UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

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

CLI-15-18

MEMORANDUM AND ORDER

DTE Electric Company has appealed the Atomic Safety and Licensing Board's ruling in LBP-15-5, which admitted three contentions for hearing in this license renewal proceeding.[1] For the reasons set forth below, we reverse the Board's contention admissibility decision and direct the Board to terminate the proceeding.

I. BACKGROUND

On April 24, 2014, DTE Electric Company filed an application to renew the operating license for Fermi Nuclear Power Plant, Unit 2, for an additional twenty years.[2] Unit 2 is the only

[1] *Applicant's Notice of Appeal of LBP-15-5* (Mar. 3, 2015); *Applicant's Brief in Support of Appeal of LBP-15-5* (Mar. 3, 2015) (Appeal).

[2] *See* DTE Electric Company; Fermi 2, 79 Fed. Reg. 34,787 (June 18, 2014).

reactor currently in operation on the Fermi site. Its operating license expires on March 20, 2025.

The NRC Staff accepted DTE's license renewal application for review and published notice of its docketing decision in the *Federal Register*, along with an opportunity for interested persons to request a hearing on the application.[3] Three environmental groups—Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario, and Beyond Nuclear (collectively, Joint Petitioners)—together filed a request for hearing with four proposed contentions challenging DTE's application.[4] Another environmental group, Citizens Resistance at Fermi 2 (CRAFT), filed a separate request for hearing with fourteen proposed contentions.[5] DTE and the Staff opposed the requests for hearing; although they did not challenge the petitioners' standing, they argued that the petitioners had not raised an admissible contention.[6] After hearing oral argument on contention admissibility, the Board granted both hearing

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[3] *Id.*

[4] *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) (Joint Petitioners' Hearing Request).

[5] *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; corrected Sept. 3, 2014) (CRAFT Hearing Request).

[6] *DTE Electric Company Answer Opposing Petitions to Intervene and Requests for Hearing* (Sept. 12, 2014), at 1 (DTE Answer); *NRC Staff's Answer to Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear* (Sept. 12, 2014), at 1; *NRC Staff's Answer to Citizens' Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for Public Hearing* (Sept. 12, 2014), at 1. Joint Petitioners and CRAFT filed replies in support of their hearing requests. *Intervenors' Combined Reply in Support of Petition for Leave to Intervene and Request for Hearing of Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario and Beyond Nuclear* (Sept. 19, 2014); *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* (Sept. 19, 2014) (CRAFT Reply).

requests and admitted a portion of Joint Petitioners' Contention 4 and portions of CRAFT Contentions 2 and 8.[7] DTE's appeal followed.[8]

II. DISCUSSION

Our contention admissibility rules are designed to ensure that only focused, well supported issues are admitted for hearing. Contentions must be set forth with particularity and must meet all six contention admissibility factors.[9] For each contention, the petitioner shall:

> (1) provide a specific statement of the issue of law or fact to be raised or controverted;
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> (2) provide a brief explanation of its basis;
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> (3) demonstrate that the issue raised is within the scope of the proceeding;
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> (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (5) provide a concise statement of the alleged facts or expert opinions that support the 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 petitioner intends to rely to support its position on the issue; and
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> (6) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact, with 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

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[7] LBP-15-5, 81 NRC 249, 307-08 (2015). Judge Arnold provided a separate opinion explaining that he agreed with the Board's ruling except as to the admission of CRAFT Contention 2. *Id.* at 310-13 (Arnold, J., dissenting).

[8] Our rules provide an appeal as of right on the question whether a request for hearing should have been wholly denied. 10 C.F.R. § 2.311(d)(1). DTE's appeal falls squarely within this rule.

[9] *Id.* § 2.309(f)(1).

> required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[10]

We will defer to licensing board rulings on standing and contention admissibility absent error of law or abuse of discretion.[11]

DTE argues that the Board erred in admitting the petitioners' three contentions for hearing and asks us to reverse the Board's decision.[12] Joint Petitioners and CRAFT oppose DTE's appeal and urge us to affirm the Board's decision.[13] We find that the Board erred in admitting Joint Petitioners' Contention 4B and CRAFT Contentions 2 and 8. We address each contention in turn.[14]

A. Joint Petitioners' Contention 4B

In Contention 4, as originally proposed, Joint Petitioners asserted that DTE's license renewal application lacked a sufficient analysis of "mutually initiating/exacerbating radiological catastrophes" involving the transmission corridor between Fermi Unit 2 and the now-recently licensed, but as-yet unconstructed, Fermi Unit 3.[15] They asserted that the "cumulative impacts

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[10] *Id.* § 2.309(f)(1)(i)-(vi).

