No. _____

In The
Supreme Court of the United States

BEYOND NUCLEAR,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the U.S. Nuclear Regulatory Commission commit segmentation and violate the longstanding recognition of the pre-eminence of the National Environmental Policy Act when it redefined "construction" in its Atomic Energy Act regulations to exclude environmental impact analysis of a major, integral transmission line corridor through critical habitat for endangered and threatened species?

Did the NRC violate its duty to obey NEPA when it denied admission of public intervenors' contention because of an arbitrarily short deadline and simultaneously rejected its own Atomic Safety and Licensing Board Panel's *sua sponte* recommended adjudication of the matter?

LIST OF PARTIES

PETITIONER

Beyond Nuclear

RESPONDENTS

U.S. Nuclear Regulatory Commission, DTE Electric Company

CORPORATE DISCLOSURE STATEMENT

Beyond Nuclear is a nongovernmental corporation.

There is no parent or publicly held company owning 10% or more of the corporation's stock.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit was determined to be unreported under its local Circuit Rule 36(d) that the ruling on the issues raised did not warrant a published opinion. The final Judgment of the Court, dated November 27, 2017, is reproduced in the appendix at App. 1-4.

The Nuclear Regulatory Commission's relevant Memorandum and Order is referred to as CLI-15-01, is reported at 81 NRC 1, and appears at App. 5-24. The Memorandum and Order of the Commission's Atomic Safety and Licensing Board is referred to as LBP-14-9, is reported at 80 NRC 15, and appears at App. 25-108.

JURISDICTION

The court of appeals entered judgment on November 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns whether 42 U.S.C. § 4332, part of the National Environmental Policy Act ("NEPA") and its implementing regulations, which formerly were harmonized with Atomic Energy Action ("AEA") requirements at 42 U.S.C. § 2133(d), 42 U.S.C. § 2232(a)

and supporting regulations with respect to coverage of environmental concerns, may be reinterpreted to reduce applicability of NEPA to the proposed major, integral components of a nuclear power plant. The texts of these statutes and pertinent NEPA and NRC regulations are reproduced at App. 114-121.

STATEMENT OF THE CASE

Because this appeal arises under NEPA and the AEA, federal statutes administered by the Nuclear Regulatory Commission ("NRC" or "Commission"), judicial review was sought of agency action at the District of Columbia Circuit Court of Appeals pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which authorizes judicial review of all federal agency actions.

This petition challenges the Respondent Nuclear Regulatory Commission Staff's ("NRC Staff") alleged noncompliance with NEPA for failing to include significant direct and indirect environmental impacts of a 29-mile-long, 300-foot-wide transmission line corridor, part of the planned Fermi Unit 3 Nuclear Power Plant ("Fermi") in Michigan, in the Final Environmental Impact Statement ("FEIS") for the project. Throughout the six-year licensing case, the NRC Staff and Commission maintained that the agency's 2007 Limited Work Authorization regulation ("2007 LWA Rule") allows segmentation for EIS purposes of the transmission corridor from the rest of the power plant project.

The planned nuclear power plant would be erected on part of a 1,200-acre site and was addressed in the Draft and Final Environmental Impact Statements. NEPA treatment of the indispensable 1,069-acre transmission line corridor connecting the power plant to the regional electrical grid was compiled only as a cumulative impacts analysis until near the end of the licensing case, when the Commission ruled that scattered mentions of environmental impacts outside of the much-criticized "cumulative impacts" section of the FEIS sufficed as analysis of direct impacts. CLI-15-01 (App. 17).

DTE Electric Company ("DTE"), the other Respondent, applied in 2008 for an NRC combined operating license ("COL") to construct and operate a GE-Hitachi Economic Simplified Boiling Water Reactor ("ESBWR") on the Fermi site in Monroe County, Michigan. Beyond Nuclear is a grassroots nonprofit organization which along with several other grassroots organizations intervened on behalf of their members in the COL proceeding to request a hearing on fourteen proposed contentions in opposition to granting of the license.

The Atomic Safety and Licensing Board ("ASLB" or "Board") assigned to try such matters admitted four of the contentions for a hearing. Beyond Nuclear and the other intervenors later proposed several additional contentions, including Contention 23, a challenge to the NRC Staff's compliance with NEPA as it pertains to the anticipated environmental impacts of the proposed transmission line corridor.

