

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of

DETROIT EDISON COMPANY

(Fermi Nuclear Power Plant, Unit 3)

Docket No. 52-033-COL

ASLBP No. 09-880-05-COL-BD01

April 30, 2013

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)

Before this Licensing Board is 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 27.¹ We deny Intervenor's motion in its entirety.

I. Background

This combined license ("COL") contested proceeding involves the application of DTE Electric Company (formerly the Detroit Edison Company) ("Applicant") under 10 C.F.R. Part 52, Subpart C, to construct and to operate a GE-Hitachi Economic Simplified Boiling Water Reactor ("ESBWR"), designated Unit 3, on its existing Fermi nuclear facility site in Monroe County, Michigan.²

¹ Motion for Resubmission of Contentions 3 and 13, for Resubmission of Contention 23 or its Admission as a New Contention, and for Admission of the New Contentions 26 and 27 (Feb. 19, 2013) [hereinafter "FEIS Contentions"].

² 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.

On March 9, 2009, the Intervenor submitted a petition to intervene that contained 14 proposed contentions, including Contentions 3 and Contention 13.³ DTE and the NRC Staff filed answers to the petition on April 3, 2009.⁴ On July 31, 2009, we ruled that Intervenor has standing and admitted four of their contentions, including Contention 3.⁵ The Board also found that Contention 13, as initially filed, was inadmissible for failure of meeting the pleading requirements of 10 C.F.R. § 2.309(f)(1).⁶ On July 9, 2010, the Board granted summary disposition of Contention 3 in favor of DTE.⁷

On October 28, 2010, the NRC Staff and the U.S. Army Corps of Engineers published the draft environmental impact statement ("DEIS").⁸ On January 11, 2012, Intervenor filed a Motion for Leave to Late-File Amended and New Contentions along with a Motion for Resubmission of Contention 10, to Amend/Resubmit Contention 13, and for Submission of New Contentions 17 through 24.⁹ On February 6, 2012, DTE and the NRC Staff each filed answers

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³ Petition of Beyond Nuclear [et al.] for Leave to Intervene in Combined Operating Licensing Proceedings and Request for Adjudication Hearing (Mar. 9, 2009).

⁴ Applicant's Answer to Petition to Intervene (Apr. 3, 2009); NRC Staff Answer to Petition for Leave to Intervene in Combined License Proceedings and Request for Adjudication Hearing (Apr. 1, 2009).

⁵ See Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, aff'd, CLI-09-22, 70 NRC 932 (2009).

⁶ LBP-09-16, 70 NRC at 297-04.

⁷ See Licensing Board Order (Board's Order Granting Summary Disposition of Contention 3) (July 9, 2010) (unpublished) [hereinafter "Summary Disposition Order"].

⁸ Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3, NUREG 2015, Vol. 1 (Oct. 2011) (ADAMS Accession No. ML11287A108) [hereinafter "DEIS"].

⁹ See Motion for Leave to Late-File Amended and New Contention (Jan. 11, 2012); Motion for Resubmission of Contention 10, to Amend /Resubmit Contention 13, and for Submission of New Contentions 17 through 24 (Jan. 11, 2012) [hereinafter "DEIS Contentions"].

opposing the Intervenor's DEIS Contentions and the newly proposed/resubmitted contentions.¹⁰

On June 21, 2012, we denied most of the proposed contentions challenging the DEIS – including Contentions 13 and 23 – and deferred ruling on specific aspects of proposed Contentions 20 and 21.¹¹

On December 12, 2012, the Board issued an order that established a schedule for filing new or amended contentions based on the Final Environmental Impact Statement ("FEIS"),¹² which was published in January 2013.¹³ On February 19, 2013, the Intervenor's filed their motion to admit new contentions based on the FEIS.¹⁴ On March 18, 2013, Applicant and the NRC Staff filed their answers to the instant motion.¹⁵ Intervenor's filed a combined reply to the answers on March 25, 2013.¹⁶

¹⁰ See Applicant's Answer to Proposed New Contentions (Feb. 6, 2012); 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) [hereinafter "Staff Answer to DEIS Contentions"].

¹¹ See Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC ____ (June 21, 2012). The board subsequently ruled that no part of either Contention 20 or Contention 21 could be admitted. Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 75 NRC ____, ____ (Nov. 9, 2012) (slip op. at 52).

¹² See Licensing Board Order (Modifying the Schedule) (Dec. 12, 2012) (unpublished).

¹³ Final Environmental Impact Statement for the Combined Licensed (COL) for Enrico Fermi Unit 3, NUREG-2015 (Jan. 2013) [hereinafter "FEIS"].

¹⁴ See FEIS Contentions.

¹⁵ See Applicant's Answer to Proposed New Contentions Based on Final Environmental Impact Statement (Mar. 18, 2013) [hereinafter "Applicant's Answer"]; 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) [hereinafter "Staff Answer"].

¹⁶ See 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) [hereinafter "Reply"].

II. Legal Standards

New and amended contentions must satisfy two sets of regulations to be admissible: (1) the timeliness standards in 10 C.F.R. § 2.309(c)(1) and (2) the general contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

A. Timeliness Standards

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 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.

10 C.F.R. § 2.309(c)(1).

This formulation of section 2.309(c)(1) is an amendment to and simplification of the previous timeliness standards articulated in the 2012 version of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c)(1).¹⁷ In the revised regulations, the three-part test formerly found in 10 C.F.R. § 2.309(f)(2)(i)-(iii), which is now found in section 2.309(c)(1), is the only requirement for filing new or amended contentions after the initial deadline.¹⁸

In this case, the Board established a 30-day deadline for filing timely new contentions based on the publication of the FEIS or other new information.¹⁹ For contentions based on the DEIS, we established a 60-day deadline for timely new contentions.²⁰

¹⁷ See Amendment to the Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012).

