

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 15-1173

**In the United States Court of Appeals for the
District of Columbia Circuit**

BEYOND NUCLEAR,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents,

DTE ELECTRIC COMPANY,

Intervenor-Respondent.

**ANSWERING BRIEF FOR
INTERVENOR-RESPONDENT DTE ELECTRIC COMPANY**

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DECEMBER 6, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The Petitioner is Beyond Nuclear. Respondents are the United States Nuclear Regulatory Commission (“NRC”) and the United States of America. Intervenor-Respondent is DTE Electric Company (“DTE”).

B. Orders Under Review

Beyond Nuclear seeks review of the following:

1. Combined License and Record of Decision, 80 Fed. Reg. 26,302 (May 7, 2015);
2. NRC Memorandum and Order CLI-14-10 (Dec. 16, 2014); and
3. NRC Memorandum and Order CLI-15-13 (Apr. 30, 2015).

C. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, DTE Electric Company (“DTE”) hereby files this Disclosure Statement.

Intervenor-Respondent DTE is a corporation organized under the laws of the State of Michigan, with its principal executive offices in Detroit, Michigan. DTE Electric is an operating public utility engaged principally in the business of electricity generation and distribution throughout southeastern Michigan. DTE and its subsidiaries are subsidiaries of DTE Energy Company, a diversified energy company involved in the development and management of energy-related businesses and services nationwide, organized under the laws of the State of Michigan, with its principal executive offices in Detroit, Michigan. DTE Energy Company, DTE’s parent corporation, is the only publicly held corporation owning ten percent or more of DTE’s stock.

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GLOSSARY

APA	Administrative Procedure Act
Board	Atomic Safety and Licensing Board
DTE	DTE Electric Company
EIS	Environmental Impact Statement
JA	Joint Appendix
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

INTRODUCTION

The Petition for Review argues that NRC abused its statutory discretion in granting DTE Electric Company (“DTE”) a combined license for the construction and operation of the proposed Fermi Unit 3 (“Fermi 3”) nuclear power plant. None of the errors alleged by Beyond Nuclear warrants appellate review. NRC confirmed that DTE satisfied the Atomic Energy Act and prepared an extensive Environmental Impact Statement (“EIS”) to fulfill its obligations under the National Environmental Policy Act (“NEPA”). NRC ultimately granted the license to DTE after six years of regulatory submissions, nearly 70,000 hours of agency review time, 80 public meetings, and multiple days of administrative hearings. Now Beyond Nuclear, whose avowed goal is to stop all nuclear plants, claims that even more procedural steps and analyses are required. This is a bald attempt to obstruct Fermi 3.

Beyond Nuclear’s principal complaint is that NRC did not hold a hearing on the environmental impacts of offsite transmission lines that, if and when ultimately constructed, will connect Fermi 3 to the electric grid. But NRC gave all parties, including Beyond Nuclear, the opportunity to propose issues to be addressed in a contested administrative hearing and then to present testimony and evidence in support of any issues that met NRC’s threshold for holding a hearing. Although Beyond Nuclear made a number of challenges, some of which were accepted for

hearing, it failed to timely raise Contention 23. Under its rules, NRC has no duty to hold a hearing on an untimely issue.

Unable to justify its delay in raising Contention 23, Beyond Nuclear says that NRC should have heeded the recommendation of one of its boards to conduct a hearing *sua sponte* on the environmental impacts of offsite transmission lines. But NEPA does not obligate NRC to conduct such a hearing, nor does the Atomic Energy Act provide special procedural rights to parties who otherwise fail to comply with NRC's regulations. NRC provided all of the input opportunities required by NEPA and the Atomic Energy Act. Nothing more was required.

In any event, NRC sufficiently examined the potential environment impacts of the anticipated transmission lines throughout its EIS. Contrary to Beyond Nuclear's assertions, NRC did not refuse to consider environmental impacts in the offsite transmission corridor. NRC explained in the EIS that offsite transmission lines are not a Federal project under NRC's Atomic Energy Act jurisdiction and that the lines' final location has not been determined. Not knowing exactly what would be built or where, NRC necessarily made reasonable judgments concerning upper and lower bounds of environmental impacts using the best available information. Beyond Nuclear offers no reason to second-guess the informed judgments made by the expert agency.

Beyond Nuclear's arguments on quality assurance likewise are unfounded. They are premised on the fiction that there was no quality assurance program applied to the limited site investigation work that was necessary for DTE to prepare the application. NRC determined, based on evidence and testimony presented at a contested administrative hearing, that DTE properly engaged a qualified contractor to perform site investigation work under the contractor's quality assurance program and that DTE retained responsibility for quality assurance during site investigation activities. In short, NRC concluded that DTE satisfied NRC's quality assurance requirements. To be sure, at one point NRC Staff issued a minor violation to DTE regarding its quality assurance program. But Beyond Nuclear never identified any error in the quality assurance measures actually applied to the limited site investigation work, nor did it allege any defect in the data collected and reported in the application. Unable to show that NRC's ultimate conclusion was an abuse of discretion, Beyond Nuclear asks this Court to be a second finder of fact and revisit issues that were thoroughly aired, and resolved, in NRC's evidentiary hearing. That is not the Court's role here. The Petition for Review should be rejected.

STATEMENT OF JURISDICTION

DTE agrees with Federal Respondents' Jurisdictional Statement.

STATEMENT OF THE ISSUES

1. Did NRC satisfy NEPA with respect to its review of the environmental impacts of offsite transmission lines for Fermi 3?

2. Did NRC properly exercise its discretion in declining to admit Beyond Nuclear's untimely Contention 23 for hearing or to consider offsite transmission line issues in a hearing *sua sponte*?
3. Did NRC reasonably find in favor of DTE on Contention 15 after a full evidentiary hearing?

STATUTES AND REGULATIONS

Applicable statutes and regulations are provided in the separately bound addendum.

STATEMENT OF THE CASE

I. Combined License Application And Review

On September 18, 2008, Detroit Edison (now DTE)¹ applied to NRC for a combined license for Fermi 3.² NRC's issuance of a combined license requires an Environmental Impact Statement in accordance with NEPA. 10 C.F.R. § 51.20(b). NRC published the draft EIS for comment in October 2011. NRC issued the final EIS in January 2013. R791, 792 (JA____, ____). NRC also documented its safety

¹ DTE formerly operated under the name Detroit Edison Company. The name change was effective on January 1, 2013.

² A combined license is issued in accordance with 10 C.F.R. Part 52. The license authorizes construction of a nuclear facility. Subject to NRC making the finding as defined in 10 C.F.R. § 52.103(g), the license also authorizes operation after completion of construction.

review, in compliance with the Atomic Energy Act and NRC regulations, in a final Safety Evaluation Report. R1039-1040 (JA____, ____).

NRC affords interested parties an opportunity to participate in a contested hearing. *See* 42 U.S.C. § 2239(a). A coalition of organizations, including Beyond Nuclear, sought a hearing on the application. A three-member Atomic Safety and Licensing Board (“Board”) considered Beyond Nuclear’s contentions, accepting some for hearing and rejecting others. The Board held a two-day evidentiary hearing in October 2013. The Board resolved all issues in favor of DTE and NRC Staff. R732 (JA____).

In accordance with the Atomic Energy Act, NRC also held a separate uncontested hearing to assess the overall sufficiency of Staff’s review of DTE’s application. *See* 42 U.S.C. §§ 2235(b), 2239(a); 79 Fed. Reg. 72,215, 72,216-17 (Dec. 5, 2014) (Notice of Hearing); *Exelon Generation Co., LLC*, 62 N.R.C. 5, 49-50 (2005). NRC concluded that Staff’s review had been adequate to support all safety and environmental findings required under 10 C.F.R. §§ 52.97(a) and 51.107(a). R1094 at 50-51 (JA____-____).

