

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 3)

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Docket No. 52-033-COL

APPLICANT'S OPPOSITION TO PETITION FOR REVIEW ON CONTENTION 23

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STANDARD FOR REVIEW	2
BACKGROUND	3
DISCUSSION.....	5
A. Requirements for New or Amended Contentions.....	5
B. Resubmitted Contention 23 Was Untimely	6
C. There Was No Material Difference Between the DEIS and FEIS.....	10
D. Contention 23 Was Inadmissible	12
CONCLUSION.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
<u>JUDICIAL DECISIONS</u>	
<i>Union of Concerned Scientists v. NRC</i> , 920 F.2d 50, 55 (D.C. Cir. 1990).....	9
<u>ADMINISTRATIVE DECISIONS</u>	
<i>AmerGen Energy Co., LLC</i> (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235 (2009).....	9
<i>Duke Power Co.</i> (McGuire Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373 (2002).....	7
<i>Georgia Institute of Technology</i> (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281 (1995).....	12
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318 (1999).....	6
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216 (2000).....	5
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11 (2003).....	2
<u>STATUTES AND REGULATIONS</u>	
10 C.F.R. § 2.309	5, 6, 8
10 C.F.R. § 2.341	1, 2

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INTRODUCTION

In accordance with the Secretary’s Order, dated September 10, 2014, and 10 C.F.R. § 2.341(b)(3), DTE Electric Company (“DTE”) responds to the Intervenors’ Petition for Review of the Licensing Board’s decision dismissing Contention 23.¹ The Board rejected proposed Contention 23 as untimely because it was not based on any new or materially different information presented in the Draft Environmental Impact Statement (“DEIS”).² The Board concluded that the Intervenors’ challenge could have, and should have, been made based on DTE’s Environmental Report (“ER”). The Board explained that each of the issues that comprised the subject matter of the contention was in fact discussed in the ER.³ In an April 30, 2013 Order, the Board later rejected a similar contention that was filed based on the Final Environmental Impact Statement (“FEIS”) for the same reasons.⁴

¹ “Intervenors’ Petition for Review of Atomic Safety and Licensing Board’s Dismissal of Contention 23 for Lack of Timeliness,” dated October 6, 2014 (“Petition for Review”).

² *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC ___ (2012) (slip op. June 21, 2012, at 42).

³ *Id.* at 42-43.

⁴ Licensing Board Order (Denying Intervenors’ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and

In the Petition for Review, the Intervenors argue that the Licensing Board improperly rejected proposed Contention 23 as untimely, focusing mostly on the resubmitted Contention 23. DTE opposes the Petition for Review. The Intervenors have failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board, or any other question or consideration that merits review. The information that formed the basis for the original and resubmitted Contention 23 was available prior to publication of the DEIS and FEIS. There was no good cause for the Intervenors' tardy filing. The Commission should affirm the Board's decisions denying Contention 23.

STANDARD FOR REVIEW

Under 10 C.F.R. § 2.341(b)(4), the Commission may, in its discretion, grant a petition for review, giving due weight to the existence of a “substantial question” with respect to the following considerations: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest.⁵

for Admission of New Contentions 26 and 27) at 22–24 (April 30, 2013) (unpublished) (“April 30 Order”).

⁵ 10 C.F.R. § 2.341(b)(4)(i)-(v); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003).

BACKGROUND

The Intervenors first submitted Contention 23 following publication of the DEIS.⁶ The original Contention 23 alleged that “[t]he high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the [DEIS]” and asserted that the analysis of “the environmental impacts to the approximately 1,000 acres of transmission corridor is deficient.”⁷ The Board found the proposed contention to be untimely because it was not based on any new or materially different information presented in the DEIS.⁸ The Board concluded that the Intervenors’ challenge could have and should have been made based on DTE’s ER. The Board rightly pointed out that each of the issues addressed in the contention was in fact discussed in the ER, including the transmission corridor route and impacts on historic and cultural resources, endangered or threatened species, and wetlands and vegetation.⁹

In LBP-12-12 the Board identified the NRC Staff’s DEIS description of transmission line construction as a “preconstruction activity” and the NRC Staff’s reference to the agency’s lack of regulatory authority over offsite transmission lines, which would be sited and built by an entity other than DTE.¹⁰ The Board noted the need for agencies to address

⁶ LBP-12-12 at 42.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 42-43.

¹⁰ *Id.* at 45-46.

