

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 2)

Docket No. 50-341-LR

ASLBP No. 16-951-01-LR-BD01

January 10, 2017

MEMORANDUM AND ORDER
(Ruling on Motion to Reopen the Record and File a New Contention)

Before the Licensing Board is a motion to reopen the record and for leave to file a new contention (Motion to Reopen) filed by Citizens' Resistance at Fermi 2 (CRAFT).¹ Because CRAFT has failed to satisfy the Commission's stringent requirements for reopening a closed record, we deny the Motion to Reopen.

I. Background

This proceeding concerns the April 24, 2014 application of the DTE Electric Company (DTE) to renew its operating license for the Fermi Nuclear Power Plant, Unit 2 (Fermi 2) for an additional twenty years from the current expiration date of March 20, 2025.² The background of

¹ Corrected November 21, 2016 Filing: 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 (Nov. 25, 2016) [hereinafter Motion to Reopen].

² Letter from J. Todd Conner, Site Vice President, to Document Control Desk, NRC (Apr. 24, 2014) (ADAMS Accession No. ML14121A532).

the license renewal proceeding is set forth in more detail in an earlier licensing board order³ and an order of the Commission.⁴

In the initial license renewal adjudication, CRAFT proposed fourteen contentions.⁵ The licensing board concluded that CRAFT established representational standing⁶ and admitted two of CRAFT's contentions.⁷ On appeal, the Commission reversed the licensing board's contention admissibility decision and directed the board to terminate the adjudicatory proceeding,⁸ which the board did on September 11, 2015.⁹

CRAFT filed a motion to reopen the record and request to admit a new contention on November 21, 2016.¹⁰ It seeks to reopen the record to admit evidence it recently obtained concerning the distribution of potassium iodide (KI) tablets in the Fermi 2 Emergency Planning Zone (EPZ), which CRAFT argues shows that actual KI tablet distribution in the EPZ is lower than DTE assumed in its severe accident mitigation alternatives (SAMA) analysis.¹¹ CRAFT

³ See DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC 249, 254–55, rev'd, CLI-15-18, 82 NRC 135 (2015).

⁴ See DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 136–37 (2015).

⁵ Fermi, LBP-15-5, 81 NRC at 255.

⁶ Id. at 256–57. Because CRAFT has already established its standing we do not address that issue. See infra notes 27–29 and accompanying text.

⁷ Fermi, LBP-15-5, 81 NRC at 309.

⁸ Fermi, CLI-15-18, 82 NRC at 150.

⁹ DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), LBP-15-25, 82 NRC 161, 161 (2015).

¹⁰ 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 (Nov. 21, 2016). CRAFT submitted a corrected version of its November 21, 2016 motion on November 25, 2016. See supra note 1 and accompanying text.

¹¹ Motion to Reopen at 7.

seeks to admit a new contention because “the KI distribution program is factored and accounted for within [DTE]’s Fermi 2 SAMA analysis and . . . the data input assumes KI coverage is widespread and very effective within the 10-mile Fermi EPZ.”¹² CRAFT contends that DTE’s “SAMA analysis errs by significantly underestimating the economic costs and consequences of a severe accident.”¹³

The NRC’s Acting Secretary referred CRAFT’s Motion to Reopen to the Atomic Safety and Licensing Board Panel¹⁴ and this Board was established to preside over the adjudicatory proceeding on December 7, 2016.¹⁵

The NRC Staff and DTE filed answers opposing CRAFT’s Motion to Reopen.¹⁶ CRAFT filed a reply to the NRC Staff’s and DTE’s answers.¹⁷

II. Legal Standards

The legal standards for license renewal and SAMA analysis are set forth in an earlier licensing board order,¹⁸ and therefore need not be repeated here.

The requirements to reopen a closed adjudicatory proceeding are set forth in 10 C.F.R.

¹² Id. at 10.

¹³ Id. at 8.

¹⁴ Acting Secretary of the Commission Order (Dec. 6, 2016) at 1 (unpublished).

¹⁵ Establishment of Atomic Safety and Licensing Board (Dec. 7, 2016) (unpublished); see also 81 Fed. Reg. 90,388 (Dec. 14, 2016).

¹⁶ NRC Staff Answer to CRAFT’s Motion to Reopen the Record and Petition to Intervene (Dec. 1, 2016) [hereinafter NRC Staff Answer]; DTE Electric Company Answer Opposing CRAFT Motion to Reopen and Proposed New Contention (Dec. 1, 2016) [hereinafter DTE Answer].

¹⁷ CRAFT Combined Reply to DTE and NRC Staff Answers to CRAFT Consolidated Motions and Proposed New Contention (Dec. 8, 2016) [hereinafter Reply].

¹⁸ See Fermi, LBP-15-5, 81 NRC at 259–61.