NRC subsequently issued the combined license to DTE. R1096 (JA____). The license does not set a time limit for DTE to begin construction, and DTE has no immediate plans to begin construction. The license expires 40 years from the date

that NRC finds that acceptance criteria for construction have been met in accordance with 10 C.F.R. § 52.103(g).

II. Transmission Corridor Environmental Impacts

A. Offsite Transmission Lines For Fermi 3

ITCTransmission owns and operates the transmission system in southeastern Michigan. *ITCTransmission* operates within the Midwest Independent Transmission System Operator regional reliability area. *ITCTransmission* is not controlled by or affiliated with DTE.

With respect to the interconnection process for new generation, DTE does not control decision-making for changes to the transmission system. DTE simply provides information regarding its own proposed generation facility to the system operator and *ITCTransmission*. The system operator and *ITCTransmission* determine necessary upgrades to the transmission system and evaluate routes for any new transmission lines that may be required. R791 at 3-18 (JA____). *ITCTransmission* is then responsible for finalizing the locations of any transmission lines and for obtaining any regulatory approvals, including a Certificate of Public Convenience and Necessity from the Michigan Public Service Commission. *Id.*

B. NRC Environmental Review Of Offsite Transmission Lines

Although NRC does not have jurisdiction over any offsite transmission lines that may be built by *ITCTransmission*, NRC nevertheless evaluates the environmental impacts of offsite transmission lines as impacts of the federal license

for a nuclear generating plant. *See* 10 C.F.R. § 50.10(a)(2)(vii) and (c) (excluding transmission lines from the requirement for a combined license); *but see* 72 Fed. Reg. 57,416, 57,421, 57,443 (Oct. 9, 2007) (stating that NRC will evaluate impacts of activities outside of NRC's jurisdiction, such as offsite transmission lines, as part of its cumulative impacts analysis under NEPA).³ NRC follows this approach in the EIS for Fermi 3.

Because *ITCTransmission* has not proposed a location for the offsite transmission corridor or applied for any regulatory approvals, NRC relies on available information and reasonable expectations of configurations that *ITCTransmission* likely would use for the transmission corridor based on standard industry practice. R791 at 2-45 (JA____). The EIS explains that the likely location of the proposed transmission line is within an existing transmission corridor extending for approximately 18.6 miles outward from the Fermi site. *Id.* at 2-46 (JA____). *ITCTransmission* likely would build the remaining 10.8 miles within a right-of-way that it currently owns, but does not yet use. *Id.*

Having identified the probable location for the transmission lines, NRC considers transmission impacts throughout the EIS, just as it would direct and

³ Beyond Nuclear does not argue that NRC's Atomic Energy Act authority extends to offsite transmission lines. Accordingly, the scope of NRC's regulatory jurisdiction is not an issue before the Court and is not addressed further herein.

indirect impacts. NRC does not, for example, limit its consideration of transmission lines to Chapter 7 (titled *Cumulative Impacts*). The EIS describes environmental attributes of the anticipated transmission corridor (Chapter 2), impacts of transmission line construction (Chapter 4), and impacts of transmission line operation (Chapter 5). In each chapter, NRC considers effects on attributes such as land use, terrestrial and aquatic resources, historic and cultural resources, and non-radiological health impacts. NRC also specifically addresses transmission-related impacts in its alternative energy sources and alternative site reviews (Chapter 9). *Id.* NRC summarizes these impacts in Appendix M. R792 (JA_____).

C. Hearing Process On Contention 23

Beyond Nuclear first proposed Contention 23, raising issues regarding the adequacy of NRC's consideration of the environmental impacts of new offsite transmission lines, *after* NRC published the draft EIS. R182 (JA_____). The Board dismissed the proposed contention as untimely, explaining that, under NRC's rules in 10 C.F.R. § 2.309(f)(2) and (c), the contention should have been proposed during the initial hearing opportunity based on the Environmental Report included with DTE's application. R243 at 42-43 (JA_____).

Beyond Nuclear resubmitted Contention 23 following publication of the final EIS. R298 (JA_____). The Board again dismissed the contention as untimely for the same reasons. R471 (JA_____).

The Board later sought Commission approval to consider some transmission-related issues in a hearing *sua sponte* in accordance with 10 C.F.R. § 2.340(b). R738 (JA____).⁴ NRC concluded that the issues identified by the Board did not warrant discretionary review in an evidentiary hearing, explaining that Staff followed NRC regulations and guidance on consideration of offsite transmission lines and evaluated transmission-corridor impacts throughout the EIS. R985 at 10-13 (JA____-____). The Commission subsequently confirmed in the uncontested hearing that Staff took a hard look at the environmental impacts of offsite transmission lines and that its thorough consideration of the issue satisfied NEPA. R1094 at 50 n.243 (JA____).

III. Quality Assurance

A. NRC Requirements For Quality Assurance Program

Every application for a combined license must include a description of the quality assurance program applied to the facility design, and to be applied to the future fabrication, construction, and testing of the structures, systems, and components and to the administrative controls that assure safe operation. 10 C.F.R. § 52.79; 10 C.F.R. Part 50, Appendix B. Applicants should “establish at the earliest practicable time, consistent with the schedule for accomplishing the activities, a

⁴ Black’s Law Dictionary defines *sua sponte* as: “[Latin ‘of one’s own accord; voluntarily’]” and “without prompting or suggestion; on its own motion.” *Sua Sponte*, Black’s Law Dictionary (10th ed. 2014). In this case, the term refers to an issue not properly raised by a party or petitioner but proposed for hearing by the Board.

quality assurance program which complies with the requirements of [Appendix B].”

10 C.F.R. Part 50, Appendix B.

NRC regulations specifically permit an applicant to “delegate to others, including contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but [the applicant] shall retain responsibility for the quality assurance program.” *Id.*, Section I, “Organization.” Appendix B allows an applicant to use procurement documents to “require contractors or subcontractors to provide a quality assurance program consistent with the pertinent provisions of this appendix.” *See id.*, Section IV, “Procurement Document Control,” and Section VII, “Control of Purchased Material, Equipment, and Services.”

B. NRC Safety Review Of Quality Assurance

NRC evaluated the Fermi 3 quality assurance program using the guidance in its Standard Review Plan, as supplemented by additional regulatory and industry guidance. NRC documented its review of DTE’s quality assurance program in a Safety Evaluation Report. R1040 at 17-1 (JA_____).

For activities occurring before the date of the application (*e.g.*, site investigation work, such as geologic and hydrologic evaluations), NRC determined that DTE satisfied the requirements of 10 C.F.R. Part 50, Appendix B, by contractually delegating to its engineering contractor, Black & Veatch, the work of

establishing and executing a quality assurance program. *Id.* at 17-36 (JA____). NRC further found that during the pre-application period DTE retained and exercised responsibility for the quality assurance program by providing satisfactory oversight of contracted activities. *Id.* NRC concluded that DTE therefore satisfied Appendix B for the site investigation work.

Separately, NRC found that DTE established its own quality assurance program for the Fermi 3 project prior to submitting the application to NRC, that DTE's program met the requirements of Appendix B, and that it could be employed during the design, construction, and operation of Fermi 3. *Id.*; R732 at 34 (JA____).

C. Hearing Process On Contention 15

Beyond Nuclear's Contention 15 was extrapolated largely from an NRC Staff inspection in August 2009 that led Staff to issue a Notice of Violation. In admitting Contention 15 for hearing, the Board identified two specific issues for consideration. R92 (JA____). The first issue alleged that DTE failed to comply with quality assurance requirements during the pre-application period. The second issue alleged a history of quality assurance violations on the Fermi 3 project. The parties submitted extensive testimony on these issues, and the Board held a two-day evidentiary hearing on them in October 2013. The Board ultimately decided Contention 15 in DTE's favor. R732 (JA____).

