UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: DTE ELECTRIC COMPANY (Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

APPLICANT’S OPPOSITION TO SUA SPONTE CONSIDERATION OF TRANSMISSION CORRIDOR ISSUES

July 28, 2014
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>BACKGROUND</td>
<td>2</td>
</tr>
<tr>
<td>A. NRC Staff Evaluation of Offsite Transmission Corridor</td>
<td>2</td>
</tr>
<tr>
<td>B. Standard for <em>Sua Sponte</em> Review</td>
<td>3</td>
</tr>
<tr>
<td>DISCUSSION</td>
<td>3</td>
</tr>
<tr>
<td>A. The NRC Staff Followed Regulations and Guidance in Completing the Fermi 3 FEIS</td>
<td>3</td>
</tr>
<tr>
<td>B. The NRC Staff’s Approach to Offsite Transmission Corridor Impacts Satisfies NEPA</td>
<td>7</td>
</tr>
<tr>
<td>1. The Offsite Transmission Line Is Not A Connected Action Under NEPA</td>
<td>8</td>
</tr>
<tr>
<td>2. There Is No Improper Segmentation</td>
<td>10</td>
</tr>
<tr>
<td>C. The NRC Staff Took a “Hard Look” at Offsite Transmission Corridor Impacts</td>
<td>13</td>
</tr>
<tr>
<td>D. Even If the Commission Decides Further Action Is Necessary, It Should Not Consider the Issues in a Contested Hearing</td>
<td>19</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>20</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

## JUDICIAL DECISIONS

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baltimore Gas &amp; Electric Co. v. NRDC, 462 U.S. 87,100 (1983)</td>
<td>20</td>
</tr>
<tr>
<td>Cal. Trout v. Schaefer, 58 F.3d 469 (9th Cir. 1995)</td>
<td>12</td>
</tr>
<tr>
<td>Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991)</td>
<td>18</td>
</tr>
<tr>
<td>Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir. 1992)</td>
<td>17</td>
</tr>
<tr>
<td>Crounse Corp. v. I.C.C., 781 F.2d 1176 (6th Cir. 1986)</td>
<td>6, 15</td>
</tr>
<tr>
<td>Detroit Edison Co. v. NRC, 630 F.2d 450 (6th Cir. 1980)</td>
<td>5</td>
</tr>
<tr>
<td>Enos v. Marsh, 769 F.2d 1363 (9th Cir. 1985)</td>
<td>9, 12</td>
</tr>
<tr>
<td>Friends of Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975)</td>
<td>9</td>
</tr>
<tr>
<td>Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995)</td>
<td>20</td>
</tr>
<tr>
<td>Kleppe v. Sierra Club, 427 U.S. 390 (1976)</td>
<td>10, 15</td>
</tr>
<tr>
<td>Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F.3d 517 (9th Cir. 1994)</td>
<td>17</td>
</tr>
<tr>
<td>N.A.A.C.P. v. Medical Ctr., Inc., 584 F.2d 619 (3d Cir. 1978)</td>
<td>10</td>
</tr>
<tr>
<td>Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)</td>
<td>18</td>
</tr>
<tr>
<td>N. Slope Borough v. Minerals Mgm’t Serv., 343 Fed. Appx. 272 (9th Cir. 2009)</td>
<td>17</td>
</tr>
<tr>
<td>Pub. Serv. Co. of N.H. v. NRC, 582 F.2d 77 (1st Cir. 1978)</td>
<td>5</td>
</tr>
<tr>
<td>Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987)</td>
<td>10</td>
</tr>
<tr>
<td>Save the Bay, Inc. v. U.S. Corps of Eng’rs, 610 F.2d 322 (5th Cir. 1980)</td>
<td>10</td>
</tr>
</tbody>
</table>
South Carolina v. O'Leary, 64 F.3d 892 (4th Cir. 1995) .................................8
South Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085 (9th Cir. 2010) ..............13
Town of Winthrop v. FAA, 535 F.3d 1 (1st Cir. 2008) ..................................................18
UCS v. NRC, 920 F.2d 50 (D.C. Cir. 1990) .................................................................20
Utahns for Better Trans. v. U.S. Dep’t of Trans., 305 F.3d 1152 (10th Cir. 2002) ..........9
Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189 (9th Cir. 1997) ..........9
Wilderness Workshop v. BLM, 531 F.3d 1220 (10th Cir. 2008) .................................9

ADMINISTRATIVE DECISIONS

Calvert Cliffs 3 Nuclear Project, LLC et al (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, __ NRC __ (2013) .................................7
Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069 (1982) .................................................................7
Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3), ALAB-247, 8 AEC 936 (1974) ....5
Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278 (2002) .................................10
Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516 (1985) .................................................................3
Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53 (1973) ....7
South Carolina Electric & Gas Co. and Santee Cooper (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-09, __ NRC __ (2012) .................................6
Union Electric Co. (Callaway Plant, Units 1 & 2), ALAB-352, 4 NRC 371 (1976) .............7
Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277 (1987) ..............................................8
### STATUTES AND REGULATIONS

10 C.F.R. § 2.340 ................................................................. ....................................................... 3

10 C.F.R. § 50.10 ................................................................. ....................................................... 4

40 C.F.R. § 1502.22 ................................................................. ..................................................... 15

40 C.F.R. § 1508.25 ................................................................. ..................................................... 8, 9, 10


