UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 50-341-LA
DTE ELECTRIC COMPANY,	)	
	)	April 3, 2020
(Fermi Nuclear Power Plant, Unit 2)	)	

APPLICANT'S ANSWER OPPOSING PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST FILED BY CITIZENS' RESISTANCE AT FERMI 2 (CRAFT)

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), DTE Electric Company ("DTE" or "Applicant") submits this Answer in opposition to the Petition of Citizens' Resistance at Fermi 2 ("CRAFT") for Leave to Intervene and for a Hearing filed on March 9, 2020 ("Petition").[1] CRAFT seeks to intervene in the proceeding associated with the DTE's September 5, 2019 license amendment request ("LAR" or "Application").[2] By way of background, the current operating license for Fermi Nuclear Power Plant, Unit 2 ("Fermi 2" or "Plant") contains a condition requiring DTE to remove and replace certain spent fuel racks in the Fermi 2 spent fuel pool ("SFP"). In the LAR, DTE requests the U.S. Nuclear Regulatory Commission ("NRC") to modify Fermi 2's license to

[1] Petition of Citizens' Resistance at Fermi 2 (CRAFT) for Leave to Intervene and for a Hearing on DTE's License Amendment Request to Invalidate a License Extention [sic] Condition by a License Amendment Request (Mar. 9, 2020) (ML20071G500) ("Petition"). The Petition package (ML20071G493) includes eight declarations: Declaration of Jessie Pauline Collins, an officer of CRAFT to file as *pro se* counsel (ML20071G510); Declaration of Alisa A. Barker (ML20071G526); Declaration of Pam Barker (ML20071G530); Declaration of Janet T. Cannon (ML20071G542); Declaration of Hedwig Kaufman (ML20071G523); Declaration of Martin R. Kaufman (ML20071G517); Declaration of Cass G. Olszta (ML20071G537); Declaration of Andrea Pierce (ML20071G534) (collectively, the "CRAFT Declarations").

[2] *See* NRC-19-0004, Letter from Paul Fessler, DTE, to NRC Document Control Desk, "License Amendment Request to Revise Technical Specifications to Utilize Neutron Absorbing Inserts in Criticality Safety Analysis for Fermi 2 Spent Fuel Storage Racks" (Sept. 5, 2019) (ML19248C679) ("LAR" or "Application").

remove that condition (and approve corollary changes to the Plant's technical specifications and criticality analysis) as part of an alternative plan to install neutron-absorbing inserts (*i.e.*, NETCO SNAP-IN® rack inserts) in the subject racks, rather than remove them.[3]

CRAFT's Petition seeks to intervene in the above-captioned proceeding and requests a hearing on the LAR. To grant the Petition, the Atomic Safety and Licensing Board ("Board") must find that CRAFT has both demonstrated standing and proffered at least one admissible contention.[4] However, as explained in detail below, CRAFT has done neither; thus, the Petition should be denied.

As to standing, CRAFT claims representative standing based on the proximity of seven of its "members" who live within a 50-mile radius of Fermi 2.[5] But CRAFT's claim to proximity-based standing cites an incorrect legal standard, as explained further below, that is only applicable to proceedings for the issuance of construction permits and initial or renewed licenses. The instant proceeding involves a license *amendment*. Under the correct standard, proximity-based standing is not available in this proceeding. And CRAFT makes no attempt to demonstrate traditional standing. Accordingly, it has not satisfied its affirmative obligation to demonstrate standing here, and its Petition should be rejected for this reason alone.

The Petition also purports to present eight contentions which, along with the supporting facts and arguments, are scattered throughout the Petition. As an initial matter, CRAFT broadly contends that the NRC cannot amend Fermi 2's license as requested in the LAR because the requested change involves a license condition. But as explained below, this line of argument

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3 *Id.* at 1-2; *see also id.*, Encl. 1, "Evaluation of the Proposed License Amendment" at 3-6.

4 *See* 10 C.F.R. § 2.309(a).

5 Petition at 5-6. *See also* Craft Declarations.

contradicts and improperly challenges the Atomic Energy Act of 1954, as amended ("AEA") and therefore is inadmissible as a contention. CRAFT's eight proposed contentions fare no better. For example, Proposed Contentions 1 through 7 purport to challenge the NRC Staff's proposed No Significant Hazards Consideration ("NSHC") determination.[6] NRC regulations explicitly forbid such challenges in an adjudicatory proceeding.[7] Even if challenges to the NSHC were not barred, these contentions also raise various unsupported challenges that are beyond the scope of, or immaterial to, this proceeding and fail to dispute the LAR itself. Finally, Proposed Contention 8 claims that DTE's LAR is "part of an ongoing pattern of irresponsible and dangerous decisions" that could cause "catastrophic impacts."[8] As explained below, these reckless and meritless claims do not remotely satisfy the admissibility criteria in 10 C.F.R. § 2.309(f)(1). Thus, because CRAFT has not submitted a single admissible contention, the Petition must be denied for this additional reason.

II. BACKGROUND AND LEGAL STANDARDS

A. The LAR

Fermi 2 uses two types of high-density storage racks in its SFP. The first uses Boraflex as the neutron absorbing material; the second uses Boral as the neutron absorber.[9] In the Boraflex racks, the Boraflex material is sandwiched between the stainless steel sheets comprising the rack.[10] In 2001, the NRC approved[11] DTE's request for License Amendment No. 141,

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6 Petition at 9-11.

7 10 C.F.R. § 50.58(b)(6).

8 Petition at 17.

9 LAR, Encl. 1 at 3.

10 LAR, Encl. 1 at 7; *id*, Encl. 5 at 16 fig.6.

11 *See* Letter from J. Lamb, NRC, to W. O'Connor, Jr., DTE, "Fermi 2 – Issuance of Amendment re: Spent Fuel Pool Rerack (TAC No. MA7233)" (Jan. 25, 2001) (ML010310205) ("LA 141 Issuance").

allowing (but not requiring) replacement of the Boraflex racks with Boral racks for the purpose of increasing the capacity of the SFP.[12] This replacement was planned to occur over three campaigns, the first two of which were completed in 2001 and 2007. The third campaign, however, has not been implemented.

After License Amendment No. 141 was issued, the NRC and the industry accumulated operating experience indicating that Boraflex degradation may present challenges to licensee satisfaction of SFP subcriticality requirements in NRC regulations and plant technical specifications.[13] Accordingly, during the Fermi 2 license renewal process, DTE committed to implementing the rack replacement approved in License Amendment No. 141 (*i.e.*, making it mandatory, not optional) "so that the current Boraflex panels in the spent fuel pool will not be required to perform a neutron absorption function during the period of extended operation."[14] DTE's commitment also noted that, "[i]f, based on further analyses and subject to any necessary NRC approvals, DTE identifies an alternative to implementation of the rack replacement approved in Amendment No. 141 that can be completed in a timely manner, this commitment will be revised accordingly."[15] In December 2016, the NRC issued Renewed Facility Operating License NPF-43 with a License Condition that DTE "fully implement the Boraflex rack

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12 *See* LA 141 Issuance, Encl. 2, "Safety Evaluation" § 2.0.