First, the Board agreed that NRC regulations gave DTE the option to delegate to its contractor the work of establishing and executing the quality assurance program for site characterization activities, provided that the contractor had a quality assurance program that satisfied 10 C.F.R. Part 50, Appendix B, and that DTE retained responsibility for the program. *Id.* at 38 (JA____). The Board then concluded that DTE had properly engaged a qualified contractor to perform the pre-application safety-related activities under the contractor's quality assurance program and that DTE in fact had retained responsibility for quality assurance during the site investigation activities. *Id.* at 39 (JA____). As a result, the Board concluded that DTE satisfied Appendix B requirements for the pre-application period. *Id.*

Second, the Board found that both quality assurance violations identified by NRC Staff during the 2009 inspection had been satisfactorily resolved and had no effect on any safety-related activities. Beyond Nuclear made no showing of any defect in the application or site investigation activities. *Id.* at 39-40 (JA____-____); R957 at 6-7 (JA____-____). There was no evidence of a pervasive failure to comply with quality assurance requirements. *Id.* at 40 (JA____). The Board concluded that DTE's quality assurance program met all relevant NRC regulations. *Id.*

Following the Board's decision on Contention 15, Beyond Nuclear sought Commission review. R735 (JA____). NRC denied the petition for review, explaining that the Board made extensive factual findings to support its decision, all

of which were supported by the evidence presented by DTE and Staff. R957 at 7 (JA_____).

STANDARD OF REVIEW

This court will set aside an agency rule or licensing decision only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also, e.g., Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144 (D.C. Cir. 2005).

The arbitrary and capricious standard controls review of agency actions with respect to any substantive environmental issues that are properly before the court. The court may set aside such actions only if it finds that NRC committed “a clear error of judgment.” *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 385 (1989).

To the extent that NRC’s technical judgments and predictions are before the court for review, the court “must generally be at its most deferential.” *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). The court is obligated to “defer to the wisdom of the agency, provided its decision is reasoned and rational.” *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009).

In reviewing NRC’s interpretations of its own rules—here, notably, its rules governing contention admissibility, authority over offsite transmission corridor siting and construction, and quality assurance—the court gives “controlling weight”

to the agency's constructions unless they are "plainly erroneous or inconsistent with the regulation." *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 228 (D.C. Cir. 2011).

SUMMARY OF THE ARGUMENT

NRC's EIS for Fermi 3 satisfies NEPA's hard look requirement. Contrary to Beyond Nuclear's claims, NRC did not ignore or refuse to consider the environmental impacts of building and operating offsite transmission lines. Consistent with NRC regulations and guidance, as well as the Council on Environmental Quality's NEPA regulations, NRC addressed the environmental impacts in representative transmission corridors using the best available information. NRC's assessment was based on reasonable expectations regarding the location of those corridors, standard industry practices, and publicly available information. While Beyond Nuclear suggests that NRC's decision to evaluate transmission lines impacts as a cumulative impact of the project rather than a "connected" action calls into question the sufficiency of the EIS, this argument has no basis in regulation or in the EIS itself. NRC fully considered the impacts of transmission lines in its overall assessment of the Fermi 3 combined license.

NRC affords interested parties an opportunity to participate in a contested hearing subject to procedural rules on timeliness and admissibility. NRC reasonably applied its own rules in declining to admit Beyond Nuclear's proposed transmission

line contention for hearing. The Court should defer to NRC's rejection of the contention. The Court likewise should defer to NRC's decision not to hold a hearing *sua sponte* on offsite transmission corridor impacts. There is no right to such a hearing under NEPA. *Nat. Res. Def. Council v. NRC*, 823 F.3d 641, 652 (D.C. Cir. 2016). The decision whether to conduct a hearing on environmental issues that do not meet NRC's contention admissibility criteria lies within NRC's sole discretion and may not be reviewed under the Administrative Procedure Act ("APA"). *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978); 5 U.S.C. § 701(a)(2).

Finally, NRC held an evidentiary hearing to resolve Beyond Nuclear's concerns about the quality assurance measures applied to the Fermi 3 project. NRC fully considered and resolved each of Beyond Nuclear's issues based on a substantial record in administrative proceedings. NRC's interpretation of its quality assurance regulations, as well as the Board's findings of fact, are entitled to deference. The Court should not permit Beyond Nuclear to re-litigate issues thoroughly investigated, considered, and resolved by the expert administrative agency based on the record before it.

ARGUMENT

I. NRC Took A Hard Look At Environmental Impacts In The Offsite Transmission Corridor

NEPA mandates that a federal agency take a “hard look” at any major federal action. This ensures that the agency, in reaching its decision, will have available and will carefully consider information concerning significant environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NRC’s issuance of a combined license requires an EIS. 10 C.F.R. § 51.20(b).

A. NRC Followed Its Regulations and Guidance In Assessing Transmission Line Impacts

Beyond Nuclear’s brief creates the false impression that NRC excluded transmission lines from the scope of its environmental review. *See* Pet. Br. at 2 (“Did the Commission Staff’s determination not to include NEPA analysis of the transmission corridor in the [final EIS] comprise a new circumstance and thus the proper subject of a timely-submitted contention?”); *id.* at 11 (“[Beyond Nuclear] sought to have the NRC Staff address the environmental impacts of the transmission line corridor extending some 29 miles from the regional grid to the Fermi 3 plant within the NEPA documents for Fermi 3.”); *id.* at 38 (“Exclusion Of Transmission Corridor Analysis From FEIS Comprises A ‘Serious Matter’ for *Sua Sponte* Consideration”); *id.* at 42 (alleging a Staff “failure to include the adverse, expected transmission corridor environmental effects in the Draft and Final Environmental Impact Statements for Fermi”).

This is simply not the case. As demonstrated below, NRC conducted a complete review of the environmental impact of transmission lines, constrained only by the scope of presently available information about transmission line corridors. The review was thorough and constitutes the “hard look” required for NEPA.

In this case, *ITCTransmission* is responsible for the offsite transmission lines. As discussed above, *ITCTransmission* has not yet developed specific plans for lines for Fermi 3, nor has it applied for any regulatory permits or approvals. DTE has not even planned the start of construction for Fermi 3, much less begun construction, at this time. Accordingly, NRC followed agency guidance applicable to this circumstance, which provides:

In some cases transmission lines may be constructed and operated by an entity other than the applicant. In such cases, impact information may be limited and the reviewer should proceed with the assessment using the information that can be obtained.⁵

NRC guidance is consistent with the approach described in the Council on Environmental Quality’s NEPA regulations and in cases addressing circumstances where information is not complete or available to an agency. *See* 40 C.F.R. § 1502.22 (where there is “incomplete or unavailable information,” an EIS may be

⁵ *See* R549 at 14-15 (JA____ - ____) (citing NUREG-1555, “Environmental Standard Review Plan,” at § 4.1.2, Revision 1 (July 2007), and related guidance).

“based upon theoretical approaches or research methods generally accepted in the scientific community”); *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (explaining that the scope of an EIS “requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility”); *Envtl. Prot. Info. Ctr. v. Blackwell*, 389 F.Supp.2d 1174, 1188 (N.D. Cal. 2004) (noting that, in cases where information is not complete or is unavailable to an agency, the agency need only make clear that information is lacking).

B. The EIS Satisfies NEPA

The adequacy of the Fermi 3 EIS is subject to a “rule of reason.” *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004). An agency need not have complete information on all issues before proceeding; it is enough that NRC takes a “hard look” at the likely impacts of offsite transmission corridor development and “come[s] to grips with all important considerations.” *Marsh*, 490 US at 373, 377; *Exelon Generation Co., LLC*, 62 N.R.C. 801, 811 (2005).

