

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO INTERVENORS' PETITION
FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD'S
DISMISSAL OF CONTENTION 23 FOR LACK OF TIMELINESS

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On July 7, 2014, the Atomic Safety and Licensing Board (Board) in this combined license (COL) proceeding issued a Memorandum regarding the Intervenors'¹ 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.² On July 11, 2014, the Commission invited the parties to provide their views on the Board's request,³ which remains pending before the Commission. On September 10, 2014, the Secretary of the Commission issued an Order establishing a timeline for petitions for review of the Board's decisions rejecting Contention 23 on procedural grounds.⁴ In this order, the Secretary of the Commission indicated that it viewed Contention 23 as "intertwined

¹ Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, 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 (collectively, Intervenors).

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

³ Commission Order (Inviting Parties to Submit Briefs) (July 11, 2014) (unpublished) (Commission *Sua Sponte* Briefing Order), ADAMS Accession No. ML14192B385.

⁴ Order of the Secretary (Sept. 10, 2014) (unpublished), ADAMS Accession No. ML14253A478.

with the Board's request" for *sua sponte* review.⁵ The Intervenor's filed their petition on October 6, 2014.⁶ For the reasons set forth herein, the Intervenor's petition should be denied.

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.⁷ The Fermi 3 COL application includes an Environmental Report (ER), as required by 10 C.F.R. § 51.50(c).⁸ 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.⁹ The ER describes the most likely location of the transmission line route, describes potential environmental impacts from their construction and operation, and states the basis for the Applicant's reasonable expectation that ITC *Transmission* would follow standard industry practices in the siting, construction, and operation of the lines.¹⁰ The Intervenor's filed their intervention petition and fourteen contentions on March 9, 2009.¹¹ No contention related to transmission lines was included in this initial filing.

⁵ *Id.* at 1.

⁶ Intervenor's Petition for Review of Atomic Safety and Licensing Board's Dismissal of Contention 23 for Lack of Timeliness (Oct. 6, 2014) (Contention 23 Petition for Review), ADAMS Accession No. ML14279A630.

⁷ 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.

⁸ Detroit Edison Fermi 3 COLA (Environmental Report), Revision 0 (Oct. 8, 2008) (ER), ADAMS Accession No. ML082730660.

⁹ ER at 1-4 to 1-5, 2-2, and 10-1.

¹⁰ *Id.* at 4-12.

¹¹ Petition of Beyond Nuclear, Citizens for Alternatives to Chemical Contamination, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunther, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan,

On October 28, 2011, the NRC Staff and the U.S. Army Corps of Engineers published, and made available to the public, the draft environmental impact statement (DEIS) for Fermi 3.¹² The Intervenor filed contentions based on the DEIS on January 11, 2012.¹³ The Applicant and Staff filed answers to the DEIS Contentions on February 6, 2012,¹⁴ and the Intervenor filed their reply on February 13, 2012.¹⁵ The Applicant filed a surreply related to Contention 23 on February 17, 2012.¹⁶ On June 21, 2012, the Board issued a decision rejecting the DEIS version of Contention 23 on timeliness grounds.¹⁷ In so doing, the Board noted that the contention should have been filed based on the ER—i.e., with the Intervention Petition filed in March 2009—and that the “Intervenors [did] not establish that the contention is based on any data or conclusions in the DEIS that are significantly different from those in the ER.”¹⁸

Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudicatory Hearing (March 9, 2009) (Intervention Petition), ADAMS Accession No. ML090680881.

¹² NUREG-2105, Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3 (October 2010) (DEIS).

¹³ 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.

¹⁴ Applicant’s Answer to Proposed New Contentions (Feb. 6, 2012) (Applicant’s Answer to DEIS Contentions), ADAMS Accession No. ML12037A240; NRC Staff Answer to Intervenor’s Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Feb. 6, 2012) (Staff’s Answer to DEIS Contentions), ADAMS Accession No. ML12037A270.

¹⁵ Reply in Support of “Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24” (Feb. 13, 2012), ADAMS Accession No. ML12044A398.

¹⁶ Applicant’s Motion for Leave to File a Surreply and Surreply (Feb. 17, 2012), ADAMS Accession No. ML12048B448.

¹⁷ *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 775-76 (2012).