§ 2.326. Pursuant to section 2.326(a), a motion to reopen must (1) be timely;¹⁹ (2) address a significant safety or environmental issue; and (3) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.²⁰ Pursuant to section 2.326(b), a motion to reopen must also be accompanied by “affidavits that set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) of this section have been satisfied.”²¹ Among other things, such affidavits “must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.”²² The Commission has stated that the “burden of satisfying the reopening requirements is a heavy one,’ and ‘proponents of a reopening motion bear the burden of meeting all of [the 10 C.F.R. § 2.326(a)–(b)] requirements.”²³

Pursuant to section 2.326(d), “[a] motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for

¹⁹ A discretionary exception is available if the motion presents “an exceptionally grave issue.” 10 C.F.R. § 2.326(a)(1).

²⁰ Id. § 2.326(a)(1)–(3).

²¹ Id. § 2.326(b).

²² Id.

²³ AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009) (quoting La. Power & Light Co. (Waterford Steam Elec. Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986) and Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-90-10, 32 NRC 218, 221 (1990)). Reopening the record is an “extraordinary” action. Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citing Final Rule: “Criteria for Reopening Records in Formal Licensing Proceedings,” 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)). According to the Commission, if the burden were not deliberately heavy, “‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings.” Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 554–55 (1978)).

new or amended contentions filed after the deadline in § 2.309(b).²⁴ Under this standard, good cause must be demonstrated by showing that: “(i) [t]he information upon which the filing is based was not previously available; (ii) [t]he information upon which the filing is based is materially different from information previously available; and (iii) [t]he filing has been submitted in a timely fashion based on the availability of the subsequent information.”²⁵ The Commission generally considers a contention based on new information to be timely if the contention is filed within thirty days of the new information’s availability.²⁶

A new contention filed by a party to or participant²⁷ in the proceeding must also satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f).²⁸ Because CRAFT previously satisfied the requirements for standing, it is not required to demonstrate standing again regarding its newly filed contention.²⁹

²⁴ 10 C.F.R. § 2.326(d).

²⁵ Id. § 2.309(c)(1)(i)–(iii).

²⁶ See S. Nuclear Operating Co. (Vogle Elec. Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 218 n.8 (2011). The first Fermi 2 Board provided that, in general, a proposed new, amended, or migrated contention would be timely under 10 C.F.R. § 2.309(c) if filed within thirty days of the date when the new and material information on which it is based first became available. Licensing Board Order (Initial Scheduling Order) (Feb. 27, 2015) at 3 (unpublished). With respect to new, amended, or migrated contentions based on new and material information in the NRC Staff’s supplemental environmental impact statement (SEIS), final SEIS (FSEIS), and safety evaluation report (SER) with open items, and final SER, the Board’s scheduling order provided that a proposed contention would be deemed timely under 10 C.F.R. § 2.309(c) if it is filed within sixty days of the date when the document containing the new and material information first becomes available. Id.

²⁷ Pursuant to 10 C.F.R. § 2.4, a “participant” is defined as “an individual or organization (including a governmental entity) that has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status by an Atomic Safety and Licensing Board or other presiding officer.”

²⁸ 10 C.F.R. § 2.309(c)(4).

²⁹ Id.

III. Discussion

The brunt of CRAFT's argument is that DTE's SAMA analysis is faulty for assuming that the distribution of KI tablets in the EPZ is widespread and effective, when in fact it is limited to only a small percentage of the population within the EPZ.³⁰ The NRC Staff and DTE responded by arguing that CRAFT's motion fails to satisfy all three of the criteria pursuant to 10 C.F.R. § 2.326(a), and is not supported with an affidavit, as required by 10 C.F.R. § 2.326(b).³¹ The Board concludes, as detailed below, that the motion fails to satisfy the criterion of section 2.326(a)(3), i.e., the motion fails to demonstrate that a materially different result would have been likely had the proffered evidence been considered initially. Thus, there is no need for the Board to decide whether the motion satisfies the other two criteria of section 2.326(a). The Board also concludes that the Motion to Reopen fails to satisfy the requirement of section 2.326(b) that the motion be supported by affidavit. For both these reasons, the Board denies the Motion to Reopen.³²

³⁰ Motion to Reopen at 8, 10.

³¹ See generally NRC Staff Answer at 8–17; DTE Answer at 3–8.