13 *See, e.g.*, NRC Generic Letter 2016-01, "Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools" (Apr. 7, 2016) (ML16097A169).

14 NRC-15-0081, Letter from V. Kaminskas, DTE, to NRC Document Control Desk, "Fermi 2 License Renewal Application Update for the Boraflex Monitoring Program" at 2 (Sept. 24, 2015) (ML15268A454) ("Boraflex Commitment Letter").

15 *Id*.

replacement … so that the Boraflex material in the spent fuel pool will not be required to perform a neutron absorption function."[16]

In the LAR, DTE proposes "an alternative to implementation of the rack replacement approved in Amendment No. 141," as contemplated in its original license renewal commitment.[17] More specifically, DTE proposes to use neutron-absorbing inserts (*i.e.*, NETCO SNAP-IN® rack inserts) to perform the neutron absorption function in the racks containing Boraflex. The inserts are installed in the existing Boraflex racks, within each spent fuel "cell" in the rack (*i.e.*, between the stainless steel sheet and the cell area in which the spent fuel assemblies are placed).[18] Even though the Boraflex is still sandwiched between the stainless steel, after the inserts are installed, the Boraflex will no longer be credited as a neutron absorber in the criticality safety analysis.[19] The LAR, if approved, would thus eliminate the need to remove and replace the remaining Boraflex racks, yet still meet the intent of the current License Condition.[20] In addition to being more economically efficient, this alternative approach entails significantly less occupational radiation dose, and less radiological waste (*i.e.*, the old racks), as compared to full rack removal and replacement.[21]

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16 DTE Elec. Co., Docket No. 50-341, Fermi-2, Renewed Facility Operating License, Renewed License No. NPF-43 at 8 (Dec. 15, 2016) (ML053060228).

17 Boraflex Commitment Letter at 2.

18 LAR, Encl. 1 at 8-9.

19 *Id.* at 4-5.

20 *Id.* at 5.

21 *See* Slides, Curtiss-Wright, Nuclear Division, "NETCO SNAP-IN® Rack Inserts: Neutron Absorber Panels for Fermi Boraflex Spent Fuel Racks" at 12 (June 27, 2018) (ML18177A208) ("Curtiss-Wright Slides").

B. Legal Standards for License Amendments

The AEA and NRC regulations permit licensees to seek amendments of their existing licenses.[22] In reviewing license amendment requests, the NRC is guided by the same considerations which govern the issuance of such licenses.[23] Section 189a.(2) of the AEA also grants the NRC authority to issue and make immediately effective any amendment to an operating license "upon a determination by the Commission that such amendment involves no significant hazards consideration."[24] To support an NSHC determination, the proposed amendment must satisfy the following three criteria. It must not:

> (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
>
> (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
>
> (3) Involve a significant reduction in a margin of safety.[25]

NRC regulations at 10 C.F.R. § 50.58(b)(6) explain that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission."[26] Section 50.58(b)(6) has long been held to be a jurisdictional bar to intervenor challenges regarding NSHC determinations.[27] Thus, the Staff's NSHC determination is not subject to challenge in an adjudicatory proceeding.

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22 10 C.F.R. § 50.90.

23 10 C.F.R. § 50.92(a).

24 42 U.S.C. § 2239(a)(2)(A).

25 10 C.F.R. § 50.92(c).

26 10 C.F.R. § 50.58(b)(6).

27 *See, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (holding that intervenor challenges to NSHC determinations will be summarily rejected: "Our regulations provide that '[n]o petition or other request for review of or hearing on the staff's no significant hazards consideration determination will be entertained by the Commission.' . . . The regulations are quite clear in this regard.") (quoting 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990) ("The issue of whether the proposed amendment does or

C. Procedural History

DTE filed the LAR on September 5, 2019. The NRC published a notice in the *Federal Register* informing the public that it proposes to determine that the LAR involves no significant hazards considerations, providing an opportunity for the public to submit written comments on the NRC Staff's NSHC determination, and offering an opportunity for persons whose interests may be affected by the license amendment to file (within 60 days of the notice) hearing requests and intervention petitions ("Hearing Opportunity Notice").[28] The Hearing Opportunity Notice also contemplated that potential parties may need access to the Sensitive Unclassified Non-Safeguards Information ("SUNSI") and Safeguards Information ("SGI") in the LAR for contention drafting purposes. Thus, it directed those potential parties to request access from the NRC.[29] CRAFT requested access to SUNSI and SGI on January 16, 2020, and the NRC Staff denied CRAFT's request on January 27, 2020.[30] No timely challenge of that denial was filed.[31] CRAFT filed its Petition on March 9, 2020. DTE timely files this Answer opposing the Petition in accordance with the provisions of 10 C.F.R. § 2.309(i)(1).

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does not involve a significant hazards consideration is not litigable in any hearing") (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 6 n.3 (1986), *rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 495-96 (1989).

28 Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 85 Fed. Reg. 728, 729-30 (Jan. 7, 2020) ("Hearing Opportunity Notice").

29 *Id*. at 735.

30 *See* NRC Staff Response to Request for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information Related to a License Amendment Request for Fermi 2 (Jan. 27, 2020) (ML20027B877).

31 Hearing Opportunity Notice, 85 Fed. Reg. at 737 ("The requestor may challenge the NRC staff's adverse determination with respect to access to SUNSI or with respect to standing or need to know for SGI by filing a challenge within 5 days of receipt of that determination.").

D. Legal Standards For Standing

To determine whether a petitioner presents a cognizable interest to intervene in a proceeding, the Commission applies contemporaneous judicial concepts of standing.[32] The petitioner bears the burden to provide facts sufficient to establish standing.[33] As relevant here, a petitioner may satisfy that burden in one of three ways.

1. Traditional Standing Requirements

First, a petitioner may show traditional standing. This requires a showing that a person or organization has suffered or might suffer a concrete and particularized injury that is: (1) fairly traceable to the challenged action; (2) likely redressable by a favorable decision; and (3) arguably within the zone of interests protected by the governing statutes—here, the AEA.[34] These criteria are known as injury-in-fact, causality, and redressability.

2. Proximity-Based Standing

Second, in certain limited NRC proceedings, a petitioner may use the proximity presumptions the Commission has created to simplify standing requirements for individuals who reside within, or have frequent contacts with, a geographic zone of potential harm. In proceedings that involve *construction or operation* of a nuclear power plant, the zone is considered to be the area within a 50-mile radius of the site. In such proceedings, "proximity" standing rests on the presumption that an accident associated with the nuclear facility (i.e.,

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[32] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015) (citation omitted).

[33] *See U.S. Enrichment Corp*. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 98 (2000)).

[34] *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

reactor) could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility.[35]

The NRC has held that the proximity presumption may be sufficient to confer standing on an individual or group in Part 50 proceedings involving reactor "construction permits, operating licenses, or *significant* license amendments thereto," such as those involving a physical expansion of the facility[36] or extended power uprates.[37] As the Commission has noted, "those cases involve[] the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences."[38] To establish proximity standing, a petitioner must provide "*fact-specific standing allegations*, not conclusory assertions," as the Commission "cannot find the requisite 'interest' based on . . . general assertions of proximity."[39]

Yet the Commission has held that in a license amendment case such as this one, "a petitioner cannot base his or her standing simply upon a residence or visits near the plant, unless the proposed action quite 'obvious[ly]' entails an increased potential for offsite consequences."[40] In such a case, "[w]hether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the

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35 *Id.* (citations omitted).

