

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

DTE ELECTRIC COMPANY ANSWER OPPOSING
CRAFT MOTION TO REOPEN AND PROPOSED NEW CONTENTION

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December 1, 2016

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INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.309(c), DTE Electric Company (“DTE”) answers both the motion to reopen and proposed new contention filed by CRAFT on November 21, 2016.¹ CRAFT seeks a hearing on a single contention challenging the adequacy of the Severe Accident Mitigation Alternatives (“SAMA”) analysis included in DTE’s Environmental Report (“ER”) for Fermi 2 license renewal. CRAFT alleges that DTE used incorrect SAMA analysis assumptions and inputs derived from the existing Fermi 2 Emergency Preparedness Plan “[t]o the extent that the Applicant’s SAMA analysis relies on the input assumption that the [Fermi 2 potassium iodide (“KI”)] distribution program is largely effective and adequately protective of public health.” New Contention at 8. CRAFT also claims in its Motion that the issues raised in the New Contention satisfy the Commission’s reopening standards.

¹ “Citizen’s Resistance At Fermi 2 (CRAFT)’s Consolidated Motion To Reopen The Record Of License Renewal Proceeding And To File A New Contention For Fermi Unit 2 Nuclear Power Plant” (“Motion”); “Citizens’ Resistance At Fermi 2 (CRAFT) Motion Requesting Leave To File A New Contention Based On New And Existing SAMA Considerations Of Potassium Iodide Distribution In The Primary EPZ And Secondary EPZ” (“New Contention”).

The Commission should deny the Motion. CRAFT's issue related to current implementation of the KI program is not within the scope of a license renewal review. CRAFT's proposed contention attempting to draw a nexus to the license renewal SAMA analysis does not raise a genuine dispute. The Fermi 2 SAMA analysis does not take credit for the KI program in the calculation of accident consequences, and therefore the implementation of the program does not impact the SAMA results. Moreover, CRAFT's contention is untimely. Any challenges to the adequacy of the SAMA analysis should have been filed based on the ER. There is no excuse for CRAFT's failure to raise this issue until the eleventh hour. Finally, the Commission also should deny the Motion because it fails to satisfy the stringent standards for reopening in 10 C.F.R. § 2.326.

BACKGROUND

On August 18, 2014, CRAFT filed a timely hearing request on the Fermi 2 license renewal application. CRAFT did not raise any issues related to distribution of KI as part of the Fermi 2 Emergency Plan. The Licensing Board initially admitted two of CRAFT's proposed contentions in a decision (LBP-15-05) dated February 6, 2015. However, on appeal, the Commission reversed the decision to admit CRAFT's contentions.² The proceeding was terminated on September 11, 2015. There is currently no pending adjudicatory proceeding for the Fermi 2 license renewal application.

On November 6, 2015, the NRC Staff published a draft plant-specific supplement, Supplement 56, to NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("License Renewal GEIS"), regarding the renewal of the Fermi 2 operating license for an additional 20 years of operation. CRAFT did not file proposed new

² See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, __ NRC __ (slip op. Sept. 8, 2015).

contentions following publication of the draft Supplemental Environmental Impact Statement (“SEIS”). The NRC Staff published the final SEIS on September 28, 2016. 81 Fed. Reg. 66700 (Sept. 28, 2016). CRAFT’s proposed new contention does not reference the final SEIS and is not based on any information in the final SEIS.

DISCUSSION

A. The Commission Should Deny the Hearing Request

1. *The Proposed Contention Is Inadmissible*

CRAFT offers only one contention. That proposed contention claims that DTE’s SAMA analysis errs by significantly underestimating the economic costs and consequences of a severe accident “[t]o the extent that the Applicant’s SAMA analysis relies on the input assumption that the KI distribution program is largely effective and adequately protective of public health.” New Contention at 8. CRAFT does not discuss or challenge the MACCS2 code’s embedded modeling or methodology. Instead, CRAFT alleges that information suggesting lower KI voucher use among Fermi 2 Emergency Planning Zone (“EPZ”) residences than previously reported means that the “consequences analysis provided by the Applicant may be wholly unreasonable and knowingly disingenuous.” *Id.* In other words, CRAFT argues that the SAMA model may underestimate the consequences of a severe accident if it relies on incorrect assumptions regarding KI availability to lower the impacts of an accident.