72 Fed. Reg. 57416 (Oct. 9, 2007) ................................................................. ........................................ passim


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INTRODUCTION  

In accordance with the Secretary’s Order, dated July 11, 2014, DTE Electric Company (“DTE”) responds to the Licensing Board’s Memorandum requesting Commission approval to conduct a *sua sponte* review of two issues involving the environmental evaluation of offsite transmission corridors.1 DTE opposes *sua sponte* review. The Board’s request is fundamentally at odds with the Commission’s regulations addressing transmission corridor impacts under the National Environmental Policy Act (“NEPA”). The NRC Staff followed NRC regulations and its own NEPA guidance throughout the Fermi 3 environmental review. Challenges to NRC regulations, or even disagreements with Commission policies, are not appropriate for resolution in a site-specific adjudicatory hearing. In any event, the Final Environmental Impact Statement (“FEIS”) addresses the environmental impacts in offsite transmission corridors in accordance with Commission rules and guidance, and with NEPA. The standards for *sua sponte* review have not been met.

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1 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), dated July 7, 2014.
BACKGROUND

A. NRC Staff Evaluation of Offsite Transmission Corridor

The NRC Staff discusses the impacts of offsite transmission lines throughout the Fermi 3 FEIS. The FEIS observes (at 2-45) that new offsite transmission lines built to support Fermi 3 would be owned and operated by ITC\textit{Transmission}, and that DTE has no control over the siting, design, or operation of offsite transmission lines.\footnote{2} The FEIS explains (at 2-10) that ITC\textit{Transmission} has not formally announced a route for a new offsite transmission line serving Fermi 3. The NRC Staff therefore relied on publicly-available information and reasonable expectations regarding configurations that ITC\textit{Transmission} would use for the offsite transmission corridor based on standard industry practice. The FEIS notes that a new transmission line is expected to be built within an existing corridor for approximately 18.6 miles extending outward from the Fermi site. The remaining 10.8 miles, extending to the Milan Substation, would be built within an undeveloped right-of-way (“ROW”) owned by ITC\textit{Transmission}.\footnote{3} The FEIS notes (at 2-46) that some transmission tower footings were installed in the undeveloped ROW as part of earlier plans but were not used, and the corridor has been only minimally maintained. The undeveloped ROW crosses mostly agricultural and forest land with scattered wetlands, and no part of the route crosses designated or protected natural or recreational areas.\footnote{4} This undeveloped corridor is the focus of the Board’s request.

\footnote{2} See also Affidavit of Peter Smith, DTE, dated May 30, 2013, at ¶11. Mr. Smith discusses the System Impact Study that MISO requested from ITC\textit{Transmission}. \textit{Id.} at ¶10.

\footnote{3} \textit{Id.} ITC\textit{Transmission}, not DTE, must obtain applicable regulatory approvals to develop the transmission system. Smith Aff. at ¶10 The final transmission route will be determined in a Certificate of Public Convenience and Necessity (“CPCN”) from the Michigan Public Service Commission (“MPSC”). \textit{Id.} at ¶¶10, 12-13.

\footnote{4} FEIS at 2-10.
B. Standard for Sua Sponte Review

Under 10 C.F.R. § 2.340(b), a Board may consider matters sua sponte only where the Commission finds that a “serious” safety, security, or environmental matter exists. As pointed out in DTE’s May 30 Brief, the reference to a “serious” safety or environmental matter implies a high level of significance and this authority is to be exercised only in “extraordinary circumstances.” A serious safety issue, for example, might pose a significant risk to public health and safety, such as a defect that, if uncorrected, could lead to offsite releases. Examples of safety issues considered for sua sponte review include containment leak testing and control room habitability, breakdowns in quality assurance, unresolved safety issues, and the Safe Shutdown Earthquake. By analogy, to be a serious environmental issue, the FEIS would need to overlook an important issue entirely, have the potential to destabilize an important environmental resource, or cause a severe adverse environmental impact (e.g., a LARGE impact).

DISCUSSION

A. The NRC Staff Followed Regulations and Guidance in Completing the Fermi 3 FEIS

The NRC Staff addressed offsite transmission corridor impacts for Fermi 3 as directed by NRC regulations, guidance, and Commission precedent. Specifically, the NRC Staff followed the 2007 limited work authorization (“LWA”) rule, which limited the definition of “construction” to those activities within the NRC’s regulatory authority and expressly excluded

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6 Id. at 9 n.44. We identified no examples of the Commission authorizing sua sponte review of an environmental issue. In one case, a Board considered, but declined to conduct, sua sponte review of make-up water for cooling systems and public dose calculations for radioactive releases. But, those issues implicate public health and safety, not the relative magnitude of environmental effects. *Houston Lighting and Power Co., et al.* (South Texas Project, Units 1 and 2), LBP-85-8, 21 NRC 516 (1985).
transmission lines from that definition. On FEIS page 1-6, the NRC Staff highlights the LWA rule and explains that, as directed by the Commission, activities not within the NRC’s purview, including offsite transmission lines, are called “preconstruction.” Because preconstruction is not part of the NRC action, their impacts are not reviewed as a direct effect of the NRC action, but are considered as “cumulative impacts.” This same approach is described in the statements of consideration for the LWA rule, which states that “preconstruction impacts will be evaluated as part of the cumulative impacts analysis.”