36 *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989) (citations omitted) (emphasis added).

37 *See, e.g.*, *Tenn. Valley Auth.* (Browns Ferry Nuclear Plant Units 1, 2, & 3), LBP-16-11, 84 NRC 139, 144 n.26 (2016), *aff'd on other grounds*, CLI-17-5, 85 NRC 87, 94 & 90 n. 17 (2017).

38 *St. Lucie*, 30 NRC at 329-30.

39 *Consumers Energy Co*. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 410 (2007) (emphasis added).

40 *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 191 (1999) (rejecting proximity presumption argument in license amendment proceeding due to plant's shutdown and defueled status) (alteration in original) (citation omitted).

significance of the radioactive source."[41] In other words, "a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility."[42] The petitioner "cannot seek to obtain standing . . . simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences."[43]

3. Representational Standing

Finally, like CRAFT here, an organization may seek to establish representational standing based on the standing of one or more individual members. To establish representational standing, an organization must: (1) show that the interests it seeks to protect are germane to its own purpose; (2) identify at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested require an individual member's participation in the organization's legal action.[44]

E. Legal Standards For Contention Admissibility

Petitions to intervene must "set forth with particularity" the contentions a petitioner seeks to have litigated in a hearing.[45] The requirements for an admissible contention are set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi) and also described in the Hearing Opportunity Notice.[46] Failure to

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41 *Ga. Inst. of Tech.* (Ga. Tech. Research Reactor), CLI-95-12, 42 NRC 111, 116-17 (1995).

42 *Zion*, CLI-99-4, 49 NRC at 188 (emphasis in original) (citations omitted); *see also St. Lucie*, CLI-89-21, 30 NRC at 329-30 ("Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific 'injury in fact' that will result from the action taken").

43 *Zion*, CLI-99-4, 49 NRC at 192.

44 *Palisades*, CLI-07-18, 65 NRC at 409 (citation omitted).

45 *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-8, 81 NRC 500, 503-04 (2015) (quoting 10 C.F.R. § 2.309(f)(1)); *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 74 (2017) (same).

46 *See* Hearing Opportunity Notice, 85 Fed. Reg. at 730.

comply with any one of the six admissibility requirements in Section 2.309(f)(1) is grounds for rejecting a proposed contention.[47]

The Commission's contention admissibility requirements are "strict by design."[48] They seek "to ensure that NRC hearings 'serve the purpose for which they are intended: to adjudicate *genuine, substantive safety and environmental issues* placed in contention by qualified intervenors.'"[49] The requirements thus reflect a "deliberate effort to prevent the major adjudicatory delays caused in the past by ill-defined or poorly supported contentions that were admitted for hearing although 'based on little more than speculation.'"[50] To warrant an adjudicatory hearing, proposed contentions thus must have "some reasonably specific factual or legal basis."[51]

The petitioner alone bears the burden to meet the standards of contention admissibility.[52] Thus, where a petitioner neglects to provide the requisite support for its contentions, the presiding officer may not cure the deficiency by supplying the information that is lacking or making factual assumptions that favor the petitioner to fill the gap.[53] A contention that merely

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47 *See* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

48 *Dominion Nuclear Conn., Inc*. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

49 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999)) (emphasis added) (citation omitted).

50 *Susquehanna*, CLI-15-8, 81 NRC at 504 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

51 *Id.* (quoting *Millstone*, CLI-03-14, 58 NRC at 213).

52 *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015) ("[I]t is Petitioners' responsibility . . . to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission.") (citation omitted).

53 *See id.* at 329; *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 (2015); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), CLI-91-12, 34 NRC 149, 155 (1991) (citation omitted).

states a conclusion, without reasonably explaining why the application is inadequate, cannot provide a basis for the contention.[54]

Under 10 C.F.R. § 2.309(f)(1), a petitioner must explain the basis for each proffered contention by stating alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely in litigating the contention at hearing.[55] To be admissible, the issue raised must fall within the scope of the proceeding and be material to the findings that the NRC must make related to the application.[56] A "material issue" is one that would "make a difference in the outcome of the licensing proceeding."[57] "[T]he petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application."[58]

Contentions that challenge NRC regulations,[59] seek to impose requirements stricter than those imposed by the agency,[60] or opine on how Staff should conduct its review[61] are all outside the scope of NRC adjudicatory proceedings. A contention also must provide sufficient

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54 *See USEC Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

55 10 C.F.R. § 2.309(f)(1)(ii), (v).

56 10 C.F.R. § 2.309(f)(1)(iii)-(iv); *Susquehanna*, CLI-17-4, 85 NRC at 74 (citing the regulation).

57 *Oconee*, CLI-99-11, 49 NRC at 333-34 (citation omitted).

58 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 62 (2008).

59 10 C.F.R. § 2.335(a).

60 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-15-4, 81 NRC 156, 167 (2015); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 (2012); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 206 (2000); *Curators of the Univ. of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 170 (1995).

61 *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 25 (2001) (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 350 (1998), *aff'd sub nom Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied,* 531 U.S. 1070 (2001)) ("'[I]t is the license application, not the NRC Staff review, that is at issue in our adjudications.'").

information to show a genuine dispute with the application on a material issue of law or fact.[62] The contention must refer to the "specific portions of the application . . . that the petitioner disputes," along with the "supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure, and provide supporting reasons for the petitioner's belief."[63]

III. CRAFT HAS NOT ESTABLISHED STANDING

CRAFT seeks representational standing on behalf of its "members"[64] and relies solely on proximity to Fermi 2 as a purported basis for standing.[65] More specifically, CRAFT submitted several declarations from individuals who claim residence within a 50-mile radius of Fermi 2, and asserts these individuals "have presumptive standing by virtue of their proximity to [Fermi 2]."[66] In support of this assertion, CRAFT cites a licensing board decision in the *Diablo Canyon* Independent Spent Fuel Storage Installation proceeding explaining that "petitioners who live within 50 miles of a proposed nuclear power plant are presumed to have standing in reactor construction permit and operating license cases."[67] The quoted standard is inapplicable here

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62 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 NRC at 74.

63 *Susquehanna*, CLI-17-4, 85 NRC at 74 (quoting and citing 10 C.F.R. § 2.309(f)(1)(vi)).

64 According to a recent article, "CRAFT does not have formal members," but has 500 Facebook followers and "distributes its newsletter to about 1,500 people." Blake Bacho, *NRC Holds Open House About Fermi, Protest Takes Place*, THE MONROE NEWS (May 1, 2019), https://www.monroenews.com/news/20190501/nrc-holds-open-house-about-fermi-protest-takes-place (emphasis added). Thus, it is not even clear that CRAFT qualifies for representational standing. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 530-31 (1991) ("representational standing . . . hinges upon the organization having a *member* to represent." (emphasis in original)).