[11] *See, e.g.*, *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009).

[12] Appeal at 1.

[13] *Combined Answer Brief of Petitioners in Opposition to DTE Appeal of LBP-15-5* (Mar. 30, 2015), at 15.

[14] DTE does not challenge the Board's decision on either Joint Petitioners' or CRAFT's standing to intervene. *See* Appeal at 1.

[15] Joint Petitioners' Hearing Request at 35 ("Fermi 2 and Fermi 3's safety and environmental risks due to common mode failures, and the potential for mutually initiating/exacerbating radiological catastrophes[]involving the common Transmission Corridor (TC) shared by both units' reactors and pools, have been inadequately addressed in DTE's Fermi 2 License Renewal Application (LRA) and Environmental Report (ER). Also, the cumulative impacts associated with the proposed new Fermi 3 reactor cannot be excluded from DTE's Fermi 2 LRA and ER as 'remote' or 'speculative,' for it is DTE's own proposal, and is advanced in the Fermi 3

associated with" proposed Fermi Unit 3 and its anticipated common transmission corridor must be considered as part of the severe accident mitigation alternatives (SAMA) analysis prepared for the Fermi Unit 2 license renewal application.[16] Although SAMA analyses are conducted as part of the agency's environmental review under the National Environmental Policy Act (NEPA), Joint Petitioners' contention combined safety and environmental concerns, calling into question the ability of both units to survive a prolonged loss of power.[17]

In support of their contention, Joint Petitioners referenced, among other things, accounts of the March 11, 2011, Fukushima Dai-ichi nuclear accident in Japan.[18] Joint Petitioners also

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[combined license] proceeding. Such environmental and safety analysis is required on this unique local problem specific to Fermi 2 and 3. It can, and must, be dealt with in Severe Accident Mitigation Alternatives (SAMA) analyses, and must be treated as Category 2 Issues in NRC's forthcoming Draft Supplemental Environmental Impact Statement (DSEIS), as required by NEPA and the AEA."). Category 2 issues are environmental issues the agency considers on a site-specific basis under the National Environmental Policy Act (NEPA) for license renewal. Category 1 issues are those environmental issues that the agency has resolved generically and therefore does not consider in specific license renewal proceedings. 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1.

[16] *Id.* We require license renewal applicants to provide a consideration of alternatives to mitigate severe accidents in their license renewal application "[i]f the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment." 10 C.F.R. § 51.53(c)(3)(ii)(L). SAMA analyses are conducted for the purposes of the NRC's environmental review under NEPA; they are not safety analyses. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322 (2012) ("The SAMA analysis is a site-specific analysis focusing on potential additional mitigation measures that could be implemented to further reduce severe accident risk (probability or consequences). The analysis by practice has been a cost-benefit analysis, examining whether particular hardware or procedural changes may be cost-beneficial to implement, given the degree of risk reduction that reasonably could be expected from the change."). For a detailed discussion of the conduct of SAMA analyses in NRC license renewal proceedings, see *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39 (2012).

[17] *See* Joint Petitioners' Hearing Request at 40-43.

[18] *See id.* at 42-46.

listed a selection of DTE's SAMA candidates and asserted that the implementation costs for those SAMAs are "relatively low" and "minimal" compared to DTE's daily profits from electricity sales and the potential human and economic costs from an accident at Fermi Unit 2.[19]

The Board divided Contention 4 into two parts. Part "A" tracked the text of the contention as proposed in Joint Petitioners' hearing request and described above.[20] The Board found this portion of the contention inadmissible.[21] For part "B" of the contention, the Board extracted a portion of Joint Petitioners' reference to the Fukushima Dai-ichi accident, where, as part of its support for Contention 4 overall, Joint Petitioners hypothesized that an accident at Fermi Unit 2 or Fermi Unit 3 could lead to the evacuation of the entire Fermi site.[22] The Board observed that "a fission product release from Fermi 2 would adversely impact the operation of Fermi 3, thereby increasing the total costs resulting from a release from Unit 2" and reformulated the contention to read:

> The Fermi 2 Severe Accident Mitigation Alternatives analysis fails to evaluate the impact that a severe accident at Fermi 2 would have on the operation of the proposed nearby Fermi 3.[23]

The Board admitted the contention as reformulated.[24]

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[19] *Id.* at 53.