¹⁸ *Id.* at 775. The Board’s decision to reject the DEIS version of Contention 23 on timeliness grounds was *not* related to the fact that the Intervenor filed the DEIS Contentions fifteen days late without requesting a deadline extension. The Board’s Initial Scheduling Order had established a 60-day deadline for new contentions based on the DEIS. See Licensing Board Order (Establishing schedule and procedures to govern further proceedings) (Sept. 11, 2009) (unpublished) (Initial Scheduling Order), ADAMS Accession No. ML09254092. The Intervenor filed the DEIS Contentions 75 days after publication of the DEIS.

On January 18, 2013, the FEIS was published and made available to the public.¹⁹ The Intervenor filed contentions based on the FEIS, including a revised version of Contention 23, on February 19, 2013.²⁰ The Applicant and the Staff filed their answers on March 18, 2013,²¹ and the Intervenor filed their reply on March 25, 2013.²² The Board also rejected the FEIS version of Contention 23 as untimely and for failing to meet the late filing requirements in 10 C.F.R. § 2.309.²³ However, in declining to admit the FEIS version of the contention, 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.²⁴ The parties filed briefs providing their views on May 30, 2013.²⁵

However, the Board’s decision that the contention was inadmissible was not related to this filing delay, but rather on the far more substantial delay (from 2009 to 2012) resulting from the Intervenor’s failure to file the contention as part of their initial challenge to the ER. See *Fermi*, LBP-12-12, 75 NRC at 748-51, 775-76.

¹⁹ NUREG-2105, Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, Final Report (January 2013) (FEIS).

²⁰ Intervenor 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.

²¹ Applicant’s Answer to Proposed New Contentions Based on Final Environmental Impact Statement (Mar. 18, 2013) (Applicant’s Answer to FEIS Contentions), ADAMS Accession No. ML13077A477; NRC Staff Answer in Opposition to 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 (Mar. 18, 2013) (Staff’s Answer to FEIS Contentions), ADAMS Accession No. ML13077A427.

²² Combined Reply in Support of “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 (Mar. 25, 2013), ADAMS Accession No. ML13085A404.

²³ Licensing Board 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) (Order Rejecting FEIS Contentions), ADAMS Accession No. ML13120A527.

²⁴ *Id.* at 23.

²⁵ NRC Staff Response to Board Order Concerning Proposed Sua Sponte Review of Contention 23 (May 30, 2013) (Staff 2013 *Sua Sponte* Brief), ADAMS Accession No. ML13150A261; Applicant’s Brief Opposing *Sua Sponte* Review of Environmental Impacts in the Offsite Transmission Corridor (May 30,

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.²⁶ The parties filed their initial briefs on July 28, 2014,²⁷ and the Nuclear Energy Institute (NEI) also filed an *amicus curiae* brief on that date.²⁸ The parties filed their reply briefs on August 7, 2014.²⁹ The Board's request for *sua sponte* review is currently pending before the Commission.

For the reasons stated below, the Board correctly concluded that Contention 23 failed to meet the NRC's requirements for late-filed contentions. Accordingly, the Intervenor's petition for review should be denied.

2013), ADAMS Accession No. ML13150A418; Affidavit of Peter Smith on Transmission Corridor Topics (May 30, 2013), ADAMS Accession No. ML13150A415; Intervenor's Memorandum in Support of *Sua Sponte* ASLB Referral of Transmission Line Corridor NEPA Compliance Issue (May 30, 2013), ADAMS Accession No. ML13150A434.

²⁶ See *Fermi*, LBP-14-09, 80 NRC ___ (slip op.). See generally Commission *Sua Sponte* Briefing Order.

²⁷ NRC Staff's Response to Commission's Order Inviting Comments on the Board's Request for Approval to Conduct *Sua Sponte* Review of Contention 23 (Transmission Lines) (July 28, 2014) (Staff's Initial *Sua Sponte* Brief), ADAMS Accession No. ML14209B059; Applicant's Opposition to *Sua Sponte* Consideration of Transmission Corridor Issues (July 28, 2014), ADAMS Accession No. ML14209B059; Intervenor's Motion for Commission Approval of LBP-14-09 (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) (July 28, 2014) (Intervenor's Initial *Sua Sponte* Brief), ADAMS Accession No. ML14211A444. The Intervenor filed by e-mail on July 28, 2014, and resubmitted their brief through the Electronic Information Exchange on July 30, 2014.