65 The Petition is unclear as to whether CRAFT seeks organizational standing on its own behalf. Nevertheless, to the extent it does, its proximity-based claim fails for the same reasons discussed herein.

66 Petition at 5.

67 *Id.* at 5-6 (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426-427 (2002), in turn citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001)).

because the instant proceeding is *not* a "reactor construction permit [or] operating license case." Rather, it is a license *amendment* proceeding. Accordingly, as the *Diablo Canyon* board went on to explain, the question of whether the proximity presumption even *applies* to this proceeding hinges on a petitioner's affirmative demonstration of the existence of an "obvious potential for offsite consequences."[68]

A. CRAFT Has Not Demonstrated an "Obvious Potential for Offsite Consequences"

As noted above, CRAFT cited the wrong standard for proximity-based standing in a license amendment proceeding. More importantly, it made *no attempt* to satisfy the correct standard—and it failed even to plead some mechanism by which adding neutron absorbers would increase the risk of offsite harm. Thus, at the most basic level, the Petition fails to satisfy CRAFT's *affirmative burden* to demonstrate standing.[69]

Even reading the Petition's standing discussion in a light most favorable to CRAFT, its assertions fail to satisfy the applicable standard. More specifically, the only discernable assertion of offsite consequences in CRAFT's standing discussion alleges that "add[ing] additional materials into an over-crowded SPF [sic] . . . endanger[s] all life within a 50-mile radius."[70] But as explained further below in the context of CRAFT's proposed contentions: (1) the LAR does not seek approval to add "additional materials" to the SFP; (2) the physical capacity of the Fermi 2 SFP is *well below* its licensed design capacity; and (3) the LAR does not

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68 *Diablo Canyon*, LBP-02-23, 56 NRC at 427 (citing *Turkey Point*, LBP-01-6, 53 NRC at 148 (quoting *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994))).

69 *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

70 Petition at 6. Furthermore, CRAFT's standing declarations contain only generalized allegations of harm insufficient to demonstrate either traditional standing or any obvious potential for offsite consequences. *See, e.g.*, Pam Barker Decl. ("I am concerned that Fermi's proposed use of SNAP-IN neutron conductors [sic] could jeopardize my safety and the safety of other residents in the vicinity.")

propose to modify either the physical or licensed capacity of the SFP. CRAFT simply misunderstands the purpose and scope of the LAR.[71] At bottom, the Petition's standing discussion, even viewed in a light most favorable to CRAFT, offers no explanation of how *this* LAR somehow could present a potential for off-site consequences.[72]

B. The Addition of a Safety Enhancement Does Not Present an "Obvious Potential for Offsite Consequences"

Even setting aside *arguendo* CRAFT's failure to affirmatively demonstrate standing, the proximity presumption is inapplicable to this proceeding because the LAR itself does not entail an "obvious potential for offsite consequences." More specifically, the LAR seeks changes to the relevant license condition, technical specifications, and safety analysis to effectuate the *addition* of a safety enhancement—namely, the NETCO SNAP-IN® rack inserts. Adjudicatory precedent demonstrates that, in proceedings such as this one in which a safety system is added, a potential for offsite consequences is anything but obvious.

More specifically, in a 1998 decision involving a license amendment at the Millstone plant, the licensing board found, and the Commission affirmed, that the petitioner failed to establish an "obvious" potential for offsite consequences where the LAR pertained to the

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[71] *See Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998), *aff'd* CLI-98-20, 48 NRC 183, 184 (1998) (rejecting standing partially on the basis that the petitioner's standing and contention arguments were "not focused, as [they] should be on . . . the subject of the license amendment in th[at] proceeding," but instead focused on out-of-scope topics and generalized assertions, precisely as CRAFT does here).

[72] Even if CRAFT had demonstrated an "obvious potential for offsite consequences," which it has not, it still fails to supply a factual basis for invoking a 50-mile presumptive radius. As explicitly noted in the *Diablo Canyon* case cited by CRAFT, "the zone of possible harm varies, depending on the type of proceeding." *Diablo Canyon*, LBP-02-23, 56 NRC at 427 (citing *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000)). And the Petition fails to justify any "zone of potential harm" connected to the LAR (which seeks to effectuate the *addition* of a safety enhancement), let alone the maximum 50-mile zone used in construction permit and operating license proceedings. Accordingly, CRAFT fails to demonstrate entitlement to the proximity presumption for this additional reason.

addition of a safety-related pump.[73] The *Millstone* board found that "claims . . . that the license amendment involves modifications . . . that have not been analyzed adequately does not demonstrate, *without a great deal more*, how an accident with offsite consequences results from" the addition of a safety system.[74] The *Millstone* board further held that, "even assuming the instant amendment . . . somehow presents the potential for offsite . . . consequences, that potential is *anything but obvious*."[75] As the licensing board in a different proceeding observed, the *Millstone* board was "understandably confounded by the petitioner's challenge to the *addition* of a safety system."[76] So too here. CRAFT has not provided the "great deal more" required to demonstrate an "obvious potential for offsite consequences" from the specific LAR at issue in this proceeding. Thus, its claim to standing must be rejected for this additional reason.

IV. CRAFT HAS NOT SUBMITTED AN ADMISSIBLE CONTENTION

A. CRAFT's Introductory Arguments Are Inadmissible

In its introductory discussion, CRAFT makes several assertions and arguments that are inadmissible as contentions in this proceeding for the reasons explained below.

1. CRAFT's Claim That a License Amendment Cannot Modify a License Condition Is an Impermissible Collateral Attack on the AEA and NRC Regulations

As noted above, the LAR proposes to amend the Fermi 2 operating license to eliminate a license condition based on an alternative compliance method. In its Petition, CRAFT argues that granting the LAR would "invalidate[] the license condition contract," and therefore, the LAR cannot be granted because "DTE has signed and committed to a legal agreement and cannot at

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73 *Millstone*, 48 NRC at 155-56 (citation omitted).

74 *Id.* (emphasis added).

75 *Id.* at 155 (emphasis added).

76 *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-17, 81 NRC 753, 774 (2015).

this point make a substitution."[77] CRAFT's claim fails under the weight of significant legal authority.

First and foremost, the AEA itself expressly authorizes the NRC to amend operating licenses.[78] Second, the NRC's license amendment regulations at 10 C.F.R. §§ 50.90 to 50.92 explicitly authorize licensees to request amendments to their licenses.[79] CRAFT offers no support for its assertion that license *conditions* are immutable, and cannot be eliminated or modified—nor could it, because this argument is legally baseless. Neither the AEA nor NRC regulations treat the elimination or modification of license conditions any differently than, for example, technical specifications. Indeed, as the NRC has explained, "technical specifications *are* license conditions."[80] And there are many examples of the NRC amending licenses to eliminate or modify license conditions.[81] License conditions originating in license renewal proceedings are no more or less subject to the AEA's change process, and CRAFT does not explain why it believes they are.

At bottom, CRAFT's argument challenges the AEA and NRC regulations. The Commission has clearly held that petitioners may not challenge the AEA in administrative

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77 Petition at 4.