¹⁸ See 10 C.F.R. 2.309(c)(1).

¹⁹ See Licensing Board Order (Scheduling Order) at 2 (Sept. 11, 2009) (unpublished) [hereinafter "Scheduling Order"].

²⁰ See Scheduling Order at 2-3; see also Licensing Board Order (Modifying the Schedule) at 2 (Dec. 12, 2012) (unpublished).

B. General Admissibility Standards

Any new or amended contention must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). An admissible contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (vi) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or, in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.²¹

The purpose of section 2.309(f)(1) is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²² The Commission has emphasized that the rules on contention admissibility are “strict by design.”²³ Further, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications pursuant to 10 C.F.R. § 2.335(a). Failure to comply with any of these requirements is grounds for not admitting a contention.

²¹ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

²² Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²³ See, e.g., Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358-59 (2001); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999).

III. Board Ruling on Intervenor's Motion

The instant motion asks the Board to admit five contentions based on the FEIS.²⁴ Intervenor has resubmitted previously filed Contentions 3, 13, and 23; thus, we will refer to them by their original numbering. Contentions 26 and 27 are new. For the reasons discussed below, we find that the five contentions based on the FEIS are inadmissible.

A. Contention 3: Environmental Analysis of Effects of Low-Level Radioactive Waste

In resubmitted Contention 3, Intervenor's assert:

The FEIS violates NEPA by failing to address the environmental impacts of the 'low-level' radioactive waste that it will generate in the absence of reliable licensed permanent disposal facilities or capability to isolate the radioactive waste from the environment for greater than 10 years."²⁵

As previously noted, the Board admitted a reformulated version of Contention 3 in 2009.²⁶ In the original Contention 3, Intervenor alleged that the Environmental Report ("ER") failed to adequately address the issue of long-term radioactive waste management and disposal of low-level radioactive waste ("LLRW") that would be generated at Fermi Unit 3 because the ER ignored the lack of an available disposal facility.²⁷ Intervenor contended that Contention 3 was a "contention of omission."²⁸

The Board found a portion of Contention 3 admissible as a "contention of omission" based on DTE's failure to acknowledge in the ER "that it lacks an offsite disposal facility and to

²⁴ See generally FEIS Contentions.

²⁵ Id. at 6.

²⁶ See LBP-09-16, 70 NRC at 252-68.

²⁷ See REFILED Petition of Beyond Nuclear, et al., for Leave to Intervene in Combined Operating License Proceedings and Request for Adjudication Hearing (Apr. 21, 2009) at 39-40 [hereinafter "Refiled Petition" and "Initial Contentions"]. Because the Intervenor's original petition was submitted in five separate, unnumbered documents, the Board instructed the Intervenor to submit a newly filed petition consolidated into one final document that was refiled on April 21, 2009. See Licensing Board Order (Regarding Oral Argument) (Apr. 9, 2009) at 2 (unpublished).

²⁸ See Initial Contentions at 44.

either explain its plan for storing such wastes onsite during the license term, or show that it has some alternative means of managing the wastes that will not require either an offsite disposal facility or extended onsite storage.”²⁹

The reformulated Contention 3 was limited to (1) the ER’s deficiency in addressing the lack of a licensed offsite facility; and (2) the ER’s failure to (a) address the need for, and the environmental consequences of, long-term storage of Class B and C waste at the Fermi 3 site, or (b) demonstrate that long-term storage at the Fermi 3 site will not be necessary.³⁰

Subsequently, the Board granted summary disposition on Contention 3, finding that the contention was moot because DTE had amended the ER to explain its plans for managing Class B and C waste if an offsite facility was not available.³¹ The Board concluded that Intervenor, although broadly disputing the adequacy of DTE’s new plan, failed to demonstrate a genuine factual dispute with the adequacy of the LLRW management plan described in the amended ER.³²

In the instant motion, Intervenor resubmit Contention 3 based upon information in the FEIS.

1. Parties’ Positions

In its motion, Intervenor argues that “things have changed” since the publication of the ER because DTE has indicated that it will store LLRW for up to a decade at the Fermi 3 plant site, but the FEIS fails to discuss extended or permanent onsite storage of low-level waste.³³

DTE argues that Contention 3 is untimely because (1) Intervenor could have raised this

²⁹ See LBP-09-16, 70 NRC at 256-57.

³⁰ Id. at 257.

³¹ See Licensing Board Order (Granting Motion for Summary Disposition of Contention 3) at 5 (July 9, 2010) [hereinafter “Summary Disposition Order”].

³² Id. at 6-7.

³³ FEIS Contentions at 6.

issue based on the revised ER or the DEIS and (2) there are no material differences between the DEIS and FEIS discussion of the Fermi 3 LLRW management plans; thus, there is no new or materially different information to serve as the basis of a timely contention.³⁴ DTE contends that, even if Intervenor's resubmitted Contention 3 had been timely, the resubmitted contention is not admissible because there is no longer an omission related to extended onsite storage in the license application. Thus, the contention fails to raise a genuine dispute.³⁵

The NRC Staff argues that resubmitted Contention 3 is untimely because (1) it raises issues that Intervenor could have raised at the time of their original intervention petition, at the time the ER was amended in 2010, or when the DEIS was issued in 2011;³⁶ and (2) Intervenor has not demonstrated that the FEIS version of Contention 3 is based on information that was not previously available or that is materially different from information provided in the amended ER or in the DEIS.³⁷ The Staff contends that even if Contention 3 were timely, the extended onsite storage issue raised in Contention 3 is still not admissible because the FEIS acknowledges the potential impacts of low level waste storage even if offsite storage were not to become available. Thus, Contention 3 fails to raise a genuine dispute with the license application.³⁸

2. Timeliness of Resubmitted Contention 3

We agree that Contention 3 is untimely because it raises issues that Intervenor has previously raised in their original intervention petition in 2009, and could have raised in 2010 when the ER was amended or in 2011 when the DEIS was issued. Intervenor has not

³⁴ See Applicant's Answer at 6.

