UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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)

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

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)

On July 7, 2014, the Atomic Safety and Licensing Board (Board) in this combined license (COL) proceeding issued a Memorandum regarding the Intervenors’ proposed Contention 23, which concerned the environmental impacts of transmission lines; the Board concluded that, although the contention has been rejected twice on procedural grounds, it merits sua sponte review. On July 11, 2014, the United States Nuclear Regulatory Commission (Commission) invited the parties to provide their views on the Board’s request.

For the reasons set forth herein, sua sponte consideration of Contention 23 is not appropriate because the Final Environmental Impact Statement (FEIS) prepared by the NRC Staff included a “hard look” at potential environmental impacts from the anticipated transmission line corridor that meets the requirements established by the NRC in 10 C.F.R. Part 51 for compliance with the National Environmental Policy Act (NEPA). Accordingly, no “significant environmental issue” exists that would warrant sua sponte consideration. Moreover, should the

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2 Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-14-09, 80 NRC ___ (July 7, 2014) (slip op.).

Commission consider further inquiry to be appropriate, the mandatory hearing that the Commission will conduct for the Fermi COL application provides a means for such inquiry.

PROCEDURAL BACKGROUND

On September 18, 2008, the DTE Electric Company (formerly the Detroit Edison Company) (DTE or Applicant) submitted an application for a COL for one ESBWR advanced boiling water reactor, designated as Unit 3, to be located at the site of the operating Fermi Nuclear Power Plant, Unit 2, in Monroe County, Michigan. The Fermi 3 COL application includes an Environmental Report (ER), as required by 10 C.F.R. § 51.50(c). This ER notes that transmission lines for Fermi 3 would be owned and operated by ITC Transmission, and that the Applicant has no control over the construction or operation of the transmission lines. The ER describes the most likely location of the transmission line route, describes potential environmental impacts, and includes a reasonable expectation that ITC Transmission would follow standard industry practices in the siting, construction, and operation of the lines.

On October 28, 2011, the NRC Staff and the U.S. Army Corps of Engineers (USACE) published, and made available to the public, the draft environmental impact statement (DEIS) for Fermi 3. On January 18, 2013, the FEIS was published and made available to the public. The Intervenors, previously admitted as parties to the proceeding, filed versions of Contention

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4 Letter from Jack M. Davis, DTE, to NRC, Detroit Edison Company Submittal of a Combined License Application for Fermi 3 (NRC Project No. 757) (Sept. 18, 2008), ADAMS Accession No. ML082730763.

5 Detroit Edison Fermi 3 COLA (Environmental Report) (Oct. 8, 2008) (ER), ADAMS Accession No. ML082730660. Subsequent revisions can be found at ADAMS Accession Nos. ML101110572 and ML110600498.

6 ER at 1-4 to 1-5, 2-2, and 10-1.

7 Id. at 4-12.

8 NUREG-2105, Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3 (October 2010) (DEIS).

23, which concerned the environmental impacts of transmission lines, in response to both the DEIS and the FEIS. The Board rejected both versions of Contention 23 as untimely and for failing to meet the late filing requirements in 10 C.F.R. § 2.309. However, in declining to admit the contention on the FEIS, the Board stated that “this is an appropriate point for the Board to decide whether the issue the Contention raises merits *sua sponte* review under [10 C.F.R.] Section 2.340(b)” and invited the parties to provide their views on that question. The parties filed briefs providing their views on May 30, 2013. The Board’s July 7, 2014, Memorandum expressed the Board’s opinion that *sua sponte* review was merited, and the Commission’s July 11, 2014, order invited the parties to provide additional comments.

**LEGAL STANDARDS**

I. **LEGAL STANDARDS FOR SUA SPONTÉ REVIEW**

The Staff’s 2013 *Sua Sponte* Brief includes sections describing the legal standards governing *sua sponté* review. To summarize here, 10 C.F.R. § 2.340(b) states that

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10 Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Jan. 11, 2012) (DEIS Contentions), ADAMS Accession No. ML12012A278; 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 (February 19, 2013) (FEIS Contentions), ADAMS Accession No. ML13050A935.

11 *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 775-80 (2012); Licensing Board Memorandum and Order (Denying Intervenors’ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27) (April 30, 2013) (unpublished) (Order Rejecting FEIS Contentions), ADAMS Accession No. ML13120A527.

