the environment. The transmission corridor is essential to both safety and
environment, for a failure of the transmission lines could initiate a domino effect disaster, leading to a Loss of Coolant Accident (LOCA), reactor core meltdown, and catastrophic release of hazardous radioactivity.

At p.12/60 (of the .pdf counter), the ASLB stated that while Contention 23 was untimely, “it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS.” LBP-12-12, 75 NRC 742, 776 (2012). At p.13/60, the ASLB stated that “Because the Staff must comply with NEPA regardless of whether Intervenors filed a timely contention, the Board recommended that ‘the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS.’” Id. at 780. At that point, the NRC Staff could have - and should have – taken Intervenors’ relevant DEIS commentary to heart, and made the requisite improvements by the time of the FEIS publication, but did not. NRC staff even ignored ASLB’s warning that its NEPA treatment of the transmission line corridor was woefully inadequate.

As the ASLB mentioned, even the U.S. Environmental Protection Agency warned NRC staff that its NEPA handling of the transmission line corridor was not acceptable. Letter from Kenneth Westlake, EPA, to Cindy Bladey, NRC, Re: Draft Environmental Impact Statement for the Combined License (COL) for Enrico Fermi Unit 3, Monroe County, Michigan, CEQ# 20110364, attach. 1, at 2 (Jan. 10, 2012) (ADAMS Accession No. ML12023A034).

The ASLB’s admonition, at p.32/60 (of the .pdf counter), that “In short, absent clear conflict an agency cannot interpret its way out of its NEPA responsibilities,” is all the more poignant, given USEPA’s pointed urging that there be NEPA compliance as to the transmission corridor.
The ASLB’s injunction, at p.40-41/60 (of the .pdf counter), that “excluding the transmission corridor from the scope of the proposed action may allow construction of the corridor to begin before the NRC has balanced the benefits of the Fermi 3 project against all of its environmental costs, despite NEPA’s goal of a fully informed agency decision before the proposed action is authorized,” captures well the absurd, “Through the Looking-Glass” nature of NRC staff’s position. At p.48/60 (of the .pdf counter), the ASLB instead cites a court ruling where a federal agency was not allowed to “turn NEPA on its head, making ignorance into a powerful factor in favor of immediate action where the agency lacks sufficient data.” Citing *Sierra Club v. Norton*, 207 F.Supp.2d 1310, 1334–35 (S.D. Ala. 2002). Hence, NRC’s conclusion *vis-à-vis* the Fermi 3 transmission corridor, of “minimal environmental impact” makes little sense when an agency lacks essential information and has not sought to compile it through independent research.

At p.44-45/60 (of the .pdf counter), the ASLB stated “. . . the surveys necessary to determine whether the transmission corridor will harm ‘important species and habitat’ were not conducted during preparation of the FEIS, but may be conducted by other agencies at unknown future dates, which may not be until after the NRC has issued the COL. *The Staff failed to explain why it did not require such surveys to assist in preparation of the FEIS.* . . .” (Emphasis added). Regarding aquatic species, “As with terrestrial species, the NRC staff failed to explain why it did not require such surveys so that the necessary information could have been included in the FEIS.”

At p.45-46/60 (of the .pdf counter), the ASLB documented the U.S. Fish and Wildlife Service’s non-concurrence with NRC Staff, and the Staff’s inaction as to that move, respecting
transmission line impacts on endangered and threatened species. Then, at LBP-14-09, p.48/60 (of the .pdf counter), the ASLB notes that the staff acknowledges some responsibility concerning identification of cultural and historical resources under Federal law, but refuses to take the lead in the investigation:

As to impacts on historic and cultural resources, the Staff declared that ‘any further investigations to identify the presence of cultural and historic resources and to evaluate the NRHP-eligibility of such resources would be the responsibility of ITC Transmission, who would conduct such investigations in accordance with applicable regulatory and industry standards to assess impacts.

FEIS at 4-102.

At p.46/60 (of the .pdf counter), the ASLB states “The FEIS also states that the NRC, in conjunction with the USACE, chose to comply with the National Historic Preservation Act through the NEPA process. As the Lead Federal Agency in this process, the NRC has responsibility for determining potential impacts on the cultural environment under NEPA and on historic and cultural resources that may qualify for the National Register of Historic Places under NHPA § 106.” But the associated determinations have not been concluded. At p.46/60 (of the .pdf counter), the ASLB states:

Despite acknowledgment that ‘[t]he proposed new approximately 11-mile transmission line route…has been assessed as having a moderate to high potential for identifying archaeological resources…, no Phase I cultural resource investigations were conducted’ during DTE’s preparation of the ER. Though NRC subsequently conducted 106 consultations with interested federal, state, and tribal entities, the NRC did not consult on the impact of offsite transmission lines because it does not consider ‘the building of transmission lines [to be] an NRC-authorized activity’ and considers the ‘proposed transmission lines to be outside the NRC’s [area of potential effects].’ Thus, the Staff states only that there is an ‘approximately 11-mi portion of the proposed offsite transmission line route [that] will require a new transmission line route and may result in impacts on historic and/or cultural resources’ that ‘could be minor’ or ‘could be greater.’”