³⁵ Id. at 6-7.

³⁶ See Staff's Answer at 9.

³⁷ Id. at 17-20.

³⁸ Id. at 11-13.

demonstrated that resubmitted Contention 3 is based on information that was not previously available or that is materially different from information provided in the ER or in the DEIS.

DTE's assessment that Fermi 3 would be capable of storing low-level waste onsite for up to ten years has been in the ER since DTE amended it in February 2010.³⁹ Additionally, DTE's plan to store low-level waste onsite for ten years was discussed in the DEIS, which was published in October 2011.⁴⁰ Intervenor could have challenged DTE's storage plans when DTE amended its ER in 2010 or after the DEIS was published in 2011. Thus, the discussion of DTE's low-level waste onsite storage plans in the FEIS was previously available, as the information was discussed in the ER and the DEIS.

Moreover, Intervenor does not explain why or how the information about the Waste Control Specialists, LLC ("WCS") site in Texas in the FEIS is new or materially different from information that was previously available.⁴¹ Intervenor referred to the WCS site in the initial version of Contention 3, but did not assert that DTE failed to discuss the possible space limitations of the WCS site in the ER.⁴² The WCS site was also referred to as a possible storage location for Fermi 3 waste in the DEIS.⁴³ Intervenor did not allege that the discussion of the WCS site in the DEIS was inadequate.⁴⁴ Thus, in the FEIS version of Contention 3, Intervenor has not demonstrated how the issue of offsite storage development is based upon

³⁹ See, e.g., Letter to NRC Document Control Desk from Peter W. Smith, Director, Nuclear Development – Licensing and Engineering, DTE (Feb. 16, 2010), Att. 1, at 5 ("[The reconfigured Fermi 3] Radwaste Building provides storage space sized to hold the total combined minimum volume of 3 months of packaged Class A and 10 years of packaged Class B/C low-level radioactive waste estimated to be generated during plant operations.") (ADAMS Accession No. ML100500278).

⁴⁰ DEIS at 6-14.

⁴¹ See generally FEIS Contentions at 6-11.

⁴² See Initial Contentions at 39.

⁴³ DEIS at 6-14.

⁴⁴ See generally DEIS contentions.

information that is materially different than information that has been available since the beginning of the proceeding.

3. Admissibility of Resubmitted Contention 3

We agree that even if Contention 3 were timely, it is not admissible because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1).

In LBP-09-16, the Board admitted Contention 3 as a “contention of omission.”⁴⁵ Subsequently, the Board dismissed the initial version of Contention 3 as moot after DTE addressed the onsite storage of low-level waste in its amended ER.⁴⁶

As the Board previously explained, and as articulated in section 2.309(f)(1)(vi), a contention of omission requires a showing that “the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner’s belief.”⁴⁷ In resubmitted Contention 3, Intervenor’s argue that NEPA requires the FEIS to analyze the environmental impacts of extended onsite LLRW storage.⁴⁸ When Intervenor’s made this argument among their initial contentions, the Board agreed, finding that “Contention 3 is material to compliance with NEPA and the NRC’s regulations implementing NEPA, and it therefore satisfies the requirement of section 2.309(f)(1)(iv).”⁴⁹

On the other hand, the Board also concluded in its order granting summary disposition that, “[i]f the Applicant cures the omission, the contention will become moot. Then, [the intervenor] must timely file a new or amended contention if it intends to challenge the sufficiency

⁴⁵ See LBP-09-16, 70 NRC at 256.

⁴⁶ See Summary Disposition Order at 5.

⁴⁷ LBP-09-16, 70 NRC at 244.

⁴⁸ See FEIS Contentions at 9.

⁴⁹ LBP-09-16, 70 NRC at 258.

of the new information supplied by the Applicant.”⁵⁰ In its summary disposition order, the Board determined that DTE had cured the omission by amending its ER, subsequently mooted Contention 3.⁵¹ Intervenor did not submit a new or amended contention challenging the adequacy of DTE’s analysis in the amended ER.

Intervenor alleges that the FEIS fails to include a discussion of the environmental impacts of LLRW storage at the Fermi 3 site for an extended period of time in the event that offsite disposal is not available.⁵² However, the FEIS discusses additional waste minimization measures to specifically reduce or eliminate Class B or C waste.⁵³ For example, DTE states that (1) it has proposed a Solid Waste Management System for Fermi 3 that provides enough storage space to hold the total combined volume of 3 months of packaged Class A and 10 years of packaged Class B and Class C waste; and (2) if additional storage capacity for Class B and C waste is required, DTE could construct additional storage facilities or DTE could also enter into an agreement with a third-party contractor to process, store, own, and ultimately dispose of the waste.⁵⁴ In fact, Intervenor cites this entire discussion in their motion.⁵⁵

Additionally, contrary to Intervenor’s argument, the FEIS states that WCS facility in Andrews County, Texas, “may accept Class A, B, and C LLW from outside the Texas Compact for disposal, subject to established criteria, conditions, and approval processes. Michigan is not currently affiliated with any compact. Other disposal sites may also be available by the time

⁵⁰ Summary Disposition Order at 6 (quoting Virginia Elec. and Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC 294, 317-18 (2008) (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002))).

⁵¹ See Summary Disposition Order at 5.

⁵² See FEIS Contentions at 8-9.

⁵³ See FEIS at 6-14 to 6-15.