12 Order Rejecting FEIS Contentions at 23.


14 See *Fermi*, LBP-14-09, 80 NRC ___ (slip op.). See generally Commission Briefing Order.

15 Staff 2013 *Sua Sponte* Brief at 5-6, 12-15.
The presiding officer 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.\(^\text{16}\)

This authority provides a means for a Board to address an issue, subject to Commission approval, if it has been excluded from the proceeding on procedural grounds rather than because it has been rejected on its merits.\(^\text{17}\) Among the factors that boards have used to analyze the appropriateness of \textit{sua sponte} review are whether there are other forums in which the issue could be considered and whether public interest factors weighs in favor of review.\(^\text{18}\)

The Commission has made clear that the \textit{sua sponte} rule is to be used sparingly and only in “extraordinary circumstances.”\(^\text{19}\) Furthermore, there has been little discussion or application in NRC cases of the “serious environmental matter” standard in 10 C.F.R. § 2.340(b);\(^\text{20}\) when boards have previously exercised (or recommended exercise of) \textit{sua sponte} authority, the issues they raised were almost always related to safety concerns rather than environmental matters.\(^\text{21}\)

\(^{16}\) 10 C.F.R. § 2.340(b).

\(^{17}\) \textit{Cleveland Elec. Illuminating Co.} (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1119 (1982).


\(^{19}\) Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41872, 41874 (1998). Accordingly, no licensing board has attempted to invoke its \textit{sua sponte} authority in many years.

\(^{20}\) The Commission has discussed the standard for supplementing an EIS in terms that are arguably analogous to this standard for \textit{sua sponte} review. See \textit{Private Fuel Storage, Inc.} (Independent Spent Fuel Storage Installation), CLI-06-03, 63 NRC 19, 27 (2006). See Staff 2013 \textit{Sua Sponte} Brief at 13 & n.26 for additional discussion.

\(^{21}\) See, \textit{e.g.}, \textit{Tenn. Valley Auth.} (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), LBP-76-44, 4 NRC 637, 648-49 (1976) (seismic qualification issues); \textit{Duquesne Light Co.} (Beaver Valley Power Station, Unit 1), ALAB-408, 5 NRC 1383, 1385 (1977) (multiple safety issues). However, in one rare example, a board ruled that a particular “need for power” question was a “serious environmental matter” that warranted \textit{sua sponte} review because Staff had not conducted a NEPA review of the plant when it was originally licensed, and therefore there had been no disclosure or analysis of the environmental impacts of the
II. LEGAL STANDARDS GOVERNING NEPA REVIEWS

The Staff’s 2013 Sua Sponte Brief includes a more detailed description of general NEPA standards for environmental reviews of COL applications.\(^{22}\) To summarize, NEPA requires that an agency prepare an EIS before approving any major Federal action that will significantly affect the quality of the human environment.\(^{23}\) The NRC’s regulations that implement NEPA, 10 C.F.R. Part 51, require the preparation of an EIS in order to issue a COL.\(^{24}\) Under NEPA, the NRC must take a “hard look” at the environmental impacts of a proposed action, as well as reasonable alternatives to that action.\(^{25}\) This “hard look” analysis should use “the best available information at the time the assessment is performed.”\(^{26}\)

NEPA analyses “often must rely upon imprecise and uncertain data . . . and must be ‘judged on their reasonableness.’”\(^{27}\) A reasonable analysis may include estimates or assumptions so long as it discloses areas where there is incomplete or unavailable information and to what extent uncertainty may affect the conclusions.\(^{28}\) “An environmental impact statement [is not] intended to be a ‘research document,’ reflecting the frontiers of scientific action or any inquiry “as to whether the activity is necessary or desirable.” See Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-2, 11 NRC 44, 69 (1980). That board also noted that it took sua sponte review because of a lack of any other forum where the issue might be considered. Id.

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\(^{22}\) Staff 2013 Sua Sponte Brief at 6-8.


\(^{24}\) 10 C.F.R. § 51.20(b)(2).


\(^{26}\) NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 341 (2012).

\(^{27}\) Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 167 (2005) (citation omitted).

\(^{28}\) See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208-09 (2010) (a reasonable severe accident mitigation alternatives analysis should disclose incomplete and unavailable information and significant uncertainties); Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-07, 75 NRC 379, 391-92 (2012) (NEPA “does not require that [the NRC] wait until inchoate information matures into something that later might affect our review.”).
methodology, studies, and data….While there ‘will always be more data that could be
gathered,’ agencies ‘must have some discretion to draw the line and move forward with
decision-making.”

DISCUSSION

The Commission should deny the Board’s request for *sua sponte* review for the following
reasons. First, contrary to the Board’s position, the Commission has clearly defined the
boundaries of NRC authority and the significance of those boundaries for the staff’s
environmental reviews. Second, the Board’s argument regarding the need to analyze
transmission lines as “connected actions” in this proceeding is unpersuasive and does not
include a factual issue susceptible to resolution at an evidentiary hearing. Third, the Fermi 3
FEIS already includes a discussion of transmission line impacts sufficient to satisfy NEPA based
on currently available information. Finally, the Commission may raise any issue related to the
FEIS in the uncontested portion of the hearing.