²⁸ Amicus Curiae Brief of the Nuclear Energy Institute, Inc. in Response to the Commission's July 11, 2014 Briefing Order (July 28, 2014), ADAMS Accession No. ML14209B082.

²⁹ Applicant's Reply Brief Opposing *Sua Sponte* Consideration of Transmission Issues (Aug. 7, 2014), ADAMS Accession No. ML14219A689; NRC Staff Reply to Other Parties' Pleadings Related to the Board's Request for Approval to Conduct *Sua Sponte* Review of Contention 23 (Transmission Lines) (Aug. 7, 2014), ADAMS Accession No. ML14219A731; Intervenor's Reply Memorandum in Support of Motion for Commission Approval of LBP-14-09 (Aug. 7, 2014) (Intervenor's *Sua Sponte* Reply Brief), ADAMS Accession No. ML14219A768. The Intervenor filed a "corrected" version of their reply on August 8, 2014. See ADAMS Accession No. ML14220A217.

LEGAL STANDARDS

I. LEGAL STANDARDS GOVERNING PETITIONS FOR REVIEW

Commission regulations in 10 C.F.R. § 2.341 establish that 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 the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.³⁰

Furthermore, 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.”³¹ In the event that a petition for review relies on facts not previously raised before the presiding officer, the Petitioner must explain why they were not raised.³²

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.³³ 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.³⁴ The NRC’s regulations that implement NEPA,

³⁰ 10 C.F.R. § 2.341(b)(4)(i)-(v).

³¹ 10 C.F.R. § 2.341(b)(5).

³² *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005).

³³ Staff 2013 *Sua Sponte* Brief at 6-8.

³⁴ 42 U.S.C. § 4332(2)(C).

10 C.F.R. Part 51, require the preparation of an EIS in order to issue a COL.³⁵ 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.³⁶ This “hard look” analysis should use “the best available information at the time the assessment is performed.”³⁷

NEPA analyses “often must rely upon imprecise and uncertain data . . . and must be ‘judged on their reasonableness.’”³⁸ 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.³⁹ “An environmental impact statement [is not] intended to be a ‘research document,’ reflecting the frontiers of scientific methodology, studies, and data....[W]hile 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.’”⁴⁰

III. LEGAL STANDARDS GOVERNING CONTENTION ADMISSIBILITY

The legal standards for contention admissibility that were in place in early 2012, at the time the Intervenor filed their DEIS Contentions, are described in the Staff’s Answer to DEIS Contentions.⁴¹ To summarize, 10 C.F.R. § 2.309(f)(2) at that time stated that, for issues arising

³⁵ 10 C.F.R. § 51.20(b)(2).

³⁶ See *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).

³⁷ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 341 (2012).

³⁸ *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 167 (2005) (citation omitted).

³⁹ 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.”).

⁴⁰ *Comanche Peak*, CLI-12-07, 75 NRC at 392 (quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 11-13 (1st Cir. 2008)).

⁴¹ Staff’s Answer to DEIS Contentions at 4-7.

under NEPA, a “petitioner shall file contentions based on the applicant’s environmental report,” and “may amend those contentions or file new contention if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant’s documents.”⁴² Otherwise, new or amended contentions may be filed only with leave of the presiding officer if they meet the following requirements:

- (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.⁴³

Contentions that did not meet the timeliness test of 10 C.F.R. § 2.309(f)(2) could be submitted under 10 C.F.R. § 2.309(c)(1), which established an eight-part balancing test for admission of untimely contentions.⁴⁴ In addition, all contentions were required to meet the contention pleading standards in 10 C.F.R. § 2.309(f)(1),⁴⁵ and contentions challenging NRC regulations were barred by 10 C.F.R. § 2.335(a).⁴⁶

The contention pleading standards in 10 C.F.R. § 2.309 were amended and simplified on August 3, 2012,⁴⁷ such that the eight-part balancing test formerly found in 10 C.F.R. § 2.309(c)(1) was eliminated and portions of 10 C.F.R. § 2.309(f)(2) were moved to that location. The standards in place since that change (and at the time the Intervenors filed their

⁴² 10 C.F.R. § 2.309(f)(2) (through 2012 version).

⁴³ 10 C.F.R. § 2.309(f)(2)(i)-(iii) (through 2012 version).

⁴⁴ See Staff’s Answer to DEIS Contentions at 5-6. See also *Fermi*, LBP-12-12, 75 NRC at 748-51 (applying the eight-part balancing test to a pleading that was filed fifteen days late).