The Fermi 3 EIS meets the “hard look” standard by evaluating the likely environmental impacts in the offsite transmission corridor based on available information from *ITCTransmission* and reasonable projections of impacts from future transmission corridor siting, construction, and operation. *See Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)

(“Reasonable forecasting and speculation is . . . implicit in NEPA.”); *Crounse Corp. v. Interstate Commerce Commission*, 781 F.2d 1176, 1193-96 (6th Cir. 1986) (ruling that the ICC had justified the limited scope of its analysis on the grounds that “the lack of final design and engineering plans made it impossible to conduct an in-depth analysis”).

NRC evaluated impacts from transmission lines throughout the EIS based on the best available information from *ITCTransmission* and others—just as it would direct or indirect impacts of the plant.⁶ Chapter 2 describes the environmental attributes of the anticipated transmission corridor, including land use, terrestrial and wetland ecology, aquatic ecology, and historic and cultural resources.⁷ Chapter 4 discusses impacts of transmission line construction on land use, terrestrial and wetland ecology, aquatic ecology, and historic and cultural resources.⁸ Chapter 4 also contains a “bounding analysis” of potential wetland impacts from transmission

⁶ Following the convention used for direct and indirect impacts, the EIS identifies the affected environment in Chapter 2, the proposed activity in Chapter 3, construction impacts in Chapter 4, operational impacts in Chapter 5, and cumulative impacts in Chapter 7. These are summarized in Appendix M, *Environmental Impacts from Building and Operating Transmission Lines Proposed to Serve Fermi 3*, which provides a roadmap to the EIS sections that discuss the environmental impacts from transmission lines. R792 (JA____).

⁷ R791 at 2-45, 2-61, 2-79, 2-82, 2-126, and 2-208 to 2-209 (JA____, ____, ____, ____, ____-____).

⁸ *Id.* at 4-8, 4-29, 4-45, 4-51 to 4-53, and 4-100 to 4-102 (JA____, ____, ____, ____-____, ____-____).

corridor construction.⁹ Chapter 5 discusses the effects of transmission line operation on land use, terrestrial and wetland ecology, aquatic ecology, air quality, and non-radiological health.¹⁰

The EIS also specifically addresses transmission-related impacts in Chapter 7, *Cumulative Impacts*, including cumulative impacts on land use, terrestrial and aquatic resources, historic and cultural resources, and non-radiological health impacts.¹¹ NRC also considers offsite transmission corridor impacts in its reviews of alternative energy sources and alternative sites.¹² All of the information on transmission corridor impacts informs the overall cost-benefit balance in the EIS.¹³

In its Statement of Facts, Beyond Nuclear lists a number of issues that it alleges were insufficiently addressed in the EIS due to the lack of a final location for offsite transmission lines. Pet. Br. at 12-17. Although these purported deficiencies

⁹ *Id.* at 4-44 to 4-45, J-2 (JA____-____, ____). A “bounding analysis” refers to an evaluation that is based on conservative assumptions regarding environmental impacts. A bounding analysis provides an assessment of impacts that includes (or bounds) anticipated impacts of alternatives with lesser environmental impacts.

¹⁰ *Id.* at 5-3 to 5-4, 5-22, 5-27, 5-41 to 5-43, 5-100 to 5-101, 5-104 (JA____-____, ____-____, ____-____, ____-____, ____-____, ____).

¹¹ *Id.* at 7-7, 7-18 to 7-21, 7-31 to 7-33, 7-37 (JA____, ____-____, ____-____, ____).

¹² *See, e.g., id.* at 9-87, 9-143, 9-193 (JA____, ____-____, ____).

¹³ *Id.* at 10-32 (Table 10-4) (JA____).

are not developed further in the brief, one example involving the snuffbox mussel is particularly illustrative. Even though the presence of the species has never been documented along the likely transmission line route, the EIS still discusses potential impacts and mitigation measures. R791 at 5-46 (JA____). Chapter 2 reports that:

The snuffbox mussel was last reported from Monroe, Wayne, and Washtenaw Counties in 1933, 2000, and 1977, respectively (MNFI 2007g). Streams with conditions suitable for the snuffbox mussel are not present on the Fermi site, although there is a possibility that shoreline areas of Lake Erie near the site could contain suitable substrates. The snuffbox mussel is unlikely to inhabit any of the smaller streams that are crossed by the proposed transmission line corridor.

Id. at 2-109 (JA____). The Chapter 4 discussion of potential impacts to the snuffbox mussel from building transmission lines concludes that:

It is not known whether suitable stream habitat or populations of the snuffbox mussel occur along the proposed offsite transmission line corridor. It is anticipated that the small streams that would be crossed by the proposed transmission line corridor could be easily spanned without placing structures in stream channels and that [best management practices] would be implemented to protect water quality in streams during building activities. Additional regulatory review of proposed plans for construction of the offsite transmission lines, which would be built, owned, and maintained by ITCTransmission, may be conducted by the MDEQ and/or USACE, and potential impacts on water quality are expected to be addressed through mitigation measures and [best management practices] required under issued permits. On the basis of this information, the review team concludes that preconstruction- and construction-related activities for Fermi 3 would not affect the snuffbox mussel.

Id. at 4-60 (JA____). Elsewhere the EIS discusses impacts to the snuffbox mussel from transmission line operation. *Id.* at 5-53 (JA____). The EIS assesses potential impacts to wetlands and other wildlife in the offsite transmission corridor at a similar level of detail. *See, e.g., id.* at 2-61 and 2-64 (identifying wetlands in corridor), 4-43 to 4-45, 4-51 to 4-62 (describing range of potential impacts to wildlife and wetlands in corridor) (JA____, ____, ____-____, ____-____).

In sum, the EIS thoroughly considers potential impacts to the snuffbox mussel—as well as the impacts on other species and on other environmental attributes—based on reasonable expectations regarding the location of the transmission corridors, standard industry practices, and publicly available information. The EIS satisfies NEPA’s hard look standard.

Beyond Nuclear suggests that NRC’s decision to treat transmission lines impacts as cumulative impacts rather than a “connected” action calls into question the sufficiency of the EIS. Pet. Br. at. 20. This argument has no support in regulation or in the EIS. The Council on Environmental Quality regulation cited by Beyond Nuclear requires agencies to consider “connected actions,” “cumulative actions,” and “similar actions,” without distinguishing the level of assessment required for each type of action. 40 C.F.R. § 1508.25(a), (c). Whether a transmission line is termed a connected or cumulative action, or its effects considered as direct or cumulative impacts, is irrelevant so long as the agency has appropriately analyzed

the impacts in the EIS. *See S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1098 n.5 (9th Cir. 2010) (finding it unnecessary to determine whether two actions were connected where the EIS for the action at issue “appropriately considered” the other action’s impact). NRC did not give the evaluation of transmission impacts short shrift. The extent of NRC’s evaluation of transmission lines was limited only by the information available; NRC’s characterization of transmission line impacts did not reduce the depth or rigor of its analysis. Beyond Nuclear has not shown otherwise.

Beyond Nuclear also suggests that NRC improperly segmented interrelated parts of the Fermi 3 project. Pet. Br. at 42, 45, 46. But, other than citing general case law, Beyond Nuclear fails to demonstrate that NRC segmented its NEPA review or ignored the impacts of transmission lines. An agency impermissibly “segments” a NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. *Delaware Riverkeeper Network v. Federal Energy Regulatory Commission*, 753 F.3d 1304, 1313 (D.C. Cir 2014). The Supreme Court also has held that, under NEPA, proposals for actions that will have cumulative or synergistic environmental impact upon a region pending concurrently before an agency must be considered together. *Kleppe*, 427 U.S. at 410. But these general principles do not apply to the present circumstances.

