

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission**

In the Matter of:)	
)	Docket No. 52-033-COL
DTE Electric Company)	
)	October 6, 2014
(Fermi Nuclear Power Plant, Unit 3))	

* * * * *

**INTERVENORS' PETITION FOR REVIEW
OF ATOMIC SAFETY AND LICENSING BOARD'S DISMISSAL
OF CONTENTION 23 FOR LACK OF TIMELINESS**

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I. Introduction and Summary of Grounds for Petition

Beyond Nuclear, *et al.*¹, Petitioners-Intervenors herein, (“Petitioners”), by and through counsel, pursuant to 10 C.F.R. § 2.341(b), hereby petition the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for review of the Atomic Safety and Licensing Board’s (“ASLB”) “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Contention 23 or its Admission as a New Contention, and for Admission of New Contentions 26 and 27” (April 30, 2013) (unpublished) wherein (at pp. 21-22) the ASLB dismissed Intervenors’ Contention 23. The contention seeks inclusion of the power line transmission corridor within the Final Environmental Impact Statement (“FEIS”) for the Fermi 3 COLA proceeding.

In the April 30 order, the Atomic Safety and Licensing Board (“ASLB”) ruled in favor of

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

the Applicant, DTE Electric Company (“DTE”) to deny admission of Contention 23 although the ASLB believed that, but for the untimeliness of its submission, the contention would be admissible for adjudication.

According to 10 C.F.R. § 2.341(b)(4), a petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to certain enumerated considerations. Petitioners believe that the ASLB ruling on Contention 23 “is without governing precedent or is a departure from or contrary to established law;” that a “substantial and important question of law, policy, or discretion has been raised;” that the “conduct of the proceeding involved a prejudicial procedural error;” and that there are other considerations arising from the decision which the Commission “may deem to be in the public interest.” 10 C.F.R. § 2.341(b)(4)(ii)-(v). Petitioners submit that they have raised a substantial question respecting these considerations.

By order dated September 10, 2014, the Commission, which believes that “the issues raised in Intervenor’s Contention 23 are intertwined with the Board’s [*sua sponte*] request,” amended the deadline to allow the parties to file petitions for review of the Board’s dismissal of Contention 23 until October 5, 2014.²

The ASLB’s finding in favor of the Applicant raises the following important questions of law, fact, and policy:

First, The Licensing Board improperly denied admission of Contention 23 based upon a flawed ruling as to timeliness, namely, that the Licensing Board decided not to treat the NRC

²Because October 5, 2014 fell on a Sunday, Monday, October 6, 2014 is the legal deadline set by the Commission.

Staff's refusal to include NEPA analysis of the Fermi 3 transmission corridor in the Final Environmental Impact Statement as a new circumstance between the Staff's issuance of the Draft Environmental Impact Statement ("DEIS") and the FEIS, and therefore, the proper subject of a new, timely-submitted contention.

Second, even if the Board properly excluded Contention 23 from the proceedings in favor of its contemporaneous intention at the time to consider a *sua sponte* referral to the full Commission recommending transmission corridor treatment in the Fermi 3 NEPA documents (a referral which it subsequently made to the Commission), Petitioners' move to have Contention 23 admitted is legally separate and distinct, and has no bearing, on the process or merits of the *sua sponte* referral.

The April 30, 2013 ASLB order warrants review under 10 C.F.R. § 2.341(b)(4)(ii)-(v), and reversal should be ordered of the ruling which excluded Petitioners' Contention 23 from the COL proceeding. Even if the Commission is inclined to affirm the ASLB's decision, it should further determine that the contention litigation has no relationship to, or bearing on, the Commission's determination of the *sua sponte* referral.