⁴⁵ *Id.* at 6-7.

⁴⁶ *Id.* at 59.

⁴⁷ See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012).

FEIS Contentions) are described in the Staff's Answer to FEIS Contentions.⁴⁸ To summarize, the revised 10 C.F.R. § 2.309(c)(1) states that new or amended contentions may be filed after the initial filing period only if the presiding officer determines that a participant has demonstrated good cause for filing after the initial deadline by showing that

- (i) The information upon which the filing is based was not previously available; and
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.⁴⁹

Under the revised version of 10 C.F.R. § 2.309(f)(2), an intervenor is still required to file contentions based on the ER, and may file new or amended environmental contentions based on the Staff's environmental review documents only if the contentions meet the requirements of the revised 10 C.F.R. § 2.309(c)(1).⁵⁰ All contentions are still required to meet the pleading standards of 10 C.F.R. § 2.309(f)(1),⁵¹ and contentions challenging NRC regulations remain barred by 10 C.F.R. § 2.335(a).⁵²

DISCUSSION

In their petition, the Intervenors argue that the Board was incorrect to deny admission of Contention 23 on timeliness grounds, but correct insofar as it argued that the contention might have been admissible had it not been barred by procedural requirements regarding timely filing.⁵³ The Intervenors are wrong on both points. For the reasons discussed below, the Board was correct in dismissing both versions of Contention 23 on timeliness grounds. However, even

⁴⁸ Staff's Answer to FEIS Contentions at 3-6.

⁴⁹ 10 C.F.R. § 2.309(c)(1) (2013 and later versions).

⁵⁰ 10 C.F.R. § 2.309(f)(2) (2013 and later versions). See also Staff's Answer to FEIS Contentions at 3-4.

⁵¹ See Staff's Answer to FEIS Contentions at 5-6.

⁵² *Id.* at 24.

⁵³ See Contention 23 Petition for Review at 2-3.

if the contention had been timely, it failed to meet the NRC's general contention admissibility standards and should have been dismissed. Accordingly, the Commission should deny the Intervenors' petition for review.

I. THE BOARD CORRECTLY DISMISSED BOTH VERSIONS OF CONTENTION 23 ON TIMELINESS GROUNDS

The Intervenors' petition does not address the Board's dismissal of the DEIS version of the Contention 23. The Intervenors' first version of Contention 23 was filed following publication of the DEIS, and the Board correctly rejected it because the Intervenors failed to point to any information in the DEIS that differed materially from the ER that would allow the Intervenors to satisfy the timeliness requirements then found in 10 C.F.R. § 2.309(f)(2).⁵⁴ In any event, the instant petition identifies no dispute with that ruling. Rather, the Intervenors' petition requests Commission review of the Board's decision to reject the FEIS version of the contention on timeliness grounds. In their FEIS contention and in their petition, the Intervenors incorrectly allege that information in the FEIS differs materially from information available at the DEIS stage, and that the FEIS version of the contention satisfies the timeliness requirements currently found in 10 C.F.R. § 2.309(c)(1).⁵⁵

The Intervenors raise two distinct arguments in support of their position. First, they argue that the Board's recommendation that the Staff consider the issues raised by the Intervenors when preparing the FEIS constitutes new information that justifies admission of a new contention.⁵⁶ Second, they assert that the Staff changed its position on the use of existing transmission line infrastructure between the DEIS and the FEIS, and that this change of position justifies admission of a new contention.⁵⁷ Both of these arguments were raised previously

⁵⁴ See *Fermi*, LBP-12-12, 75 NRC at 775-76.

⁵⁵ See FEIS Contentions at 22-25, 27-28; Contention 23 Petition for Review at 7-11.

⁵⁶ Contention 23 Petition for Review at 3-8.

⁵⁷ *Id.* at 8-11. The heading on page 8 of the petition refers to differences between the ER and the DEIS.

before the Board,⁵⁸ and the Board rejected the contention based on the first of these.⁵⁹ Furthermore, while the Board did not reach the second of these arguments in its decision rejecting the contention, the parties' pleadings demonstrated that the Intervenors' argument is factually incorrect based on the plain text of the DEIS and FEIS.⁶⁰ The Intervenors have submitted no arguments that indicate the Board's decision to dismiss Contention 23 on timeliness grounds was erroneous or that Commission review is warranted under 10 C.F.R. § 2.341. Accordingly, their petition for review should be denied.