Beyond Nuclear first proposed Contention 23 after the Staff issued the draft Environmental Impact Statement ("DEIS") on the power plant project. After the ASLB dismissed the contention as late, Beyond Nuclear resubmitted Contention 23 following publication of the Final Environmental Impact Statement ("FEIS"). The ASLB again dismissed the contention as late. In Contention 23, both as originally proposed and resubmitted, Beyond Nuclear challenged the segmentation from the overall project of the transmission line corridor connecting the proposed plant to the regional grid. Petitioner also questioned the adequacy of the NRC Staff's cumulative analysis of environmental impacts of constructing the transmission lines. The U.S. Environmental Protection Agency ("USEPA") had raised similar objections in its formal comments.

Despite rejection of Contention 23 as being late, the ASLB found some merit to Beyond Nuclear's arguments. In its first ruling dismissing the contention for tardiness, the Board recommended that the Staff consider Intervenors' environmental critique when preparing the FEIS. In its second ruling, the Board affirmed tardiness, but reiterated its view that Intervenors had raised a substantial, albeit untimely, issue.

The ASLB solicited briefs from the parties on the question of whether it should recommend that the full Commission approve, *sua sponte*, Board adjudication of the adequacy of the NRC Staff's NEPA treatment of transmission corridor impacts pursuant to 10 C.F.R. § 2.340(b). Beyond Nuclear supported *sua sponte* review, while DTE and the NRC Staff opposed it. In its

Memorandum Order LBP-14-9, the ASLB determined that the issues raised in Contention 23 merited *sua sponte* review[1] and pursuant to 10 C.F.R. § 2.340(b), requested that the Nuclear Regulatory Commissioners allow the ASLB to undertake that review. App. 47-48 and App. 99-108. The ASLB found a strong likelihood that the transmission corridor had been "segmented" from the power plant project despite being considered "preconstruction activity" under the 2007 LWA Rule, and that the transmission corridor could not be excluded from the FEIS merely because the transmission lines would be owned by a separate company named ITC Transmission.

On the *sua sponte* referral, the ASLB referred two issues to the Commission:

> (1) "[w]hether the building of offsite transmission lines intended solely to serve . . . Fermi Unit 3 qualifies as a connected action under NEPA and, therefore, requires the Staff to consider its environmental impacts as a direct effect of the construction of Fermi Unit 3"; and
>
> (2) "[w]hether the Staff's consideration of environmental impacts related to the transmission corridor, performed as a cumulative

[1] Memorandum (Determining that Issues Related to Intervenors' Proposed Contention 23 Merit *Sua Sponte* Review Pursuant to 10 C.F.R. § 2.340(b) and Requesting Commission Approval), LBP-14-9, 80 NRC 15, 37 (2014).

> impact review, satisfied NEPA's hard look requirement."[2]

The Commission ordered additional briefing and accepted an *amicus curiae* filing from the Nuclear Energy Institute. The Commission also contemporaneously took up Beyond Nuclear's petition for review of the ASLB's dismissal of Contention 23. Beyond Nuclear maintained that the ASLB's recommendation to the NRC Staff to consider inclusion of the transmission corridor within the scope of the FEIS comprised new information and created a new "dispute" with the DEIS which should have cured tardy initiation of the contention. Beyond Nuclear also argued that there were material differences between the DEIS and FEIS language relating to the transmission corridor which justified admission of the issue for adjudication.

The Commission overruled Beyond Nuclear on the timeliness issue. CLI-15-01 at 9 (App. 15).

The gist of Beyond Nuclear's argument in favor of adjudication of Contention 23 is that exclusion of the corridor from the scope of the project for NEPA purposes meant that the gross environmental effects of construction, and their mitigation, would not be identified, compiled or disclosed. The transmission corridor occupies 1,069 acres and will be 29 miles long by several hundred feet wide, with three industrial 345-kilovolt (kV) lines strung on dozens of towers. Many deficiencies identified in comments by agencies such as the USEPA on the DEIS went largely uncured and

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[2] LBP-14-9, slip op. at 16 (App. 47-48).