II. Factual and Procedural Background

The essential question Petitioners' Contention 23 asked was who is responsible for enforcing NEPA concerning the transmission line corridor extending some 29 miles from the regional grid to the Fermi 3 nuclear power plant? DTE had neglected to include any meaningful environmental assessment of the transmission line corridor in its Environmental Report. Intervenors assumed that the transmission corridor, which would occupy 1,000 acres of land across its 29-mile length, was improperly segmented or partitioned from the Fermi 3 project, and

that the NRC Staff would rectify this obviously improper omission when the Staff prepared the Draft Environmental Impact Statement (“DEIS”). Instead, the Staff in the DEIS failed to analyze the transmission corridor for its direct environmental impacts. When Intervenor realized that the corridor would again be omitted, this time from the agency’s DEIS, on January 11, 2012, they filed a “Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 Through 24,” raising, among other matters, the new Contention 23. *See* ML12012A278 at pp. 41-53.

In response, the ASLB rejected admission of Contention 23. However, in its “Memorandum and Order (Ruling on Motion for Leave to Late-file Amended and New Contentions and Motion to Admit New Contentions),” *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, ASLBP No. 09-880-05-COL-BD01 (June 21, 2012) at pp. 44-45, the ASLB observed that

Although Contention 23 is untimely, it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS. Intervenor presents a number of criticisms of the DEIS’s limited evaluation of the environmental impacts of the transmission line corridor. For example, Intervenor emphasizes that substantial construction will take place in undeveloped wetlands, forests, and grasslands. . . . Intervenor also stress potential impacts to threatened and endangered species. . . . Intervenor further argue that maintenance of the transmission corridor will continue to impact wetlands and other environmental resources after construction is completed. . . .

The ASLB further found that there is a strong likelihood that NEPA compliance respecting the transmission corridor had been “segmented” from the power plant project, and that the NRC as a regulatory agency cannot credibly maintain that even if the transmission corridor construction falls in the category of “preconstruction activity,” that environmental impacts from that activity fall outside NRC authority:

It appears that the sole purpose of the new transmission corridor is to transmit electrical energy generated by Fermi Unit 3, and that it would serve no useful purpose absent the new nuclear power plant. If that is true, the transmission corridor lacks independent utility (*i.e.*, it is a connected action) and must be fully evaluated in the FEIS, though the NRC may define construction of the transmission corridor as a preconstruction activity, it is owned by a company other than the Applicant, and it is outside the NRC's regulatory jurisdiction. The NRC's obligations under NEPA include evaluating all environmental effects of the proposed action (including connected actions) that it has the authority to prevent. Even though the NRC does not license construction or operation of the transmission corridor, it has the authority to deny the license for Fermi Unit 3 if, for example, the total environmental costs of the new reactor and connected actions exceed the benefits. Denial of the license would effectively prevent harmful environmental impacts resulting from construction and operation of the transmission corridor, given that its sole purpose appears to be transmitting electrical energy generated by Fermi Unit 3.

Id. at pp. 47-48. Hence although the ASLB found that Petitioners had articulated no satisfactory explanation for waiting until the DEIS stage to object on the record, it noted that primary responsibility for compliance with NEPA lies with the Commission, and pronounced “*We recommend, therefore, that the NRC Staff consider the issues raised by Intervenors when it prepares the FEIS.*” (Emphasis supplied). *Id.* at pp. 48-49.

In a subsequent order, the ASLB declared that the transmission corridor includes habitat for the Eastern Fox Snake, a state-threatened reptile species that was the subject of adjudication of Contention 8:

[T]he review team concludes that the impacts from construction and preconstruction activities for Fermi 3 on terrestrial resources on the Fermi site *and transmission line corridor would be SMALL to MODERATE* The potential for MODERATE impacts is limited to possible adverse effects on the eastern fox snake. The staff's evaluation of the potential impacts on the eastern fox snake recognizes the potential for mitigation measures proposed by Detroit Edison. . . and approved by the MDNR [Michigan Department of Natural Resources] to significantly reduce impacts on that species, thereby leading to SMALL impacts, but acknowledges the possibility of MODERATE impacts if proposed mitigation is not implemented as described in their plan.

(Emphasis supplied). “Memorandum and Order (Denying Motion for Reconsideration of the

Board's Order Denying Second Motion for Summary Disposition of Contention 8)," *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLBP No. 09-880-05-COL-BD01 (January 30, 2013), p. 5 (citing p. 4-47 of FEIS).