- A. The Intervenors are incorrect in asserting that the Board's decision dismissing DEIS contentions is new information that would justify admitting a new contention.

The Intervenors' first claim is that the Board's decision dismissing the DEIS version of the contention and the FEIS itself are new information that would justify admission of a timely new contention.⁶¹ According to the Intervenors, the Board's decision rejecting the DEIS contentions was a *sua sponte* order to the Staff to consider transmission line impacts as directed by the Board, and they assert that this order "is valid and one upon which the Intervenors have a right to rely."⁶² The Intervenors assert that the Staff failed to follow the Board's order in this matter, and that this failure by the Staff is new information that justifies

However, the discussion that follows relates to alleged differences between the DEIS and the FEIS. The heading appears to be in error, as the discussion that follows does not identify any alleged differences between the ER and the DEIS.

⁵⁸ FEIS Contentions at 22-24.

⁵⁹ Order Rejecting FEIS Contentions at 21-22.

⁶⁰ See Applicant's Answer to FEIS Contentions at 20-21; Staff's Answer to FEIS Contentions at 23-24.

⁶¹ Contention 23 Petition for Review at 4-5, citing *Fermi*, LBP-12-12, 75 NRC at 776-80. See also FEIS Contentions at 22-24.

⁶² FEIS Contentions at 24; see also Contention 23 Petition for Review at 6. The Intervenors have also incorrectly referred to the Board's decision as an "injunction." See Intervenors' Initial *Sua Sponte* Brief at 7.

admission of the FEIS version of Contention 23 under 10 C.F.R. § 2.309(c)(1).⁶³

The Board rejected the Intervenor's argument and stated that the Intervenor failed to demonstrate that any information in the FEIS was different from the corresponding information in the DEIS or the ER.⁶⁴ The Board explicitly rejected the Intervenor's claim that its ruling on the DEIS contentions was an "order" to the Staff to expand its discussion of transmission lines in the FEIS, stating instead that it was a "recommendation."⁶⁵ The Board concluded that "[its] 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 appeared in those documents."⁶⁶

The Board's ruling on this matter was correct. The Intervenor argued that the *absence* of change between the DEIS and the FEIS can be new information to support contention admissibility, but this argument has no legal basis. The Board acknowledges that it did not "order" the Staff to make specific changes to the FEIS.⁶⁷ Furthermore, as both the Staff and the Applicant argued before the Board, such an "order" would be inconsistent with a Board's authority in ruling on contention admissibility.⁶⁸ The Intervenor's characterization of the Board's recommendations as an "order" on which they have a "right to rely" is therefore incorrect.

⁶³ FEIS Contentions at 25; Contention 23 Petition for Review at 6. As the Staff noted before the Board, the Intervenor continues to reference the old version of 10 C.F.R. § 2.309, which was changed on August 3, 2012. See Staff's Answer to FEIS Contentions n.23; Contention 23 Petition for Review at 6. The correct citation at the time the FEIS Contentions were submitted and currently is 10 C.F.R. § 2.309(c)(1) rather than 10 C.F.R. § 2.309(f)(2). The Staff uses that citation here. See discussion *supra* at 8-9 & nn.47-50.

⁶⁴ Order Rejecting FEIS Contentions at 21.

⁶⁵ *Id.* at 22.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Staff's Answer to FEIS Contentions at 22, citing *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-6, 59 NRC 62, 74 (2004) (a licensing board does not have the authority to direct the Staff in the performance of its independent responsibilities). See also Applicant's Answer to FEIS Contentions at 17 & n.62.

Because they base this portion of their timeliness argument on this incorrect characterization, rather than on any claim that the FEIS analysis has changed materially from the analysis in the DEIS, the Intervenor's have failed to show that the contention meets the requirements of 10 C.F.R. § 2.309(c)(1). The Intervenor's assertion that the Board's ruling is "flawed"⁶⁹ merely repeats arguments previously rejected by the Board, without citing any legal authority that is contrary to the Board's ruling. Accordingly, this claim does not raise an issue that warrants Commission review under 10 C.F.R. § 2.341.

B. The Intervenor's argument that the Staff changed positions between the DEIS and the FEIS is factually incorrect, based on the plain text of the documents.