⁵⁴ See FEIS at 6-14.

⁵⁵ See FEIS Contentions at 6-8.

Fermi 3 could become operational.”⁵⁶ The FEIS then discusses a Solid Waste Management System for Fermi 3, which includes constructing additional temporary storage facilities in the event that offsite storage is not available.⁵⁷ Thus, Intervenor’s argument that the FEIS lacks discussion of WCS’s limited availability for Fermi 3’s waste holds no weight.

Moreover, other portions of Intervenor’s argument have been previously rejected for failing to satisfy 10 C.F.R. § 2.309(f)(1). For instance, Intervenor attempt to raise an issue regarding the disposal of greater-than-Class-C waste.⁵⁸ However, the Board held that disposal of greater-than-Class-C waste, by statute, is the responsibility of the federal government and that the Intervenor had not “provided facts to support a contention that the United States will fail in its responsibility to provide for the disposal of greater-than-Class-C waste. 10 C.F.R. § 2.309(f)(1)(v).”⁵⁹ Intervenor do not provide any additional facts in their resubmitted Contention 3 to raise this issue again. Thus, this portion is, once again, not admissible under 10 C.F.R. 2.309(f)(1).

The Board has also previously considered Intervenor’s argument that DTE’s decommissioning planning incorrectly assumes that waste will be offsite at the time the facility ceases operation and should instead account for waste being stored onsite.⁶⁰ In LBP-09-16, the Board held that the portion of Contention 3 disputing the cost estimate for decommissioning is an indirect challenge to 10 C.F.R. § 50.75(c); thus, the contention is inadmissible because it indirectly attacks the Commission’s regulations.⁶¹

⁵⁶ See FEIS at 6-14.

⁵⁷ Id.

⁵⁸ See FEIS Contentions 10-11.

⁵⁹ LBP-09-16, 70 NRC at 254.

⁶⁰ See FEIS Contentions 10-11.

⁶¹ LBP-09-16, 70 NRC at 255.

In sum, the resubmitted Contention 3 is inadmissible because it is untimely, and also because it fails to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).

B. Contention 13: The Need and Demand for Power from Fermi 3

In the resubmitted Contention 13, the Intervenor asserts:

The Final Environmental Impact Statement (FEIS) does not contain the “hard look” required by NEPA or the Atomic Energy Act respecting need and demand for Fermi 3. It overestimates forecast demand for electricity through the decade of the 2020s, when Fermi 3 is planned to begin power generation. The FEIS relies on two flawed analyses of future demand, one of which predates and so does not account for the 2007-08 economic recession, and the other of which has consistently overestimated electrical consumption, belied by actual usage data, for every year since it was compiled. The FEIS analyses of need for power, energy alternatives and cost/benefit analysis are consequently skewed and grossly inaccurate, falsely justifying need for a new baseload nuclear plant because they are based on inaccurate, irrelevant and/or outdated information.⁶²

Resubmitted Contention 13 is Intervenor’s third attempt to admit Contention 13.

The original version of Contention 13 was asserted among the initial contentions in 2009.⁶³ In the original version of Contention 13, Intervenor raised four specific issues: (1) the cost of a new nuclear facility, (2) the need for power analysis in the Applicant’s ER, (3) the consideration of energy efficiency in the Applicant’s ER, and (4) the consideration of alternative energy sources in the Applicant’s ER.⁶⁴ In LBP-09-16, the Board separately analyzed each of these issues, concluding that all four issues were inadmissible because Intervenor did not provide factual or expert support to demonstrate a genuine material dispute with the application.⁶⁵

⁶² See FEIS Contentions at 12.

⁶³ See Initial Contentions at 109-22.

⁶⁴ See id. at 111-22.

⁶⁵ See LBP-09-16, 70 NRC at 298-304.

The second version of Contention 13 was based upon the publication of the Fermi 3 DEIS.⁶⁶ The DEIS version of Contention 13 reargued issues two, three, and four with respect to the DEIS, and Intervenor provided a declaration and report by a consultant to the Sierra Club, Ned Ford.⁶⁷ In LBP-12-12, the Board rejected the DEIS version of Contention 12 as untimely, concluding that Intervenor needed to demonstrate that the DEIS contained new data, new conclusions, or information that was “not previously available” as required under 10 C.F.R. § 2.309(f)(2)(i),⁶⁸ but Intervenor made no such demonstrations.⁶⁹ The Board also highlighted the fact that Intervenor “could have submitted (and indeed did submit) this contention upon publication of Applicant’s ER.”⁷⁰

The third version of Contention 13 is based upon the FEIS and is currently before the Board.

1. Parties’ Positions

Intervenor asserts that resubmitted Contention 13 is admissible because the need for power analysis in the FEIS uses out-of-date forecasts and therefore fails to meet NEPA requirements.⁷¹ Although Intervenor made similar allegations regarding the ER and the DEIS, Intervenor argues that resubmitted Contention 13 is timely because in part it challenges a new

⁶⁶ See DEIS Contentions at 10-22.

⁶⁷ See id.; see also Att.2, Declaration of Ned Ford; Att. 3, Fermi 3: A Critique of the Resource Options Comparing Fermi 3 to Efficiency and Renewable Generation.

⁶⁸ The 2012 version of the NRC’s regulations has specific language related to new or amended contentions that are based upon NEPA issues. See 10 C.F.R. § 2.309(f)(2) (2012). This language, which stated that Intervenor may file new contentions “if there are data or conclusions in the NRC draft or final [EIS] . . . that differ significantly from the data or conclusions in the applicant’s documents,” no longer appears in the latest publication of NRC regulations. See 10 C.F.R. § 2.309(f)(2) (2013).

⁶⁹ See Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC __, __ (slip op. at 14) (2012).