“connected actions” under NEPA and recommended that the NRC Staff consider the issues raised by the Intervenors when it prepared the FEIS.¹¹

The Intervenors subsequently resubmitted Contention 23 following publication of the FEIS.¹² The Board again rejected Contention 23 as untimely for essentially the same reasons as before.¹³ The Board, however, questioned whether the issues in Contention 23 that it had identified in its prior decision, related to the Staff’s approach to addressing the environmental impacts in transmission corridors, merited *sua sponte* review. Since the parties had not previously addressed the issue, the Board sought their views on whether *sua sponte* review was appropriate. Following the parties’ submissions, the Board requested Commission approval to conduct a *sua sponte* review of two issues relating to the offsite transmission corridor.¹⁴ The Board’s request to conduct a *sua sponte* review remains pending.

In its Order, dated September 10, 2014, the Commission noted that issues raised in Intervenors’ Contention 23 are intertwined with the Board’s request to conduct *sua sponte* review because they both involve the adequacy of the NRC Staff assessment of offsite transmission corridors. The Commission amended the deadline to file a petition for review of

¹¹ *Id.* at 49.

¹² “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” (“FEIS Contentions”), dated February 19, 2013.

¹³ 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), dated April 30, 2013 (“April 30 Order”).

¹⁴ LBP-14-09, dated July 7, 2014.

the Board's dismissal of Contention 23 (as originally proposed and resubmitted). The Intervenors filed the Petition for Review on October 6, 2014.¹⁵

DISCUSSION

For the reasons below, the Intervenors have not identified a finding of material fact that is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding. Nor have the Intervenors identified a necessary legal conclusion that is without governing precedent or that is a departure from or contrary to established law. The timeliness issues raised by the Intervenors also do not involve a substantial and important question of law, policy or discretion, a prejudicial error, or any other consideration that would warrant reversal of the Board's decisions. The Petition for Review should be denied.

A. Requirements for New or Amended Contentions

The timeliness and admissibility of a proposed contentions must be evaluated in accordance with the Commission's standards in 10 C.F.R. Part 2. In general, a contention must be based on the COL application or other documents available at the time the hearing request and petition to intervene is filed.¹⁶ The regulation provides that intervenors may file a new or amended environmental contention if there are data or conclusions in the DEIS or FEIS that "differ significantly from the data or conclusions in the applicant's documents."¹⁷ A new contention may be considered only if: (1) the information upon which the new or amended

¹⁵ The Intervenors previously filed a petition for review of LBP-14-07, dated May 23, 2014, in which the Board ruled in favor of DTE on Contention 15. That petition for review is pending.

¹⁶ 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available).

¹⁷ 10 C.F.R. § 2.309(c).

contention is based was not previously available; (2) the information upon which the new or amended contention is based is materially different from information previously available; and (3) the new or amended contention has been submitted in a timely fashion based on the availability of subsequent information.¹⁸

New or amended contentions, including those based on the FEIS, also must meet the admissibility standards that apply to all contentions, which the Commission has said are “strict by design.”¹⁹ As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Failure to comply with any of these requirements is grounds for the dismissal of a contention.²⁰

B. Resubmitted Contention 23 Was Untimely

In the Petition for Review, the Intervenors assert that, at the FEIS stage, the resubmitted Contention 23 was timely because “the NRC Staff had flagrantly allowed segmentation in repudiation of the ASLB’s recommendation to include impacts to the

¹⁸ *Id.*

¹⁹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

²⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

Transmission Corridor in the FEIS.”²¹ According to the Intervenors, the “ASLB warning to the NRC Staff”—in the form of a “regulatory advisory”—constituted “new information” that was “materially different from that previously available.”²² This argument fails. The facts that form the basis for the original and resubmitted Contention 23 were available in DTE’s ER, and the legal arguments in the contention could have been (and therefore should have been) raised based on the ER — that is, prior to the DEIS or Licensing Board decision in LBP-12-12.

The focus of a NEPA contention is initially on the adequacy of the applicant’s ER. To be timely, a contention first filed following publication of a DEIS or FEIS must be based on data or conclusions that differ significantly from what was submitted in the license application and cannot raise arguments that could have been raised previously.²³ In the original Contention 23, the Intervenors pointed to no information or conclusion in the DEIS that differed from that in the ER. In fact, in the original Contention 23, the Intervenors repeatedly acknowledge that the DEIS’ treatment of the transmission corridor echoes the ER.²⁴ The Board agreed, concluding that the original proposed Contention 23 based on the DEIS was not timely because it was not based on new or materially different information:

²¹ Petition for Review at 7.

²² *Id.* at 7-8.

²³ *Duke Power Co.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1& 2), CLI-02-28, 56 NRC 373, 385-386 (2002).