The Board asserts (at 25) that there is a “serious question” as to whether the NRC Staff must consider offsite transmission lines as a “connected action.” But, in doing so, the Board does not claim that the NRC Staff failed to follow the LWA rule’s approach. Instead, the Board points to EPA’s comments on the Fermi 3 FEIS, and implies that the Fermi 3 FEIS is inconsistent with Council on Environmental Quality (“CEQ”) regulations. But, the Commission sought comments from both EPA and CEQ during the LWA rule’s development. Neither objected to the NRC’s approach to NEPA at that time. And, in response to EPA

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7 “Limited Work Authorizations for Nuclear Power Plants; Final Rule,” 72 Fed. Reg. 57416 (Oct. 9, 2007) (“LWA rule”); 10 C.F.R. § 50.10(a)(2)(vii). In the rulemaking, the Commission specifically considered, and rejected, the issues raised by the Board.

8 Preconstruction is not limited to activities that occur prior to NRC-licensed construction. Many preconstruction activities could and probably will be performed concurrently with construction. See, e.g., “Interim Staff Guidance on the Definition of Construction and on Limited Work Authorizations,” COL/ESP-ISG-4, at 9 n.2.

9 FEIS at 1-7.

10 72 Fed. Reg. at 57421.

11 See LBP-14-09 at 14 (citing EPA comments on the Fermi 3 FEIS arguing that the offsite transmission corridor is a connected action and recommending that NRC consider transmission impacts as direct impacts); id. at 20, 36, and 48.

12 72 Fed. Reg. at 57422.
comments on the Fermi 3 DEIS, the NRC Staff explained that its treatment of offsite transmission impacts was consistent with NRC regulations and noted that offsite transmission impacts were in fact considered as cumulative impacts. This undercuts the Board’s assertion (at 34 n.152) that the NRC did not give much, if any, consideration to EPA’s suggestion. The Board also suggests that an LWA rule comment raised valid concerns with the NRC’s review of preconstruction impacts. But, the Commission specifically considered and rejected those concerns. By seeking permission to re-consider these same issues in a contested hearing, the Board is essentially disputing the Commission’s regulations.

The NRC Staff’s approach in the FEIS also follows NRC guidance, which is entitled to “special weight.” The guidance appropriately recognizes changes in the U.S. electricity transmission system that have taken place since the 1970s. NUREG-1555, Section 4.1.2, Rev. 1, dated July 2007, explains that, where transmission lines are constructed and operated by an entity other than the applicant, the impact information may be limited and the

13 FEIS at E-41.
14 See LBP-14-09 at 25 (citing comments from NRC staffer in 72 Fed. Reg. at 57420).
17 The cases cited by the Board, such as Detroit Edison Co. (Greenwood Energy Ctr., Units 2 & 3), ALAB-247, 8 AEC 936 (1974), Detroit Edison Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980), and Pub. Serv. Co. of N.H. v. NRC, 582 F.2d 77, 82 (1st Cir. 1978), all pre-date significant restructuring of the electricity industry. In the 1970s, the typical utility had legal authority to exercise eminent domain for supporting infrastructure, such as transmission lines. Here, as the FEIS recognizes, DTE has no control over the siting of offsite transmission lines. Further, the cases cited by the Board (at 8, 28) rely on GDC 17 as indicative of NRC jurisdiction over transmission line siting. GDC 17, however, is a standard by which nuclear facilities are to be designed to assure safety (i.e., a limiting condition), not an exercise of authority over transmission lines or their routes.
reviewer should proceed using the information that can be obtained. This is precisely what the NRC Staff did here. The NRC guidance follows an approach that has been accepted where information available to an agency is limited.

The NRC Staff also followed its guidance on evaluation of preconstruction impacts in COL/ESP-ISG-026, “Environmental Issues Associated with New Reactors.” Attachment 4 clarifies the cumulative effects analysis, which includes offsite transmission and other preconstruction activities. Attachment 6 specifically notes that, since the LWA rule, “transmission lines are clearly not construction” and, as a result, the NRC Staff will no longer consider alternative transmission systems. The Board does not even address this NRC guidance. Instead, the Board asserts (at 34) that, if ITC Transmission’s transmission corridor lacks independent utility, the NRC Staff must evaluate alternatives. But, considering alternative offsite transmission corridors would be directly contrary to NRC guidance.

The NRC Staff’s approach is also consistent with that taken for other COLs. For example, in reviewing uncontested issues for Summer, the Commission found the NRC Staff’s treatment of offsite transmission impacts—that is, assessing “preconstruction” activities as cumulative impacts—to be acceptable. The NRC approach in the Fermi 3 FEIS is the same.

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18 See, e.g., FEIS at 2-45 (“Detroit Edison has no control over the design or operation of transmission lines off of its plant sites. Accordingly, the description presented here of the terrestrial resources that interface with the transmission line corridors is based on publicly available information and reasonable expectations of the configurations that ITC Transmission would likely use based on standard industry practice.”).