78 *See, e.g.*, AEA § 189.a.(2)(A) ("The Commission may issue and make immediately effective any amendment to an operating license . . . .") (codified at 42 U.S.C. § 2239(a)(2)(A)).

79 Requests to modify conditions imposed in renewed licenses must be fully justified and approved by the NRC Staff using the *same considerations* that originally governed the issuance of the renewed license. *See* 10 C.F.R. § 50.92(a).

80 *See* NRC, Frequently Asked Questions (FAQs) About License Renewal Inspection Procedure (IP) 71003, "Post-Approval Site Inspection for License Renewal," https://www.nrc.gov/reactors/operating/licensing/renewal/introduction/inspections/faq-ip71003.html#14 (last visited Mar. 23, 2020) (emphasis added).

81 *See, e.g.*, Letter from T. Kim, NRC, to W. O'Connor, Jr., DTE, "Fermi 2 – Issuance of Amendment re: Deletion of License Condition 2.C.(11) (TAC No. MB2090)" (June 26, 2002) (ML021780057).

adjudications.[82] Furthermore, pursuant to 10 C.F.R. § 2.335(a), NRC regulations are not subject to challenge in adjudicatory proceedings such as this one either (absent a waiver, which CRAFT neither requested nor received). Accordingly, this impermissible collateral attack on the AEA and NRC regulations is inadmissible as beyond scope, immaterial, unsupported, and because it fails to raise a genuine dispute with the LAR on a material issue of law or fact, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

2. CRAFT's Arguments Regarding Physical Installation of the Neutron Absorbing Inserts, the Use of GNF3 Fuel, and the Capacity of the Spent Fuel Pool Are Beyond the Scope of This Proceeding

CRAFT notes that DTE plans to begin the installation of the NETCO SNAP-IN® rack inserts in the summer of 2020 (likely before the LAR is approved by the NRC) and suggests that physical installation prior to NRC approval is impermissible.[83] CRAFT also observes that the LAR analysis considered the use of a planned future fuel type (known as GNF3) and suggests that a license amendment is needed to use a different type of fuel at Fermi 2.[84] Additionally, CRAFT makes an unsupported—and factually incorrect[85]—assertion that the SFP at Fermi is being utilized at "twice" its capacity.[86] However, a contention is admissible only if it is within the scope of the proceeding outlined in the hearing opportunity notice.[87] Here, the proceeding

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82 *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 605 (2009) ("A petitioner may not challenge applicable statutory requirements as part of an administrative adjudication.") (citations omitted).

83 Petition at 4 (citing LAR § 3.1.5).

84 *Id.* (citing LAR § 3.2); *id*. at 16-17 (Contention 7).

85 *See* LAR, Encl. 1 at 7 (noting the Fermi 2 has a *physical* capacity of 3,590 fuel assemblies, based on the number of racks in the SFP, and that "[t]his capacity is less than the storage capacity limit of 4608 fuel assemblies defined in TS 4.3.3."). *See also* DTE Elec. Co., Docket No. 50-341, Fermi-2, Renewed Facility Operating License, Renewed License No. NPF-43 at PDF page 361/396 (Dec. 15, 2016) (ML053060228) (TS 4.3.3) ("The spent fuel storage pool is *designed* and shall be maintained with a storage capacity limited to no more than 4608 fuel assemblies.") (emphasis added).

86 Petition at 8.

87 *Commonwealth Edison Co.* (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980).

pertains only to the LAR,[88] which does not request NRC approval to: (1) use GNF3 fuel,[89] (2) physically install the rack inserts,[90] or (3) alter the capacity of the SFP.[91] Rather, the LAR seeks NRC approval to eliminate a license condition, revise a technical specification, and implement a new criticality safety analysis based on having inserted these additional new neutron absorbers.[92] Accordingly, CRAFT's arguments regarding the physical installation of the inserts, the use of GNF3 fuel, and the capacity of the SFP are inadmissible as beyond the scope of this proceeding.[93]

3. CRAFT's Reference to Operating Experience at LaSalle County Station and Purported Challenge to the Boraflex Monitoring Program Fail to Identify a Genuine Dispute with the LAR

In the Petition, CRAFT discusses operating experience ("OE") at another operating reactor (LaSalle County Station) in which a neutron-absorbing insert was inadvertently removed while moving a fuel assembly.[94] CRAFT appears to suggest—without any further explanation or support—that the LAR failed to evaluate this OE. But that suggestion is baseless. In the very section of the LAR cited by CRAFT, Section 3.4.1, DTE fully evaluates this OE as follows:

> In February 2013, an insert was inadvertently removed while moving a fuel assembly. It was identified that the cause of this event

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88 *See generally* Hearing Opportunity Notice.

89 DTE has determined that GNF3 fuel may be used without a license amendment under the provisions of 10 C.F.R. § 50.59. This determination is not subject to challenge here. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

90 *See* LAR, Encl. 1 at 4 ("DTE plans to perform the physical installation of the inserts under the provisions of 10 CFR 50.59 as has been done at other plants (see Section 3.1.5).").

91 *See id.* at 7 ("No changes are being proposed in this LAR to the number of racks or to the total capacity of the Fermi 2 SFP.").

92 *See generally* LAR.

93 To the extent CRAFT is challenging NRC regulations at 10 C.F.R. § 50.59 permitting licensees to make certain changes "without obtaining a license amendment," its argument is yet another impermissible collateral attack on NRC regulations, contrary to 10 C.F.R. § 2.335, and is outside the scope of this proceeding for this additional reason, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

94 Petition at 4 (citing LAR § 3.4.1).

> was that the fuel assembly channel fastener came in contact with the insert. To reduce the potential for occurrence of a similar type event at Fermi 2, DTE plans to administratively control insert and channel fastener orientation. Procedures will ensure that fuel assemblies are oriented with the channel fastener at the opposite corner from the inserts when placing a fuel assembly into an SFP storage rack cell with an insert. The criticality safety analysis consideration of a missing insert as described above would bound a single missing insert resulting from an inadvertent removal if one were to potentially occur despite the additional administrative controls proposed by Fermi 2. Inadvertent removal of a rack insert would be entered into the Fermi 2 Corrective Action Program for resolution of the condition.
>
> If a channeled spent fuel assembly cannot fit into the SFP storage rack cells containing rack inserts due to mechanical clearances, the fuel assembly could be placed into the other SFP storage rack cells (i.e., the Boral racks). Alternatively, if it is not desired to place the fuel assembly in the Boral racks, the fuel assembly could be de-channeled and stored.[95]

CRAFT neither acknowledges nor disputes any portion of this discussion. Thus, it fails to meaningfully engage, or identify a genuine dispute, with the LAR, and therefore is inadmissible as contrary to 10 C.F.R. § 2.309(f)(1)(vi).

CRAFT also purports to challenge what it deems the overarching assumption of the LAR—the sufficiency of the Boraflex Monitoring Program.[96] However, CRAFT's criticisms are misplaced. The LAR does not rely on the Boraflex Monitoring Program whatsoever. In fact, the LAR proposes to *eliminate* the Boraflex Monitoring Program.[97] CRAFT's misplaced challenge appears to rest on its underlying mistaken belief that the NETCO SNAP-IN® rack inserts, themselves, will use Boraflex, or that DTE could continue to credit the Boraflex in the existing

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[95] LAR, Encl. 1 at 16.