⁷⁰ Id.

⁷¹ See id. at 14-15.

section in the FEIS: the confirmatory calculations allegedly based on a 2008 forecast by the North American Electric Reliability Corporation (NERC), the Electric Long-Term Reliability Analysis (LTRA).⁷²

DTE argues that the third version of Contention 13 is (1) untimely because the information relied upon by Intervenor either was previously available or is not materially different from information previously available; and (2) even if the Board finds that Contention 13 is timely, Contention 13 is inadmissible because it fails to raise a genuine dispute with the FEIS.⁷³ DTE contends that resubmitted Contention 13 does not raise a material dispute with the FEIS because Intervenor are demanding a more precise forecast of the need for power than the Commission has determined is required by NEPA, and because Intervenor have failed to address other aspects of the need for power analysis.⁷⁴

The NRC Staff argues that resubmitted Contention 13 is inadmissible because (1) the FEIS version of Contention 13 is untimely, (2) the contention repeats claims regarding the Michigan Public Service Commission (MPSC) 21st Century Electric Energy Plan (21st Century Plan) that have already been raised and rejected twice in this proceeding, and (3) Intervenor's argument based on the LTRA is based on an incorrect reading of the FEIS and thus cannot serve as the basis of an admissible contention.⁷⁵

2. Timeliness of Resubmitted Contention 13

We agree that resubmitted Contention 13 is not based upon new or materially different information insofar as it challenges the Staff's reliance on the 21st Century Plan or other matters that the Staff also discussed in the DEIS and/or the ER. The contention

⁷² See FEIS Contentions at 13-14.

⁷³ See Applicant's Answer at 9-15.

⁷⁴ Id. at 14-15.

⁷⁵ Id. at 15.

is timely, however, to the extent it challenges the FEIS's new confirmatory calculations based on the LTRA, because that was an analysis introduced for the first time in the FEIS.

As noted, this is Intervenor's third attempt to admit Contention 13, the first challenging the ER and the second challenging the DEIS. The Board concluded that the original version of Contention 13 was inadmissible for failing to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1).⁷⁶ We deemed the second version of Contention 13 untimely because Intervenor did not demonstrate that the DEIS actually contained new data, new conclusions, or information that was not previously available.⁷⁷

To the extent Intervenor's focus on information that has not changed between the DEIS and FEIS, Contention 13 is not based on new and materially different information.⁷⁸ In particular, Intervenor again argues that the need for power analysis in Chapter 8 of the FEIS is flawed because it relied on the 21st Century Plan, which was published in 2006, and therefore fails to account for the effects of the recent recession on the demand for electricity.⁷⁹ Intervenor argues that by overestimating the future demand for electricity, the FEIS overstates the benefits of constructing Fermi 3.⁸⁰

Intervenor has not indicated how information in the FEIS based on 21st Century Plan is new or materially different from that in the ER or the DEIS, as required under 10 C.F.R. § 2.309(c)(1). In fact, Intervenor points to previous versions of Contention 13 to support resubmitted Contention 13, but does not explain how the information in the FEIS is new or

⁷⁶ See LBP-09-16, 70 NRC at 297-304.

⁷⁷ See LBP-12-12, 75 NRC at __ (slip op. at 14-15).

⁷⁸ See, e.g., FEIS Contentions at 13-14.

⁷⁹ See id. at 13.

⁸⁰ Id.

materially different from previously available information.⁸¹ For this reason, Intervenor could have submitted (and indeed did submit) much of Contention 13 upon publication of ER and the DEIS. The parts of Contention 13 that argue matters previously raised fail to satisfy the requirements of Section 2.309(c)(1).

Intervenor also challenge the Staff's new confirmatory calculations based on the LTRA. Those new calculations were not in the ER or the DEIS, and thus Intervenor could not have challenged them previously. In support of Contention 13, Intervenor cite the "new data or conclusions" language that is no longer used in the 2013 NRC regulations.⁸² Intervenor do not address the legal standards now found in Section 2.309(c)(1). Nevertheless, although the "new data or conclusions" language has been deleted from the regulations, Intervenor may still challenge new data and/or conclusions in the FEIS if the criteria of Section 2.309(c)(1) are satisfied, as they are here. The new FEIS calculations based on the LTRA, offered to confirm the Staff's earlier conclusions based on the 21st Century Plan, constitute new and materially different information, and Intervenor filed a timely challenge to the new information when it appeared in the FEIS. That aspect of Contention 13 accordingly complies with Section 2.309(c)(1).

3. Admissibility of Resubmitted Contention 13

We conclude that no aspect of Contention 13 is admissible because Intervenor have not raised a genuine dispute with the FEIS.

In the initial version of Contention 13, which was based on the ER, Intervenor argued that the 21st Century Plan was outdated because it failed to account for the

⁸¹ See, e.g., FEIS Contentions at 13 ("Intervenor objected to this reliance on the 21st Century Plan at the DEIS stage, arguing that since it 'completely omits the second largest economic downturn in American history in its demand forecasting' it cannot be 'sufficient to reasonably characterize' a realistic demand for power in Southeast Michigan over the next 15 years.").

⁸² See FEIS Contentions at 3-4.

recession that began in 2008.⁸³ In rejecting the initial version of Contention 13, the Board observed that the Intervenor had at most “provided some alleged facts suggesting the future need for power might be closer to the low-growth case identified in the ER,” but had not “provided facts or expert opinion to indicate that the future need for power will likely fall below the low-growth case” or “identified an issue affecting the need for power or a source of uncertainty that was not considered in the ER.”⁸⁴ In rejecting the DEIS version of Contention 13, the Board restated its reasoning for rejecting the initial Contention 13 and noted that Intervenor did not take into account material that the Staff included in the DEIS.⁸⁵

The Board’s reasoning in rejecting the ER-based Contention 13 and the DEIS-based Contention 13 also applies to the FEIS-based Contention 13. Intervenor again allege that the need for power analysis in the FEIS fails to meet NEPA requirements because it relies in part on the MPSC 21st Century Electric Energy Plan, a 2006 energy planning report that was prepared “before the Great Recession” and therefore “failed to anticipate the dramatic consequential reduction in electricity demand.”⁸⁶ Those arguments have already been raised and rejected twice in this proceeding and are no more convincing now.