[20] LBP-15-5, 81 NRC at 268 (majority opinion).

[21] *Id.* at 270-72. Because the Board declined to admit part A, we do not discuss it further here.

[22] *Id.* at 272 (citing Joint Petitioners' Hearing Request at 38).

[23] *Id.* at 273.

[24] *Id.* at 277.

On appeal, DTE argues that Contention 4B should not have been admitted for several reasons.[25] But in what we find to be the strongest argument for reversal, DTE asserts that the Board improperly supplemented Joint Petitioners' claims to admit the contention.[26] DTE argues that the Board made the argument for Joint Petitioners that additional SAMA candidates could become cost-beneficial after factoring in the costs of any impacts to Fermi Unit 3 from an accident originating at Fermi Unit 2.[27] DTE also argues that the Board, "without any support or reference to the contention itself," hypothesized that it would be "genuinely plausible" for two particular SAMA candidates to more than triple in benefit relative to their cost, thus making them cost-beneficial.[28]

We agree that the Board erred in admitting Joint Petitioners' Contention 4B. Comparing Joint Petitioners' contention as originally proposed to the Board's formulation, we find that the arguments on which the Board relied in admitting Contention 4B originated with the Board rather

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[25] In particular, DTE asserts that Joint Petitioners "never claimed that DTE overlooked any potential SAMAs (cost-beneficial or otherwise) relevant to offsite or onsite power" and that they failed to challenge DTE's conclusion that the SAMA candidates evaluated in the Environmental Report were not cost-beneficial. Appeal at 5. In addition, DTE asserts that the contention fails to demonstrate a genuine dispute because Joint Petitioners did not explain how an accident at Unit 2 would impact Unit 3 and, in turn, the SAMA analysis in DTE's license renewal application. *Id.* at 7 & n.18. DTE also argues that "the premise underlying the contention is too speculative to meet the standards for admissibility" because the timing of the construction of Fermi Unit 3 is not settled. *Id.* at 6. Since the filing of DTE's appeal, the Staff has issued the combined license for Fermi Unit 3. *See DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-13, 81 NRC __, __ (Apr. 30, 2015) (slip op. at 51) (authorizing issuance of the combined license). Nevertheless, as DTE represented at the uncontested hearing on that application, the timing of construction is still uncertain. Transcript of Mandatory Hearing at 209-10 (attached as Appendix B to Order of the Secretary (Adopting Proposed Transcript Corrections and Admitting Post-Hearing Exhibits) (Mar. 9, 2015) (unpublished) (ADAMS accession no. ML15068A411)).

[26] Appeal at 8-10.

[27] *Id.* at 8.

[28] *Id.* at 9.

than Joint Petitioners. Although boards have some discretion to reformulate or narrow contentions "to eliminate extraneous issues or to consolidate issues for a more efficient proceeding," this authority is not without limit.[29] A licensing board, for example, may not supply information that is lacking in a contention that otherwise would be inadmissible.[30]

Here, the Board exceeded its authority when it reformulated Joint Petitioners' Contention 4B. The Board selected text from Joint Petitioners' discussion of Contention 4 that, similar to the evacuation contemplated during the Fukushima accident, "'[a] large-scale radioactivity release'" from the Fermi Unit 2 reactor or spent fuel pool or Fermi Unit 3 reactor or spent fuel pool "'could well lead to the evacuation of the entire Fermi nuclear power plant site—of the workforces for both plants, and even of emergency responders (such as firefighters, or military personnel) brought in from offsite to deal with a disaster.'"[31] But Joint Petitioners did not provide any nexus between this statement and any deficiencies in DTE's SAMA analysis, which would have been necessary to establish a genuine dispute for an admissible contention.[32] Rather, in context, the statement is provided as support for Joint Petitioners' argument that the transmission lines connecting the units to the grid, whether they are considered "offsite" or "onsite," could lead to a common accident scenario between Fermi Unit 2 and proposed Fermi Unit 3.[33] We find nothing in Joint Petitioners' hearing request that would justify making the evacuation issue a stand-alone contention.

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[29] *Crow Butte*, CLI-09-12, 69 NRC at 552-53 (internal quotation marks omitted).

[30] *Id.* at 552-53, 565-66.

[31] LBP-15-5, 81 NRC at 272 (quoting Joint Petitioners' Hearing Request at 38).

[32] *See* 10 C.F.R. § 2.309(f)(1)(vi); *Seabrook*, CLI-12-5, 75 NRC at 323-24.