When the ASLB "recommended" that the Staff consider within the FEIS the environmental impacts of construction and maintenance of transmission lines through and within the 29-mile corridor, Petitioners continued to rightly expect that the NRC Staff would recognize its primacy in complying with NEPA and that, having finally understood the imperative of including the transmission corridor within the FEIS, that task would be accomplished. When the NRC Staff's response was, instead, to decline to treat the transmission corridor within the FEIS, Petitioners timely moved a second time for admission of Contention 23. See Intervenor's February 21, 2013 "Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or Its Admission as a New Contention, and for Admission of New Contentions 26 and 27," ML13050A935 at pp. 21-53.

In their 2013 Motion, Petitioners urged that Contention 23 should be admitted on either of two grounds: (1) treatment as a new contention according to 10 C.F.R. §2.309(f)(2) because the ASLB in LBP-12-12 had strongly admonished the NRC staff to include the Transmission Corridor in the FEIS stage of the proceeding and the Staff refused, which comprised new information, materially different from that previously available; or alternatively, (2) there was a dispute of fact between the Environmental Report ("ER") and the DEIS, which should have allowed Petitioners to resubmit Contention 23 at the FEIS stage.

The ASLB emphasized the significance of its recommendation, noting that the "recommendation does not cure the Intervenor's failure to bring their NEPA challenges in response to

the DEIS and/or the ER, given that the alleged deficiencies were apparent in those documents.”

“Memorandum and Order (Denying Intervenor’s 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) at p. 22. Nonetheless, the Board stated that Contention 23 “raises a substantial NEPA issue that might have been admissible had it been timely filed,” and that the issue raised by Contention 23 was still appropriate for evaluation under 10 C.F.R. § 2.340(b) for *sua sponte* consideration. *Id.* at 23.

Subsequently, the ASLB did order *sua sponte* consideration of the transmission corridor under NEPA. “Memorandum (Determining that Issues Related to Intervenor’s Proposed Contention 23 Merit *Sua Sponte* Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval),” LBP-14-09, 80 NRC __ (July 7, 2014) (slip op.).

III. Argument

A. At the FEIS stage, Contention 23 should have been evaluated as ‘new’ because the NRC Staff had flagrantly allowed segmentation in repudiation of the ASLB’s recommendation to include impacts to the Transmission Corridor in the FEIS

In its 2012 ruling (LBP-12-12) denying admission of Contention 23 at the DEIS stage, the ASLB painstakingly identified the violation of NEPA by failing to address impacts to the Transmission Corridor within the DEIS, and warning that the Board could consider a *sua sponte* referral. The very ASLB warning to the NRC Staff constituted “new information” which was “materially different from that previously available” and which identified a dispute of law between DTE’s Environmental Report (“ER”) and the NRC Staff’s DEIS which the NRC Staff was strongly “recommended” to cure. The Board’s ruling in LBP-12-12 was “materially different information” - a regulatory advisory - that Petitioners relied upon in the belief that NEPA

compliance regarding the Transmission Corridor would soon follow. This regulatory advisory supplied the basis for Petitioners' second motion for admission of Contention 23 at the FEIS stage.

The availability of new information on an issue where there previously was none fulfills the requirement that late contentions be based on "materially different information" in 10 C.F.R. § 2.309(f)(2)(ii). *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 820 (2005) ("Something obviously is different than nothing. . . ." *Id.*).

***B. Disparate assertions of the Transmission Corridor footprint
between the ER and DEIS created a dispute of fact***

Petitioners also propounded the existence of a dispute of fact between the Environmental Report ("ER") and the DEIS and FEIS, upon which they predicated the resubmission of Contention 23. In the FEIS (at p. 2-46), appears this statement:

For a portion of this eastern 18.6-mi segment of the proposed route, reconfiguring existing conductors may allow for the use of existing transmission infrastructure without the need for building additional transmission infrastructure.

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

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

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

The first 18.6 mi of transmission lines (going west and north from Fermi) would be installed alongside the 345-kV lines that are already in place (Figure 3-8). By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.

