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  
November 10, 2014

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

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Beyond Nuclear, et al., Petitioners-Intervenors herein, (“Intervenors”), by and through counsel, hereby reply to the NRC Staff and DTE Electric Company (“DTE”) responses to their Petition for Review of the dismissal of Contention 23.

I. Reply to NRC Staff Response to Intervenors’ Petition

The NRC Staff places exaggerated weight upon the Intervenors’ admitted failure to have raised a contention in their initial petition for leave to intervene over the exclusion of the Fermi 3 transmission corridor (hereinafter “TC”) from DTE’s Environmental Report. The apparent Staff tactic is to justify denial of the Commission’s consideration of the sua sponte referral by the Atomic Safety and Licensing Board (“ASLB”) because it was not raised by Intervenors at an earlier stage of these proceedings. The Staff thus argues a precept which has no footing at all in NRC regulations or case determinations: the Intervenors did not timely raise the

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

Petitioners pointed out the essential legal principles in their first brief on both the timeliness issue, but more importantly, they addressed the complete absence of any legal relationship between the ASLB’s *sua sponte* certification of the TC NEPA issue to the Commission, and the question of whether the *sua sponte* referral hinges upon any act, or failure to act, by Intervenors.

The Staff may have been misled or confused by the Commission’s conclusory statement expressed in its September 10, 2014 order, that “the issues raised in Intervenors’ Contention 23 are intertwined with the Board’s [*sua sponte*] request.” This is an incorrect statement, and the Staff relies on it to its peril. The opposite viewpoint remains bright line law despite the NRC Staff’s considerable wishfulness otherwise.

The *sua sponte* referral to the Commission of the issue of unaddressed TC impacts did not require as a prerequisite that Intervenors try, first, to have the ASLB admit Contention 23. ASLBs have the prerogative, under the regulations, to consider raising serious issues *sua sponte*, along with 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). ASLBs are uniquely empowered to go beyond issues raised by the parties to raise additional meritorious matters *sua sponte*. 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
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 NRC Staff goes so far as to incompletely cite supposed regulatory authority to the Commission to buttress its insuperable proposition. At p. 6 of its Response, the Staff declares “10 C.F.R. § 2.341(b)(5) provides that ‘[a] petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer.’” The inference here is that Intervenors were obliged to have raised TC NEPA failings to the ASLB before the ASLB, itself, could even take up the matter of a *sua sponte* referral of the issue to the Commission.

This is unfortunately a misleading use of the procedural regulations. 10 C.F.R. § 2.341(b)(5) states in its entirety the following:

(5) A petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer. A matter raised *sua sponte* by a presiding officer has been raised before the presiding officer for the purpose of this section.

In this case, the “presiding officer” of the ASLB raised the TC NEPA concerns *sua sponte*; as a matter of law, because the ASLB presiding officer raised it, the TC NEPA concerns have been properly “raised” before the ASLB. The Staff’s argument to the contrary relies on concealing the exculpatory part of the regulation from the Commission’s notice. Section 2.341(b)(5) read as a whole *excuses Intervenors from any obligation of raising the TC NEPA matter* via a timely
contention filing earlier in the proceeding.

II. Reply to DTE Response to Intervenors’ Petition

DTE is more circumspect in its entreaties, but ultimately urges the same improper conflation of the Petition for Review and the *sua sponte* TC NEPA referral. After arguing the merits of Intervenors’ timeliness over Contention 23 in its brief, DTE raises the “intertwined issues” mantra yet again:

If the Commission decides that either the original or resubmitted Contention 23 was timely, the Commission, not the Board, should address the contention’s admissibility in the first instance. Because the Commission is presently considering the Board’s request to conduct *sua sponte* review of offsite transmission corridor issues and those issues are closely intertwined with Contention 23, it would be most efficient and would promote consistent regulatory treatment for the Commission to resolve the request for *sua sponte* review, this Petition for Review, and the admissibility of Contention 23 (if necessary) in a single decision.

The Commission, however, must make separate, considered determinations, not a “single decision.” Section 2.341( c)(2) of 10 C.F.R. requires that “[i]f a petition for review is granted, the Commission may issue an order specifying the issues to be reviewed and designating the parties to the review proceeding.” A different track is followed by the Commission for consideration of *sua sponte* matters, see generally 10 C.F.R.§§ 2.340, 2.344. Like the NRC staff, DTE effectively argues that the Commission should ground its decision as to the *sua sponte* referral on this Petition for Review. That would be improper. The Commission must not let its determination of one controversy decide the other.

Because ASLBs may raise important safety and environmental issues *sua sponte*, they should review even untimely contentions to determine that they do not raise important issues that should be considered *sua sponte. Consumers Power Co. (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631-32 (1982). Indisputably, the ASLB’s discretion to render a *sua sponte* referral is
separate and apart from intervenors’ opportunities to propose contentions to ASLBs.

III. Conclusion

Even if the Commission finds that Intervenors untimely raised Contention 23 to the ASLB, it gains no basis by which it can then dismiss the *sua sponte* referral by the ASLB as being “intertwined” with Intervenors’ acts. The ASLB’s spontaneous referral is legally distinct and must be determined on its own considerable merits. The Commission must decide the matters separately and not bootstrap its finding as to one into the ruling on the other.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of

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

Docket No. 52-033

November 10, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “INTERVENORS’ REPLY IN SUPPORT OF 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 10th day of November, 2014.

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