In this case there is no federal approval required for the transmission lines. In fact, there is no “proposal” to site or construct offsite transmission lines pending before NRC or any other State or Federal agency. Nonetheless, NRC has disclosed and weighed the environmental impacts of offsite transmission lines throughout the EIS. NRC did not fail, as Beyond Nuclear alleges, “to include the adverse, expected transmission corridor environmental effects in the Draft and Final [EIS] for Fermi.” Pet. Br. at 42. Nor did NRC exclude transmission impacts from the EIS simply because they would be sited, constructed, and operated by *ITCTransmission*. As discussed above, NRC described and assessed impacts of the likely transmission line configuration in detail throughout the EIS based on the best available information and reasonable projections. There has been no improper “segmentation.” By any measure, the EIS meets NEPA’s goals of considering and disclosing environmental impacts of offsite transmission lines.

At bottom, NRC did not ignore or refuse to consider offsite transmission impacts, or attempt to segment its consideration of Fermi 3 construction and operation from transmission lines. Instead, NRC identified the information that was unavailable, explained why it was unavailable, described the relevance of the unavailable information, summarized existing credible information and scientific evidence, and evaluated potential impacts of offsite transmission lines. The comprehensive scope of NRC’s EIS—based on the best available information and

reasonable projections—more than satisfies NEPA’s “hard look” standard. *See Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (explaining that an agency has taken a “hard look” at the environmental impacts of a proposed action if the EIS “‘contains sufficient discussion of the relevant issues and opposing viewpoints,’ and . . . the agency’s decision is ‘fully informed’ and ‘well-considered’”); *New York v. NRC*, 824 F.3d 1012, 1022 (D.C. Cir. 2016) (recognizing that an agency does not engage in arbitrary and capricious decision-making by making predictive judgment or even by relying on incomplete data).

II. NRC Did Not Abuse Its Discretion In Refusing To Admit Beyond Nuclear’s Untimely Contention Or Consider Offsite Transmission Impacts *Sua Sponte*

A. The Court Owes Deference To NRC Decision Rejecting Contention 23 As Untimely

NRC regulations dictate the criteria that a party’s contention must meet in order to initiate a contested hearing. 10 C.F.R. § 2.309(f)(1). This court has held that NRC’s “procedural rules [under 10 C.F.R. § 2.309(f)] do not facially violate the Atomic Energy Act or the APA [and] they are also consistent with NEPA.” *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56-57 (D.C. Cir. 1990). In particular, this court found NRC’s rules on the timeliness of proposed contentions to be acceptable. *See id.* at 55 (“[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.”). Because NRC reasonably applied its contention timeliness and admissibility rules in evaluating Beyond Nuclear’s proposed transmission line contention, the Court should defer to NRC’s rejection of the contention.

Under NRC’s rules, a contention must be based on the application or other documents available at the time a party files a hearing request. 10 C.F.R. § 2.309(f)(2). A party may file a new environmental contention based on a draft or final EIS only if there are data or conclusions in the later document that “differ significantly from the data or conclusions in the applicant’s documents.” *Id.* Otherwise, a new contention may be considered only if: (1) the information upon which the new or amended 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. 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Beyond Nuclear did not file any contention on transmission line impacts based on the application and Environmental Report prepared by DTE. Instead, Beyond Nuclear first submitted Contention 23, which alleged deficiencies in Staff’s treatment of transmission line impacts, following publication of the draft EIS. R243 at 42 (JA____). Applying the criteria in section 2.309(f)(2), the Board found

proposed Contention 23 untimely because it was not based on any new or materially different information from the application. *Id.* The Board concluded that Beyond Nuclear's challenge should have been made based on the treatment of transmission lines in DTE's Environmental Report that was included in the application.

Beyond Nuclear resubmitted Contention 23 following publication of the final EIS. R298 (JA____). However, the fundamental facts had not changed. The Board again applied the standard in the regulations and again rejected Contention 23 as untimely. R471 at 19-22 (JA____-____). NRC denied Beyond Nuclear's petition for review of the Board's decisions, concurring that Contention 23 was untimely. R985 at 8 (JA____).

Beyond Nuclear now seeks to re-litigate the same timeliness issues in this Court. The Court need not entertain such appeals. NRC's interpretation of its own rules—here, its rules governing the timeliness of contentions—should be given “controlling weight” unless they are “plainly erroneous or inconsistent with the regulation.” *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 228 (D.C. Cir. 2011). Indeed, NRC's procedural rules warrant increased deference because of the “unique degree ‘to which broad responsibility is reposed in the [Commission], free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.’” *BPI v. Atomic Energy Comm’n*, 502 F.2d 424, 428 n.3 (D.C. Cir. 1974) (quoting *Siegel v. Atomic Energy Comm’n*, 400 F.2d 778, 783 (D.C. Cir. 1968)); *see*

also *Cities of Statesville v. Atomic Energy Comm’n*, 441 F.2d 962, 977 (D.C. Cir. 1969) (en banc) (explaining that NRC “should be accorded broad discretion in establishing and applying rules for ... public participation”).

Similarly, NRC’s application of its rules of procedures to the facts is entitled to deference. NRC rejected the original and resubmitted Contention 23 in accordance with 10 C.F.R. § 2.309(f)(2) and (c)(1) after finding that Beyond Nuclear had failed to raise a new issue. Whether an actual “new” issue is raised is a matter for NRC to determine in the first instance, and NRC’s decision is reviewed deferentially. *Union of Concerned Scientists*, 920 F.2d at 55. Beyond Nuclear has not identified any plainly erroneous finding in the three NRC decisions rejecting Contention 23 as untimely. NRC addressed and then rejected each of Beyond Nuclear’s rationales for late filing, pointing to information in the application that could have formed the basis for an earlier, timely contention. Having followed its rules, NRC’s decision to exclude Contention 23 from the hearing process as untimely is reasonable.

B. The Commission Properly Exercised Its Discretion In Declining To Hold A Voluntary Hearing On Transmission Impacts

Beyond Nuclear argues that NRC acted arbitrarily and capriciously when it rejected the Board’s request to consider certain aspects of the offsite transmission corridor *sua sponte*. Under 10 C.F.R. § 2.340(b), a Board may consider a matter on its own initiative—that is, without an admissible contention of a petitioner—only

where it finds that a “serious” safety, security, or environmental matter exists, and even then, only with NRC’s express approval to do so. NRC exercises this authority only in “extraordinary circumstances.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 N.R.C. 18, 22-23 (1998).

Here, NRC determined that the issue of transmission impacts did not warrant consideration in an adjudicatory hearing. NRC explained that Staff had conducted a comprehensive analysis of transmission-corridor impacts throughout the EIS in accordance with NRC regulations and guidance and that this mooted the need for further hearing.¹⁴ R985 at 10 (JA____). For the reasons discussed above, NRC’s conclusion was reasonable and well-supported.

Moreover, NRC had no obligation to consider NEPA issues in a hearing. *See Union of Concerned Scientists*, 920 F.2d at 56 (“While NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues.”); *Nat. Res. Def. Council*, 823 F.3d at 642 (“NEPA does not mandate particular hearing procedures and does not require hearings.”) (internal citations omitted). NRC provided all of the input opportunities required by NEPA and NRC regulations in 10 C.F.R. Part 51. Nothing more is required.

¹⁴ NRC noted that it would evaluate Staff’s review of transmission impacts in the uncontested hearing required by the Atomic Energy Act. In that hearing, NRC found that Staff took a hard look at the environmental impacts of transmission lines. R1094 at 40-43, 50 (JA____-____, ____).