We also find inadmissible Intervenor’s challenge to the Staff’s new confirmatory calculations based on the LTRA.⁸⁷ Intervenor argue that the Staff used the 2008 version of the LTRA to perform these calculations. In fact, the Staff’s calculations were based on

⁸³ Initial Contentions at 113.

⁸⁴ LBP-09-16, 70 NRC at 302.

⁸⁵ See LBP-12-12, 75 NRC at ___ (slip op. at 16-17).

⁸⁶ FEIS Contentions at 13.

⁸⁷ Id. at 13-14.

the 2010 version of the LTRA, and not, as Intervenor's argue, the 2008 version.⁸⁸ The FEIS plainly states: "The review team's reassessment is based on ReliabilityFirst's 2010 Long Term Resource Assessment, hereafter the LTRA (RFC 2010)."⁸⁹ As the Staff argues, "In NRC proceedings, an intervenor's imprecise reading of a document cannot serve as the basis for an admissible contention."⁹⁰ Because Intervenor's do not provide facts or expert opinion to show a genuine dispute with the FEIS based on the Staff's use of the 2010 version of the LTRA,⁹¹ the LTRA argument in Contention 13 is inadmissible.

Thus, resubmitted Contention 13 will not be admitted.

C. Contention 23: the Transmission Line Corridor

Intervenor's state that they

assert a new contention, or alternatively, resubmit their former Contention 23, as amended, seeking consideration of new and significant information from the Final Environmental Impact Statement . . . for the COLA for Fermi 3 which is relevant to completion of NEPA analysis of the transmission corridor. Specifically, Intervenor's request a hearing on the inadequately-disclosed and -described environmental implications of having an operational transmission line corridor extending for nearly thirty (30) miles between the regional electric grid and Fermi 3.⁹²

Intervenor's first submitted Contention 23 in response to the DEIS. As originally pled, it stated:

The high-voltage transmission line portion of the project involves a lengthy corridor which is inadequately assessed and analyzed in the Draft Environmental Impact Statement.⁹³

In its June 12, 2012, Order ruling on the DEIS contentions, the Board found proposed

⁸⁸ See FEIS at 8-19.

⁸⁹ See id.

⁹⁰ Staff's Answer at 19 (citing Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995)).

⁹¹ See FEIS Contentions 14-15.

⁹² Id. at 21.

⁹³ LBP-12-12, 75 NRC at ___ (slip op. at 42).

Contention 23 untimely, holding that:

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. Rather than put forward any information to show how the DEIS differs from the ER, Intervenors at several points acknowledge that the DEIS' treatment of the transmission corridor echoes the ER. Because Contention 23 is not based on new or materially different information, it is not timely under Section 2.309(f)(2).⁹⁴

The Board stated, however, that while Contention 23 was untimely, "it raises substantial questions concerning the adequacy of the DEIS that the NRC Staff should carefully consider in preparing the FEIS."⁹⁵ Intervenors criticized the DEIS for, among other things, failing to adequately define the route for the corridor, identify endangered or threatened species along the corridor, adequately evaluate impacts on wetlands and vegetation, and adequately investigate historic or cultural resources that may be affected. The Board concluded that, "[g]iven the very limited analysis in the DEIS of these and other environmental impacts arising from the transmission line corridor, these claims may have been admissible had they been filed in a timely manner."⁹⁶ The Board further observed that, even though the Staff regards the transmission corridor as a preconstruction activity and it is outside the NRC's regulatory jurisdiction, the construction and maintenance of the transmission corridor is sufficiently closely connected with Fermi Unit 3 that its environmental consequences must be analyzed in the FEIS.⁹⁷ Because the Staff has the primary responsibility to comply with NEPA, the Board recommended that "the NRC Staff consider the issues raised by Intervenors when it prepares

⁹⁴ Id. at 42-43.

⁹⁵ Id. at 43.

⁹⁶ Id. at 45.

⁹⁷ Id. at 46.

the FEIS.”⁹⁸

1. *Timeliness of Resubmitted Contention 23*

Both the NRC Staff and the Applicant argue that, as before, Contention 23 is not based on new or materially different information.⁹⁹ They argue that the Intervenor’s challenges could have and should have been made in response to the ER and/or the DEIS.

We agree that Intervenor’s 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 corridor¹⁰⁰ and impacts from the corridor on historic and cultural resources,¹⁰¹ on endangered or threatened species,¹⁰² and on wetlands and vegetation.¹⁰³ The same issues were also reviewed in the DEIS.¹⁰⁴ Intervenor’s 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. Because Contention 23 is not based on new or materially different information, it is not timely under Section 2.309(c)(1).

Intervenor’s state that Contention 23 is “based on the ASLB’s June 21, 2012 ruling in this litigation,”¹⁰⁵ which they characterize as a Board “order” to the Staff to more thoroughly evaluate

⁹⁸ Id. at 49.

⁹⁹ Staff’s Answer at 22-24; DTE Answer at 15-17.

¹⁰⁰ ER at 3-57.

¹⁰¹ Id. at 4-19 to 4-22.

¹⁰² Id. at 4-51 to 4-52.

¹⁰³ Id. at 4-12 to 4-16.