unresponded-to in the FEIS. While there are an estimated 30 wetlands in the corridor, none were delineated, and so EIS maps were woefully inadequate. The physical footprint of the Milan substation, where Fermi 3 would connect to the regional grid, will be quadrupled, but since there was no firm decision about how much land would be needed or the configuration of the substation facility, the FEIS omitted any detailed discussion. The routes of the three 345-kv lines through the corridor were never fixed and were depicted only generally in EIS documents, making it impossible to evaluate the NRC Staff's claim that it established upper and lower bounds of risk to natural resources, animals and plants beneath the transmission lines and towers that would be constructed. There were multiple admissions by the NRC Staff of incomplete or missing documentation and noncompliance with the Endangered Species Act; no actual terrestrial and aquatic surveys were performed. There was mere speculation that because U.S. Fish and Wildlife data for the larger area where the transmission corridor was sited showed the regional presence of the Indiana bat, Snuffbox mussel, Northern Riffleshell mussel, Purple Lilliput mussel, Eastern Massasauga rattlesnake, and the Eastern Prairie fringed orchid, that these threatened or endangered species "might" be present within the corridor. App. 88. The Fish and Wildlife Service refused to concur with any of the Endangered Species findings in DTE's environmental report, which was the foundational document for the NRC Staff's DEIS and FEIS. The lack of Endangered Species Act compliance meant that mitigation arrangements for

harms to unidentified, endangered and threatened plants and animals were not developed and so did not appear in the FEIS.

Further, while temporary disruption of 143 acres contiguous to the corridor is expected during construction for "laydown" room for equipment and materials, there were no details provided in the DEIS or FEIS of those disruptions nor of potential permanent physical changes from construction. The FEIS mentions periodic clearcutting of trees and vegetation beneath the unmapped transmission lines and the use of herbicides to retard regrowth, but there are no details beyond those bare mentions. Historic and cultural resources surveys remain grossly incomplete.

The USEPA criticized the NRC's refusal to include the transmission corridor as a component of the nuclear power plant project. USEPA complained that habitat losses were unmentioned. The USEPA argued that lengthening the transmission lines and expanding the Milan substation were not merely cumulative impacts outside the scope of the license application, but were actions directly related to the granting of the license on which the operation of Fermi 3 was dependent, and consequently should be analyzed as direct impacts within the scope of the project.

The NRC Commissioners ruled that the Staff's superficial mentions of environmental impacts in the FEIS sufficed as discussion of direct impacts:

> [T]he Staff has included what appears to be a comprehensive analysis of transmission-corridor impacts throughout the final EIS.

> Without commenting on the sufficiency of the Staff's review, we note that the Staff discussed transmission-corridor impacts in Chapters 2, 3, 4, 5, 9, and 10 of the final EIS, in addition to referencing those impacts in the cumulative impacts analysis in Chapter 7.

App. 17. The Commission criticized the ASLB for not acknowledging that "the Staff did discuss the proposed transmission corridor in the final EIS, across multiple chapters, together with the impacts of constructing and operating Fermi Unit 3." App. 18.

Beyond Nuclear timely filed a petition for review at the D.C. Circuit Court of Appeals on June 19, 2015 after the NRC issued a Combined Operating License for Fermi 3 in a Federal Register announcement on May 7, 2015. App. 109-113. The appeal was held in abeyance while Beyond Nuclear timely pursued a related case at the D.C. Circuit, *New York v. NRC*, Docket Nos. 14-1210, 14-1212, 14-1216, and 14-1217 (Consolidated) which dealt with Beyond Nuclear's contention in the Fermi 3 COL proceeding challenging the lawfulness of the NRC's Continued Storage of Spent Nuclear Fuel Final Rule and the supporting Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, both issued in September 2014.

The D.C. Circuit rejected Beyond Nuclear's petition for review in its November 27, 2017 *per curiam* decision. The court accorded "substantial deference" to the NRC's interpretations of its own procedural regulations because the interpretations were not "plainly erroneous or inconsistent with the regulation." App. 3.

The NRC "did not plainly err in determining that Beyond Nuclear's contention regarding the EIS was untimely under its regulations and was not based on information that was 'not previously available.'" *Id.* Nor, according to the panel, did the Commission abuse its discretion when it decided that exclusion of the transmission corridor "was not so 'serious' as to warrant *sua sponte* review in a contested hearing . . . because the EIS did consider the issues presented by the contention and because the NRC had already scheduled a hearing to review the overall sufficiency of the EIS," citing *Lorion v. NRC*, 785 F.2d 1038, 1042 (D.C. Cir. 1986).

