

October 2, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DTE ELECTRIC CO.) Docket No. 50-341-LR
)
(Fermi Nuclear Power Plant, Unit 2))

NRC STAFF MOTION TO STRIKE PORTIONS OF CRAFT'S REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this motion to strike¹ portions of the “Combined Reply of Citizens’ Resistance at Fermi 2 (CRAFT) to NRC Staff and DTE Electric Co. Answers to CRAFT’s Petition for Leave to Intervene and Request for a Public Hearing” (Reply).² CRAFT’s Reply impermissibly includes new arguments or bases not within the scope of its original petition to intervene (Petition)³ without any attempt to satisfy the standards governing late-filed contentions as set forth in 10 C.F.R. § 2.309(c). Accordingly, these new arguments and bases should be stricken as illustrated in NRC Staff Attachment 1.⁴

¹ As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Ms. Jessie Collins, *pro se* counsel for CRAFT, in an attempt to resolve the issues raised in this motion. CRAFT stated that it will stand by the facts raised and the arguments made in its Reply and that it believes that these are in spirit with the originally submitted contentions.

² Combined Reply of Citizens’ Resistance at Fermi 2 (CRAFT) to NRC Staff and DTE Electric Co. Answers to CRAFT’s Petition for Leave to Intervene and Request for a Public Hearing (dated Sept. 19, 2014; served on the parties through the NRC Electronic Information Exchange on Sept. 22, 2014) (Reply).

³ Citizens’ Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for a Public Hearing Upon DTE Electric’s Request of 20-Year License Extension for the Enrico Fermi 2 Nuclear Reactor (Aug. 18, 2014) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14246A599) (Petition).

⁴ NRC Staff Attachment 1 (Redline-Strike-Out Excerpts of CRAFT’s Reply).

BACKGROUND

This proceeding concerns the April 24, 2014 filing by DTE Electric Co. (DTE) of a license renewal application (LRA) for Fermi 2.⁵ The Staff accepted the LRA for review and published a *Federal Register* Notice on June 18, 2014, providing a Notice of Opportunity for Hearing.⁶ On August 18, 2014, CRAFT filed its Petition, which proposed fourteen contentions. On September 12, 2014, the Staff and DTE filed answers opposing the Petition.⁷ CRAFT timely filed its Reply on September 22, 2014.⁸ CRAFT's Reply contained new arguments and bases in support of its proposed contentions that expanded the scope of the arguments set forth in its Petition.

DISCUSSION

I. Legal Standards Governing Arguments Raised for the First Time in a Reply Brief

Under the Commission's rules, a petitioner may file a reply to any answer filed in response to its petition to intervene.⁹ The scope of that reply, however, is not unlimited.¹⁰ In *Palisades*, the Commission explained that:

⁵ Letter from J. Todd Conner, Site Vice President, DTE Energy Co., to NRC, Fermi 2 License Renewal Application (April 24, 2014) (ADAMS Accession No. ML14121A532) (transmitting the LRA for Fermi 2). The LRA itself is available at ADAMS Package No. ML14121A554 (LRA). DTE submitted an administrative amendment to the LRA on June 5, 2014 (ADAMS Accession No. ML14156A237).

⁶ DTE Electric Company; Fermi 2, License renewal application; opportunity to request a hearing and to petition for leave to intervene, 79 Fed. Reg. 34,787 (June 18, 2014).

⁷ NRC Staff's Answer to Citizens' Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for Public Hearing (Sept. 12, 2014) (ADAMS Accession No. ML14255A495) (Staff Answer). DTE Electric Company Answer Opposing Petitions to Intervene and Requests for Hearing (Sept. 12, 2014) (ADAMS Accession No. 14255A474) (DTE Answer) (opposing both the CRAFT Petition and Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear (Aug. 18, 2014) (ADAMS Accession No. ML14230B040)).

⁸ CRAFT received an extension of time in which to file its Reply. See Order (Granting Request for Extension of Time) (Sept. 18, 2014) (unpublished) (ADAMS Accession No. ML14261A366).