In the Environmental Report, DTE stated that placement of additional transmission infrastructure "may be necessary" despite reconfiguration of conductors and use of existing towers. In the

DEIS, the NRC Staff said new lines could use existing towers, but that new transmission infrastructure “may be necessary.” Then, in the FEIS, the NRC Staff finds that reconfigured existing conductors may allow for the use of existing transmission infrastructure “without the need for building additional transmission infrastructure.” Certainly the latter assessment was made, based upon new data which is not disclosed in the FEIS. There is no explanation of that change of position, and there is a paucity of descriptive information in either the Environmental Report or the NEPA documents about the anticipated footprint(s) from the transmission line infrastructure. Citing no specifics, the NRC Staff claims that instead of further disruption within the transmission corridor, there will be less. The Staff distinguished its FEIS position on the prospects for major construction in the transmission corridor from DTE’s conclusion in the ER, yet the public has been provided no supportive data or other explanation.

NRC regulations at 10 C.F.R. § 2.309(f)(2) state that “[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.” It then provides, however, that a petitioner “may amend those contentions *or file new contentions* if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.” 10 C.F.R. § 2.309(f)(2); *Calvert Cliffs 3 Nuclear Project, LLC, and Unistart Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-10-24 at 7 (December 28, 2010). “This provision tempers the restrictive effect of the agency’s requirement that NEPA contentions be filed based on the ER by allowing petitioners or intervenors to challenge significantly different data or conclusions that appear for the first time in a NRC Staff NEPA document.” *Id.*

at 7.

Use of “data or conclusions” means it is sufficient that either data *or* conclusions in the FEIS may differ significantly from those in the ER; both need not do so. A contention may therefore challenge a DEIS even though its ultimate conclusion on a particular issue (*e.g.*, the need for power) is the same as that in the ER or DEIS, as long as the FEIS relies on significantly different data than the ER or DEIS to support the determination. The reverse is also true: a significantly different conclusion in the DEIS may be challenged even though it is based on the same information that was cited in the ER. *Id.* at 7.

Also, the provision refers to “conclusions,” not “the conclusion” or “all conclusions.” Thus, even though the FEIS’s ultimate conclusion on a particular issue might be the same as that in the ER or DEIS (*e.g.*, that there is a need for additional power generating capacity), other conclusions in the FEIS related to the ultimate conclusion might be challenged if they differ significantly from those in the ER or DEIS. These could also be a permissible basis for a new or amended contention, even though the ultimate conclusion remains unchanged. *Id.* at 7.

Thus, if the DEIS for Unit 3 contains either data or conclusions that differ significantly from those in the ER, Intervenor may file contentions challenging the DEIS even though both the ER (*viz.*, the applicant) and the DEIS (the NRC Staff) each reach the same result. *Id.* at 8. If Intervenor fails to show that the FEIS contains new data or conclusions that differ from those in the DEIS, §2.309(f)(2) provides another alternative. It allows a new contention to be filed after the initial docketing with leave of the presiding officer upon a showing that:

- i. The information upon which the amended or new contention is based was not previously available;

- ii. The information upon which the amended or new contention is based is materially different than information previously available; and
- iii. The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

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

The inconsistent speculation about reuse of existing Transmission Corridor towers extant between the Environmental Report and the Final Environmental Impact Statement should have comprised the opening for admission of Contention 23.

C. Although Petitioners’ Contention 23 may appear to be ‘intertwined’ with the sua sponte referral by the Fermi 3 ASLB to the Commission, the referral has next to nothing to do, legally, with Contention 23

In its September 10, 2014 Order in this case, the Commission stated that “Because the issues raised in Intervenors’ Contention 23 are *intertwined with the Board’s request*, the deadline to file petitions for review of the Board’s dismissal of that contention (as originally proposed and resubmitted) is hereby amended.”