[33] *See* Joint Petitioners' Hearing Request at 38. At oral argument, Joint Petitioners maintained that their contention related to the loss of offsite power along a shared transmission corridor.

As DTE points out, the Board itself supplied the reasoning that because an accident at Fermi Unit 2 would impact Fermi Unit 3, "DTE should have evaluated the adverse impacts on the operation of Fermi 3 as costs averted by SAMAs that would reduce the risk of a severe accident at Fermi 2 or the consequences of such an accident."[34] Then the Board, again on its own initiative, selected certain SAMA candidates whose implementation DTE had rejected because their costs outweighed their benefits.[35] The Board concluded that "[i]t is genuinely plausible, given the moderate costs of . . . [these SAMAs], that . . . the costs averted [from a fission product release at Fermi Unit 2] would increase to the point that one or both of those SAMAs would become cost-beneficial."[36] Although Joint Petitioners had listed these SAMAs in their hearing request as part of a larger list of candidates that they deemed related to their transmission-corridor/loss of power contention, they did not identify a specific deficiency in DTE's SAMA analysis or argue that such a deficiency, once corrected, would tip the balance in favor of finding the listed SAMAs cost-beneficial.[37]

Rather, Joint Petitioners asserted that the costs of the rejected SAMA candidates are minimal compared to DTE's daily profits from its electricity sales and the potential human and

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See Oral Argument Transcript at 84, 91 (Tr.). The evacuation issue was raised during Board questioning, but even then, Joint Petitioners linked the issue to the transmission corridor. *See id.* at 94-95, 98-99, 107, 113-15.

[34] LBP-15-5, 81 NRC at 273. Although the Board attributes this statement to Joint Petitioners, *see id.*, the Board does not reference Joint Petitioners' hearing request, nor do we find this argument in Joint Petitioners' contention.

[35] *Id.* at 277.

[36] *Id.*

[37] *See* Joint Petitioners' Hearing Request at 49-54.

economic costs from an accident at Fermi Unit 2.[38] But Joint Petitioners' conclusory statements do not amount to a challenge to the SAMA analysis.[39] First, with regard to the cost-benefit balance in the SAMA analysis, DTE's profits are immaterial. The cost of implementing a particular mitigation measure compared to the risk averted from its implementation is what determines whether a mitigation measure is cost-beneficial.[40] Second, Joint Petitioners must, at a minimum, provide "factual or expert basis for why the proposed changes in the analysis are warranted (e.g., why the inputs or methodology used is unreasonable, and the proposed changes or methodology would be more appropriate)," and their generalized reference to the potential human and economic costs from an accident at Fermi Unit 2 falls short of the support necessary for a SAMA contention.[41] Joint Petitioners did not engage, with any specificity, the economic consequences of an accident at Fermi Unit 2 already considered in DTE's SAMA analysis.[42] Therefore, Joint Petitioners' Contention 4B (were we to consider it a stand-alone contention without the Board's amplifications) failed to demonstrate a genuine dispute with the

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[38] *Id.* at 53.

[39] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 12 (2002) ("A conclusory statement that an envisioned SAMA 'would not pose a great challenge' is insufficient."); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 363 (finding that "highly generalized" arguments "do not come close to meeting our contention rule").

[40] *See Pilgrim*, CLI-12-15, 75 NRC at 706-07 ("By NRC practice to date, the SAMA analysis has been a quantitative cost-benefit analysis, assessing whether the cost of implementing a specific enhancement outweighs its benefit.").

[41] *Seabrook*, CLI-12-5, 75 NRC at 323-24.

[42] *See id.* at 323 ("We have long held that contentions admitted for litigation must point to a deficiency in the application, and not merely 'suggestions' of other ways an analysis could have been done, or other details that could have been included. SAMA adjudications would prove endless if hearings were triggered merely by suggested alternative inputs and methodologies that conceivably could alter the cost-benefit conclusions.").

SAMA analysis provided in DTE's Environmental Report.[43] Consequently, it should not have been admitted.