20 This guidance was issued for public comment. 78 Fed. Reg. 56750 (Sept. 13, 2013).

21 See, e.g., South Carolina Electric & Gas Co. and Santee Cooper (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-12-09, __ NRC __ (2012) (slip op. at 9-10, 53-54).
There is no question that the NRC Staff’s review of transmission corridor impacts in the FEIS follows the Commission’s regulations, guidance, and precedent. The Board’s request is therefore tantamount to a challenge to NRC regulations and the Commission’s current approach to satisfying NEPA for offsite transmission lines. But, it is a “fundamental principle of administrative law” that the agency’s rules are not subject to collateral attack in adjudicatory proceedings.\textsuperscript{23} The Board’s disagreement with Commission policy is no basis for \textit{sua sponte} review. Moreover, the Board’s concern is not limited to Fermi 3, but rather would apply to offsite transmission impacts for any license application involving new corridors. Under these circumstances, the appropriate forum for resolving these issues, to the extent that there is even an issue, is the rulemaking process.\textsuperscript{24} Policy issues, such as those raised by the Board, are simply not appropriate for resolution in a site-specific adjudicatory proceeding.\textsuperscript{25}

B. The NRC Staff’s Approach to Offsite Transmission Corridor Impacts Satisfies NEPA

The Board’s first issue, addressed in Section II.C, is that the construction of a new transmission corridor should have been analyzed as a “connected action” in the FEIS. However, the offsite transmission line is not a connected action and there are no improper segmentation concerns. The NRC Staff’s approach is consistent with cases interpreting NEPA.

\textsuperscript{22} \textit{Compare} Fermi 3 FEIS Section 1.1.2 to Summer FEIS Section 1.1.2; \textit{see also} Calvert Cliffs 3 FEIS (same); South Texas Project, Units 3 & 4 FEIS (same).

\textsuperscript{23} \textit{Carolina Power \\& Light Co.} (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

\textsuperscript{24} \textit{Union Electric Co.} (Callaway Plant, Units 1 \\& 2), ALAB-352, 4 NRC 371 (1976); \textit{cf. Long Island Lighting Co.} (Shoreham Nuclear Power Station), ALAB-99, 6 AEC 53, 55-56 (1973) (as a general rule, a generic issue should not be considered in an individual proceeding, where the issues appropriately could be considered via rulemaking).

\textsuperscript{25} \textit{Calvert Cliffs 3 Nuclear Project, LLC et al} (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-04, ___NRC___ (slip op. March 11, 2013, at 4-5).
1. **The Offsite Transmission Line Is Not A Connected Action Under NEPA.**

The Board asserts (at 25) that “[i]n order for construction of the transmission corridor to constitute a connected action under 40 C.F.R. § 1508.25, three requirements must be met.” But, the test for connected actions is different from that articulated by the Board.\(^{26}\) Under Section 1508.25, connected actions are those that: (i) automatically trigger other actions requiring 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. The offsite transmission corridor is not a connected action under any of these factors.\(^{27}\)

For one action to automatically trigger a second, an agency must have no choice but to complete the second action after undertaking the first.\(^{28}\) Here, NRC approval of construction for Fermi 3 does not “automatically” trigger offsite transmission line construction. The transmission lines will not be built unless and until other (non-NRC) approvals are obtained.\(^ {29}\) Also, under the second test, one action can exist without the other. Even though Fermi 3’s value may be reduced without new transmission capacity, the plant could exist without a new line — for example, by using existing lines within certain limits.\(^ {30}\) Conversely, a new

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\(^{26}\) The Board appears to have instead applied the test for improper segmentation. That issue is discussed further below.

\(^{27}\) The NRC is not bound by CEQ regulations. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987).


\(^{29}\) The final transmission route will be determined in a CPCN issued by the MPSC. DTE’s May 30 Brief at 8, citing Peter Smith Declaration at ¶¶10, 12-13; FEIS at 4-45.

\(^{30}\) DTE’s May 30 Brief, Attachment 1, at 14 (noting that, under specified contingency scenarios, the transmission system could support 865 MW of generation from Fermi 3).
transmission corridor could serve the existing Fermi 2 or reduce congestion on the transmission system apart from Fermi 3.\(^{31}\) These circumstances are similar to those in *Wilderness Workshop v. BLM*, where the court found that a gas pipeline and proposed new wells were not “connected actions.”\(^{32}\) Even though the proposed pipeline had far more capacity than the few existing wells required, the new pipeline still could service the existing wells.

Under the third test, multiple actions should be considered in the same NEPA statement if they are interdependent and justified by the same larger action.\(^{33}\) In *Utahns for Better Trans. v. U.S. Dep’t of Trans.*, the court refused to find that three components of an urban traffic congestion relief plan were connected because they were not interdependent.\(^{34}\) The three smaller projects—a highway expansion, construction of a new highway, and transit improvements—were all justified by the larger traffic improvement project, but each smaller project did not rely on the others for its existence. Here, the plant and the transmission corridor likewise can each exist without the other.\(^{35}\) It is reasonable and rational for the NRC to license Fermi 3 without approving the transmission line because the NRC has no jurisdiction over offsite

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\(^{31}\) See *id.* at 11-12 (listing existing and assumed prospective generation used for the analysis); *id.* at 14 (assuming that all the higher queued units are in place for contingency calculations, and noting that results may vary with changes to the queue).

\(^{32}\) 531 F.3d 1220, 1229-30 (10th Cir. 2008); see also *Western Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1195 (9th Cir. 1997) (declining to find a connected action because a radio antenna could exist without an access road).