CRAFT’s proposed contention misses its mark. DTE’s SAMA analysis did not incorporate KI use into its dose consequence model. Nor did DTE give any credit for KI in calculating the consequences of a severe accident.³ Because incorporating KI into the model

³ See Attachment 1, Excerpt from *User’s Guide and Reference Manual for WinMACCS Version 3*, at 103 (noting that the parameter KIMODL determines whether consequence calculations consider KI ingestion and explaining that the value is set to KI if this is to be considered or NOKI if it is not to be considered); Attachment 2, DTE011-CALC-002,

would have reduced dose consequences, DTE's SAMA evaluation was conservative and bounding in this regard. Current voucher use therefore has no bearing on the SAMA analysis or license renewal. There is no genuine dispute with the SAMA analysis that would warrant admitting the proposed contention.

In reality, the proposed new contention questions the adequacy of the current Emergency Plan for Fermi 2 and its implementation, and therefore involves a matter outside the scope of a license renewal proceeding. The Commission has clearly stated that emergency planning issues are not within the scope of license renewal proceedings.⁴ CRAFT acknowledged as much in its proposed contention. New Contention at 7. The new contention therefore is not admissible.

2. *The Proposed Contention Is Untimely*

Apart from CRAFT's failure to present an admissible contention, the proposed contention is untimely.⁵ CRAFT's proposed new contention does not discuss or rely upon any

Fermi 2 WinMACCS Assessment of Severe Accident Consequences, Appendix A, at 32 (documenting that KIMODL is set to NOKI for the Fermi 2 model). The latter file was available to CRAFT at least as early as May 1, 2015. *See infra*, note 8.

⁴ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001). Emergency planning requirements are independent of license renewal and will continue to apply during the renewal term. They include provisions to ensure that a licensee's emergency plan remains adequate and continues to meet performance objectives, including through periodic reviews and emergency drills. *Id.* at 10. Emergency planning, therefore, is one of the safety issues that need not be re-examined within the context of license renewal.

⁵ A contention filed after the original deadline must meet the requirements of 10 C.F.R. § 2.309(c)(1)(i)-(iii), which require the petitioner to demonstrate 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.

new information in the final SEIS.⁶ Instead, the proposed contention challenges DTE’s original ER. Any contention alleging a deficiency with the SAMA analysis should have been filed at the outset of the proceeding.⁷

CRAFT attempts to cure its tardiness by referencing information obtained in a meeting with a Monroe County Emergency Management official on October 24, 2016. But no matter the most recent data on KI voucher use, CRAFT could have raised its fundamental concern with the SAMA analysis — an alleged reliance on KI availability to reduce the consequences in the SAMA analysis — based on the original ER. Indeed, multiple commenters raised KI distribution in comments on the draft SEIS. *See, e.g.*, FSEIS at A-330. Moreover, the sample WinMACCS input file for the Fermi 2 SAMA analysis described in note 3 was disclosed to CRAFT on May 1, 2015.⁸ Had CRAFT examined the available record at that time, as it was obliged to do under the NRC’s rules, it would have discovered that the Fermi 2 SAMA analysis did not take credit for KI distribution. CRAFT’s failure to review the information available to it in a timely manner in order to discern whether there was anything to its proposed contention only highlights that the contention is impermissibly late.

⁶ Had CRAFT based its contention on new or different information in the final SEIS, it still would have been untimely. The notice of availability of final SEIS was published in the *Federal Register* on September 28, 2016 — 54 days prior to CRAFT’s filing.

⁷ *See* 10 C.F.R. § 2.309(f)(2) (explaining that, for issues arising under NEPA, participants should file contentions based on the applicant’s ER).

⁸ *See* “Applicant’s Initial Disclosures,” dated May 1, 2015 (ADAMS Accession No. ML15121A863) at Attachment 1, page 3 (DTE00041).