¹⁰⁴ See, e.g., DEIS at 2-10 to -11, 2-32, 2-60, 2-80, 2-205, 4-27, 4-39, 4-42, 5-20, 5-24, 5-38, 5-89.

¹⁰⁵ FEIS Contentions at 22.

the impacts of the transmission line corridor in its FEIS.¹⁰⁶ To the extent Intervenor believe that LBP-12-12 cures the timeliness problem for Contention 23, they are mistaken. The Board did not “order” the Staff to make any change in the FEIS. The Board simply made a recommendation to further the agency’s compliance with NEPA. The Board’s 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. Thus, the Board’s recommendation does not alter the timeliness analysis.

2. *Sua Sponte review of the FEIS’s Transmission Corridor Analysis*

Intervenor suggest that the Board either has exercised or should consider exercising its authority to review the adequacy of the transmission corridor analysis *sua sponte*. They note that “[a] licensing board has the power to raise *sua sponte* any significant environmental or safety issue in operating license hearings,”¹⁰⁷ and that “[t]he 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.”¹⁰⁸ Intervenor also refer to the Appeal Board’s instruction that “[l]icensing boards have independent responsibilities in the realm of the enforcement of the NEPA command; *i.e.*, their role is not confined to the arbitration of those environmental controversies as may happen to have been placed before them by the litigants in the particular case.”¹⁰⁹

¹⁰⁶ Id. at 24.

¹⁰⁷ FEIS Contentions at 24 (citing 10 C.F.R. § 2.340(a) (formerly § 2.760a); Consol. Edison Co. of N.Y. (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)). Although Intervenor cite 10 C.F.R. § 2.340(a), the relevant provision for this case is Section 2.340(b) because DTE is seeking a combined license.

¹⁰⁸ FEIS Contentions at 25 (citing Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-82- 79, 16 NRC 1116, 1119 (1982)).

¹⁰⁹ Tennessee Valley Authority (Hartsville Nuclear Plant Units 1A, 2A, 1B, and 2B), ALAB-380, 5 NRC 572, 575 (1977).

In a combined license proceeding, the authority for *sua sponte* review is found in 10 C.F.R. § 2.340(b). It provides that, in an initial decision, the presiding officer, in addition to ruling on the admitted contentions, shall

make findings of fact and conclusions of law on any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer under, inter alia, the provisions of §§ 2.323 and 2.341.

Here, although we have twice ruled that Contention 23 was not properly filed by the Intervenor, the Board previously stated that the Contention raises a substantial NEPA issue that might have been admissible had it been timely filed. Thus, although the Board has not decided whether the issue raised by Contention 23 satisfies the criterion of Section 2.340(b) for *sua sponte* consideration, the issue is appropriate for the Board's evaluation under that provision. Now that the FEIS has been issued and the Board has ruled that Contention 23 remains procedurally defective, this is an appropriate point for the Board to decide whether the issue the Contention raises merits *sua sponte* review under Section 2.340(b). Thus far, however, the parties have not directly addressed that issue. They have instead, understandably, focused their efforts on the admissibility of the FEIS contentions under Sections 2.309(c)(1) and 2.309(f)(1). In addition, even if the Board agreed that the standard of Section 2.340(b) is satisfied, the Commission would have to concur in that determination before the issue could be further litigated before this Board. Thus, it is not clear that the issue raised by Contention 23 could be resolved under the schedule for resolution of Contentions 8 and 15 (which remains in effect) even if the Board concluded that *sua sponte* review is appropriate and the Commission agreed.

Accordingly, the Board will not decide the question of *sua sponte* review of Contention 23 in this Order. Instead, the Board will allow the parties thirty (30) days from the date of this Order to state their views as to whether the issue raised by Contention 23 satisfies the criterion of Section 2.340(b) for such review, after which the Board will rule on the matter. In addition to

presenting their views concerning the Section 2.340(b) issue, the Board requests that the parties address, through documentary evidence and/or affidavits, the following factual issues to the extent they are able to do so:

- (1) The current status of planning for and development of the transmission line corridor;
- (2) Whether any permits necessary for development of the transmission line corridor have been applied for;
- (3) Whether any routes for the transmission line corridor are currently being actively evaluated other than the proposed route shown in the FEIS, page 2-11;
- (4) Whether the transmission line is likely to be constructed even if Fermi Unit 3 is not built.

In conclusion, Contention 23 is not admitted, but the Board will in a subsequent order decide whether it is appropriate for *sua sponte* review. If the Board decides that such review is appropriate and the Commission agrees, the Board will establish a schedule for the part of Contention 23 that may be subject to adjudication. The current schedule for Contentions 8 and 15 remains in effect.

D. Contention 26: Transmission Corridor Impacts on Wildlife

Proposed New Contention 26 reads as follows:

There has been no federal Endangered Species Act (“ESA”) biological assessment of the plant and animal species within the proposed transmission line corridor which itself is part of the proposed Fermi 3 power plant project and there are no ESA mitigation arrangements published in the Fermi 3 FEIS for a combined operating license.¹¹⁰

Proposed Contention 26 concerns (1) the lack of a biological assessment concerning the proposed transmission line corridor’s impact on endangered and threatened species protected

¹¹⁰ FEIS Contentions at 53.

under the ESA, and (2) the failure to discuss in the FEIS mitigation measures for protected species that may be required in order to comply with the ESA.¹¹¹

The allegation concerning the inadequacy of the NEPA analysis of transmission corridor impacts fails to meet the standards of Section 2.309(c)(1) for the reasons explained previously concerning Contention 23. Transmission corridor impacts were discussed in both the ER and the DEIS, and in LBP-12-12, the Board found untimely the Intervenor's challenges in Contention 23 to the DEIS analysis of transmission corridor impacts, including their claims concerning impacts to endangered and threatened species.¹¹² Intervenor fails to identify any new and materially different information that would justify revisiting the Board's earlier ruling, and thus Contention 26 fails to comply with Section 2.309(c)(1).