\(^{33}\) 40 C.F.R. § 1508.25(a)(1)(iii).

\(^{34}\) 305 F.3d 1152, 1161, 1183-84 (10th Cir. 2002).

\(^{35}\) *Enos v. Marsh*, 769 F.2d 1363, 1371-72 (9th Cir. 1985) (upholding decision to exclude the impact of non-federal shore facilities from a NEPA assessment of a new deep draft harbor); *Friends of Earth, Inc. v. Coleman*, 518 F.2d 323, 328 (9th Cir. 1975) (finding that an agency was not required to prepare an EIS for state funded projects in a partially federally funded airport development).
transmission lines.\textsuperscript{36} And, it would be rational for ITCTransmission to develop the new corridor to support non-nuclear generation at the Fermi site, other nearby generation, or other grid improvements.

2. \textit{There Is No Improper Segmentation}

Rather than evaluating the three “connected action” factors in Section 1508.25(a)(1), the Board analyzed the improper segmentation factors: (1) whether there is a proposed action; (2) whether the actions have independent utility; and (3) whether there is sufficient federal control and responsibility. None of these factors suggests improper segmentation of transmission corridor impacts for Fermi 3.

The Supreme Court has held that only “when several proposals for ... actions … are pending concurrently before an agency, [must] their environmental consequences ... be considered together.”\textsuperscript{37} The Court concluded that agencies are not required to consider “possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions” and specifically reversed the court of appeals’ ruling that the agency must include significant federal actions that were merely under “consideration,” as compared with those that are actually proposed.\textsuperscript{38} The transmission corridor described in the FEIS is not a proposed action. ITCTransmission would construct, own, and operate the transmission lines. There is currently no defined route, no application for relevant permits or approvals, and no

\textsuperscript{36} Even if the NRC had authority over transmission line routing, the fact that a federal action is a “but for” cause of a non-federal action does not, in itself, subject the non-federal action to NEPA. \textit{Ringsred v. City of Duluth}, 828 F.2d 1305, 1308 (8th Cir. 1987); \textit{Save the Bay, Inc. v. U.S. Corps of Eng’rs}, 610 F.2d 322, 327 (5th Cir.), \textit{cert. denied}, 449 U.S. 900 (1980); \textit{N.A.A.C.P. v. Medical Ctr., Inc.}, 584 F.2d 619, 630-34 (3d Cir. 1978).


\textsuperscript{38} \textit{Id.} at 410 n. 20, 404 (emphasis added).
control over the siting or construction of the lines by DTE or the NRC. And, contrary to the Board’s assertion that the transmission line upgrades are essentially fixed, the System Impact Study prepared by ITC Transmission notes that “[u]ltimately, a different set of upgrades may be required,” depending on several factors, including network changes that occur before plant startup.  

In light of “major uncertainties surrounding” the transmission line, offsite transmission line construction is “too inchoate to rise to the level of a ‘proposal’ within the meaning of Kleppe and its progeny.”

The Board suggests (at 27) that no party has identified any other function that transmission lines are intended to serve other than to serve Fermi 3. Yet, immediately thereafter, the Board notes that DTE stated that the transmission lines might serve other generation resources if Fermi 3 is not constructed. The Board claims this possibility is too speculative to establish independent utility, and cites a 1974 case involving a greenfield site. But, if a different generating facility were built at or near the Fermi site, or if there were expansions of nearby generating stations, the same or different transmission line may be needed. A transmission line therefore has independent utility apart from Fermi 3. Moreover, there is already existing transmission serving the site for Fermi 2, so the analogy to an “airplane that can’t fly” is inapt.

39 DTE’s May 30 Brief, Attachment 1, at 5, 17.

40 See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 296 (2002).

41 See DTE’s May 30 Brief, Attachment 1, at 17 (“Future situations that differ from the assumptions contained in this report may affect the observations, recommendations and conclusions. ITC Transmission makes no guarantee that these or other factors not foreseen during the study will not impact the proposed observations, recommendations and conclusions.”); id. at 5 (“[T]he models used for this study were based on expected topology and system conditions (load, generation dispatch, reactive devices, etc.) for the 2017 time frame. The assumptions made in the models came from the best information available as of the date of this report, and are speculative in nature.”).
Finally, the Board claims (at 30) that the Commission has “authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project.” The Board relies on various outdated cases for the proposition that the NRC may condition approval on routing of transmission lines. But, those cases addressed entirely different factual scenarios, involving integrated utilities that controlled both plant and transmission line construction. Here, different companies are responsible for the nuclear power plant and transmission lines.\textsuperscript{42} The Commission also specifically addressed this issue in the LWA rule, noting that its “redefinition of preconstruction reflects its reconsideration of the proper regulatory jurisdiction of the agency, and properly divides what was considered a single Federal action into private action for which the NRC has no statutory basis for regulation, and the Federal action.”\textsuperscript{43}

At bottom, there is no connected action and, even if there were, no improper segmentation. The first issue presented by the Board does not raise a “serious” environmental issue. The Board’s questions have already been answered by the Commission.\textsuperscript{44} There is no basis for \textit{sua sponte} review.