[96] Petition at 8.

[97] *See, e.g.*, LAR, Encl. 1 at 25 ("the Boraflex monitoring program will be eliminated as described in Enclosure 9").

racks after the LAR is approved. But both claims are factually incorrect. The inserts do not contain Boraflex.[98] And the fundamental purpose of the LAR is the same as the License Condition—to discontinue reliance on the Boraflex material to perform a neutron absorption function—albeit through an alternative approach. Regardless of the reason for CRAFT's misunderstanding, its challenge to the sufficiency of the Boraflex Monitoring Program fails to identify a genuine dispute with the LAR (which does not rely on that program) and therefore is inadmissible as contrary to 10 C.F.R. § 2.309(f)(1)(vi).

B. Contentions 1 through 7 (NSHC Determination) Are Not Litigable In This Proceeding

In the Hearing Opportunity Notice, the NRC Staff "propose[d] to determine that [the LAR] involves no significant hazards consideration."[99] CRAFT's Proposed Contentions 1 through 7 purport to challenge aspects of this determination. For example, in its Proposed Contention 1, CRAFT directly challenges the Staff's proposed determination (as to the first NSHC criterion) that the LAR does not involve "a significant increase in the probability or consequences of an accident previously evaluated."[100] And the next several pages of the Petition, inclusive of Proposed Contentions 1 through 7, purport to challenge the Staff's proposed determinations regarding all three NSHC criteria.[101] And in the closing discussion of Proposed Contentions 1 through 7, CRAFT requests a hearing explicitly for the purpose of disputing the Staff's NSHC determination.[102]

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98 The inserts are made of aluminum boron carbide composite. *See* LAR, Encl. 8, NETCO Report NET-259-03, Rev. 5, "Material Qualification of Alcan Composite for Spent Fuel Storage" at 1-1 (July 30, 2009).

99 Hearing Opportunity Notice, 85 Fed. Reg. at 729.

100 Petition at 9.

101 *Id.* at 9-17.

102 *Id.* at 17.

Such challenges are explicitly barred by NRC regulations. More specifically, 10 C.F.R. § 50.58(b)(6) states that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission." This regulation has long been held to be a *jurisdictional bar* to intervenor challenges regarding NSHC determinations.[103] The Commission has noted that "[t]he regulations are quite clear in this regard."[104] Thus, because CRAFT's Proposed Contentions 1 through 7 seek to challenge the Staff's proposed NSHC determination—which simply is not subject to challenge in this proceeding—these contentions are inadmissible as beyond scope, immaterial, and because they fail to raise a genuine dispute with the LAR on a material issue of law or fact, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), and (vi).

C. Contention 2 (Boraflex Degradation) Is Inadmissible

CRAFT's proposed Contention 2 presents a variety of assertions regarding Boraflex. However, the specific argument CRAFT seeks to raise in this proposed contention is not entirely clear. Nevertheless, it does not present an admissible contention. At a high level, this contention asserts that "reliance on faulty Boraflex must be examined."[105] But, as noted above, the LAR proposes to *eliminate* all reliance on Boraflex in the Fermi 2 licensing basis. Thus, this argument fails to identify any deficiency in the LAR.

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[103] *See, e.g., Shearon Harris*, CLI-01-7, 53 NRC at 118 (holding that intervenor challenges on this topic will be summarily rejected: "Our regulations provide that '[n]o petition or other request for review of or hearing on the staff's no significant hazards consideration determination will be entertained by the Commission.'") (quoting 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee*, LBP- 90-6, 31 NRC at 91 ("The issue of whether the proposed amendment does or does not involve a significant hazards consideration is not litigable in any hearing") (citation omitted) ; *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 495-96 (1989).

[104] *Shearon Harris*, CLI-01-7, 53 NRC at 118.

[105] Petition at 10.

CRAFT also makes unsupported assertions regarding speculated "corrosion" that purportedly could cause Boraflex to "adhere to the fuel assemblies" and create "debris" in the SFP.[106] But CRAFT provides zero support, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v), for these assertions. Furthermore, they disregard basic factual information in the LAR. For example, the LAR notes that the Boraflex in the existing racks is "sandwiched" between stainless steel sheets.[107] In other words, Boraflex is not in contact with the fuel assemblies. Moreover, the NETCO SNAP-IN® rack inserts will be installed *between* the fuel assemblies and the stainless steel racks.[108] Simply put, the inserts will constitute a *further* barrier between the fuel assemblies and the existing Boraflex. At bottom, CRAFT's speculated scenario of Boraflex (or the existing stainless steel racks) somehow "adhering" to spent fuel assemblies is entirely unsupported, factually implausible, and fails to raise a genuine dispute with the LAR.[109]

CRAFT also cites two documents related to events at other power reactor sites in which Boraflex degradation resulted in noncompliances with technical specifications.[110] But CRAFT fails to explain how these documents identify some deficiency in—or even relate to—the instant LAR. Again, to the extent CRAFT believes that the NETCO SNAP-IN® rack inserts contain Boraflex, it is mistaken. And its arguments in this regard fail to dispute the LAR.

Finally, CRAFT points to a June 27, 2018 pre-submittal meeting and purports to challenge a statement that corrosion of "less than 0.05 milometers [sic] per year is not excessive

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106 *Id.* at 10-11.

107 LAR, Encl. 1 at 7.

108 *Id.* at 19; *see also id*. Encl. 5 at 15.

109 Furthermore, to the extent CRAFT could be arguing that the inserts may experience corrosion or other degradation, it fails to engage with the portions of the LAR that address "Corrosion" (*id.* at 14 (§ 3.3.2)) and detail the "Rack Insert Monitoring Program" (*id.* at 22 (§ 3.8)), and therefore fail to dispute the application, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

110 Petition at 10 (citing documents related to Turkey Point and Pilgrim).

corrosion or mass loss."[111] CRAFT appears to be referencing a presentation by Curtiss-Wright, DTE's vendor, in which it noted that "[r]ecent coupons [from NETCO SNAP-IN® rack inserts at other sites] showed no indication of excessive corrosion or mass loss (less than the acceptance criteria of <0.05mil/yr)."[112] CRAFT again fails to explain how this statement purportedly identifies some deficiency in the LAR at issue in this proceeding. And CRAFT fails to acknowledge or dispute the discussions of corrosion and insert monitoring in the LAR.[113] Ultimately, CRAFT's bare, conclusory statements that the LAR is deficient fail to demonstrate an admissible contention.[114] Contentions must refer to *specific* portions of the application that the petitioner disputes along with *specific* supporting reasons for each dispute.[115] CRAFT simply failed to do so here. Accordingly, proposed Contention 2 is immaterial, unsupported, and fails to dispute the LAR, contrary to 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

D. Contention 3 (K-Effective Threshold) Is Inadmissible

In the Petition, "CRAFT Contends (Contention 3) that the credit for Boraflex as a neutron absorbing material as required by the License Renewal License Condition, the effective neutron multiplication factor, k-effective, is less than or equal to 0.95, if the spent fuel pool (SFP) is fully flooded with unborated water does not leave conservative margin to stay subcritical."[116] As noted above, the LAR proposes to eliminate any credit for Boraflex as a neutron absorbing

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111 *Id.* at 11.