B. CRAFT Contention 2

We find that the Board also improperly supplemented the remaining contentions it admitted in LBP-15-5. In Contention 2, CRAFT questioned whether the Staff had adequately notified area Indian Tribes and First Nations, including the Walpole Island First Nation, of the license renewal proceeding for Fermi Unit 2.[44] Without this notice, CRAFT asserted, these Tribes and First Nations might not have been aware of the opportunity to request a hearing on DTE's license renewal application or the opportunity to participate in the scoping process for the Staff's environmental review.[45] CRAFT therefore requested that the Board require the Staff to "notify the tribes of their rights and opportunity [to request a hearing], and provide them at least

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[43] *See* 10 C.F.R. § 2.309(f)(1)(vi); *cf. Kansas Gas and Electric Co. and Kansas City Power and Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 577 (1975) ("In sum, we think the Board was wrong to strain to discern the outlines of any contention in a petition as amorphous as this one.").

[44] CRAFT Hearing Request at 9-10 ("While it appears that NRC notified a number of Native American tribes across Michigan, as far away as Wisconsin and even Oklahoma, about the environmental scoping public comment opportunity for the proposed extension of the Fermi 2 nuclear reactor license, it seems that NRC did not notify numerous Native American tribes, bands, and First Nations in the area of concern. Likewise, it is unclear that NRC adequately notified even the aforementioned tribes in Michigan, Wisconsin, and Oklahoma of their rights to intervene with contentions in that proceeding, in addition to their opportunity to provide public comments during the environmental scoping proceedings; it seems clear that the tribes, bands, and First Nations not notified of their environmental scoping public comment opportunity were also not informed of their right to intervene against extending Fermi 2's license. . . . [T]ribes cannot intervene . . . if NRC fails to inform them of the proceeding, and their opportunity and right to petition for leave to intervene and submit official contentions. Many tribal members had no idea their tribal governments were allowing the contamination of the lands they are guaranteed to hunt, fish, and gather food forevermore. These tribal members allow CRAFT to represent them in this proceeding.").

[45] *Id.* at 10.

sixty days in which to submit . . . contentions" and "at least sixty days to submit public comments" for the environmental scoping process.[46]

As DTE points out, the contention that the Board admitted in LBP-15-5 differed significantly from the one that CRAFT originally proposed.[47] Based on information that CRAFT raised for the first time in its reply—a letter from the Chief of the Walpole Island First Nation that cited its members' active fishing and harvesting of resources in close proximity to Fermi Unit 2 and CRAFT's statement that it disagreed with the environmental justice conclusions in DTE's Environmental Report[48]—the Board, with Judge Arnold dissenting, held that Contention 2 raised an admissible challenge to DTE's discussion of subsistence fishing in the Fermi site vicinity.[49] The Board also noted that CRAFT had included a preface for all of its contentions, which among other things, asserted that there were "'material deficiencies'" in DTE's license renewal

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[46] *Id.* at 12.

[47] *See* Appeal at 13-17.

[48] *See* CRAFT Reply at 21-23; Miskokomon, Dan, Chief, Walpole Island First Nation, letter to Allison M. Macfarlane, NRC (Sept. 22, 2014) (ML14265A490) (requesting "an opportunity to thoroughly review the license renewal process to ensure that . . . [the First Nation's] rights are protected") (Miskokomon Letter). The Staff filed a motion to strike portions of CRAFT's reply, including the new environmental justice issue in CRAFT Contention 2. *See NRC Staff Motion to Strike Portions of CRAFT's Reply* (Oct. 2, 2014), at 4-5, Attachment 1. DTE supported the Staff's motion; CRAFT opposed it, claiming that its new arguments fell within the scope of its original contention and DTE's and the Staff's answers. *DTE Electric Company Response in Support of NRC Staff Motion to Strike Portions of CRAFT's Reply* (Oct. 14, 2014), at 2; *CRAFT Reply to NRC Staff Motion to Strike* (Oct. 10, 2014), at 1-2. The Board denied the Staff's motion to strike CRAFT's environmental justice claim because it found that CRAFT's arguments "legitimately amplif[ied]" the "subsistence consumption" issue in CRAFT Contention 2. LBP-15-5, 81 NRC at 285. As discussed further below, however, we disagree with the Board's determination.

