

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) )

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DTE ELECTRIC COMPANY ANSWER  
OPPOSING CRAFT PETITION FOR REVIEW OF LBP-17-01

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February 28, 2017

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INTRODUCTION

In accordance with 10 C.F.R. § 2.341(b)(3), DTE Electric Company (“DTE”) responds to CRAFT’s Petition for Review<sup>1</sup> of the Licensing Board’s decision (LBP-17-01) denying CRAFT’s motion to reopen and rejecting a proposed new contention. The Board denied CRAFT’s motion because CRAFT failed to demonstrate that a materially different result would be likely had its proffered evidence been considered initially and also because CRAFT failed to support its motion with the required affidavit. LBP-17-01 at 6, citing 10 C.F.R. §§ 2.326(a)(3), (b). CRAFT does not dispute the Board’s findings with respect to the criteria for reopening a closed proceeding or the absence of the required affidavit, instead claiming that the Board’s ruling “relies primarily on procedural and technical arguments to counter the validity of the premise of CRAFT’s new contention.” Petition for Review at 2.

DTE opposes the Petition for Review. CRAFT fails to demonstrate a substantial question for review with respect to any of the considerations identified in 10 C.F.R. § 2.341(b)(4). CRAFT does not identify a clear error of fact, error of law, procedural error, or

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<sup>1</sup> “Citizen’s Resistance at Fermi 2 (CRAFT) Appeal to NRC Commission Decision Set Forth in LBP-17-01,” dated February 3, 2017 (“Petition for Review”).

abuse of discretion by the Board, or any other question or consideration that merits Commission review. The motion to reopen was correctly denied for at least two independent reasons. There was no need to reach the issue of the admissibility of the proposed contention.

### **STANDARD FOR REVIEW**

Under 10 C.F.R. § 2.341(b)(4), the Commission may, in its discretion, grant a petition for review, giving due weight to the existence of a “substantial question” with respect to the following considerations: (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (3) a substantial and important question of law, policy or discretion has been raised; (4) the conduct of the proceeding involved a prejudicial procedural error; or (5) any other consideration which the Commission may deem to be in the public interest. 10 C.F.R. § 2.341(b)(4)(i)-(v).

### **DISCUSSION**

CRAFT has not addressed with specificity any of the considerations set forth in Section 2.341(b)(4), submitting only that “carving out the vital issue of emergency preparedness from a license renewal proceeding is arbitrary and capricious” and maintaining that it “has raised a genuine material dispute with DTE’s license renewal application within the scope of review, and no party nor the presiding officer to date has yet refuted this basic notion.” Petition for Review at 2. Neither assertion provides grounds for granting the petition.

In its motion to reopen, CRAFT alleged that DTE’s Severe Accident Mitigation Alternatives (“SAMA”) analysis improperly assumed that the Fermi 2 potassium iodide (“KI”) distribution program was “largely effective and adequately protective of public health.” New Contention at 8. The Board, however, explained that DTE’s SAMA analysis conservatively ignored the benefits of KI tablet distribution in the Emergency Planning Zone (“EPZ”) and

therefore that reopening the record to admit evidence on tablet distribution would not lead to materially different cost-benefit conclusions for the SAMA candidates.<sup>2</sup> LBP-17-01 at 9. CRAFT does not point to any document or other information to suggest otherwise in its Petition for Review.

With respect to its assertion that the Board somehow improperly “carv[ed] out the vital issue of emergency preparedness from a license renewal proceeding,” CRAFT provides no support. To be sure, the Board did note in footnote 44 that CRAFT’s “true concern appears to be with DTE’s Emergency Planning efforts” and that “a challenge to the adequacy of DTE’s Emergency Planning efforts is outside the scope of a relicensing proceeding.” But this was not the basis for the Board’s decision to deny the motion to reopen. CRAFT therefore fails to demonstrate a substantial question for review with respect to the reasons given by the Board for its decision. And, in any event, the Board was correct that current emergency planning issues are outside the scope of license renewal.<sup>3</sup>

The Board also presented a second, independent basis for denying the motion to reopen. Because reopening an adjudicatory record is an “extraordinary action,” CRAFT must satisfy stringent criteria apart from the merits of its underlying concerns.<sup>4</sup> The Board denied CRAFT’s motion because CRAFT did not support its motion with an affidavit, as required by

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<sup>2</sup> Contrary to CRAFT’s assertion of a deficiency, the Fermi 2 SAMA analysis did not take credit for the KI program in the calculation of accident consequences. Implementation of the program (or not) therefore cannot impact SAMA results.

<sup>3</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001); *see also* 10 C.F.R. § 50.47(a)(1)(i).

<sup>4</sup> *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011); *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.”).

10 C.F.R. § 2.326(b). CRAFT nowhere addresses this aspect of the Board’s decision in its Petition for Review, other than by broadly noting that the Board relied “primarily on procedural and technical arguments to counter the validity of the premise.” However, a motion to reopen must clear certain procedural and technical thresholds under the rules of practice. Though CRAFT would have the Commission disregard its own regulations, the Board was correct that CRAFT’s failure to include an affidavit doomed the motion.

CONCLUSION

For the above reasons, CRAFT fails to demonstrate a substantial question for review with respect to any of the considerations identified in 10 C.F.R. § 2.341(b)(4). The Commission should deny CRAFT’s Petition for Review.

Respectfully submitted,

          /s/ signed electronically by            
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Dated in Washington, D.C.  
this 28th day of February 2017

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CERTIFICATE OF SERVICE

I certify that copies of the “DTE ELECTRIC COMPANY ANSWER OPPOSING CRAFT PETITION FOR REVIEW OF LBP-17-01” has been served on this 28th day of February 2017 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,

/s/ signed electronically by  
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Dated in Washington, D.C.  
this 28th day of February 2017