I. THE COMMISSION HAS CLEARLY DEFINED THE BOUNDARIES OF NRC
AUTHORITY

In 2007, the Commission promulgated a new rule regarding Limited Work Authorizations
(LWAs) that clarified certain limits on NRC’s regulatory authority. This rule included a new
definition of “construction,” in which the Commission redefined the scope of activities requiring
the NRC’s approval, reflecting “its reconsideration of the proper regulatory jurisdiction of the
agency.” In key respects, the Board’s analysis of NRC jurisdiction in its Memorandum

29 Id. (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 11-13 (1st Cir. 2008)).

(LWA Rule).

31 72 Fed. Reg. at 57418-19. Subsequently, in 2011, the NRC promulgated a rule amending the definition
of “construction” in the materials licensing context to be consistent with the 2007 LWA rule’s amendment
for power reactor licensing. See Final Rule, Licenses Certifications, and Approvals for Materials
Licensees, 76 Fed. Reg. 56951 (Materials Licensing Rule). Therein, the Commission ratified the policy
and legal rationales behind the LWA Rule and determined that activities that are not “construction” are
private actions that “will be considered by the NRC in accordance with its regulations in 10 CFR Part 51
as part of the agency’s cumulative impacts analysis.” Id. at 56952.
implicitly disagrees with the Commission’s position in the LWA rule.\textsuperscript{32} Because the Board’s overarching jurisdictional argument strongly influences its subsequent Fermi-specific conclusions, the Staff addresses this argument first.

The revised definition of “construction” in the LWA Rule provides that “construction does not include…[b]uilding of service facilities, such as…transmission lines.”\textsuperscript{33} As stated in the Statement of Considerations (SOC) for the LWA Rule, this new definition represents a reconsideration of NRC jurisdiction—limiting it to activities with a reasonable nexus to radiological health and safety—which was explicitly based on the Commission’s assessment of its Atomic Energy Act (AEA) authority, developments in NEPA case law, and the objective of implementing the NRC’s regulatory program more effectively.\textsuperscript{34} In the SOC, the Commission explained the legal and policy reasons for the rule change and why it remained fully consistent with applicable law, including NEPA.\textsuperscript{35}

The 2007 rule change clarified and narrowed the Commission’s interpretation of the NRC’s regulatory authority. As a result, certain cases on which the Board’s Memorandum relies are no longer applicable. The Board focused in particular on two cases\textsuperscript{36} in which courts had upheld NRC’s assertion of authority to regulate the building of transmission lines for environmental reasons unrelated to radiological health and safety or common defense and

\textsuperscript{32} See Fermi, LBP-14-09, 80 NRC at __ (slip op. at 7-10, 19-25, 30-39).

\textsuperscript{33} 10 C.F.R. § 50.10(a)(2) & (a)(2)(vii); 10 C.F.R. § 51.4 (incorporating definition of “construction” into environmental regulations in paragraph (1)(ii)(G)).

\textsuperscript{34} See 72 Fed. Reg. at 57420.

\textsuperscript{35} 72 Fed. Reg. at 57426-28; see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (citing Smiley v. Citibank (South Dakota), N. A., 517 U.S. 735, 742 (1996)) (Reversal in agency policy is not invalidating if the agency adequately explains the reasons for the change.).

\textsuperscript{36} See Fermi, LBP-14-09, 80 NRC at __ (slip op. at 30-31) (citing Pub. Serv. Co. of N.H. v. NRC, 582 F.2d 77, 82 (1st Cir. 1978) and Detroit Edison Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980)).
security. But the Commission’s 2007 LWA Rule altered the position that the agency took before those courts. The Commission, after fully considering its past interpretations of NRC authority and the changed legal landscape, permissibly clarified the scope of NRC authority. In doing so, however, the Commission made clear that the NRC would still fully evaluate environmental impacts in compliance with NEPA, but in a manner consistent with its clarified definition of the Federal action.

With the LWA rule, the Commission acknowledged an important regulatory distinction between private actions (i.e., “actions for which the NRC has no statutory basis for regulation”) and the Federal action (i.e., “licensing of construction activities with a reasonable nexus to radiological health and safety or common defense and security, for which no other regulatory approach is acceptable”), a distinction that it found logically dictated changes in NRC’s NEPA implementation. To reflect this distinction, the Commission directed the NRC staff to implement NEPA in accord with the new definition of the Federal action by addressing “construction” activities as the “effects of the NRC’s licensing action” and by considering the non-Federal activities in the context of the cumulative impacts analysis in the EIS. To facilitate the NRC staff’s compliance with NEPA, the LWA Rule therefore required applicant environmental reports to include a description of the non-Federal activities, including transmission line building, in the report’s analysis of cumulative impacts.