[49] LBP-15-5, 81 NRC at 280-82; *id.* at 310-13 (Arnold, J., dissenting). CRAFT also asserted at oral argument that its original contention, which asserted that the Walpole Island First Nation had been excluded from the proceeding, implied an environmental justice component. Tr. at 197.

application "'that could significantly jeopardize (impact) public health and safety.'"[50] According to the Board, this statement, along with an additional reference to the Walpole Island First Nation's consumption of food obtained near the Fermi site, supported the admission of a narrowed contention that asserted:

> The [Environmental Report] failed to consider whether members of the Walpole Island First Nation would be negatively affected by the renewal of the Fermi 2 operating license due to impacts on tribal hunting and fishing rights, especially with respect to the potential consumption of contaminated foods.[51]

We find that the Board in this instance improperly reformulated CRAFT Contention 2. The Board's decision turned CRAFT's "notification" contention, which requested relief in the form of additional time for the Walpole Island First Nation and other Tribes and First Nations in the vicinity of the Fermi site to propose contentions and to comment on the scoping for the Staff's environmental review, into a "subsistence consumption contention" that challenged the Environmental Report's consideration of impacts to the Walpole Island First Nation's food supply from the renewal of DTE's operating license for Unit 2. But CRAFT's statement of its contention, its requested relief, and the supporting statements, all pointed to a contention regarding the Staff's purported failure to notify area Tribes and First Nations of the license renewal proceeding—a claim that the Board dismissed as inadmissible.[52] We give some

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[50] LBP-15-5, 81 NRC at 280 (majority opinion) (quoting CRAFT Hearing Request at 3).

[51] *Id.* at 282. Judge Arnold disagreed with the Board's admission of Contention 2; in his view, the Board majority "crossed an ill-defined line and improperly assembled a contention from bits and pieces taken from . . . [CRAFT's hearing request and reply]." *Id.* at 310 (Arnold, J., dissenting).

[52] *Id.* at 279-80 (majority opinion). At oral argument, CRAFT reiterated that Contention 2 was focused on notification. *See* Tr. at 191-92. Moreover, in response to prompts during Board questioning, CRAFT did not raise a specific challenge to DTE's license application. *See id.* at 193-94 ("JUDGE SPRITZER: If we had such a hearing, what precise arguments would you present on behalf of your members who are also members of the Walpole Nation? MS. COLLINS: That their lives and livelihood are endangered, would be further endangered. That

leeway to pro se litigants in our adjudicatory proceedings, but even though CRAFT is not represented by counsel, the Board should not have read into CRAFT's petition a different challenge from the one CRAFT presented in Contention 2.[53]

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this is a violation of international law and international treaty rights. And that they need to be a full partner in the hearings, not just us, not just CRAFT representing a few of their members."). At oral argument CRAFT also indicated, in response to Board questioning, that the Walpole Island First Nation is aware of the *Fermi* license renewal proceeding. *Id.* at 192. In addition, the Staff referred to the letter it received from the Chief of the Walpole Island First Nation and explained that the Staff's response, among other things, provided background on the license renewal application review process and invited the Walpole Island First Nation to comment on the Staff's draft supplemental environmental impact statement. *Id.* at 204-05; *see also* Miskokomon Letter; Dean, William M., NRC, letter to Dan Miskokomon, Chief, Walpole Island First Nation (Oct. 31, 2014) (ML14295A239) (responding to Miskokomon Letter).

[53] *See South Carolina Electric & Gas Co. and South Carolina Public Service Authority (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 6 (2010); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (noting that although "a board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, . . . the board cannot do so by ignoring the [contention admissibility] requirements" and emphasizing that "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions"); *cf. Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) ("[T]he lenient treatment generally accorded to pro se litigants has limits."); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. . . . At the same time, we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant."). We are unpersuaded by the Board's determination that the preface to CRAFT's contentions provided the necessary context to establish a substantive component to Contention 2. LBP-15-5, 81 NRC at 286-88. This agency has long recognized that contentions must be pled with sufficient specificity to put opposing parties on notice of which claims they will actually have to defend. *Wolf Creek*, ALAB-279, 1 NRC at 576. The preface contained general and unparticularized references to "health and safety significance" and "material deficiencies" in the Environmental Report. Such statements would not satisfy our rule that contentions be pled with specificity. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 391 (2012). Therefore the material in the preface to CRAFT's contentions would not have put a reasonable participant on notice that despite Contention 2's repeated reference to inadequate notification, it also contained a substantive challenge regarding hunting and fishing rights.

The Board also improperly bolstered the admitted contention with CRAFT's argument made on reply concerning DTE's environmental justice discussion.[54] Although a petitioner may respond to the legal or logical arguments presented in the answers to its hearing request, a petitioner may not use its reply to raise new issues for the first time.[55] We require adherence to the deadlines and procedures in our rules so that the other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information.[56] For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier.[57]

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[54] The Board also held that as reformulated, "Contention 2 would remain viable even had [the Board] granted the Staff's motion to strike" because CRAFT's reference to environmental justice "merely amplified the subsistence consumption issue initially raised in Contention 2." LBP-15-5, 81 NRC at 286. As discussed above, however, the Board's reasoning is flawed because Contention 2, as originally proposed, did not raise a subsistence-consumption issue but instead focused on notice.