Because there is no right to a hearing under NEPA, and because NEPA does not dictate how NRC should determine who receives a hearing on environmental issues that do not meet NRC's contention admissibility criteria, there are no statutory factors to guide NRC's decision whether to hold a hearing under the circumstances. The decision to conduct a hearing *sua sponte* lies, as its voluntary nature would suggest, within NRC's sole discretion. *See Vermont Yankee*, 435 U.S. at 524 (explaining that an agency's "formulation of procedures is basically to be left within the discretion of agencies to which Congress has confided the responsibility for substantive judgments"). An agency's exercise of this discretion cannot be challenged under the APA. *See* 5 U.S.C. § 701(a)(2) (providing the APA does not apply to "agency action ... committed to agency discretion by law"); *see, e.g., Tamenut v. Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other Courts of Appeals that a Bureau of Indian Affairs's decision whether to reopen proceedings *sua sponte* is committed to agency discretion by law).

III. NRC's Decision On Quality Assurance Followed A Full Evidentiary Hearing And Was Based On A Complete Record

In litigating Contention 15, Beyond Nuclear challenged the quality assurance measures applied to site investigation activities conducted in preparation for the Fermi 3 application and well prior to license issuance. Now, Beyond Nuclear seeks to re-litigate those issues before this Court. Beyond Nuclear begins with a selective

and misleading recitation of the administrative record. Pet. Br. at 24-32. Beyond Nuclear then broadly alleges that there were “gaps and complete abdications” in quality assurance that “raise legitimate doubt as to whether the plant can be operated safely.” *Id.* at 35. Beyond Nuclear ultimately argues that NRC erred in failing to reverse the Board’s decision on Contention 15. *Id.* at 51. However, Beyond Nuclear’s assertions are unfounded. There were no “gaps” or “abdications” in quality assurance. And Beyond Nuclear’s issues were fully considered by NRC in administrative proceedings based on a substantial record. There was no reason for NRC to reverse the Board’s findings. There likewise is no reason for this Court to reverse NRC.

A. NRC Found That DTE Implemented A Quality Assurance Program In Accordance With NRC Regulations

Judging from its brief, one would assume that Beyond Nuclear alleged defects in DTE’s quality assurance program that posed a danger to the public. In reality, Beyond Nuclear’s Contention 15 did not relate to the quality of plant construction. It could not, because construction of Fermi 3 has not begun. The contention did not even relate to the quality of the proposed reactor design.¹⁵ Beyond Nuclear’s claims relate only to the quality assurance measures applied to work completed prior to

¹⁵ The Fermi 3 application references a design previously certified by NRC and therefore not subject to re-litigation in a combined license review.

DTE submitting the application to NRC. During that time there were only limited site characterization activities subject to quality assurance requirements (*e.g.*, collecting certain geologic and hydrologic data). The record below thoroughly addressed the quality assurance measures applied to those activities. *See* R732 at 19-40 (JA____-____).

Contrary to Beyond Nuclear's claims (Pet. Br. at 54), there was no "undisputed evidence" of a "lack of a quality assurance program." As discussed above, DTE delegated quality assurance for pre-application work to its qualified engineering contractor, Black & Veatch. The Board found that by contract, and subject to DTE direction and oversight, Black & Veatch was required to implement its own NRC-compliant quality assurance program for the pre-application site work. R732 at 38-40 (JA____-____). Further, the Board found that DTE reviewed a prior audit of Black & Veatch's program; employed an owner's engineer to oversee Black & Veatch's quality assurance efforts; observed the contractor's work and quality assurance efforts; and ultimately did not accept work from Black & Veatch until it had established its own quality assurance program governing the acceptance review. *Id.* at 38-40 (JA____-____). In the proceeding Beyond Nuclear did not dispute the quality of any specific data or information developed for the application or relied upon by NRC. *See, e.g.*, R664 at 460 (Beyond Nuclear's witness answering "no" when asked by the Board whether he had identified any specific instance of a

material safety significant error in a safety-related portion of the Fermi 3 application) (JA_____).

Fundamentally, Beyond Nuclear took issue with DTE's temporary delegation of quality assurance functions to the contractor (until DTE fully developed and staffed its own program). The Board rejected Beyond Nuclear's argument. The Board concluded that safety-related activities performed prior to submitting an application must be completed under an acceptable quality assurance program. R732 at 29 (JA_____). Nonetheless, DTE was not required to have a completely in-house Appendix B quality assurance program for the pre-application period. *Id.* at 28-29 (JA_____ - _____). Under the plain language of 10 C.F.R. Part 50, Appendix B, an applicant "may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof," so long as the applicant retains responsibility for the program. *Id.* at 29 (JA_____), *quoting* 10 C.F.R. Part 50, Appendix B, Section I. Based on the record, the Board found clear evidence of DTE maintaining responsibility for the quality assurance program—by contract, DTE management observations, third party oversight, and audits of the contractor's program. *Id.* at 39 (JA_____). NRC did not disturb these findings and conclusions. R957 at 7 (JA_____). Moreover, contrary to Beyond Nuclear's assertions to this Court (Pet. Br. at 56-57), no exemption from either NRC regulations or industry guidelines was necessary. *Id.* at 11 (JA_____).

NRC's interpretation of its quality assurance regulations and its assessment of the adequacy of quality assurance measures applied to site investigation activities are entitled to substantial deference. *Balt. Gas & Elec. Co.*, 462 U.S. at 103. Beyond Nuclear's overarching assertion in its brief—that there was a lack of “reasonable assurance” of the program's adequacy—is unsupported and contradicted by the administrative record.

B. The Extensive Record Below Supports NRC's Decision On Quality Assurance

Beyond Nuclear's entire argument to this Court is a reprise of arguments made below. Those arguments were rejected, by both the Board and Commission. Each of the issues—like the delegation issue discussed above—was fully addressed during the evidentiary hearing on Contention 15. The record on Contention 15 included nearly 200 exhibits, live testimony from eight expert witnesses, and approximately 500 pages of transcript.¹⁶ Following the hearing, the Board issued extensive findings of fact. R732 at 30-38 (JA____-____). NRC affirmed the Board's findings. R957 at 7 (JA____). NRC's decision on quality assurance, therefore, was supported by substantial evidence and was neither arbitrary nor capricious. The Court need not be drawn into the details of matters best addressed by the expert agency based on

¹⁶ This was in addition to the 52,000 hours that NRC Staff spent reviewing the technical aspects of DTE's application. R1094 at 2 (JA____).

the record before it. *Marsh*, 490 U.S. at 377 (explaining that factual resolution of issues requiring a high level of scientific expertise is best left to “the informed discretion of the responsible federal agencies”) (internal citations omitted). Having set forth the reasons for its decision and responded meaningfully to each concern raised by Beyond Nuclear, NRC’s decision is not arbitrary and capricious. *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

Beyond Nuclear argues that there was a pattern of quality assurance violations for Fermi 3 and cites cases related to construction quality. *See* Pet. Br. at 52-53 (citing a series of cases involving the Pacific Gas & Electric Company). However, the facts for Fermi 3 are completely different than the facts of the cases cited. Those cases involved quality assurance violations that occurred during construction of a plant and that called into question whether the plant had in fact been built in accordance with the license. Here, Beyond Nuclear merely alleges (Pet. Br. at 55) that DTE “got around to reviewing the paperwork to qualify [Black & Veatch’s] 2008 working arrangements and work product only in 2009, when DTE had finally established some in-house functioning [quality assurance] staff.” The timing of DTE’s documentation of its (experienced and well-qualified) contractor’s qualifications hardly rises to the level of a finding that would “raise legitimate doubt as to whether the plant can be safely operated” once actually built. *Pacific Gas & Electric Co.*, 18 N.R.C. 1340, 1345 (1983).