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37 See id. at 33.
38 See Nat’l Cable & Telecomms. Ass’n, 545 U.S. at 981.
40 Id. at 57427 (while the effects caused by the non-Federal, site preparation activities would not be considered effects of the NRC’s licensing action, the effects of the non-Federal activities would be considered during any subsequent “cumulative impacts” analysis). This distinction furthers the NRC staff’s ability to meaningfully discuss and compare environmental baseline conditions “against which the incremental effect of the NRC’s major Federal action (i.e., issuing an LWA, construction permit, or combined license) would be measured.” Id.
41 Id. (citing 10 C.F.R. § 51.45(c)); 10 C.F.R. § 51.14(a).
The Commission’s clear articulation of the NRC’s jurisdictional limits and its resulting expectations regarding NEPA implementation\textsuperscript{42} appropriately informs the meaning of the regulations in 10 C.F.R. Parts 50 and 51 and, to the extent there is any ambiguity in those regulations, the Commission’s SOC provide persuasive evidence for resolving it.\textsuperscript{43} Most importantly, by setting out the definition of the Federal action as “construction,” activities that are coextensive with the AEA’s grant of authority to the NRC over radiological health and safety and common defense and security,\textsuperscript{44} the Commission established a jurisdictional rationale for distinguishing these effects of licensing from those of the private activities that are not construction.\textsuperscript{45} It is appropriate for the NRC to consider the scope of its regulatory jurisdiction as defined in the AEA, 10 C.F.R. § 50.10, and 10 C.F.R. § 51.4, when determining how to carry out its NEPA obligations, including considering building transmission lines as a cumulative impact.\textsuperscript{46} The building of transmission lines by ITC \textit{Transmission} is precisely the sort of private activity that the Commission intended to distinguish from the Federal action: in addition to not being an activity controlled by DTE,\textsuperscript{47} it is not a safety-related activity or subject to NRC approval; it is also likely “subject to regulatory authority of another Federal, State, or local agency”\textsuperscript{48} as discussed in Sections II and III below.

\textsuperscript{42} See id. at 57427.

\textsuperscript{43} See \textit{Wyoming Outdoor Council v. U.S. Forest Service}, 165 F.3d 43, 53 (D.C. Cir. 1999) (The preamble to a regulation, though it does not control the meaning of the regulation, is persuasive evidence of an agency’s contemporaneous understanding of its proposed rules.).

\textsuperscript{44} See e.g., 42 U.S.C. § 2201(b) (AEA § 161b). As the Commission noted, “NEPA is a procedural statute and does not expand the jurisdiction delegated to an agency by its organic statute.” 72 Fed. Reg. at 57427 (citing \textit{Robertson v. Methow Valley Citizens Council}, 490 U.S. 332, 350-52 (1989)).

\textsuperscript{45} See 10 C.F.R. § 51.4

\textsuperscript{46} See \textit{Kentuckians for the Commonwealth vs. U.S. Army Corps of Engineers}, 746 F.3d 698, 706 (6th Cir. 2014) (U.S. Army Corps “reasonably limited its scope of review to the effects proximately caused by the specific activities that were authorized by the permit.”).

\textsuperscript{47} Smith 2013 Affidavit at 2-6.

\textsuperscript{48} 76 Fed. Reg. at 56952 (The Commission noted, in the Materials Licensing Rule mirroring the LWA
In addition, the compatibility of NRC’s NEPA-implementing regulations and the Commission’s position in SOCs for the LWA rule is, contrary to the Board’s view, supported by the structure of 10 C.F.R. Part 51 itself. Part 51 requires applicants to submit environmental reports to assist the NRC in developing its environmental reviews to comply with NEPA. In the LWA Rule, the Commission adopted a requirement for applicants to structure their environmental reports—documents explicitly intended to “aid the Commission in its development of an independent analysis” in its environmental reviews—with impacts from activities that are not construction in the section analyzing cumulative impacts. It would make little sense for the Commission to require this distinction in the ER if it intended for the NRC staff to do otherwise in the agency’s analysis. In analyzing the available information on the routing and impacts of the transmission lines in the cumulative impacts, the NRC staff therefore complied with the manifest intent of 10 C.F.R. Part 51.