²⁴ See “Motion For Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 Through 24,” dated January 11, 2012, at 44 (“NRC cannot attempt to duck its responsibilities under NEPA by echoing DTE”); “Reply In Support of ‘Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 Through 24,’” dated February 13, 2012, at 23 (“The DEIS (and before it, the ER) segmented the transmission line part of Fermi from the rest of the project.”).

Intervenors do not establish that the contention is based on any data or conclusions in the DEIS that are significantly different from those in the ER. We are satisfied that each of the issues that comprise the subject matter of the contention was discussed in the ER, including the route of the transmission corridor and impacts from the corridor on historic and cultural resources, on endangered or threatened species, and on wetlands and vegetation.²⁵

The fact that the NRC Staff approach in the DEIS is similar to DTE's approach in the ER cannot be a basis to claim that there is "new" information. The point of the timeliness provision in Section 2.309 is to allow a stakeholder to challenge the applicant's approach before the NRC Staff review. It is simply not enough for a petitioner to claim that they are shocked and surprised by an NRC Staff review document that mirrors an applicant's approach.²⁶

The FEIS again relied on the same data and reached the same conclusions as the DEIS. The Intervenors nevertheless resubmitted Contention 23. The Intervenors again did not identify any new or material different information in the FEIS relative to the DEIS. The Board agreed, applying the same logic to the Intervenors resubmitted Contention 23:

We agree that Intervenors have not established that Contention 23 is based on any data or conclusions in the FEIS that are significantly different from those in the ER or the DEIS. As before, we are satisfied that each of the issues that comprise the subject matter of the contention was discussed in the ER, including the route of the transmission corridor and impacts from the corridor on historic and cultural resources, on endangered or threatened species, and on wetlands and vegetation. The same issues were also reviewed in the DEIS. Intervenors have not put forward any information to show how the FEIS is materially different from the ER or the DEIS in its assessment of the impacts of the transmission line corridor.²⁷

²⁵ LBP-12-12 at 42-43.

²⁶ *See* Petition for Review at 2-3 ("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 [DEIS].").

²⁷ April 30, 2013 Order at 21 (footnotes omitted).

In an attempt to cure the absence of any new or different information in the DEIS or FEIS that would justify a timely contention, the Petition for Review claims (at 7-8) that the Board's "regulatory advisory" to the NRC Staff in LBP-12-12 somehow was "new and materially different information" on which the Intervenors could base a timely contention. But, the time to file a contention tolls when sufficient information is reasonably available for the petitioner to form a contention, not when the Board issues a decision. The Board did not have the benefit of any information beyond that previously available to the Intervenors, and the issues raised by the Board in LBP-12-12 could have been raised by the Intervenors in a timely contention based on the ER.²⁸ The Intervenors cannot disregard the timeliness requirements and add a new contention at their convenience based on information or legal arguments that could have formed the basis for a timely contention had it been made at the outset of the proceeding.²⁹

The Intervenors have made these same arguments before.³⁰ In its April 30 Order, the Board specifically addressed the Intervenors' assertion that the Board's discussion in LBP-

²⁸ The Intervenors' claim of timeliness based on the Board's decision on their untimely contention defies any normal temporal logic.

²⁹ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 271-72 (2009) (citations omitted); *see also Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("[W]e think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.").

³⁰ "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," dated February 19, 2013, at 25 ("Intervenors did not know what the NRC Staff's response to being ordered to include the transmission corridor within the FEIS would be prior to the availability of the FEIS in January 2013, and so are proffering this renewed and amended contention in a timely fashion."); *id.* at 49; "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,'" dated March 25, 2013 ("The information upon which the filing is based - that the NRC Staff pointedly ignored the guidance of the Licensing Board and instead merely

12-12 regarding the adequacy of the DEIS discussion of the offsite transmission corridor constituted “new” information. The Board stated: “To the extent Intervenor believe that LBP-12-12 cures the timeliness problem for Contention 23, they are mistaken.” The Board “simply made a recommendation” that did “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.”³¹ In other words, the Intervenor may not “piggyback” on the Board’s analysis in LBP-12-12. The same legal arguments could have been raised earlier by the Intervenor based on the ER, independently of the Board.

C. There Was No Material Difference Between the DEIS and FEIS

In the Petition for Review, the Intervenor also claim that the resubmitted proposed Contention 23 was timely because “[d]isparate assertions of the Transmission Corridor footprint between the ER and DEIS created a dispute of fact.”³² The Intervenor (Petition for Review at 8) focus on the following statements as the basis for the supposed “difference” between the ER/DEIS and FEIS:

ER (at 3-17)	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 (at 3-17)	By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.
FEIS (at 2-46)	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.

republished in the FEIS the same data and conclusions that were published in the DEIS - became known only with the publication of the FEIS.”).