B. The Commission Should Deny the Motion to Reopen

CRAFT’s new contention was accompanied by a Motion to Reopen.⁹ The Commission disfavors the filing of contentions “at the eleventh hour of an adjudication,” such as the proposed contention filed here.¹⁰ Indeed, the purpose of the reopening rule “is to raise the threshold — increase the showing necessary — for last-minute claims for additional hearings.”¹¹ For this reason, reopening an adjudicatory record is considered an “extraordinary action.”¹²

As the proponent of the Motion to Reopen, CRAFT has a heavy burden to bear and stringent criteria must be met.¹³ Any motion to reopen must satisfy the reopening criteria in 10 C.F.R. § 2.326 based on an affidavit accompanying the motion. The motion must be timely, must address a significant safety or environmental issue, and must demonstrate that a materially different result would be likely.¹⁴ CRAFT does not meet any of those criteria.¹⁵

⁹ Because the Fermi 2 proceeding was terminated after the Commission concluded that the petitioners’ had not proffered an admissible contention and before any evidence was taken, there is no record of the proceeding to “reopen.” Nevertheless, for completeness, DTE opposes the Motion for the reasons discussed herein.

¹⁰ *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337 (2011).

¹¹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 496 (2012).

¹² *Vermont Yankee*, CLI-11-2, at 338.

¹³ *Amergen Energy Company LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668, 675 (2008); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 25 (2006) (“Agencies need not reopen adjudicatory proceedings merely on a plea of new evidence.”).

¹⁴ 10 C.F.R. § 2.326(a).

¹⁵ In *Union Electric Company* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, ___ NRC ___ (April 23, 2015) (slip op. at 4 n.17), the Commission explained that where, as here, the proponent of a motion to reopen has not submitted an admissible contention, it necessarily has not satisfied the NRC’s reopening standards because it has not raised a

Here, the Motion was not timely for the reasons discussed above. Even if the motion had been filed in a timely manner, CRAFT still does not demonstrate any error in the ER, draft SEIS, or final SEIS that would warrant reopening of the record. CRAFT's assertion of a deficiency relies on its mistaken presumption that the Fermi 2 SAMA analysis took credit for KI distribution in the consequence analysis. And, nothing in the Motion suggests that reconsideration of the issue would lead to a different outcome. CRAFT did not show, or even attempt to show, that changes in assumptions regarding KI distribution would lead to identification of additional cost-beneficial SAMAs. Given the absence of any technical assessment of the consideration of KI in the SAMA analysis, CRAFT's Motion falls well short of the showing necessary to demonstrate that a materially different result would be likely had its concerns been addressed.

Finally, CRAFT ignores the requirement in 10 C.F.R. § 2.326(b) to support its Motion with affidavits addressing the reopening criteria, each of which "must be separately addressed, with a specific explanation of why it has been met." Although CRAFT claims that it did not need to submit such affidavits because the issues raised are "purely legal," the basis for its motion and contention is an alleged substantive deficiency in the ER's SAMA analysis based on KI voucher data and dose modeling.¹⁶ The issues therefore are primarily technical such that an affidavit by an expert in the disciplines appropriate to the issues raised was necessary.

significant environmental issue and has not demonstrated that a materially different result would be likely if the contention had been considered initially.

¹⁶ Motion at 4.

CRAFT's failure to satisfy 10 C.F.R. § 2.326(b) therefore provides a separate and independent basis for denying the motion.¹⁷

CONCLUSION

For the above reasons, CRAFT failed to submit an admissible contention and failed to satisfy the criteria for a Motion to Reopen. DTE did not credit KI in calculating the consequences of a severe accident as alleged in the contention. There is therefore no genuine dispute with the SAMA analysis that would warrant admitting the proposed contention or reopening the proceeding. Accordingly, the Commission should deny both the proposed new contention and the Motion.

Respectfully submitted,

/s/ signed electronically by
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Dated in Washington, D.C.
this 1st day of December 2016

¹⁷ See *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 222 (noting that a pleading “could have been rejected solely on the basis of the Appellants’ failure to comply fully with section 2.326(b)”).

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CERTIFICATE OF SERVICE

I certify that copies of the “DTE ELECTRIC COMPANY ANSWER OPPOSING CRAFT’S MOTION TO REOPEN AND PROPOSED NEW CONTENTION” has been served on this 1st day of December 2016 by Electronic Information Exchange, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

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Dated in Washington, D.C.
this 1st day of December 2016