In sum, the Board’s arguments related to NRC jurisdiction are fundamentally legal, rather than factual, in nature. To the extent the Commission believes these matters warrant clarification, it would be more appropriate for the Commission to address them rather than to permit the Board to conduct an evidentiary hearing. Accordingly, these aspects of the Board’s request do not justify *sua sponte* review. The Staff therefore turns next to the Board’s more specific assertions related to transmission lines.

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49 See 10 C.F.R. § 51.45(c).

50 See 72 Fed. Reg. at 57427.
II. THE BOARD’S ASSERTION THAT TRANSMISSION LINE IMPACTS MUST BE ANALYZED AS DIRECT IMPACTS IS INCORRECT AND DOES NOT RAISE AN ISSUE SUITABLE FOR RESOLUTION IN AN EVIDENTIARY HEARING

Another of the Board’s main assertions is that a hearing is necessary to determine whether transmission line impacts must be analyzed as direct impacts in the Fermi COL FEIS.51 For the reasons discussed below, the Board’s analysis is incorrect and does not raise any issue suitable for resolution at an evidentiary hearing.

Before discussing the Board’s arguments, it is necessary to establish certain underlying, undisputed facts related to the transmission line impacts as discussed in the FEIS. First, before DTE could begin building at the Fermi 3 site, it must obtain both a COL from the NRC and a permit from the USACE under Section 404 of the Clean Water Act.52 The USACE is a cooperating agency for the preparation of the Fermi 3 FEIS; however, the FEIS distinguishes between those impacts discussed as part of the NRC’s Federal action (i.e., those under its regulatory authority) as described in Section I above, and those impacts included to meet the requirements of the USACE.53 Offsite transmission lines that would ultimately connect Fermi 3 to the power grid are not owned or controlled by DTE, but rather by ITC Transmission.54 The activities of ITC Transmission do not require NRC licensing, but could require permits from the USACE to the extent that they affect the waters of the United States, as well as permits from other Federal, state, and local agencies. ITC Transmission has not yet applied for a Section 404 permit and is not required to do so before the NRC issues a COL to DTE.

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51 Fermi, LBP-14-09, 80 NRC at __ (slip op. at 16).
52 FEIS at 1-10 to 1-11.
53 See id. at 1-5 to 1-8.
54 Id. at 2-10. ITC Transmission, in turn, is owned by ITC Holdings Corporation, an independent, publicly traded transmission line company that operates in Michigan, Iowa, Illinois, Minnesota, Missouri, Kansas, and Oklahoma. See http://www.itc-holdings.com/. ITC Holdings Corp. trades on the New York Stock Exchange under the ticker symbol ITC. Id.
A. The Board’s analysis does not demonstrate that transmission lines that may be built by ITC Transmission are connected actions, nor that this is an issue requiring resolution at an evidentiary hearing.

The Board asserts that there is a question as to whether transmission lines to be built by ITC Transmission are “connected actions” under NEPA, and that this issue requires resolution at an evidentiary hearing. However, as the Board’s own analysis makes clear, this is a legal question, and the underlying facts are not in dispute. No party has presented, or even alluded to, any evidence that DTE exercises control over ITC Transmission’s activities and business plans.55 As discussed in Section IV below, the FEIS already references the presently available information concerning transmission lines, and the referenced information sources are already on the Fermi 3 docket. As it is unclear (and the Board does not specify) what available additional evidence has not been gathered, it appears from the Board’s legal analysis and conclusions56 that the Commission could render its decision on this matter solely on the basis of the Board’s Memorandum and the parties’ legal briefs, with no Board fact-finding required.

With respect to the legal arguments concerning connected actions, regulations promulgated by the Council on Environmental Quality (CEQ) define connected actions as those actions that are

... closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.
(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.57

55 The Intervenors have at times referred to ITC Transmission as a “contractor” for DTE, but have not made any claim or presented any evidence suggesting that the relationship is other than represented in the FEIS. See FEIS Contentions at 38.

56 Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 27-28, 30-34).

57 40 C.F.R. § 1508.25(a).
With reference to additional case law criteria, the Board indicates that an action is a connected action when it is a proposed action, when it lacks independent utility, and when there is Federal control and responsibility for the action.58 As discussed below, transmission lines that may be built by ITC Transmission do not meet these definitions and thus are not connected actions.