REASONS FOR GRANTING THE WRIT

This is a case of considerable public interest because it demonstrates how an agency may improperly reinterpret its organic statute to take precedence over the commands of NEPA.

In the decision under appeal, the D.C. Circuit wrongfully allowed the 2007 LWA Rule, which was a retrenchment in NRC regulations, to partially deregulate nuclear power plant licensing decisions from the reach of NEPA. The appellate court ignored its own precedent and that of the Sixth and First Circuits which affirmed the primacy of NEPA, and the harmonious overlap of the AEA and NEPA on environmental matters, respectively, where an agency's organic statute does not conflict with NEPA. The D.C. Circuit

credited the NRC's argument that by not strictly adhering to the NRC's internal timely contention filing requirement, Beyond Nuclear forever forfeited any chance to require FEIS treatment of the direct environmental impacts from transmission line construction. The NRC's rules of procedure, which restrict the objection to the agency's limitations on the scope of NEPA to early milestones in the lengthy licensing case were used by the NRC to avoid its independent responsibility as lead agency to comply with the statute.

The D.C. Circuit stated that Beyond Nuclear's concerns could be addressed at a non-adversarial "mandatory hearing" required by the AEA at the end of the licensing proceeding "to review the overall sufficiency of the EIS." Public parties such as Beyond Nuclear may not participate in mandatory hearings. Even before the February 4, 2015 mandatory hearing, convened at the very end of the licensing process, the Commission accepted the NRC Staff's incomplete cumulative impacts analysis as direct impacts. App. 17-18. This meant that at the last moment, the Commission allowed supplementation or amendment of the FEIS and did so without publishing notice to the public of the intention to supplement or amend the FEIS. This new FEIS information was not circulated to other federal agencies for comment, nor was it publicized for the receipt of public comments during a designated period for the same. The major tenets of NEPA aimed at promotion of public transparency and participation were thwarted. The D.C. Circuit approved use of a non-adversarial, conclusionary hearing with little to no

means of correcting serious procedural errors to supplant an adversarial adjudication which would have taken place much earlier in the six-year licensing proceeding.

The court of appeals' affirmance of the NRC determinations diverges from the D.C. Circuit's longstanding requirement that the NRC must comply with NEPA "to the fullest extent, unless there is a clear conflict of *statutory authority*." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original). The Environmental Impact Statement is typically the main, if not only, source of information for public understanding of controversial and environmentally disruptive nuclear power plant projects. Absent a definitive affirmation from the Supreme Court as to the supremacy of NEPA and the use of its scoping requirements to identify and disclose anticipated environmental harms from a nuclear power plant project, the NRC will be permitted to pare down NEPA's reach merely by using a reinterpretation of its organic statute over NEPA's commands.

I. The 2007 LWA Rule Created An Historic Conflict Between The AEA and NEPA

The DEIS, published jointly by the NRC Staff and the U.S. Army Corps of Engineers, stated that the new transmission corridor for Fermi 3 will be built and operated by ITC Transmission, which until 2004 had operated as a wholly-owned subsidiary of DTE Electric

Company. The DEIS explained that the NRC classifies the construction of transmission lines as a "preconstruction activity." Preconstruction activities include various actions required to construct a nuclear power plant that, as the result of the changes made by the NRC's 2007 limited work authorization rule ("2007 LWA Rule"), the NRC now defines as falling outside its regulatory authority and therefore not part of the NRC action to license the proposed new plant. Such preconstruction activities include "[b]uilding 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(a)(2)(vii). Because preconstruction activities are no longer included within the scope of the proposed NRC action, the NRC Staff determined not to evaluate transmission corridor impacts as a direct effect of the NRC licensing decision, but instead, to consider them in the context of cumulative impacts.

Following passage of NEPA into law, the NRC readily incorporated NEPA into its Atomic Energy Act regulatory activity.

> Prior to the 1969 enactment of NEPA, the Commission perceived its duties under the Atomic Energy Act primarily in terms of protecting the public from radiation hazards. NEPA, however, made "environmental protection a part of the mandate of every federal agency and department . . . (The Commission) is not only permitted, but compelled, to take

> environmental values into account" in carrying out its regular functions. Under NEPA, federal agencies must "use all practicable means" to avoid environmental "degradation" to the extent consistent with "other essential considerations of national policy." Thus, in the early 1970's the Commission began to consider the environmental implications of proposed nuclear facilities.