(Citations omitted) (Emphasis added). Such a flippant disregard for endangering Native
American burial sites, which have high potential for being located in the unanalyzed transmission line corridor, is highly troubling. Indeed, it is an environmental justice matter of the first order. Clearly, NRC cannot have consulted meaningfully, in a nation-to-nation manner, with Native American tribes having a connection to the lands and waters beneath the proposed transmission line, because neither ITC Transmission, DTE, nor NRC, have even determined the exact routing of the corridor itself, let alone assessed its environmental, cultural and other impacts. The NRC Staff has richly earned the criticism bestowed by the ASLB at p.53/60 (of the .pdf counter):

“…the Staff instead deferred major components of the required analysis to other agencies that it assumed would eventually undertake the necessary surveys and develop appropriate mitigation -- even though such regulatory actions, even if they occur as predicted, may not take place until after the COL is issued. This gives rise to the problem that the rule against segmentation seeks to avoid, ‘when the environmental impacts of projects are evaluated in a piecemeal fashion and, as a result, the comprehensive environmental impacts of the entire Federal action are never considered or are only considered after the agency has committed itself to continuation of the project.’” [72 Fed. Reg. at 57427–28]

The ASLB discussion of the NRC Staff’s dependence on other agencies, state and federal, emphasizes its unwillingness to address its legal responsibilities forthrightly. See “Reliance on Anticipated Certifications,” pp.49-51/60 (of the .pdf counter).

The contrast between present-day NRC Staff indifference to NEPA compliance and the better-motivated agency staff of decades ago was highlighted by the ASLB at footnote 231 on p.55/60 (of the .pdf counter):

In *Zimmer*, the Commission ordered a Licensing Board not to exercise *sua sponte* authority because the Commission had already initiated an ‘ongoing investigation’ to deal with the issues raised. *Zimmer*, CLI-82-20, 16 NRC at 110. Here, by contrast, the NRC Staff has completed the FEIS, it has provided no indication of any intent to revise the document, and the Commission has not instructed the Staff to reconsider the transmission line issue.
The ASLB’s warning, at p.55/60, is most apt:

The Staff and DTE maintain, however, that if any further inquiry needs to be made concerning the issue raised by Contention 23, it should be made by the Commission during the mandatory hearing (also referred to as an “uncontested hearing”) rather than in a contested hearing. But the mandatory hearing ordinarily takes place at the end of the licensing proceeding. If the FEIS is found deficient at that point, the need to cure the deficiencies through amendment of the FEIS could substantially delay the licensing process. The Board, by contrast, can minimize the potential delay by taking up the issue as soon as the Commission authorizes sua sponte review. [citations omitted; emphasis added]

The ASLB has articulated concern that if the FEIS deficiencies are not dealt with now, that there could be potential for greater delay if FEIS deficiencies were not resolved until the end of the process. The ASLB has advocated minimizing delay by addressing FEIS deficiencies now.

6. The Transmission Corridor as Envisioned Poses Dangerous Prospects From Loss of Offsite Power

The FEIS record contains the Limited Appearance statement of Farouk D. Baxter, PE (Expert/Specialist, Nuclear Power Plant Electrical Systems) (ML13294A355). The vulnerability which he suggests is found in the transmission lines which will traverse the corridor; they must be considered and analyzed within a FEIS/SEIS on the transmission corridor.

The text of Baxter’s limited statement is reproduced as follows:

LIMITED STATEMENT FOR ASLB HEARING ON PROPOSED FERMI NEW REACTOR
by FAROUK D. BAXTER, PE (Expert/Specialist, Nuclear Power Plant Electrical Systems)

The following two contentions outline inadequate and unsatisfactory review and resolution by the NRC Staff in addressing and resolving Safety Related issues related to Fermi 3’s Offsite Power Transmission System.

1) The routing of the three transmission lines is technically flawed, and as a result is susceptible to many single failure events that could remove all the three lines from service.