[55] *Crow Butte*, CLI-09-12, 69 NRC at 568; *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Louisiana Energy Services, L.P*. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

[56] *Cf. Wolf Creek*, ALAB-279, 1 NRC at 576 ("The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being [sought]."). That said, we recognize that certain contentions may be premature if raised at the outset of a proceeding, including, for example, contentions that challenge the Staff's consultation with affected Indian Tribes under the National Historic Preservation Act. *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 350-51 (2009) ("[W]hether and how the Staff fulfills its . . . [consultation] obligations are issues that could form the basis for a new contention . . . ."). Such a contention might appropriately be made in a timely fashion after the Staff issues its draft environmental impact statement. *See* 10 C.F.R. § 2.309(c); *Crow Butte*, CLI-09-9, 69 NRC at 351.

[57] *See, e.g.*, *Crow Butte*, CLI-09-12, 69 NRC at 548-49, 568-70.

Here, CRAFT's environmental justice concerns were not timely raised.[58] Therefore, the Board should have applied the standards in 10 C.F.R. § 2.309(c) to determine whether CRAFT had demonstrated good cause for its late filing.[59] The Board abused its discretion when it refocused CRAFT Contention 2 with the new material raised in CRAFT's reply. CRAFT Contention 2, as reformulated by the Board, is inadmissible.

C. CRAFT Contention 8

In Contention 8, CRAFT challenged several aspects of DTE's SAMA analysis, but the Board found support for, and admitted, a narrowed portion of the contention regarding the adequacy of DTE's population estimates for determining the economic cost of a severe accident at Fermi Unit 2.[60] CRAFT argued that "[p]roper inputs specific to the Fermi site indicate a far larger affected area—potentially including the densely populated centers of Metro Detroit

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[58] *Compare* CRAFT Hearing Request at 9-13, *with* CRAFT Reply at 21-23. Even were we to read CRAFT Contention 2 in the most favorable light, we do not agree that the environmental justice issue was implied by CRAFT's claim that the Walpole Island First Nation was excluded from the proceeding. *See* Tr. at 197. Our contention requirements require a level of specificity beyond mere "notice pleading." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003) (instructing that the contention pleading standards "require petitioners to plead specific grievances, not simply to provide general 'notice pleadings'"). CRAFT's original contention did not point to any specific grievance with the environmental justice discussion provided in DTE's Environmental Report. *See* CRAFT Hearing Request at 9-13. Nor did CRAFT articulate a "disproportionately high and adverse impact" to the Walpole Island First Nation. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-6, 81 NRC 340, 369, 371 (2015).

[59] *See Crow Butte*, CLI-09-12, 69 NRC at 568-69. In any event, based on our review of the record, this new claim would not have met the timeliness standards because CRAFT could have raised its environmental justice concerns when it filed its initial petition. *See* 10 C.F.R. § 2.309(c)(1); *Crow Butte*, CLI-09-12, 69 NRC at 568-69. In 2012, we consolidated our timeliness requirements in one section, section 2.309(c). Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012).

[60] *See* CRAFT Hearing Request at 25-28; LBP-15-5, 81 NRC at 297.

[(Michigan)], Ann Arbor [(Michigan)], Monroe [(Michigan)], Toledo [(Ohio)], and Windsor [(Ontario, Canada)]," which "would result in longer evacuation times and greater costs and consequences."[61] The Board understood "CRAFT to argue that these cities were excluded unreasonably from the SAMA analysis, leading DTE to 'drastically undercount[] the costs of a [s]evere [a]ccident.'"[62]

In its answer before the Board, DTE explained that the population within fifty miles of the Fermi site was considered in the SAMA analysis, "including Detroit, Ann Arbor, Monroe, and Toledo."[63] DTE also asserted at oral argument that its SAMA analysis "modeled the population within [fifty] miles irrespective of . . . whether that location was within the United States or Canada or the Walpole Island."[64] But because DTE did not specifically mention Windsor, Ontario in its answer or at oral argument, the Board concluded that CRAFT's concerns about the adequacy of DTE's population inputs were justified.[65] The Board also reviewed the Environmental Report and concluded that the document contradicted "DTE's assurances that Canadians living within [fifty] miles of Fermi 2 were included in the SAMA analysis."[66] In particular, the Board referenced a separate chapter of the Environmental Report that listed cities within a fifty-mile radius of the Fermi site with a population greater than 100,000 and noted the

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[61] CRAFT Hearing Request at 27.