Beyond Nuclear alleges “confusion” regarding the quality assurance function, citing the Notice of Violation issued by NRC Staff following an inspection in August 2009. Pet. Br. at 57, 59. Beyond Nuclear also cites that one-time violation in its recitation of the case. *Id.* at 25. But in both instances Beyond Nuclear leaves out the fact that the violation was later withdrawn in part and amended in part by NRC Staff. The violation did not implicate the quality of any information developed during the site investigation or the adequacy of information included in the application. The violation, as ultimately revised by Staff, did not cite a failure to establish and implement a quality assurance program between March 2007 and February 2008 as Beyond Nuclear claims. It addressed only a limited period of time in which DTE did not meet its own program requirements for certain audits and for trending of corrective action reports. R732 at 36-38 (JA____-____). Staff characterized the violation narrowly, judging it to have low significance and finding that DTE had taken appropriate corrective actions. *Id.* at 35-38 (JA____-____). The Board, for its part, recognized that Staff closed the violation based on DTE’s corrective actions, which included completing audits and trending corrective action reports. *Id.* Beyond Nuclear’s other concerns (*see* Pet. Br. at 28-32) were raised in the administrative hearing and rejected by the Board. *See, e.g.*, R325 at 3-9 (JA____-____); R326 at 13-23 (JA____-____); R732 at 40 (JA____). There is nothing in the record to suggest that there was a pattern or practice of quality assurance violations

that would call into question the adequacy of the information in DTE's application or DTE's commitment to quality assurance in the future. *Id.* (JA____).

In considering Beyond Nuclear's petition for review of the Board's decision, NRC concluded:

We give substantial deference to licensing board findings of fact, and we will not overturn a board's factual findings unless they are "not even plausible in light of the record viewed in its entirety." The Board made extensive factual findings to support its conclusion that DTE satisfied the requirements of 10 C.F.R. Part 50, Appendix B, all of which were supported by the evidence presented by DTE and the Staff.

R957 at 7 (JA____) (citations omitted). With respect to Beyond Nuclear's specific concerns raised on appeal before the agency—including the same ones raised here—NRC noted that Beyond Nuclear "may have misinterpreted the evidence or failed to demonstrate its relevance to the issues in dispute." *Id.* at 6 (JA____). The same can be said for Beyond Nuclear's current brief. NRC ultimately found "nothing that would suggest that the Board's findings were implausible or not supported by the record." *Id.* There is no reason for this Court to reach a different conclusion.

CONCLUSION

NRC satisfied NEPA in evaluating the potential environmental impacts of transmission lines that would be built to support Fermi 3. NRC also reasonably applied its own rules, including those governing contention admissibility, authority over offsite transmission corridor siting and construction, and delegation of quality

assurance functions. The Court should defer to NRC's application of those rules to the Fermi 3 project. In addition, NRC's decision on Beyond Nuclear's challenge to DTE's quality assurance program was thorough and supported by substantial evidence and a full record. Under the Administrative Procedure Act standard of review, the Court should reject the Petition for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,571 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit R. 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Answering Brief For Intervenor-Respondent DTE Electric Company” was deposited by me this 6th day of December, 2016 with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Counsel for all parties are registered with the CM/ECF system and received service through that method.

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ORAL ARGUMENT HAS NOT BEEN SCHEDULED**No. 15-1173**

In the United States Court of Appeals for the
District of Columbia Circuit

BEYOND NUCLEAR,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents,

DTE ELECTRIC COMPANY,

Intervenor-Respondent.

ADDENDUM

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DECEMBER 6, 2016

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10 C.F.R. § 2.309(c).....	ADD4
10 C.F.R. § 2.309(f)	ADD5
10 C.F.R. § 2.340(b)	ADD6
10 C.F.R. § 50.10(a)(2)(vii)	ADD7
10 C.F.R. § 50.10(c).....	ADD7
10 C.F.R. § 51.20(b)	ADD7
10 C.F.R. § 51.107(a).....	ADD7
10 C.F.R. § 52.79	ADD8
10 C.F.R. § 52.97(a).....	ADD9
10 C.F.R. § 52.103(g)	ADD9
40 C.F.R. § 1502.22	ADD9
40 C.F.R. § 1508.25(a), (c)	ADD10
72 Fed. Reg. 57,416 (Oct. 9, 2007).....	ADD11
79 Fed. Reg. 72,215 (Dec. 5, 2014)	ADD11

STATUTES AND REGULATIONS

The pertinent statutes and regulations for this case are excerpted as follows:

5 U.S.C. § 701(a)(2)

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

5 U.S.C. § 706(2)(A)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .

42 U.S.C. § 2235(b)

(b) Hearings

After holding a public hearing under section 2239(a)(1)(A) of this title, the Commission shall issue to the applicant a combined construction and operating license if the application contains sufficient information to support the issuance of a combined license and the Commission determines that there is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of this chapter, and the Commission's rules and regulations. . . .

42 U.S.C. § 2239(a)

(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. . . .

(a)(1)(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license. . . .

10 C.F.R. Part 50, Appendix B

Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants

Introduction

. . . Every applicant for a combined license under part 52 of this chapter is required by the provisions of § 52.79 of this chapter to include in its final safety analysis report a description of the quality assurance applied to the design, and to be applied to the fabrication, construction, and testing of the structures, systems, and components of the facility and to the managerial and administrative controls to be used to assure safe operation. . . . Nuclear power plants and fuel reprocessing plants include structures, systems, and components that prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. This appendix establishes quality assurance requirements for the design, manufacture, construction, and operation of those structures, systems, and components. The pertinent requirements of this appendix apply to all activities affecting the safety-related functions of those structures, systems, and components; these activities include designing, purchasing, fabricating, handling, shipping, storing, cleaning, erecting, installing, inspecting, testing, operating, maintaining, repairing, refueling, and modifying.

As used in this appendix, “quality assurance” comprises all those planned and systematic actions necessary to provide adequate confidence that a structure, system, or component will perform satisfactorily in service. Quality assurance includes quality control, which comprises those quality assurance actions related to the physical characteristics of a material, structure, component, or system which provide a means to control the quality of the material, structure, component, or system to predetermined requirements.

I. Organization

The applicant shall be responsible for the establishment and execution of the quality assurance program. The applicant may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality assurance program, or any part thereof, but shall retain responsibility for the quality assurance program. . . .

II. Quality Assurance Program

The applicant shall establish at the earliest practicable time, consistent with the schedule for accomplishing the activities, a quality assurance program which complies with the requirements of this appendix. This program shall be documented by written policies, procedures, or instructions and shall be carried out throughout plant life in accordance with those policies, procedures, or instructions. The applicant shall identify the structures, systems, and components to be covered by the quality assurance program and the major organizations participating in the program, together with the designated functions of these organizations. The quality assurance program shall provide control over activities affecting the quality of the identified structures, systems, and components, to an extent consistent with their importance to safety. Activities affecting quality shall be accomplished under suitably controlled conditions. Controlled conditions include the use of appropriate equipment; suitable environmental conditions for accomplishing the activity, such as adequate cleanness; and assurance that all prerequisites for the given activity have been satisfied. The program shall take into account the need for special controls, processes, test equipment, tools, and skills to attain the required quality, and the need for verification of quality by inspection and test. The program shall provide for indoctrination and training of personnel performing activities affecting quality as necessary to assure that suitable proficiency is achieved and maintained. The applicant shall regularly review the status and adequacy of the quality assurance program. Management of other organizations participating in the quality assurance program shall regularly review the status and adequacy of that part of the quality assurance program which they are executing. . . .

IV. Procurement Document Control

Measures shall be established to assure that applicable regulatory requirements, design bases, and other requirements which are necessary to assure adequate quality are suitably included or referenced in the documents for procurement of material, equipment, and services, whether purchased by the applicant or by its contractors or subcontractors. To the extent necessary, procurement documents

shall require contractors or subcontractors to provide a quality assurance program consistent with the pertinent provisions of this appendix. . . .