Fermi 3 FSAR Chapter 8.2 states: “There are no single failures that can prevent
the Fermi offsite power system from performing its function to provide power to EF3.” However, all three transmission lines from Fermi are routed in a common corridor (right of way), and as a consequence are susceptible to various severe weather and man-made single failure events, such as tornadoes, ice storms, brush fires, galloping conductors, severe solar disturbances, light aircraft impingement, and the like; each of these events has the potential for independently removing all three transmission lines in this common corridor for an extended period of time through structural damage to conductors or hardware, or both.

Conclusion: The routing of the transmission lines are flawed, thus making them susceptible to multiple types of single failure occurrences that could prevent the Fermi transmission system from providing offsite power to EF3 for extended periods of time.

The FSAR statement that “There are no single failures that can prevent the Fermi offsite power system from performing its function to provide power to EF3” is without any technical merit, and contradicts even common sense. There is an immediate need for the NRC Staff to reanalyze and resolve this issue prior to approving Fermi 3 design.

2. FSAR Section 8.2 states: “The normal preferred and alternate preferred circuits are fed from separate transmission systems, each capable of supplying the shutdown loads”.

Technically, these lines cannot be considered separate because they are routed in a common corridor (right of way) and are susceptible to various severe weather and man-made single failure events, such as tornadoes, ice storms, brush fires, galloping conductors, severe solar disturbances, light aircraft impingement, and the like; each of these events could remove both circuits for an extended period of time through structural damage to multiple transmission line conductors and hardware simultaneously. In addition, both the ‘normal preferred’ and ‘alternate preferred’ circuits have the same termination points (the Switchyard at one end and the Milan Substation at the other), which further challenge the claim that they “are fed from separate transmission systems”.

Conclusion: there is no diversity between the ‘normal preferred’ and ‘alternate preferred’ transmission systems circuits from one end to the other, to demonstrate that they are separate transmission systems. There is an immediate need for the NRC Staff to reanalyze and resolve this issue prior to approving Fermi 3 design.

There has been no NEPA analysis of the Transmission Corridor within the Fermi 3 FEIS, nor has any analysis been undertaken within the FSAR of the potential for the loss of offsite A/C power. See FSAR Chapter 8. Request for Additional Information (RAI) letters No. 6, No. 18, No. 80 (ML091890740, ML093350182, ML12300A404), and the corresponding DTE responses
confirm that the loss of offsite A/C power has
never been addressed by DTE, and that NRC staff review has somehow allowed DTE and
General Electric-Hitachi to avoid the question of offsite A/C power loss. While one argument by
way of mitigation is that Fermi 3 as an Economically Simplified Boiling Water Reactor, or
ESBWR would be a passive plant which is gravity-driven, and that no arrangements for the
interruption of offsite A/C power need be made, the most recent Fermi 3 FSAR Chapter 8
(ML14055A112) and ESBWR DCD Chapter 8 (ML14100A525) substantiate that these concerns,
echoed by Farouk D. Baxter, P.E., have not been resolved.

The Union of Concerned Scientists’ staff physicist, Dr. Edwin Lyman, has previously
commented on the untested assumptions of the ESBWR design:

4. The proposed ESBWR design relies primarily on natural forces such as gravity
to provide emergency water in the event of a loss of coolant instead of on “active”
equipment such as motor-driven pumps. …
5. However, the “passive” safety systems used by the ESBWR design are based on
largely unproven technologies and are more complex and problematic than represented by GE-Hitachi in its public relations materials. While such systems may sound good in theory because passive safety systems can work without AC electric power or operator intervention, in reality they are not that simple. One problem is that gravity provides a much weaker driving force for coolant flow than the suction provided by pumps. This means that it is harder to predict whether a passive system will work as well as an active system under the full range of potential dangers, including a terrorist attack or severe weather event…

Declaration of Dr. Edwin S. Lyman (October 31, 2008), ML083090806 (in Victoria COL pro-
ceedings).

The offsite power and single-source failure vulnerabilities of the planned transmission
corridor, and the unproven susceptibilities of the ESBWR reactor design in the event of a loss of
offsite power during a reactor outage at Fermi 3 must be identified, analyzed and disclosed
within a Supplemental Environmental Impact Statement. Addressing these matters now, rather

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than after lengthy and time-consuming litigation, will avoid unacceptable risks in project design, and will minimize further delays in finalizing the Fermi 3 project. The Commission should grant the request of the Atomic Safety and Licensing Board and broaden the scope and comprehensiveness of the NEPA document.

Respectfully,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission

In the Matter of                                      )    Docket No. 52-033

The Detroit Edison Company                          )    July 28, 2014
(Fermi Nuclear Power Plant, Unit 3)                 )

*   *   *   *   *   *   *

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “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)” were served by me upon the parties to this proceeding via the NRC’s Electronic Information Exchange system this 28th day of July, 2014.

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