Detroit Edison Co. v. NRC, 630 F.2d 450, 451 (6th Cir. 1980) (footnote and citations omitted). Notably, in *Detroit Edison*, the Sixth Circuit upheld the Commission's authority to regulate off-site transmission lines built solely to serve a nuclear facility in order to minimize environmental disturbance, making clear that this authority was founded upon the AEA:

> The Commission is empowered by [the AEA] to regulate off-site transmission lines; in the exercise of that power it must pursue the objectives of the Atomic Energy Act and NEPA simultaneously. Under the Atomic Energy Act, the Commission can issue conditional licenses for regulatory purposes. There can be no objection to its use of the same means to achieve environmental ends as well.

Id. at 450, 454. This determination, which harmonizes the environmentally-protective aims of NEPA with the AEA, involved a sister nuclear power plant, Fermi Unit 2, located at the same installation as the planned Fermi 3, remains good law and is of significance to this appeal.

Indeed, the NRC has long considered its statutory authority under the AEA to encompass conditioning approval of nuclear power plant licenses on environmentally acceptable transmission line routing. *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 80 (1st Cir. 1978) (affirming licensing board decision that conditioned approval of permits for Seabrook Nuclear Power Station on rerouting two offsite transmission lines to avoid environmental impacts on marshlands, tree species, and migratory waterfowl). This remains good law in the First Circuit.

In 1972, shortly after enactment of NEPA, the Commission adopted a major amendment to the definition of construction in 10 C.F.R. § 50.10(c) that generally prohibited, absent an NRC construction permit, "any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site and construction of non-nuclear facilities (such as turbogenerators and turbine buildings) for use in connection with the facility. . . ."[3] Thus environmentally damaging activities related to construction of a new power plant would not occur before the EIS was completed and the agency had been able to balance the benefits of the project against the environmental costs.

In 2007, however, the NRC promulgated the LWA Rule, claiming that changes were needed to allow some non-safety related activities to begin earlier than allowed under the regulations then in effect.

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[3] 37 *Fed. Reg.* 5745, 5748 (Mar. 21, 1972).

Consequently, the 2007 LWA Rule narrowed the scope of activities requiring permission from the NRC by eliminating the concept of "commencement of construction" formerly described in 10 C.F.R. § 50.10(c) and the authorization formerly described in § 50.10(e)(1).

By injecting the option of segmentation into nuclear power plant licensing procedures via the 2007 LWA Rule, the NRC abrogated nearly a half-century of harmonious interpretations of NEPA and the AEA. But while the agency may have the discretion to create a preconstruction-construction dichotomy, it cannot reinterpret the AEA to override the obligations imposed by NEPA.

II. The Agency Has An Inherent Responsibility To Address NEPA Concerns Whenever They Are Raised

The NRC's 2007 LWA Rule regulations which segment transmission line construction from the power plant project cannot relieve the NRC Staff from compiling, and the Commission from approving, an EIS which includes the direct environmental impacts of the transmission lines within the EIS. The Atomic Energy Act does not transcend NEPA compliance. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-30 (3rd Cir. 1989). Defendants may not rely on a finding of adequate protection of public health and safety under section 182(a) of the Atomic Energy Act to preclude the need for further consideration under NEPA. This is

because the NRC must comply with NEPA "to the fullest extent, unless there is a clear conflict of *statutory authority*." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original).

NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008); *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 105 (D.D.C. 2006) (distinguishing agency NEPA responsibilities in situations where "an agency has 'no ability' because of lack of 'statutory authority' to address the impact" with situations where an agency "is only constrained by its own regulation from considering impacts").

NEPA does not permit the Commission to require the parties, alone, to identify all environmental issues raised by the parties. *Calvert Cliffs*, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1118-1119 (1971). The Commission must "consider environmental values 'at every distinctive and comprehensive stage of the (agency's) process.' The primary and nondelegable responsibility for fulfilling that function lies with the Commission." *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2d Cir. 1972), quoting *Calvert Cliffs.* 449 F.2d at 1119.