Petitioners are puzzled by the relevance of whether Contention 23 was “intertwined with the Board’s request.” By Contention 23, Petitioners certainly sought to have the ASLB admit and adjudicate a contention alleging that the Transmission Corridor was improperly excluded from full analysis and consideration of environmental impacts under NEPA. And undeniably, the subject matter of Contention 23 overlaps, even to congruence, with the subject of the Licensing Board’s *sua sponte* referral. Legally however, the two acts or case events are not dependent in any way on one another, and are not “intertwined.”

The *sua sponte* referral to the Commission of the issue of unaddressed Transmission Corridor impacts did not require as a prerequisite that Petitioners try, first, to have the ASLB admit Contention 23. Atomic Safety and Licensing Boards have the prerogative, under the regulations, to consider raising serious issues *sua sponte*, and the responsibility of reviewing materials filed before them to determine whether the parties have previously raised such an issue. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1119 (1982).

A Licensing Board may, on its own motion, explore issues which the parties themselves have not placed in controversy. 10 C.F.R. § 2.340(a); *Consol. Edison Co. of N.Y., Inc.* (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976); *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-85-8, 21 NRC 516, 519 (1985). The Board’s independent responsibilities under NEPA may require it to raise environmental issues not raised by a party. *Tenn. Valley Auth.* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-380, 5 NRC 572 (1977). The ASLB has this prerogative especially where an issue is excluded from the proceeding because it has not been properly raised, rather than because it has

been rejected on its merits. *Cleveland Elec. Illuminating Co., supra*. The Board need only give its reasons for raising the problem. *Southern Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-81-36, 14 NRC 691, 697 (1981). The power should be exercised sparingly and only in extraordinary circumstances where the Board concludes that a serious safety or environmental issue remains. *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7 (1974); *Tex. Util. Generating Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-24, 14 NRC 614, 615 (1981); *Carolina Power & Light Co.* (Shearon Harris Nuclear Plant), LBP-85-49, 22 NRC 899, 915 n.2 (1985).

In sum, a licensing board has the power to raise, *sua sponte*, any significant environmental or safety issue in operating license hearings. 10 C.F.R. § 2.340(a); *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Units 1, 2& 3), ALAB-319, 3 NRC 188, 190 (1976).

IV. Conclusion

Petitioners, as Intervenors before the ASLB, timely raised the issue of Contention 23 at the DEIS and, later the FEIS, stages. They brought their motions within the time limits set by the Board's prehearing orders. Petitioners further moved for admission of Contention 23 in timely fashion relative to the stages of the litigation process. At the FEIS stage, they had relied on the ASLB's pointed advice to the NRC Staff following DEIS publication that, but for the untimeliness (in the opinion of the Board) of the motion to admit the contention, the Board would have admitted Contention 23 to the case.

Further, Petitioners demonstrated, following publication of the FEIS, that there was a dispute of fact between the FEIS and the Environmental Report over reconfiguration of electrical lines in the Transmission Corridor, and consequent reuse of existing transmission towers. In the

ER, DTE Energy predicted that there might be a need for construction of additional towers and infrastructure to accommodate the Fermi 3-related electrical lines. In the FEIS, by contrast, the NRC Staff hinted strongly that no new construction would take place. Given the apparent unwillingness of the Staff to comply with NEPA as recommended by the ASLB concerning likely environmental impacts in the Transmission Corridor from installation of Fermi 3 lines, the different wording in the FEIS must be seen as a response to the ASLB's warning about NEPA compliance, given after the DEIS was published. As a Staff response, the FEIS pronouncement about transmission corridor infrastructure needs is inadequate, factually unexplained although it is a departure from earlier predictions, and it invites the conclusion that Contention 23 should have been admitted to allow all Transmission Corridor NEPA concerns to be addressed as disputes of fact.

Finally, while Petitioners have proceeded in good faith to initiate and argue this Petition for Review, they stress that regardless of how the Commission rules on this Petition, it must consider the Fermi 3 ASLB's *sua sponte* referral as a discrete and legally independent matter, and rule upon the referral separately and without regard to the Commission's determination of the instant Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD’S DISMISSAL OF CONTENTION 23 FOR LACK OF TIMELINESS” were served by me upon the parties to this proceeding via the NRC’s Electronic Information Exchange system this 6th day of October, 2014.

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