³² On or about December 15, 2016, after CRAFT filed its Motion to Reopen and this Board was established to rule on the Motion, the NRC Staff issued the renewed license for Fermi 2. See Letter from Lois M. James, Senior Project Manager, Division of License Renewal, Office of Nuclear Reactor Regulation, NRC, to Keith Polson, Site Vice President – Nuclear Generation, DTE Electric Company (Dec. 15, 2016) (ADAMS Accession No. ML16351A459). This raises the question whether the Motion to Reopen is rendered moot by the issuance of the license. In general, a case is dismissed as moot when effective relief cannot be granted because of subsequent events. See Tex. Utils. Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993). In this instance, although the renewed license has been issued, if the Board reopens the adjudication and rules in CRAFT's favor on the new contention, it could still grant effective relief by directing the Staff to correct the deficiency in the SAMA analysis. See Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC ____ (slip op.) (Dec. 23, 2016). Therefore, the Motion to Reopen is not moot.

A. Materially Different Result

In general, “[u]nless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions and models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis.”³³ Therefore, to satisfy section 2.326(a)(3), CRAFT must show that a materially different SAMA analysis would have been likely had its proffered new evidence been included in the analysis.

CRAFT’s argument that the Fermi 2 SAMA analysis would be materially altered by its new evidence depends on its premise that the analysis assumed that KI tablet distribution in the EPZ is widespread and effective.³⁴ CRAFT states that recently “Michigan Department of Community Health personnel . . . indicated that actual distribution of KI to persons living in the [EPZ] although reported as 5.2% in 2012 is now estimated to be 10 – 15% based on substantiation of redeemed vouchers and telephone surveys.”³⁵ Although the new estimate of actual KI tablet distribution is somewhat higher than the figure reported in 2012, CRAFT believes that even the 10–15% estimate may still be well below that assumed in the SAMA analysis. According to CRAFT, “[t]o the extent that [DTE]’s SAMA analysis relies on the input assumption that the KI distribution program is largely effective and adequately protective of public health, CRAFT contends that [DTE]’s SAMA analysis errs by significantly underestimating the economic costs and consequences of a severe accident.”³⁶ CRAFT argues that if “more appropriate and realistic inputs pertaining to KI coverage in the Fermi EPZ” were used in the

³³ Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323 (2012) (quoting Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 317 (2010)).

³⁴ See, e.g., Motion to Reopen at 8.

³⁵ Id.

³⁶ Id.

SAMA analysis, it “may change the cost-benefit conclusions for the SAMA candidates evaluated.”³⁷

The NRC Staff and DTE both counter that the premise of CRAFT’s argument is flawed because, in fact, the SAMA analysis assumed no distribution of KI tablets in the EPZ.³⁸ That is, the SAMA analysis conservatively assumed that the KI tablet distribution program is completely ineffective. Thus, they argue, CRAFT is mistaken in claiming that the SAMA analysis would be materially different if the analysis had assumed a distribution of KI tablets in the EPZ of 10–15%.³⁹

Documents from the relicensing proceeding confirm that the Fermi 2 SAMA analysis assumed a KI tablet distribution input of zero. The Fermi 2 Final Environmental Impact Statement (FSEIS),⁴⁰ the Draft Supplemental Environmental Impact Statement (DSEIS),⁴¹ and Appendix E of DTE’s License Renewal Application,⁴² which contains the SAMA analysis itself, state that the analysis was based on several models, including a computer code, MELCOR Accident Consequence Code System (MACCS2), version 3.7.0. One of the assumptions used

³⁷ Id. at 9.

³⁸ NRC Staff’s Answer at 13; DTE’s Answer at 3–4.

³⁹ See NRC Staff’s Answer at 13; DTE’s Answer at 3–4.

⁴⁰ Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 56, Regarding Fermi 2 Nuclear Power Plant, NUREG-1437 § 4.11.1.2 at 4-67 (Sept. 2016) (ADAMS Accession No. ML16259A103).

⁴¹ Office of Nuclear Reactor Regulation, General Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 56, Regarding Fermi 2 Nuclear Power Plant, Draft Report for Comment, NUREG-1437 § 4.11.1.2 at 4-67 (Oct. 2015) (ADAMS Accession No. ML15300A064).

⁴² Application for 2025 License Renewal Facility Operating License for DTE Electric Company, Fermi 2, app. E, at D-95 (Apr. 24, 2014) (ADAMS Accession No. ML14121A540).

in running the MACCS2 model was that the population of the EPZ received no KI tablets.⁴³ CRAFT has not pointed to any documents or other source of relevant information to suggest otherwise.

Given that the SAMA analysis assumed that KI tablet distribution in the EPZ would be completely ineffective, the Board concludes that reopening the record to admit evidence that KI tablet distribution in the EPZ reaches only 10–15% of the population would not lead to materially different cost-benefit conclusions for the SAMA candidates. Therefore, CRAFT has failed to satisfy the requirement of 10 C.F.R. § 2.326(a)(3) because it fails to demonstrate that a materially different result would have been likely had the proffered evidence been considered initially.⁴⁴

B. Affidavit

The Board further concludes that CRAFT has failed to meet its burden pursuant to 10 C.F.R. § 2.326(b) because it did not support its motion with an affidavit. CRAFT argues that it is not required to submit an affidavit because the basis for its motion is purely legal.⁴⁵ The basis for CRAFT's Motion to Reopen, however, is the newly-proffered data relating to KI tablet distribution in the EPZ. Thus, the Motion is based on purportedly new factual information.