112 Curtiss-Wright Slides at 16. For clarity, a "mil" (as referenced in the slides) is 1/1000 of an inch, not a millimeter (as CRAFT appears to suggest). *See* "Mil," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/mil (last visited Mar. 30, 2020).

113 LAR, Encl. 1 at 14 (§ 3.3.2), 22 (§ 3.8).

114 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012) ("'Bare assertions and speculation' . . . are insufficient to trigger a full adjudicatory proceeding.") (citation omitted).

115 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 NRC at 74.

116 Petition at 11; *see also id*. at 12.

material.[117] Thus, CRAFT's argument in this regard does not raise a genuine dispute with the LAR, as required by 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, CRAFT's assertion that k-effective less than or equal to 0.95 is "not conservative" directly contradicts the NRC's "criticality accident requirements" in 10 C.F.R. § 50.68, which establish the 0.95 k-effective threshold. "When the Commission has determined that compliance with a regulation is sufficient to provide for reasonable assurance of public health and safety, a licensing board cannot impose requirements that exceed those in the regulation."[118] Moreover, pursuant to 10 C.F.R. § 2.335(a), NRC regulations are not subject to challenge in adjudicatory proceedings. Accordingly, CRAFT's proposed Contention 3 is an impermissible collateral attack on 10 C.F.R. § 50.68 and inadmissible as beyond the scope of this proceeding, immaterial, unsupported, and because it fails to raise a genuine dispute with the LAR on a material issue of law or fact, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

E. Contention 4 (Demand to Remove Spent Fuel from the SFP) Is Inadmissible

"CRAFT Contends (Contention 4) that the more prudent course of action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the pool and reduce the density."[119] However, such arguments are inadmissible because, in licensing proceedings, the question before the NRC is whether the *applicant's* approach complies with regulatory requirements, not whether there exists some alternative or arguably better means of doing so. If an applicant's supporting analyses are "grounded on reasonable assumptions, data, techniques of

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117 LAR, Encl. 1 at 4-5.

118 *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 NRC 310, 317 (quoting and agreeing with the licensing board in *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), LBP-15-17, 81 NRC 753, 789 (2015)).

119 Petition at 11; *see also id*. at 12.

analysis, and interpretations," a finding of reasonable assurance can be made "even though other data and methods might have been used."[120] In other words, CRAFT's mere presentation of an alternative method of regulatory compliance is not sufficiently probative to demonstrate a genuine dispute with the LAR on a genuine issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[121]

F. Contention 5 (Spent Fuel Crane) Is Inadmissible

CRAFT makes several other assertions—entirely unrelated and irrelevant to the LAR—regarding the Fermi 2 spent fuel crane.[122] For example, CRAFT claims the crane "must be demonstrated pedigree [sic] and be certified for the 125 tons that it will need to lift."[123] However, CRAFT identifies no connection between this statement and the LAR at issue in this proceeding (seeking NRC approval to eliminate a license condition, revise a technical specification, and implement a new criticality safety analysis). The LAR proposes no changes to the spent fuel crane whatsoever.[124] And as the NRC Staff noted a few weeks ago in rejecting a similar challenge regarding the crane:

> The NRC staff maintains oversight of the Fermi 2 reactor building crane through inspections and has concluded that the crane complies with its current licensing basis. In its oversight activities, the NRC staff verifies that the licensee operates within its licensing basis, which includes the provision to handle heavy loads with a single-

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120 *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 548 (1988), *aff'd in part, vacated in part, remanded by* ALAB-905, 28 NRC 515 (1988).

121 CRAFT's discussion of emergency diesel generators and "Quality Assurance" to support its demand for removal of spent fuel, *see* Petition at 12, is entirely irrelevant to the LAR and certainly does not demonstrate any genuine dispute therewith.

122 *See* Petition at 14-16.

123 *Id.* at 15.

124 As a point of reference, "the rack inserts weight [sic] less than 20 lbs each." LAR, Encl. 1 at 19.

> failure-proof handling system near the reactor and fuel stored in the spent fuel pool.[125]

Thus, CRAFT's arguments in this regard are simply beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), and thus are immaterial and fail to dispute the application, as required by 10 C.F.R. §§ 2.309(f)(1)(iv) and (vi).

G. Contention 6 (Demand for an Unspecified "Analysis") Is Inadmissible

"CRAFT Contends (Contention 6) that there is need for Fermi 2 specific analysis on the spent fuel pool at Fermi 2 as currently loaded, and that analysis needs to be completed prior to consideration of License Amendment put forth."[126] However, this statement does not give rise to an admissible contention. CRAFT does not specify what kind of "analysis" purportedly needs to be completed. Nor does it identify any purportedly unmet requirement for such an unspecified analysis to grant the LAR. And it entirely disregards (and therefore fails to identify any deficiency in) both: (1) the SFP analyses in the current licensing basis (which would be outside the scope of this proceeding anyway), and (2) the discussion of the "Current Spent Fuel Pool Design Basis" in Section 3.1.1 of the LAR. In sum, CRAFT provides no support for this proposed out-of-scope contention, fails to demonstrate how this contention is material to the LAR, and fails to dispute the LAR in any way. Accordingly, this argument should be rejected as contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

H. Contention 7 (Criticality Analysis as to GNF3) Is Inadmissible

The LAR notes that "[a]lthough GNF3 fuel is not currently present in the Fermi 2 SFP, introduction of GNF3 is expected to begin in Cycle 21 (approximately 2020) and this fuel type

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125 Letter from B. Venkataraman, NRC, to D. Lochbaum at 3 (Feb. 11, 2020) (ML19343A029).

126 Petition at 16.

was therefore considered in the [criticality] analysis."[127] CRAFT's proposed Contention 7 argues that the proposed use of GNF3 "has not undergone adequate evaluation as it pertains to being placed into spent fuel pool and subsequent impact on [the criticality analysis]."[128] But CRAFT does not even acknowledge the LAR's criticality analysis or its discussion of GNF3; does not identify any specific alleged deficiencies in that analysis; and does not identify any support for its claim that the analysis somehow is inadequate. CRAFT simply has not fulfilled its "iron-clad" obligation to thoroughly examine the application.[129] And its bare, conclusory statement that the application is deficient is insufficient for an admissible contention.[130] To be admissible, a contention must refer to *specific* portions of the application that the petitioner disputes along with *specific* supporting reasons for each dispute.[131] CRAFT clearly has not done so here. Accordingly, its arguments regarding the consideration of GNF3 in the criticality analysis are unsupported and fail to dispute the LAR, contrary to 10 C.F.R. §§ 2.309(f)(1)(v)-(vi).