\textsuperscript{42} See Enos, 769 F.2d at 1371-72 (finding no federal action under NEPA where non-federal portion of a project received no federal funding and was not under federal supervision). Even if the non-federal portion depends on the federal portion for its utility, the entire project (\textit{i.e.}, federal and non-federal portions together) does not constitute a single federal action that must be analyzed together since the NRC has no jurisdiction over private pre-licensing activities. \textit{Cal. Trout v. Schaefer}, 58 F.3d 469, 473-474 (9th Cir. 1995).

\textsuperscript{43} 72 Fed Reg. at 57418-57419; see also id. at 57419 (“While the agency’s regulations on construction and LWAs were a reasonable implementation of NEPA as understood in 1972, the NRC believes that, with more than 30 years’ experience in implementing NEPA and the evolving jurisprudence, the time is appropriate for reconsideration and revamping of these NRC requirements.”).

\textsuperscript{44} 72 Fed. Reg. at 57427. Section III.C.3 is titled “NRC’s Phased Approval Approach Is Not Illegal Segmentation Under NEPA.”
C. The NRC Staff Took a “Hard Look” at Offsite Transmission Corridor Impacts

The Board’s second concern (at 41-52) is that the NRC Staff failed to adequately consider transmission impacts by addressing them only as “cumulative impacts” (rather than as connected actions). Regardless of whether the two projects are “connected,” the FEIS complies with NEPA by taking a hard look at the combined impact of Fermi 3 and the offsite transmission corridor.\textsuperscript{45} Although the Board suggests (at 41) that labeling the transmission corridor as a cumulative impact lessened the depth of the analysis, whether the action is termed a connected or cumulative action is irrelevant so long as the agency has appropriately considered the impacts.\textsuperscript{46} The purposes of NEPA are to consider and disclose environmental impacts. By any measure, the Fermi 3 FEIS meets that standard.

As explained in DTE’s May 30 Brief (at 5-6), the FEIS describes the environmental attributes of the anticipated transmission corridor in Chapter 2 and discusses the impacts of transmission corridor construction and operation in Chapters 4 and 5, respectively. Chapter 4 also contains a “bounding analysis” of potential wetland impacts from transmission line construction. The Board’s assertion (at 41) that the “FEIS provided very limited information

\textsuperscript{45} See S. Coast Air Quality Mgmt. Dist. v. FERC, 621 F.3d 1085, 1098 n.5 (9th Cir. 2010) (finding it unnecessary to determine whether two actions were connected where the EIS for the action at issue “appropriately considered” the other action’s impact).

\textsuperscript{46} The Board (at 32-33) cites Border Power Plant Working Grp. v. U.S. Dep’t of Energy, 260 F.Supp.2d 997, 1012-18 (S.D. Cal. 2003), in asserting that transmission impacts must be analyzed as a direct effect even under the Commission’s interpretation of its authority in the LWA rule. But, the case, if anything, supports the NRC Staff’s approach in the FEIS. The Court in Border Power explained that power plants in Mexico were not part of the Federal “proposal” for transmission lines in the U.S. because the new plants would be outside the United States’ jurisdiction. The Court went on to address whether the impacts nonetheless should be considered secondary or cumulative effects of the proposed action. Here, the NRC Staff already considered offsite transmission impacts in the EIS as cumulative impacts. The discussion of Border Power is irrelevant. The Board’s reliance on Hammond v. Norton, 370 F.Supp. 226, 247-253 (D.D.C. 2005), is also misplaced since it involved two projects that both required similar federal permits.
concerning impacts to wetlands, streams, endangered species, and cultural resources” is not supported by a review of the FEIS itself, as described further below. Moreover, the discussion of unavoidable adverse impacts and costs used in the NEPA balancing portion of the FEIS (Chapter 10) specifically addresses offsite transmission impacts, including adverse impacts, mitigation measures, and costs. The NRC Staff therefore specifically considered transmission corridor impacts in making the overall cost-benefit balance in the FEIS. There is no basis for the Board’s suggestion (at 40) 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.”

The Board lists three possible deficiencies with the FEIS, but none raise a serious environmental issue. First, the Board states (at 48) that the NRC Staff lacked information needed to fully evaluate the environmental impacts of offsite transmission lines. The Board claims (at 49) that the FEIS makes no effort to explain why the NRC could not obtain the information. This is simply not true. The NRC Staff notes that ITC Transmission, not DTE, is responsible for siting and constructing the offsite transmission lines and explains that its assessment was based on public information and reasonable expectations of the configurations that ITC Transmission would likely use based on standard industry practice. In any event, the

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47 The NRC Staff also considered offsite transmission corridor impacts in its alternative energy sources and alternative site reviews. See, e.g., FEIS at 9-87, 9-143, 9-193.

48 The Board makes a similar argument on pages 24-25. But, the Commission specifically addressed this concern during the LWA rulemaking, noting that the NRC lacks statutory authority over pre-construction activities and explaining that that the “federal action” does not include private pre-construction activities. 72 Fed. Reg. at 57420, 57422.
NRC Staff’s approach is consistent with NEPA where only limited information is available to the agency.49 The Board nowhere addresses these cases, which were cited in DTE’s May 30 Brief.

Second, the Board complains (at 49-50) that the Staff relied on predicted future action by other regulatory agencies to conclude that transmission corridor construction and operation will have only small impacts on wetlands, streams, and protected species. This issue is closely linked to the Board’s third concern (at 51-52), which is that the FEIS merely assumes that mitigation for transmission impacts to wetlands, streams, and protected species will be addressed in permit reviews by other agencies. Neither issue demonstrates a flaw in the FEIS.