The Intervenor's second argument relies on alleged differences between the DEIS and FEIS that relate to the use of existing transmission corridor infrastructure for new transmission lines.⁷⁰ According to the Intervenor's, both the ER and the DEIS state that, "[b]y reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary."⁷¹ The Intervenor's compare this to a statement in the FEIS that "[f]or 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."⁷² The Intervenor's assert that these statements indicate a change in the Staff's position, and that the Staff's new assessment is based on data not included in the FEIS.⁷³

⁶⁹ Contention 23 Petition for Review at 2.

⁷⁰ *Id.* at 8.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 9.

The Intervenor's argument is unpersuasive because it is based only on a non-substantive difference in word order and emphasis between the two passages.⁷⁴ More significant, however, is the fact that the Intervenor chose a quotation from Chapter 2 of the FEIS and compared it to a different quotation from Chapter 3 of the DEIS.⁷⁵ When the relevant passage from Chapter 2 in the FEIS is compared to the same passage from Chapter 2 of the DEIS, and when the relevant passage from Chapter 3 is compared across the two documents, it is clear that these passages were not changed at all between the DEIS and FEIS.⁷⁶ Because there has been no change in the referenced text from the DEIS to the FEIS, the Intervenor has no support for their argument that the Staff's position has changed or that a contention can be admitted based on new information in the FEIS. Accordingly, the Intervenor's second argument also fails to support the admissibility of the FEIS version of Contention 23, and Commission review is not warranted.

II. EVEN IF THE TWO VERSIONS OF CONTENTION 23 HAD BEEN TIMELY, THEY WOULD HAVE BEEN INADMISSIBLE UNDER 10 C.F.R §§ 2.335(a) AND 2.309(f)(1)

The Board rejected both versions of Contention 23 on timeliness grounds and therefore did not reach other arguments submitted by the parties concerning the admissibility of the contention under 10 C.F.R §§ 2.335(a) and 2.309(f)(1). The Staff and the Applicant both argued that, even if Contention 23 had been filed in a timely manner based on the ER, it should have been rejected based on these general requirements for contention admissibility.⁷⁷ Although not relied upon by the Board, these arguments reinforce the conclusion that Contention 23 was properly deemed inadmissible.

⁷⁴ See Staff's Answer to FEIS Contentions at 23-24; Applicant's Answer to FEIS Contentions at n.71.

⁷⁵ See Applicant's Answer to FEIS Contentions at 20-21.

⁷⁶ Compare FEIS at 2-46 with DEIS at 2-45; FEIS at 3-18 with DEIS at 3-17.

⁷⁷ Staff's Answer to DEIS Contentions at 57-62; Applicant's Answer to DEIS Contentions at 58-64; Staff's Answer to FEIS Contentions at 24; Applicant's Answer to FEIS Contentions at 17-32.

- A. To the extent that Contention 23 is intended as a challenge to the Limited Work Authorization (LWA) Rule, it is a challenge to NRC regulations and therefore barred under 10 C.F.R § 2.335(a).

10 C.F.R § 2.335(a) states that, in the absence of a waiver, “no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding” under 10 C.F.R. Part 2.⁷⁸ In 2007, the Commission promulgated a new rule regarding Limited Work Authorizations (LWAs) that clarified certain limits on NRC’s regulatory authority.⁷⁹ 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.”⁸⁰ The revised definition of “construction” in the LWA Rule provides that “construction does not include . . . [b]uilding of service facilities, such as . . . transmission lines.”⁸¹ Contention 23 implicitly challenges this distinction,⁸² and the Intervenor’s have indicated that they consider Contention 23 to include such a challenge.⁸³

A claim that a Commission regulation is invalid is inadmissible under 10 C.F.R § 2.335(a), as is a contention seeking to impose requirements in addition to those set forth in a

⁷⁸ 10 C.F.R § 2.335(a).

⁷⁹ Limited Work Authorizations for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 57416 (Oct. 9, 2007) (LWA Rule).

⁸⁰ 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 (Sept. 11, 2011). 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.

⁸¹ 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)).

⁸² See DEIS Contentions at 47; FEIS Contentions at 23, 29-30.

⁸³ See Intervenor’s Initial *Sua Sponte* Brief at 5; Intervenor’s *Sua Sponte* Reply Brief at 1-4.

regulation.⁸⁴ To the extent that any version of Contention 23 is intended as a challenge to the LWA Rule, it is a challenge to NRC regulations and must be dismissed pursuant to 10 C.F.R § 2.335(a).