⁹ 10 C.F.R. § 2.309(i)(2).

¹⁰ See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009) (*quoting Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria"); *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)

[i]t is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first present in the original petition or raised in the answers to it. New bases for [the] contention cannot be introduced in a reply brief . . . unless the petitioner meets the [Commission's] late-filing criteria^[11]

The Commission's pleading requirements form the cornerstone of its efforts to "avoid unnecessary delays and increase the efficiency of NRC adjudication,"¹² and ensure the fundamental fairness of its proceedings.¹³ As such, "[a]llowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims."¹⁴ Therefore, petitioners are precluded from using a reply to present entirely new bases or arguments in an attempt to "reinvigorate thinly supported contentions."¹⁵ Any such improper arguments and bases should be stricken.¹⁶

II. The New Arguments and Bases Raised for the First Time in CRAFT's Reply Should be Stricken

CRAFT's Reply contains several new arguments that do not focus narrowly on the legal or factual arguments first presented in the Petition or that were raised in the Staff Answer or DTE Answer. CRAFT does not address or meet the factors for the filing of new contentions after the deadline. Therefore, the following new arguments are impermissible and should be stricken.

("[Commission] rules do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions").

¹¹ *Palisades*, CLI-06-17, 63 NRC at 732.

¹² *LES*, CLI-04-35, 60 NRC at 622-23.

¹³ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁴ *Id.*

¹⁵ *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224 (2004).

¹⁶ 10 C.F.R. § 2.319. See, e.g., *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 376-77, 399-400, 407, 429 (2008).

A. New Environmental Justice Argument in Support of Proposed Contention 2

In its Petition, CRAFT's Proposed Contention 2 argued that the NRC had failed to provide adequate notification under the National Environmental Policy Act and the National Historic Preservation Act to various tribes, including the Walpole Island First Nation.¹⁷ Proposed Contention 2 stated that the Walpole Island First Nation would be negatively affected by the renewal of the Fermi 2 operating license due to airborne radiological or toxic chemical risks, waterborne radiological or toxic chemical risks, thermal pollution, and the effects of these on the tribe's hunting and fishing rights, especially with respect to the potential for the consumption of contaminated foods.¹⁸ However, CRAFT's Proposed Contention 2 did not point to or identify any deficiency in DTE's environmental report.¹⁹

The Staff opposed Proposed Contention 2 because it did not take issue with any specific portion of the application as is required by 10 C.F.R. § 2.309(f)(1)(vi).²⁰ In its Reply, CRAFT attempts to rectify this deficiency by stating that it takes issue with the following text from the LRA: "There are no location-dependent disproportionate impacts affecting minority and low-income populations. . . . Thus, no disproportionate impact on minority or low-income populations would occur from the proposed action of renewing the Fermi 2 OL."²¹ CRAFT then concludes that "Environmental Justice is an Applicable Category 2 Issue to Fermi 2 and its proposed continuing operations, and that seems to be the issue of law validating this contention."²²

¹⁷ Petition at 9-13.

¹⁸ Petition at 11-12. As relief, CRAFT requested that the tribes that allegedly did not receive adequate notice be granted sixty days to submit public comments and petitions to intervene. *Id.* at 12.

¹⁹ Petition at 12.

²⁰ Staff Answer at 21. *See also* DTE Answer at 27.

²¹ Reply at 21-22 (quoting LRA, Appendix E, at 4-60).

²² Reply at 22.

Because this Environmental Justice argument was not made in CRAFT's Petition, the Staff respectfully requests that it be stricken as shown in NRC Staff Attachment 1.

B. New Arguments by "Incorporating by Reference" Beyond Nuclear's Petition

CRAFT's Reply seeks to incorporate by reference and re-allege all of the arguments made in Beyond Nuclear's petition to intervene²³ in this proceeding and all "germane subsequent filings" to that petition.²⁴ This constitutes an impermissible attempt to add, after the deadline, new arguments to those proposed in CRAFT's Petition through a reply brief rather than through a 10 C.F.R. § 2.309(c) motion for leave to late-file new or amended contentions. Beyond Nuclear's Petition contained additional and substantively different arguments than those made in CRAFT's Petition. Consequently, CRAFT should not be permitted to incorporate those arguments in its Reply. The Staff respectfully requests that the text in CRAFT's Reply attempting to accomplish this be stricken as shown in NRC Staff Attachment 1.