VII. Control of Purchased Material, Equipment, and Services

Measures shall be established to assure that purchased material, equipment, and services, whether purchased directly or through contractors and subcontractors, conform to the procurement documents. These measures shall include provisions, as appropriate, for source evaluation and selection, objective evidence of quality furnished by the contractor or subcontractor, inspection at the contractor or subcontractor source, and examination of products upon delivery. Documentary evidence that material and equipment conform to the procurement requirements shall be available at the nuclear powerplant or fuel reprocessing plant site prior to installation or use of such material and equipment. This documentary evidence shall be retained at the nuclear powerplant or fuel reprocessing plant site and shall be sufficient to identify the specific requirements, such as codes, standards, or specifications, met by the purchased material and equipment. The effectiveness of the control of quality by contractors and subcontractors shall be assessed by the applicant or designee at intervals consistent with the importance, complexity, and quantity of the product or services.

10 C.F.R. Part 51

Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions

10 C.F.R. Part 52

Licenses, Certifications, and Approvals for Nuclear Power Plants

10 C.F.R. § 2.309(c)

Hearing requests, petitions to intervene, requirements for standing, and contentions

(c) Filings after the deadline; submission of hearing request, intervention petition, or motion for leave to file new or amended contentions—

(1) Determination by presiding officer. Hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:

(i) The information upon which the filing is based was not previously available;

- (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(f)

Hearing requests, petitions to intervene, requirements for standing, and contentions

(f) Contentions.

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted, provided further, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention 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 which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and
- (vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, prima facie, that one or more of the

acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary prima facie showing, then the requestor must explain why this deficiency prevents the requestor from making the prima facie showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant's environmental report. Participants may file new or amended environmental contentions after the deadline in paragraph (b) of this section (e.g., based on a draft or final NRC environmental impact statement, environmental assessment, or any supplements to these documents) if the contention complies with the requirements in paragraph (c) of this section.

10 C.F.R. § 2.340(b)

Initial decision in certain contested proceedings; immediate effectiveness of initial decisions; issuance of authorizations, permits, and licenses

(b) Initial decision—combined license under 10 CFR part 52.

(1) Matters in controversy; presiding officer consideration of matters not put in controversy by parties. In any initial decision in a contested proceeding on an application for a combined license under part 52 of this chapter (including an amendment to or renewal of combined license), the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties and any matter designated by the Commission to be decided by the presiding officer. The presiding officer shall also 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.

10 C.F.R. § 50.10(a)(2)(vii)**License required; limited work authorization**

(a) Definitions. As used in this section, construction means the activities in paragraph (a)(1) of this section, and does not mean the activities in paragraph (a)(2) of this section.

...

(2) Construction does not include:

...

(vii) Building of service facilities, such as paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines; . . .

10 C.F.R. § 50.10(c):**License required; limited work authorization**

(c) Requirement for construction permit, early site permit authorizing limited work authorization activities, combined license, or limited work authorization. No person may begin the construction of a production or utilization facility on a site on which the facility is to be operated until that person has been issued either a construction permit under this part, a combined license under part 52 of this chapter, an early site permit authorizing the activities under paragraph (d) of this section, or a limited work authorization under paragraph (d) of this section.

10 C.F.R. § 51.20(b)**Criteria for and identification of licensing and regulatory actions regarding environmental impact statements**

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

...

(2) Issuance or renewal of a full power or design capacity license to operate a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or a combined license under part 52 of this chapter.

10 C.F.R. § 51.107(a)**Public hearings in proceedings for issuance of combined licenses; limited work authorizations**

(a) In addition to complying with the applicable requirements of § 51.104, in a proceeding for the issuance of a combined license for a nuclear power reactor under part 52 of this chapter, the presiding officer will:

(1) Determine whether the requirements of Sections 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the combined license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the combined license should be issued as proposed by the NRC's Director, Office of New Reactors or Director, Office of Nuclear Reactor Regulation, as appropriate.

10 C.F.R. § 52.79

Contents of applications; technical information in final safety analysis report

(a) The application must contain a final safety analysis report that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components of the facility as a whole. The final safety analysis report shall include the following information, at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license:

. . .

(25) A description of the quality assurance program, applied to the design, and to be applied to the fabrication, construction, and testing, of the structures, systems, and components of the facility. Appendix B to 10 CFR part 50 sets forth the requirements for quality assurance programs for nuclear power plants. The description of the quality assurance program for a nuclear power plant must include a discussion of how the applicable requirements of appendix B to 10 CFR part 50 have been and will be satisfied, including a discussion of how the quality assurance program will be implemented; . . .

10 C.F.R. § 52.97(a)**Issuance of combined licenses**

(a)(1) After conducting a hearing in accordance with § 52.85 and receiving the report submitted by the ACRS, the Commission may issue a combined license if the Commission finds that:

(i) The applicable standards and requirements of the Act and the Commission's regulations have been met;

(ii) Any required notifications to other agencies or bodies have been duly made;

(iii) There is reasonable assurance that the facility will be constructed and will operate in conformity with the license, the provisions of the Act, and the Commission's regulations.

(iv) The applicant is technically and financially qualified to engage in the activities authorized; and

(v) Issuance of the license will not be inimical to the common defense and security or to the health and safety of the public; and

(vi) The findings required by subpart A of part 51 of this chapter have been made.

(2) The Commission may also find, at the time it issues the combined license, that certain acceptance criteria in one or more of the inspections, tests, analyses, and acceptance criteria (ITAAC) in a referenced early site permit or standard design certification have been met. This finding will finally resolve that those acceptance criteria have been met, those acceptance criteria will be deemed to be excluded from the combined license, and findings under § 52.103(g) with respect to those acceptance criteria are unnecessary.

10 C.F.R. § 52.103(g)**Operation under a combined license**

(g) The licensee shall not operate the facility until the Commission makes a finding that the acceptance criteria in the combined license are met, except for those acceptance criteria that the Commission found were met under § 52.97(a)(2). If the combined license is for a modular design, each reactor module may require a separate finding as construction proceeds.

40 C.F.R. § 1502.22**Incomplete or unavailable information**

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is

incomplete or unavailable information, the agency shall always make clear that such information is lacking.

...

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. . . .

40 C.F.R. § 1508.25(a), (c)

Scope

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should

do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

...

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

72 Fed. Reg. 57,416 (Oct. 9, 2007)

Limited Work Authorizations for Nuclear Power Plants: Final Rule

The Nuclear Regulatory Commission (NRC) is amending its regulations applicable to limited work authorizations (LWAs), which allow certain construction activities on production and utilization facilities to commence before a construction permit or combined license is issued. This final rule modifies the scope of activities that are considered construction for which a construction permit, combined license, or LWA is necessary, specifies the scope of construction activities that may be performed under an LWA, and changes the review and approval process for LWA requests. The NRC is adopting these changes to enhance the efficiency of its licensing and approval process for production and utilization facilities, including new nuclear power reactors.

... The environmental impacts of preconstruction activities will also be described in the NRC's EIS because such description is necessary to evaluate the cumulative impacts of the Federal action, in light of the pre-existing impacts of the private, pre-construction action. The cumulative impacts discussion should provide information on the total environmental impacts of constructing the nuclear power plant to both the NRC decisionmaker and the general public.

79 Fed. Reg. 72,215 (Dec. 5, 2014)

In the Matter of DTE Electric Company, Combined License for Enrico Fermi Unit 3; Notice of Hearing

The Commission hereby gives notice that, pursuant to Section 189a of the Atomic Energy Act of 1954, as amended (the Act), it will convene an evidentiary session to receive testimony and exhibits in the uncontested portion of this proceeding regarding DTE Electric Company's September 18, 2008, application for a COL under part 52 of Title 10 of the Code of Federal Regulations (10 CFR) to construct and operate a new nuclear power generation facility at the Enrico Fermi Nuclear Plant Unit 3 site in Monroe County, Michigan (ADAMS Accession No. ML082630034). ... The matter at issue in this proceeding is whether the review of the application by the Commission's staff has been adequate to support the findings found in 10 CFR 52.97 and 10 CFR 51.107.