Regarding the CEQ regulation itself, the Board and Intervenors have not specifically asserted that the transmission lines described in the FEIS meet the three listed factors set forth in the regulation. Rather, they have inferred that because Fermi 3, if built, will ultimately need to be connected to the power grid, the transmission corridor described in the FEIS must be understood as automatically triggered by the decision to issue a COL for Fermi 3.59 In fact, the transmission line corridor described in the FEIS is merely a reasonable assumption regarding the most likely route,60 and making such assumptions is permitted as part of a NEPA analysis.61 If a COL for Fermi 3 is issued, ITC Transmission may ultimately choose to connect Fermi 3 to the grid in an alternative and entirely different way, perhaps as part of an overall grid development and reliability project; however, at present it would be pure speculation to describe the details (much less the impacts) of such a future plan, and NEPA does not require the analysis of impacts that are merely speculative.62

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58 Fermi, LBP-14-09, 80 NRC at __ (slip op. at 26-28).
59 Id. at 25; Intervenors’ 2013 Sua Sponte Brief at 4.
60 As the map and description in the FEIS show, the route is within the existing transmission line corridor for Fermi 2 for 18.6 miles and includes an additional 10.8 miles of undeveloped right-of-way possessed but not yet used by ITC Transmission. FEIS at 2-10 to 2-11.
61 Clinton ESP Site, LBP-05-19, 62 NRC at 167 (2005); Pilgrim, CLI-10-22, 72 NRC at 208-09.
62 NEPA’s “hard look” requirement is tempered by a “rule of reason” that requires agencies to address only impacts that are reasonably foreseeable—not remote and speculative. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-156, 6 AEC 831, 836 (1973). The Commission explained in this regard that “NEPA does not call for certainty or precision, but an estimate of anticipated (not unduly speculative) impacts.” Louisiana Energy Servs. (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005).
Accordingly, the Board overstates the situation when it asserts that the transmission lines described in FEIS are a “proposed action” and therefore a connected action.63 Rather, the route represents DTE’s expectation of the most likely route given existing transmission lines and rights-of-way, an expectation the Staff incorporated into the FEIS as a reasonable assumption because more precise information about ITC Transmission’s future plans is simply not available.64 No actual proposal for transmission line development in the corridor described in the FEIS is currently under consideration before any agency, and ITC Transmission is not required to present such a proposal to the NRC in any event.

The Board also asserts that the transmission lines assumed in the FEIS, if built, would lack independent utility. However, just as it is not yet certain how ITC Transmission will ultimately connect Fermi 3 to the power grid, it is also not certain how ITC Transmission’s other plans for transmission line development, including connection of other generation sources and overall grid reliability, interact with development in the corridor described in the FEIS. These uncertainties are not questions the Board can presently address by taking evidence from the parties at an evidentiary hearing, because resolving these issues depends on decisions that ITC Transmission would make in the future, and into which any inquiry would be purely speculative at this time.

Of the three-part test for connected actions that the Board describes, only the claim related to Federal control and responsibility related to major Federal actions favors the Board’s conclusion that transmission lines are a connected action.65 However, as explained below, this does not alter the adequacy of the Staff’s analysis in the FEIS. There is no dispute that there is Federal control and responsibility (or that a major Federal action occurs) when the NRC issues

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63 Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 27).
64 FEIS at 2-10.
65 Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 28-30).
a COL for a new nuclear power plant, when the USACE issues a Section 404 permit to an applicant for a COL from the NRC, or when the USACE issues a Section 404 permit to an independent transmission line company. The Board’s legal analysis of Federal control relies primarily on a case in which the Federal Highway Administration (FHWA) declined to provide documents describing a highway’s environmental impacts; the court was unpersuaded by the FHWA’s argument that it did not need to do so because the project was not Federally funded.66 By contrast, here neither the NRC nor the USACE has declined to provide environmental information regarding their licensing or permitting of DTE, and available information relevant to likely future permitting of ITC Transmission has been disclosed and evaluated as described in Section III below.67 In any event, the Board’s analysis of “Federal action” case law is very brief and serves primarily as an introduction to the longer discussion of NRC jurisdiction addressed in Section I above.

For these reasons, the Board’s conclusion that transmission lines are connected actions is unpersuasive, does not raise any factual issue susceptible to resolution at an evidentiary hearing, and does not demonstrate that the criteria for sua sponte review have been met.

B. The Board’s concerns about treating transmission lines as cumulative impacts do not raise an evidentiary issue suitable for resolution at hearing.

The Board also raises three specific claims regarding the consequences of treating transmission line impacts as cumulative impacts rather than as direct impacts of COL licensing. None of these arguments is persuasive, and none raises an issue that can be resolved at an evidentiary hearing.

66 Sw. Williamson Cnty. Cmty. Ass’n, Inc. v. Slater, 243 F.3d 270, 273 & 278-79 (6th Cir. 2001). The factual situation in that case is readily distinguishable from the Fermi case because the details of the highway project were established and available—the local government planned a road that crossed a park established with Federal funds, and Federal approval was therefore requested for a portion of a plan that was already complete and for which construction outside the park had begun. Id. at 279.