The Board overlooks the rigor of the Staff’s analysis in the FEIS. The NRC does not just rely on other agencies in reaching its impact assessment. Instead, the NRC assesses impacts based on the information available to it, which in some cases is extensive. For example, on page 2-44, the NRC explains that the undeveloped transmission corridor could require placing towers in wetlands that cannot be spanned (distances over 900 feet) and notes that the total potential permanent impact on wetlands from installation of all the towers is approximately 0.5 acres. This is not a large impact area. In addition, the NRC recognizes that wetland area impacts would be mitigated according to a mitigation plan ITCTransmission would develop in

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49 See, e.g., Crounse, 781 F.2d at 1193-96 (ruling that the ICC had justified the limited scope of its analysis on the grounds that “the lack of final design and engineering plans made it impossible to conduct an in-depth analysis”); Kleppe, 427 U.S. at 412 (explaining that the scope of an EIS “requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility”); Blackwell, 389 F.Supp.2d at 1188 (noting, in cases where information is incomplete or unavailable to an agency, the agency need only make clear that information is lacking); cf. 40 C.F.R. § 1502.22 (where there is “incomplete or unavailable information,” an EIS may be “based upon theoretical approaches or research methods generally accepted in the scientific community”).
coordination with the MDEQ and USACE, as necessary. The FEIS notes (at 4-52 and 4-53) that no new roads are needed for the offsite transmission lines because existing roads already provide sufficient access to the corridor. Using this information, the NRC concluded that impacts on aquatic habitats within the offsite transmission corridor would be temporary, easily mitigated, and minor, and no additional mitigation would be required. Similar detailed reviews were conducted for threatened and endangered species.

With respect to mitigation, NEPA requires only that agencies identify mitigation measures and their relevance to environmental impact conclusions “in sufficient detail to ensure

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50 Transmission construction techniques are designed to minimize impacts. For example, using swamp/timber mats to move equipment across wetland areas reduces impacts, as do time of year restrictions on construction, equipment with wide tires or rubberized tracks, and long-reach excavators (to avoid driving or staging in wetlands). FEIS at 4-41.

51 Although sections describing transmission impacts are too numerous to cite, one example is particularly illustrative. The Board argues (at 44, citing FEIS at 2-104) that the FEIS fails to provide information on impacts to the Northern Riffleshell. But, the Board is reading FEIS sections in isolation. In assessing impacts (at 4-56), the NRC Staff states:

Although suitable habitat for the northern riffleshell could be present in some of the streams that would be crossed by the proposed transmission line corridor, extant populations of this species in Michigan are only known to be present in the Black River in Sanilac County and the Detroit River in Wayne County (Carman and Goforth 2000). Even if present in streams crossed by the transmission line corridors, the building of transmission lines for Fermi 3 is not expected to affect the northern riffleshell because aquatic habitats that are crossed by the corridor would be spanned without placement of structures within stream channels and because BMPs would be implemented to protect water quality in aquatic habitats located near construction activity. Additional regulatory review of proposed plans for construction of the transmission lines, which would be built, owned, and maintained by ITC Transmission, may be conducted by the MDEQ and/or USACE, and potential impacts on water quality are expected to be addressed through mitigation measures and BMPs required under issued permits. On the basis of this information, the review team concludes that preconstruction- and construction-related activities would have no effect on the northern riffleshell.
that environmental consequences have been fairly evaluated."

NEPA does not require a mitigation plan that is legally enforceable or even in final form. This principle applies even where an EIS relies on mitigation for its conclusions regarding the severity of impacts. The Methow Valley EIS concluded that mitigation would greatly reduce the environmental impacts of a proposed ski area. The Supreme Court overturned a Ninth Circuit decision finding that the Forest Service “had an affirmative duty” to ensure implementation of mitigation measures before granting the permit. The Court rejected the Ninth Circuit’s view that it was “improper” for the agency to rely on mitigation that might be taken by third parties, stating that “[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.” These circumstances are replicated here. The NRC Staff considered the effect of mitigation measures on transmission line impacts, but did not (and indeed, lacks authority to) require ITC Transmission to actually implement those measures.

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53 See Theodore Roosevelt Conservation Partnership v. Salazar, 616 F. 3d 497 (2010) (NEPA “does not require agencies to discuss any particular mitigation plans that they might put in place,” nor does it “require agencies—or third parties—to effect any.”); N. Slope Borough v. Minerals Mgm’t Serv., 343 Fed. Appx. 272 (9th Cir. 2009) (holding that “a mitigation plan does not have to be legally enforceable to comply with NEPA.”).

54 Id. at 347.

55 Id. at 352.

56 See also Communities, Inc. v. Busey, 956 F. 2d 619, 626 (6th Cir. 1992) (relying on Methow Valley in holding that identification and discussion of various potential measures to mitigate the environmental impact is adequate under NEPA); Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F. 3d 517, 528 (9th Cir. 1994) (“NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.”) (citations omitted).
Finally, the NRC Staff’s assessment is consistent with NEPA’s “rule of reason.” While there “will always be more data that could be gathered,” agencies “have some discretion to draw the line and move forward with decisionmaking.”\textsuperscript{57} NEPA “should be construed in the light of reason if it is not to demand” virtually infinite study and resources.\textsuperscript{58} In addition, both the CEQ regulations and NEPA itself compel only “a reasonably complete discussion of possible mitigation measures.”\textsuperscript{59} The FEIS here certainly is reasonably complete.