[62] LBP-15-5, 81 NRC at 296 (first alteration in original).

[63] DTE Answer at 43.

[64] Tr. at 210.

[65] *See* LBP-15-5, 81 NRC at 297-98.

[66] *Id.* at 297.

absence of any Canadian cities on that list.[67] Comparing CRAFT's population argument to a contention that was admitted in the *Indian Point* license renewal proceeding, the *Fermi* Board concluded that CRAFT Contention 8 was "equally admissible" because it argued "that DTE failed to consider the costs and consequences of a severe accident on the population of Windsor in the SAMA analysis."[68] The Board reformulated the contention to state that:

> [t]he SAMA cost-benefit calculation is incorrect and thus inadequate because it did not properly account for the Canadian population within the [fifty]-mile affected area of a [s]evere [a]ccident.[69]

On appeal, DTE argues that the Board incorrectly assumed that the Canadian population was omitted from DTE's SAMA analysis.[70] DTE reiterates that its SAMA analysis accounted for the population within fifty miles of the Fermi site and emphasizes that it accounted for increases in population through tourism data from Michigan and Ohio in the United States, as well as Ontario, Canada, which, according to DTE, "establish[es] that the entire population within [fifty] miles of the site—including the Canadian population—was considered in the SAMA

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[67] *Id.* at 297-98.

[68] *Id.* at 298 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-10-13, 71 NRC 673, 686-87 (2010); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 112-13 (2008)). In *Indian Point*, the petitioner asserted that the applicant underestimated the population projections used in the SAMA analysis in part through failure to consider certain U.S. Census estimates and non-resident populations (tourists and commuters). *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 475-76 (2013). After the hearing, the *Indian Point* Board found reasonable the SAMA analysis's population projections in the Staff's supplemental environmental impact statement and resolved the contention in favor of the Staff. *See id.* at 484. As we discuss below, however, the Board's comparison of this contention with the contention admitted in *Indian Point* is inapposite because the Board inappropriately supplemented Contention 8.

[69] LBP-15-5, 81 NRC at 298.

[70] Appeal at 22.

analysis."[71] Because the contention incorrectly asserts that this information is omitted, DTE argues that CRAFT Contention 8 as reformulated by the Board fails to establish a genuine dispute with the license renewal application.[72] We find that CRAFT has not raised a genuine dispute with DTE's application and therefore the contention, as reformulated by the Board, is inadmissible.[73]

CRAFT did not identify any specific portion of the Environmental Report to support its claims regarding the treatment of the Canadian population in the SAMA analysis. Further, the Board improperly bolstered CRAFT's contention by referencing additional sections of the Environmental Report not cited by CRAFT to suggest that the SAMA analysis inappropriately discounted the Canadian population. Similar to our findings above with regard to Joint Petitioners' Contention 4B and CRAFT Contention 2, we find that the Board abused its discretion when it supplemented the support for CRAFT Contention 8 with additional references to the Environmental Report. Although our boards are expected to review the relevant documents to determine whether the arguments presented by the litigants are properly supported, the Board may not substitute its own support for a contention or make arguments for the litigants that were never made by the litigants themselves.[74] CRAFT Contention 8, as reformulated by the Board, is inadmissible.

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[71] *Id.* at 21-22.

[72] *Id.* at 22.

[73] *See* 10 C.F.R. § 2.309(f)(1)(vi).

[74] *See Crow Butte*, CLI-09-9, 69 NRC at 353-54 (reviewing the underlying support for a contention and noting that the board appropriately did not weigh the evidence, but rather "determine[d] whether the contention was supported and raised a genuine dispute material to, and within the scope of, the proceeding"); *Crow Butte*, CLI-09-12, 69 NRC at 565-71 (finding board error in the reformulation of contentions with arguments not originally raised by petitioners).

III. CONCLUSION

For the reasons set forth above, we *reverse* the Board's ruling in LBP-15-5 and *direct* the Board to terminate the proceeding.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

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Richard J. Laufer
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September, 2015.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DTE ELECTRIC COMPANY	)	Docket No. 50-341-LR
	)	
(Fermi 2)	)	
	)	
(License Renewal)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-15-18)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of September, 2015