67 The FEIS also includes a description of how the USACE may incorporate additional information that becomes available at that time. FEIS at 1-5. This information should resolve the Environmental Protection Agency’s comments on the DEIS and FEIS that the Board quoted in their memorandum. See Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 14-15).
First, the Board asserts that this treatment would allow ITC Transmission to begin building transmission lines before the NRC issues its record of decision concerning the Fermi 3 COL. While this is true, it is immaterial because it would be equally true if the Staff moved the discussion of transmission line impacts from Chapter 7 of the FEIS, which discusses cumulative impacts, to Chapters 4 and 5, which discuss direct impacts of construction and operation. ITC Transmission does not need a license or permit from the NRC to build transmission lines, regardless of where they are located, and the NRC cannot alter that fact by altering its FEIS. Nor can the NRC control ITC Transmission indirectly, through its licensing of DTE.

Second, the Board asserts that treatment of transmission line impacts as cumulative impacts affects the depth of the Staff’s analysis. This is incorrect; the depth of analysis of transmission line impacts can vary significantly based on the availability of information, even though the Staff treats transmission line impacts as cumulative impacts in all its environmental reviews. For example, in the case of the Virgil C. Summer Nuclear Station, Units 2 and 3, the transmission line corridors were owned by the same entity applying for the NRC license, and specific siting decisions regarding transmission line corridors had been made at the time the FEIS was published. For this reason, and because the USACE was a cooperating agency in that case as well, it was possible to include additional detail regarding transmission lines to support the USACE’s Section 404 permitting decision. This did not change the NRC’s description of its regulatory authority or its treatment of transmission line impacts as cumulative.

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68 Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 40).

69 The Board’s assertion that the NRC Staff might simply address transmission line issues by adding conditions to DTE’s license ignores the fact that ITC Transmission is an independent transmission line company not subject to DTE’s control. See id. at 31.

70 Id. at 41.

71 See NUREG-1939, Final Environmental Impact Statement for Combined Licenses for Virgil C. Summer Nuclear Station, Units 2 and 3 (April 2011) at 2-8 to 2-14 (Summer FEIS).

72 See id. at 4-7 to 4-12, 4-24 to 4-29, 4-34 to 4-39, 4-73 to 4-74, 5-2, & 5-16 to 5-18.
impacts for NRC licensing purposes, but it did allow for the inclusion of more detail about
corridor siting and development plans.73 In its COL environmental reviews, the Staff
consistently uses the information available and discloses any missing information, although the
level of detail about transmission line impacts may vary depending on the information presently
available about the transmission line plans.

Third, the Board asserts that treatment of transmission line impacts as cumulative
impacts precludes an analysis of alternatives and mitigation.74 However, this brief argument,
like the Board’s assertions related to level of detail, blends the Board’s general views related to
NRC jurisdiction with assertions that have more to do with the availability of information for
Fermi in particular. Comparison with the Virgil C. Summer case is again useful—in that case,
considerably more information about the transmission line plans (and associated impacts) was
available, and it was therefore possible to include more information about mitigation at the
proposed site and about alternatives in the context of the alternative sites analysis.75 In
contrast, less information is available for Fermi, and the level of detail in the FEIS is related to
this fact rather than to jurisdictional arguments.

In short, none of these three issues raises an issue suitable for review sua sponte at an
evidentiary hearing. Because neither the Board’s arguments related to connected actions nor
the Board’s arguments related to the implications of treating transmission line impacts as
cumulative impacts raises a serious environmental issue suitable for resolution at an evidentiary
hearing, sua sponte review is not appropriate.

73 See id. at 1-5 to 1-6; id. at 7-6 to 7-7, 7-14, 7-16, 7-21, & 7-26 to 7-27.
74 Fermi, LBP-14-09, 80 NRC at ___ (slip op. at 23-24 & 51).
75 See, e.g., Summer FEIS at 4-24 to 4-31 (description of terrestrial impacts of transmission lines, with
mitigation discussion); Summer FEIS at 9-49 to 9-52, 9-90 to 9-93, 9-127 to 9-131, 9-166 to 9-168
(discussion of cumulative land use impacts, including those related to transmission lines, for alternative
sites).
III. TRANSMISSION LINE IMPACTS ARE ADEQUATELY ADDRESSED AS CUMULATIVE IMPACTS IN THE FERMI 3 FEIS

The Board further asserts that, even assuming the NRC’s characterization of its regulatory authority as reflected in 10 C.F.R. Part 51 and the LWA Rule is valid, a hearing is necessary to determine whether the Staff’s consideration of environmental impacts of transmission lines, performed as a cumulative impact review, satisfies NEPA. Like the Board’s legal arguments discussed above, this concern does not raise a serious environmental issue suitable for resolution at an evidentiary hearing, and does not meet the high standard for *sua sponte* review.