In light of the above, there does not exist a serious environmental issue that would justify \textit{sua sponte} review. The Board’s concerns involve the level of detail and depth of analysis in the FEIS. There is no indication of a potential health and safety risk to the public or workers. And, there is no evidence that any dangerous or destabilizing environmental impacts have been overlooked or ignored. The FEIS concludes, for example, that offsite transmission impacts on land use would be SMALL (FEIS at 4-8), that impacts on terrestrial wildlife would be “relatively minor, and no additional mitigation would be warranted beyond that typically used by \textit{ITCTransmission}” (\textit{id.} at 4-30), and that impacts on aquatic habitats within the offsite transmission corridor would be “temporary, easily mitigated, and minor, and no additional mitigation would be required” (\textit{id.} at 4-53). These types of impacts—especially where there is no indication that the impacts are greater than those already considered in the FEIS—are not sufficiently serious to warrant \textit{sua sponte} review. Quite simply, the circumstances are not “extraordinary.” The FEIS includes a detailed assessment of impacts based on the best

\textsuperscript{57} \textit{Town of Winthrop v. FAA}, 535 F.3d 1, 11 (1st Cir. 2008).


information available, considering DTE’s lack of authority over siting, design, and construction the offsite transmission lines and the current state of ITCTransmission’s planning efforts.

D. **Even If the Commission Decides Further Action Is Necessary, It Should Not Consider the Issues in a Contested Hearing**

The Intervenors first proposed a contention on the environmental impacts of transmission lines in January 2012. In LBP-12-12 (at 45-49), the Board rejected that proposed contention as untimely. After the FEIS was issued in January 2013, the Intervenors filed a second contention on transmission line impacts. The Board again rejected that contention as untimely in a Memorandum and Order, dated April 30, 2013, but identified (at 22-24) its interest in *sua sponte* consideration of the issue. DTE and the NRC Staff opposed that suggestion in May 2013. Now, more than 13 months later, and one month after resolving the remaining contested issues, the Board seeks approval (at 55) to conduct a hearing—ostensibly, “to minimize the potential delay” of taking up the issue very late in the licensing process. And, the Board suggests (at 56) that only a *contested* hearing will suffice to cure NEPA deficiencies. The suggested remedies are neither warranted nor required.

The Board’s request comes at the eleventh hour of the Fermi 3 licensing process. The FEIS was completed 18 months ago. The contested hearing issues are resolved, and all remaining NRC Staff safety review items closed. Only certain reviews of the Advisory Committee on Reactor Safeguards (“ACRS”) and the Commission’s mandatory hearing remain. DTE understands that the Staff’s latest schedule calls for the final ACRS meeting in September 2014, and that the NRC Staff could support completing the Final Safety Evaluation Report and initiating a mandatory hearing by December 2014.\(^60\) Consideration of an environmental issue at

\(^60\) DTE understands that the NRC Staff will issue a revised schedule shortly. Remaining activities are all now well in advance of the current schedule published in 2013.
this late stage would be extremely untimely and would almost certainly delay the COL. The timing and inevitable delay would reflect poorly on the predictability of the licensing process.

While DTE does not believe that any serious environmental issue exists, or that the NRC has failed to take a hard look at transmission line impacts, the Commission has an opportunity in the mandatory hearing to supplement the NEPA record. The Board suggests (at 56) that no courts of appeals has agreed that an uncontested hearing record can “cure deficiencies” in the FEIS. However, the distinction between a contested sua sponte hearing and an uncontested hearing is baseless. Under 10 C.F.R. § 51.102(c), a final decision of either a licensing board or “the Commissioners acting as a collegial body” will constitute the environmental record of decision. And, it is well-settled that “NEPA does not require agencies to adopt any particular internal decisionmaking structure” and that NEPA “does not itself provide for a hearing on those [environmental] issues.” Accordingly, even assuming the NEPA record requires supplementation, a contested hearing is not required.

CONCLUSION

For the foregoing reasons, the Commission should not authorize the Board to conduct a sua sponte review of offsite transmission corridor impacts.

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61 The Commission’s mandatory decision will in fact address specific NEPA issues, including whether the requirements of NEPA and Part 51 have been met and whether after weighing environmental and other costs, and considering alternatives, the COL should be issued. See, e.g., Southern Nuclear Operating Co., et al. (Notice of Mandatory Hearing), 76 Fed. Reg. 50767, 50768 (2011).


63 Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir. 1995), citing UCS v. NRC, 920 F.2d 50, 56 (D.C. Cir. 1990). CEQ Guidance, 48 Fed. Reg. 34263 (July 28, 1983), states that “[p]ublic hearings or meetings, although often held, are not required; instead the manner in which public input will be sought is left to the discretion of the agency.”
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Dated at Washington, District of Columbia
this 28th day of July 2014
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S OPPOSITION TO SUA SPONTE CONSIDERATION OF TRANSMISSION CORRIDOR ISSUES” in the above captioned proceeding have been served via the Electronic Information Exchange this 28th day of July 2014.

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