⁴³ DTE Answer, attach. 1, Excerpt from User's Guide and Reference Manual for WinMACCS Version 3.7.0, at 103 (explaining that the parameter KIMODL determines whether consequence calculations consider KI ingestion and that the value is set to KI if this is to be considered or NOKI if it is not to be considered); DTE Answer, attach. 2, ENERCON, Fermi 2 WinMACCS Assessment of Severe Accident Consequences, app. A, at 32 (Sept. 30, 2013) (KIMODL was set to NOKI for the Fermi 2 model).

⁴⁴ Although CRAFT framed its motion in terms of a request to reopen the record and admit a new contention concerning DTE's SAMA analysis, its true concern appears to be with DTE's Emergency Planning efforts. See Motion to Reopen at 8–10; Reply at 3. Under 10 C.F.R. § 50.47(b)(10), nuclear power reactors must have a range of protective actions planned in the case of plume exposure in the EPZ, including the prophylactic use of KI, as appropriate. However, a challenge to the adequacy of DTE's Emergency Planning efforts is outside the scope of a relicensing proceeding. See 10 C.F.R. § 50.47(a)(1)(i).

⁴⁵ Motion to Reopen at 4.

Section 2.326(b) specifically requires an affidavit providing the factual and/or technical basis for the movant's claim that "the criteria of paragraph (a) of this section have been satisfied."⁴⁶

Given that CRAFT attached no affidavit addressing the criteria in section 2.326(a), the Board must deny its Motion to Reopen for this reason as well.

C. New Arguments in CRAFT's Reply

CRAFT changed its argument between its Motion to Reopen and its Reply. In the Motion to Reopen, CRAFT exclusively argued that DTE's SAMA analysis was faulty for assuming that KI tablet distribution was effective and widespread.⁴⁷ After DTE and the NRC Staff explained that the SAMA analysis assumed zero KI tablet distribution input, CRAFT argued in its Reply that the SAMA analysis was faulty for making that assumption.⁴⁸ The Board will not consider CRAFT's argument that the SAMA analysis was faulty for assuming that there is no distribution of KI tablets in the EPZ because this argument was not presented in its original motion.⁴⁹

In its Reply, CRAFT also claimed that it raised an environmental justice contention in its Motion to Reopen.⁵⁰ CRAFT argues that if the SAMA analysis reflected the actual KI tablet distribution in the EPZ, the SAMA analysis would highlight a disparity between KI tablet distribution in the United States' portion of the EPZ and the Canadian portion of the EPZ because Canada has a higher rate of KI tablet distribution due to a set of recently issued

⁴⁶ 10 C.F.R. § 2.326(b).

⁴⁷ See Motion to Reopen at 8, 10.

⁴⁸ Reply at 3.

⁴⁹ Cf. Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request.").

⁵⁰ Reply at 7.

regulations.⁵¹ However, CRAFT does not explain how this alleged disparity would change the SAMA analysis.⁵² The Motion to Reopen did not set forth a separate environmental justice contention, but rather claimed that “CRAFT’s new and material dispute with [DTE] extends to the environmental justice implications that a proper [Environmental Report] SAMA analysis would surely expose in a dramatic and undeniable fashion.”⁵³ Thus, CRAFT’s brief reference to environmental justice in its Motion to Reopen was solely as a potential implication of its proposed new contention concerning the adequacy of the SAMA analysis. Because CRAFT’s environmental justice argument would not materially alter the SAMA analysis, it does not change our conclusion that the Motion to Reopen must be denied.

IV. Conclusion

CRAFT’s Motion to Reopen is denied. This adjudicatory proceeding remains terminated. CRAFT may appeal this decision to the Commission, pursuant to 10 C.F.R. § 2.341, within twenty-five (25) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

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Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 10, 2017

⁵¹ Id. at 10.

⁵² See id.; 10 C.F.R. § 2.326(a)(3).

⁵³ Motion to Reopen at 10.

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 **MEMORANDUM AND ORDER (Ruling on Motion to Reopen the Record and File a New Contention) - LBP-17-01** have been served upon the following persons by Electronic Information Exchange.

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FERMI 2 (Docket No. 50-341-LR)

MEMORANDUM AND ORDER (Ruling on Motion to Reopen the Record and File a New Contention) – LBP-17-01

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

Dated at Rockville, Maryland,
this 10th day of January, 2017