As described in the Staff’s 2013 *Sua Sponte* Brief, throughout the FEIS the NRC Staff and the USACE considered and analyzed impacts related to the expected transmission line corridor. This included discussion of the corridor’s potential impacts in terms of land use and terrestrial and aquatic resources (including important species and habitats), as well as impacts that could be relevant to the USACE’s permitting action even if not to any NRC licensing decision. Chapter 7, “Cumulative Impacts,” describes these impacts related to the expected transmission line corridor in combination with the other impacts of the NRC licensing decision. Finally, Appendix M, “Environmental Impacts from Building and Operating Transmission Lines Proposed to Serve Fermi 3,” provides an index to the transmission line corridor discussions that appear throughout the FEIS.

This approach is consistent with the Environmental Standard Review Plan, NUREG-1555 (ESRP), which provides:

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76 *Fermi*, LBP-14-09, 80 NRC at __ (slip op. at 16).
77 See Staff 2013 *Sua Sponte* Brief at 9-10 for specific FEIS, DEIS, and ER citations.
78 *Id.*
79 *Id.*
80 FEIS at Appendix M.
In some cases transmission lines may be constructed and operated by an entity other than the applicant. In such cases, impact information may be limited and the reviewer should proceed with the assessment using the information that can be obtained.81

This guidance acknowledges that complete information about potential transmission line development by entities other than applicants may not (and is not required to) be available by the time the NRC is prepared to make a final determination on a COL application. The information available for Fermi 3 provided a reasonable basis for Staff to conduct a “hard look” analysis in the FEIS, including with respect to potential transmission line corridors. The Staff appropriately moved forward with its environmental review of the Fermi 3 COL application based on its analysis of available information in combination with reasonable assumptions to account for information about future transmission line plans that was necessarily incomplete or uncertain.82 NEPA does not require an agency to defer its action merely on the possibility that more information might become available in the future.83 There is no deficiency in the Staff’s analysis in the Fermi FEIS that rises to the level of a serious environmental matter under 10 C.F.R. § 2.340(b) and that would justify sua sponte review.

IV. THE COMMISSION HAS MORE EFFICIENT MECHANISMS FOR EXAMINING THESE ISSUES IF NECESSARY

To the extent that the Commission would like to examine these or other issues related to the Fermi 3 FEIS, it has mechanisms in place to do so. These include the uncontested (or “mandatory”) portion of the hearing, which provides the Commission with the opportunity to question Staff and Applicant witnesses and to develop a record. More broadly, the Commission

81 NUREG-1555, Environmental Standard Review Plan (ESRP), Revision 1 (July 2007) § 4.1.2. The Applicant followed the same ESRP guidance in developing its ER. See ER at 4-12.

82 See Seabrook, CLI-12-05, 75 NRC at 341 (a “hard look” analysis should use “the best available information at the time the assessment is performed.”); Comanche Peak, CLI-12-07, 75 NRC at 391-92 (NEPA “does not require that [the NRC] wait until inchoate information matures into something that later might affect our review.”).

83 See Comanche Peak, CLI-12-07, 75 NRC at 391-92.
retains discretion to rule on questions of law briefed by the parties, as well as to exercise its inherent supervisory authority over the NRC Staff. Contrary to the Board’s view, the questions raised here by the Board are fundamentally legal in nature and not susceptible to resolution through further fact-finding, particularly where it is undisputed that the corridor development plan has not been finalized and neither the Board nor parties have asserted that existing information has simply been overlooked. Accordingly, *sua sponte* review by the Board is neither necessary nor justifiable on grounds of judicial efficiency.

**CONCLUSION**

There is no serious environmental issue related to transmission line impacts in the Fermi 3 FEIS that meets the high standard needed to justify the Board taking *sua sponte* review. Should the Commission consider further inquiry to be appropriate, it has more efficient processes for doing so, including an opportunity to review the FEIS as part of the mandatory hearing in this proceeding.

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Dated at Rockville, Maryland
This 28th day of July, 2014

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84 See *Fermi*, LBP-14-09, 80 NRC at ___ (slip op. at 52).
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DETROIT EDISON CO. Docket No. 52-033
(Fermi Nuclear Power Plant, Unit 3)

CERTIFICATE OF SERVICE

I hereby certify that the document entitled 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), dated July 28, 2014, has been filed through the E-Filing system this 28th day of July, 2014.

/Signed (electronically) by/
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Dated at Rockville, Maryland
This 28th day of July, 2014