³¹ April 30 Order at 22.

³² Petition for Review at 8.

According to the Intervenors, the ER and DEIS acknowledge that new transmission corridor infrastructure “may be necessary,” but the FEIS states that by reconfiguring existing conductors DTE could use existing transmission infrastructure “without the need for building additional transmission infrastructure.”³³ The Intervenors argue that the “later assessment” in the FEIS must be “based on new data which is not disclosed in the FEIS” and that the NRC Staff provided no support or explanation for concluding that there will be fewer impacts in the transmission corridor.³⁴ This argument is flawed for two reasons.

First, the FEIS explains that reconfiguring existing conductors “may allow” for the use of existing transmission infrastructure without the need for building additional transmission infrastructure. The FEIS conclusion is functionally identical to that in the DEIS and ER, which also acknowledged the *possibility* that existing towers could be used by reconfiguring conductors, but nevertheless allow that placement of additional transmission infrastructure “may be necessary.” The ER, DEIS, and FEIS all recognize the *potential* to use existing transmission corridor infrastructure, but none definitively conclude that additional infrastructure is unnecessary. The Intervenors’ misreading of the FEIS cannot cure their tardiness in filing Contention 23.³⁵

Second, in the Petition for Review the Intervenors compare text in Chapter 3 of the DEIS to Chapter 2 of the FEIS. This approach presents a misleading view of the differences

³³ Petition for Review at 8.

³⁴ *Id.* at 9.

³⁵ *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995) (explaining that a petitioner’s imprecise reading of a reference document cannot serve to generate an issue suitable for litigation).

between the two documents. A comparison of corresponding sections in the DEIS and FEIS show that there are in fact no differences between the two documents:

DEIS (at 3-17)	FEIS (at 3-17)
By reconfiguring conductors, new lines in this portion of the route could use existing towers, but placement of additional transmission infrastructure may be necessary.	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 (at 2-45)	FEIS (at 2-46)
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.	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.

There are also no “revision bars” in the margin of the FEIS that would indicate a change from the DEIS. An “apples-to-apples” comparison therefore confirms the absence of any new or materially different information in the FEIS that could support a timely contention. As a result, there is no “inconsistent speculation about the reuse of existing Transmission Corridor towers” that could provide the basis for a timely contention. The Intervenor’s attempt to revive Contention 23 should be denied.

D. Contention 23 Was Inadmissible

In LBP-12-12, the Board did not conclusively resolve the admissibility of Contention 23 because it denied the contention as untimely. The Board noted, however, that “[g]iven the very limited analysis in the DEIS of these and other environmental impacts arising from the transmission line corridor, [the Intervenor’s] claims may have been admissible had they been filed in a timely manner.” The Board’s reasoning appears to be closely linked to its views of the legal issues that underlie its request to conduct a *sua sponte* review in LBP-14-09. As

explained in DTE's filings with the Commission on July 13 and August 7, 2014, the NRC Staff approach in the DEIS and FEIS is consistent with NRC regulations and precedent, as well as the NRC's obligations under NEPA. And, regardless, there is no expert or factual support for an admissible contention challenging the extensive environmental review documented in the DEIS and ultimately in the FEIS.³⁶ As a result, even if the Commission concludes that the original or resubmitted Contention 23 was timely, Contention 23 remains inadmissible.

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.

³⁶ The arguments against the admissibility of the original and resubmitted Contention 23 have been addressed in prior DTE filings and it is not necessary to repeat them here in full. See "Applicant's Answer to Proposed New Contentions," dated February 6, 2012, at 58-64; "Applicant's Answer to Proposed New Contentions Based on Final Environmental Impact Statement," dated March 18, 2013, at 17-32. In brief, Contention 23 alleges that the discussion of transmission-related impacts in the DEIS and FEIS is deficient. The Intervenor, however, ignore the extensive discussions of transmission-related impacts, including mitigation measures and bounding analyses, throughout the DEIS and FEIS and point to no impacts or resource areas that were overlooked or not considered in the NRC Staff's environmental review documents. The Intervenor also put forth no new information or expert support to suggest that impacts would be greater than those identified in the DEIS and FEIS.

CONCLUSION

For the foregoing reasons, the Commission should deny the Intervenors' Petition for Review for Review on Contention 23.

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Dated at Washington, District of Columbia
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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S OPPOSITION TO PETITION FOR REVIEW ON CONTENTION 23” in the above captioned proceeding have been served via the Electronic Information Exchange this 31st day of October 2014.

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