B. The two versions of Contention 23 fail to meet the contention admissibility standards of 10 C.F.R § 2.309(f)(1).

The two versions of Contention 23 also fail to meet the general contention admissibility standards in 10 C.F.R § 2.309(f)(1) and therefore should have been dismissed even if they had been timely. The DEIS version of the contention does not appear to challenge the Staff's basic approach of analyzing transmission line impacts under the heading of cumulative impacts;⁸⁵ rather, the Intervenor provide a list of alleged inadequacies in the DEIS cumulative impacts discussion, without providing either a legal or factual basis for their claim that the information they mention is required or any expert opinion to support their argument that the DEIS is deficient.⁸⁶ For this reason, the DEIS version of the contention fails to meet the 10 C.F.R § 2.309(f)(1) requirements that contentions have a basis, that intervenors provide a concise statement of the alleged facts or expert opinions which support the contention, and that intervenors demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact.⁸⁷

In the FEIS version of the contention, the Intervenor relied largely on observations previously made by the Board, repeating the Intervenor's past claims and interspersing them

⁸⁴ See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), ALAB, 7 NRC 63, 65 (1978); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987).

⁸⁵ Although the Intervenor use the NEPA law term "segmentation," they appear to mean the DEIS's presentation of transmission line impacts under each resource area rather than assembled together in a separate section of the document. See DEIS Contentions at 42 ("NRC's analysis flirts with illegal segmentation for not assembling NEPA disclosures associated with the transmission corridor in its own discrete section of the DEIS.").

⁸⁶ See Staff Answer to DEIS Contentions at 60-62.

⁸⁷ See 10 C.F.R. § 2.309(f)(1)(ii), (v), & (vi).

with block quotations from the Board’s decision rejecting the DEIS version of the contention.⁸⁸

Thus, like the DEIS version of the contention, the FEIS version does not include the factual or expert support needed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v), or the level of specificity required to meet the “genuine dispute” requirement of 10 C.F.R. § 2.309(f)(1)(vi).⁸⁹

Accordingly, the FEIS version of Contention 23 also fails to meet the pleading standards of 10 C.F.R. § 2.309(f)(1) and should have been rejected for that reason even had it been timely.

III. THE INTERVENORS’ ARGUMENT THAT CONTENTION 23 IS NOT “INTERTWINED” WITH THE BOARD’S *SUA SPONTE* REQUEST DOES NOT INCLUDE AN ISSUE FOR COMMISSION REVIEW

The Intervenor’s final argument, that Contention 23 is not “intertwined” with the Board’s request for *sua sponte* review,⁹⁰ does not include any separate issue for Commission review.

The Intervenor’s assert that *sua sponte* review under 10 C.F.R. § 2.340(a) is procedurally distinct from contention admissibility under 10 C.F.R. § 2.309.⁹¹ However, the Intervenor’s admit that the subject matter of the Board’s request for *sua sponte* review and Contention 23 overlap, “even to congruence.”⁹² This overlapping subject matter, in particular the Intervenor’s reliance

⁸⁸ See FEIS Contentions at 22-25, 29.

⁸⁹ See Staff’s Answer to FEIS Contentions at 24. In addressing the Board’s request for *sua sponte* review, the Staff observed that no one (including the Board) has raised any factual issue related to transmission lines that is suitable for resolution at an evidentiary hearing. See Staff’s Initial *Sua Sponte* Brief at 15-17.

⁹⁰ See Contention 23 Petition for Review at 11-13.

⁹¹ *Id.* at 12.

⁹² *Id.*

in the FEIS version of the contention on observations previously made by the Board, suggests that it is reasonable for the Commission to consider the two procedural matters jointly.

CONCLUSION

For these reasons, the Board correctly determined that Contention 23 was untimely, and the petition for review should be denied.

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Dated at Rockville, Maryland
This 30th day of October, 2014

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 INTERVENORS' PETITION FOR REVIEW OF ATOMIC SAFETY AND LICENSING BOARD'S DISMISSAL OF CONTENTION 23 FOR LACK OF TIMELINESS, dated October 30, 2014, has been filed through the E-Filing system this 30th day of October, 2014.

/Signed (electronically) by/
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Dated at Rockville, Maryland
This 30th day of October, 2014