Section 102(2) of NEPA (42 U.S.C. § 4332) therefore requires government agencies to comply "to the

fullest extent possible." *Ctr. for Biological Diversity*, 538 F.3d at 1213 (quoting *Forelaws on Bd. v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1985)). *See also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976) (quoting House and Senate Conferees, who inserted the "fullest extent possible" language into NEPA, that "no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance").

NEPA regulations interpret the language "to the fullest extent possible" to mean that "each agency of the Federal Government shall comply with that section unless existing law . . . expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6. The legislative history of § 1500.6 explains that this language "shall not be used by any Federal agency as a means of avoiding compliance with [NEPA's] directives. . . ." 115 Cong. Rec. (Part 29) 39702-39703 (1969); *see also Calvert Cliffs*, 449 F.2d 1114:

> We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow 'discretionary.' . . . Indeed, [the language] sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Beyond Nuclear urges that the NRC has classically deployed "an excessively narrow construction of its existing statutory authorizations to avoid compliance" with NEPA, something the Supreme Court

warned about in *Flint Ridge.* By the 2007 LWA Rule, the Commission backed away from the consideration of "environmental ends" that both the agency and the federal courts had read into the AEA for more than three decades:

> [U]nder the final LWA rule, NRC authorization would only be required before undertaking activities that have a reasonable nexus to radiological health and safety and/or common defense and security for which regulatory oversight is necessary and/or most effective in ensuring reasonable assurance of adequate protection to public health and safety or common defense and security.

Final Rule, Limited Work Authorizations for Nuclear Power Plants, 72 *Fed. Reg*. 57416, 57426 (Oct. 9, 2007). The 2007 LWA Rule attempted by nonmention to rescind the imperative expressed by the Sixth Circuit in *Detroit Edison* that in the exercise of the power to regulate off-site transmission lines, the NRC "must pursue the objectives of the Atomic Energy Act and NEPA simultaneously." *Detroit Edison Co. v. NRC*, 630 F.2d at 451.

The D.C. Circuit Court abused its discretion when it found that the transmission corridor environmental concerns raised by Contention 23 were "not so 'serious' as to warrant *sua sponte* review in a contested hearing." App. 2. The cumulative impacts on the transmission line portion of the power plant project were recast as direct impacts, signaling that the NRC Staff had decided to end the segmentation and consider the

transmission corridor as part of the overall project. This decision was not accompanied by a new public notice or comment participation by the public nor by sister federal agencies, as required by 10 C.F.R. § 51.73 (public comments) and 10 C.F.R. § 51.74 (circulation to agencies). The hearing scheduled by the NRC to review the overall sufficiency of the EIS was a statutorily-obliged "mandatory hearing" convened pursuant to 42 U.S.C. § 2239(a)(1)(A) of the AEA. NRC regulations at 10 C.F.R. § 51.107(a)(4) require the agency to "[d]etermine, in an *uncontested* proceeding, whether the NEPA review conducted by the NRC staff has been adequate." (Emphasis added). The event, which took place on February 4, 2015, was a review conducted by DTE Electric Company and the Commission of the adequacy of the NRC's NEPA work; it was not a *de novo* inquiry into NEPA issues. Beyond Nuclear literally was excluded, with no opportunity to offer evidence or argument.

CONCLUSION

The D.C. Circuit Court of Appeals decision here conflicts with its own relevant decision (*Calvert Cliffs*), one Supreme Court decision (*Flint Ridge*), and rulings from the Sixth, Third and First Circuits (*Detroit Edison Co.*, *Limerick Ecology Action*, and *Pub. Serv. Co. of N.H.*). The NRC has used the 2007 LWA Rule to reduce its responsibility for compliance with the National Environmental Policy Act. NEPA and the Atomic Energy Act were not previously read to conflict on the subject

of environmental concerns. The effect of the NRC's 2007 LWA Rule is to reduce the agency's continuing obligation under NEPA to "take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval. . . ." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989).

The D.C. Circuit's judgment should be reversed and the case remanded to the Nuclear Regulatory Commission for *sua sponte* admission of Contention 23 for adjudication of the adequacy of the FEIS treatment of transmission corridor impacts as direct environmental impacts of the Fermi 3 nuclear power plant project, and such other further NEPA compliance as required by law.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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