Contention 26 is also inadmissible under Section 2.309(f)(1). In LBP-12-12, the Board ruled inadmissible a similar contention alleging that the DEIS was deficient because it was issued before completion of consultation under the ESA and finalization of a biological assessment. Although the DEIS, like the FEIS, must evaluate the impacts of the proposed action on animal and plant species, we found no requirement in the NRC's NEPA regulations that the DEIS must await completion of either ESA consultation or a biological assessment before completing the required evaluation.¹¹³ Similarly, the NRC's NEPA regulations impose no such requirement on the FEIS.¹¹⁴ Thus, Intervenor fails to identify any legal obligation to delay completion of an FEIS in order to await completion of ESA consultation or a biological assessment. Moreover, Intervenor provides no evidence that either ESA consultation or preparation of a biological assessment has been completed for the transmission line corridor.

¹¹¹ Id. at 53.

¹¹² LBP-12-12, 75 NRC at ___ (slip op. at 42-43)

¹¹³ Id. at 23.

¹¹⁴ 10 C.F.R. §§ 51.90, 51.91.

On the contrary, Contention 26 states that “there has been no [ESA] biological assessment of the plant and animal species within the proposed transmission line corridor.”¹¹⁵

Accordingly, Contention 26 will not be admitted.

E. Contention 27: Transmission Line Impacts on Historic and Cultural Resources

Proposed Contention 27 states:

The FEIS for Fermi 3 fails to satisfy the requirements of National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470 et seq. (“§ 106”), because it does not address the effects upon historic and cultural resources of the planned development of infrastructure, and the destruction of natural land and water resources and viewsheds within the transmission line corridor which extends nearly thirty (30) miles from the proposed plant site.¹¹⁶

This is the third proposed contention related to the adequacy of the FEIS’s analysis of the impacts of the transmission line corridor. Not surprisingly, then, our analysis of the timeliness issue is the same for this contention as for Contentions 23 and 26. As before, the Intervenor’s challenges are inadmissible for failing to meet the standards of Section 2.309(c)(1). As already discussed, transmission corridor impacts were discussed in both the ER and the DEIS, and in LBP-12-12, the Board found untimely the Intervenor’s challenges in Contention 23 to the DEIS analysis of transmission corridor impacts, including their claims with respect to impacts on historic and cultural resources.¹¹⁷ As with Contentions 23 and 26, Intervenor fails to identify any new and materially different information concerning this issue that would justify revisiting the Board’s earlier ruling.

The contention is also inadmissible because it is based on a defective legal premise. Although the FEIS must comply with NEPA, in Contention 27 Intervenor maintains that the FEIS fails to comply with the NHPA, which presents a quite different question. The Board must

¹¹⁵ FEIS Contentions at 53.

¹¹⁶ Id. at 62-63.

¹¹⁷ LBP-12-12, 75 NRC at ___ (slip op. at 43).

therefore decide whether, and to what extent, NHPA requirements apply to the FEIS. Section 106 of the NHPA requires that

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.¹¹⁸

The agency must also allow the federal Advisory Council on Historic Preservation (ACHP) “a reasonable opportunity to comment with regard to such undertaking.”¹¹⁹

Therefore, the NHPA imposes obligations on the NRC with respect to the transmission corridor only if it is either a proposed Federal or federally assisted undertaking over which the NRC has direct or indirect jurisdiction, or if the transmission corridor is subject to licensing by the NRC. The FEIS, however, describes the transmission corridor as a private project, without mentioning federal assistance, and states that the corridor is not subject to licensing by the NRC (although some aspects of the corridor, such as stream and wetland crossings, may be subject to licensing by other federal agencies).¹²⁰ We have been provided with no contrary information by Intervenor. Thus, although the Staff stated in a December 10, 2008 Federal Register notice that it would address its NHPA responsibilities through its NEPA process,¹²¹ Intervenor have not provided the Board with any basis to conclude that the Staff’s NHPA responsibilities extend to evaluating the impact of the transmission corridor on historic and cultural resources. As our

¹¹⁸ NHPA § 106; 16 U.S.C. § 470f (2006).

¹¹⁹ Id.

¹²⁰ FEIS at 1-6 to 1-7, 2-10.

¹²¹ 73 Fed. Reg. 75,142, 75,143 (Dec. 10, 2008) (“Pursuant to 36 CFR 800.8(c), the NRC staff intends to use the process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth on 36 CFR 800.3 through 800.6.”).

discussion of Contention 23 in LPB-12-12 explains,¹²² the Staff's NEPA responsibilities may well extend to evaluating the impact of the transmission corridor on historic and cultural resources, but Contention 27 alleges a violation of the NHPA, not NEPA. It is therefore inadmissible under Section 2.309(f)(1)(vi) because it fails to demonstrate a material dispute with the FEIS.

Accordingly, Contention 27 will not be admitted.

CONCLUSION

For the reasons stated above, the Board denies 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. The Board will decide in a separate order whether Contention 23 is appropriate for sua sponte review. Any party may submit its views on that issue within thirty (30) days of this Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 30, 2013

* Copies of this Order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Applicant Detroit Edison Company; (2) Petitioners Beyond Nuclear et al.; and (3) NRC Staff.

¹²² LBP-12-12, 75 NRC at ___ (slip op. at 43-49).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

DETROIT EDISON COMPANY)

(Fermi Nuclear Power Plant, Unit 3))

(Combined License))

Docket No. 52-033-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **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)** have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-033-COL

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)

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Dated at Rockville, Maryland
This 30th day of April 2013