C. New Algal Blooms Argument in Support of Proposed Contention 12

CRAFT's Proposed Contention 12 concerned algal blooms. In its Petition, CRAFT argued that DTE's environmental report failed to adequately analyze the extent that Fermi 2's operations contributed to the growth of toxic algal blooms.²⁵ The Staff opposed the admission of Proposed Contention 12 because CRAFT did not explain, with any degree of specificity, why DTE's existing analysis of algal blooms in its environmental report was insufficient as is required by 10 C.F.R. § 2.309(f)(1)(v)-(vi).²⁶

²³ Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance Of Southwestern Ontario and Beyond Nuclear (Aug.18, 2014) (ADAMS Accession No. ML14230B040) (Beyond Nuclear Petition).

²⁴ Reply at 30, 35, 36-37.

²⁵ Petition at 32-33.

²⁶ Staff Answer at 78. CRAFT maintained that the "exact and precise extent" to which Fermi 2 thermal discharges produce toxic algal blooms was "unknown and unanalyzed," Petition at 33, but did not state how DTE's analysis in the environmental report was insufficient or how it should be changed, other

In its Reply, CRAFT newly provides three reasons supporting the claim in its Petition that the environmental report's analysis of toxic algal blooms was insufficient. First, CRAFT argues that the environmental report is insufficient because it fails to examine whether the "year round thermal discharge from Fermi 2 of 45 million gallons water at temperatures 18 degrees (F) above ambient provides for algae bloom incubation conditions in the spring and algae bloom life extension in the fall."²⁷ CRAFT asserts that the environmental report should have considered whether the thermal pollution from Fermi 2 provides for a longer life cycle for the algal blooms which could have impacts from year to year.²⁸ Second, CRAFT maintains that the environmental report's discussion of harmful algal blooms relies on data from 2008 and 2011, and that its conclusion that the impact of algal blooms is small "misses the point that HABS [harmful algal blooms] are occurring now in real time and are having a devastating impact downstream."²⁹ Third, CRAFT provides a link to a different satellite image than the one referenced in its Petition, which it claims "shows a much exacerbated aglae [sic] bloom problem than is acknowledged in the [environmental report]," and demonstrates that the environmental report's conclusions based on 2008 and 2011 data no longer hold true today.³⁰

Because CRAFT did not raise these particular challenges to DTE's environmental report in its initial Petition, the Staff respectfully requests that these new arguments in support of Proposed Contention 12 be stricken as shown in NRC Staff Attachment 1.

than by providing a satellite image that purported to demonstrate algal bloom growth in the area surrounding Fermi 2.

²⁷ Reply at 51. While the Petition stated that Fermi 2 discharges 45 million gallons of water per day into Lake Erie at temperatures 18 degrees (F) above ambient lake temperatures and suggested that this may be an "accelerator and contributor" to harmful algal blooms, see Petition at 32, the Petition did not link this claim to DTE's environmental report. Instead, the Petition simply asserted, without reference, that the environmental report failed to consider "new and updated environmental and public health data" and failed to "adequately consider Mitigation Alternatives" *Id.*

²⁸ Reply at 51.

²⁹ *Id.* at 52.

³⁰ *Id.* at 50.

CONCLUSION

For the reasons set forth above, the Atomic Safety and Licensing Board should strike the portions of CRAFT's Reply identified in NRC Staff Attachment 1.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 2nd day of October, 2014

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF MOTION TO STRIKE PORTIONS OF CRAFT'S REPLY," dated October 2, 2014, and NRC Staff Attachment 1 have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 2nd day of October, 2014.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 2nd day of October, 2014