I. Contention 8 (DTE Operations) Is Inadmissible

In Proposed Contention 8, CRAFT argues that the NRC should reject DTE's request for regulatory relief because of an "ongoing pattern of irresponsible and dangerous decisions to lower costs at the risk of catastrophic impacts to the public and the environment."[132] To support

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127 LAR, Encl. 1 at 11.

128 Petition at 16.

129 *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 496 (2010).

130 *Pilgrim*, CLI-12-15, 75 NRC at 714 ("'Bare assertions and speculation' . . . are insufficient to trigger a full adjudicatory proceeding.") (citation omitted).

131 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 NRC at 74.

132 Petition at 17.

its accusations, CRAFT points to a 1966 incident at Unit 1, and the 1993 turbine failure.[133] Based on these historical incidents, CRAFT claims that DTE has an "untrustworthy track record,"[134] "is willing to endanger the public for short-term profit,"[135] and thus, its LAR should be denied.[136] CRAFT also makes several claims about its perception of DTE's reliance on taxpayer subsidies, advertising and lobbying activities, and opposition to renewable energy.[137] For these reasons, CRAFT asks that the "operation of the plant . . . be turned over to a publically responsive body to assess the environmental and economic viability of the future operation of the plant."[138]

CRAFT's Proposed Contention 8 is inadmissible because it fails to meet the strict limits on management and character contentions, which are strongly disfavored. Nor does Proposed Contention 8 meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). In particular, CRAFT fails to show that Proposed Contention 8 is within the scope of this proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii), raises a material issue as required by Section 2.309(f)(1)(iv), has adequate factual or expert support as required by Section 2.309(f)(1)(v), or raises a genuine dispute with the LAR as required by Section 2.309(f)(1)(vi). CRAFT's failure to meet any one of these requirements makes the proposed contention inadmissible, and thus the "contention must be rejected."[139]

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133 *Id.* at 17-18.

134 *Id.* at 20.

135 *Id.* at 18.

136 *Id.* at 18-19.

137 *Id.* at 19-20.

138 *Id.* at 20.

139 *Palo Verde*, CLI-91-12, 34 NRC at 155 (citation omitted); *see also USEC Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.") (citations omitted).

1. CRAFT's Various Claims Are Not Relevant to the NRC Staff's NSHC Determination or the NRC's Approval of the LAR

The Commission places "strict limits on 'management' and 'character' contentions,"[140] and any such claims must have "some direct and obvious relationship between the character issues and the licensing action in dispute."[141] Claims based on prior actions or past violations must "be directly germane to the challenged licensing action."[142] And, "[a]llegations of management improprieties or poor 'integrity' . . . must be of more than historical interest."[143] Thus, any claims attacking a licensee character must be connected to the technical and financial qualifications of the applicants in the proceeding.[144] In this context, the Commission consistently rejects generic claims related to large companies' conduct of business activities when the conduct is not directly connected to the licensed activities in question.[145]

This standard is intentionally restrictive, and for a good reason. The Commission is "unwilling to use [its] hearing process as a forum for a wide-ranging inquiry" into general corporate activities that have no bearing on the licensee's ownership and operation of the plant or

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140 *Millstone*, CLI-01-24, 54 NRC at 366.

141 *Id.* at 365 (internal quotations and citation omitted). *See also Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 32 (1993) ("We do not mean to suggest that every licensing action throws open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee. There must be some direct and obvious relationship between the character issues and the licensing action in dispute.").

142 *Millstone*, CLI-01-24, 54 NRC at 366-67; *see also Zion*, CLI-99-4, 49 NRC at 189 (quoting *Vogtle*, CLI-93-16, 38 NRC at 32).

143 *Millstone*, CLI-01-24, 54 NRC at 366 (quoting *Ga. Tech*, CLI-95-12, 42 NRC at 120) (internal quotations omitted).

144 *See Exelon Generation Co.* (Oyster Creek Nuclear Generating Station), CLI-19-6, 90 NRC __, __ (June 18, 2019) (slip op. at 15).

145 *See Vogtle*, CLI-93-16, 38 NRC at 32 (rejecting character contention and stating that "[t]here must be some direct and obvious relationship between the character issues and the licensing action in dispute."); *Zion*, CLI-99-4, 49 NRC at 189 (same).

conduct of licensed activities.[146] Because of that, the scope of character claims relevant to a license amendment are those that directly relate to the proposed licensing action.[147]

CRAFT's Proposed Contention 8 does not meet that standard.

2. CRAFT's Allegations Are Not Related to the LAR

CRAFT makes no claims about the LAR. Instead, CRAFT complains about general corporate activities, which have no relationship to the LAR or DTE's ability to operate the Plant or perform regulated activities, which are precisely the type of general corporate activities that the Commission has declined to admit for a hearing.[148] Nor does CRAFT explain how either of two cited incidents, which occurred 54 and 27 years ago, respectively, has any relevance today to the LAR or the safe operation of Unit 2's SFP. The lack of relevance is particularly glaring regarding the reference to Unit 1, a completely different design than Unit 2.[149]

CRAFT also claims that Fermi has "been plagued with cost overruns, construction delays, and severe accidents since its inception," and that "DTE is willing to endanger the public for short-term profit."[150] But CRAFT does not explain how these unsupported allegations have

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146 *Power Auth. of the State of N.Y.* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 312 (2000); *see also Zion*, CLI-99-4, 49 NRC at 189 ("the Commission has stressed that licensing actions do not 'throw[] open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee.'") (quoting *Vogtle*, CLI-93-16, 38 NRC at 32).

147 *Millstone*, CLI-01-24, 54 NRC at 366; *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227-29 (2002).

148 *See Fitzpatrick & Indian Point*, CLI-00-22, 52 NRC at 312 (2000) ("[W]e are unwilling to use our hearing process as a forum for a wide-ranging inquiry into the corporate parent's general activities across the country.").

149 Unit 1 was a fast breeder reactor cooled by liquid sodium. In contrast, Unit 2 is a boiling water reactor that relies on slower thermal neutrons and uses light water as both a coolant and moderator. Even so, after the incident involving Unit 1, the damaged fuel was removed and replaced and the reactor restarted in 1970 before being permanently shut down in 1972.

150 Petition at 18.

any relevance to the LAR, Unit 2's SFP, or the use of NETCO SNAP-IN® rack inserts. Nor could CRAFT create such an explanation.

Proposed Contention 8 also makes several allegations that lack any factual basis and are demonstrably false. To start, CRAFT claims that Unit 2's SFP has already been reconfigured beyond designed parameters. This is incorrect, as the SFP inventory is well within the NRC-approved limits for storage. While the analysis cited by CRAFT supports a maximum inventory of 4,608 storage cells, there are only 3,590 storage cells in the Fermi SFP, and the LAR does not ask to increase the number of cells.[151] CRAFT also claims that the Mark 1 containment design has been "repeatedly flagged for critical design errors."[152] This claim is irrelevant because the SFP at Fermi is outside the Mark 1 (*i.e.*, "primary") containment.[153] Thus, the design of the Mark 1 containment structure does not affect the operation of the SFP. CRAFT also claims that DTE is attempting to use "plastic snap in" neutron absorbers.[154] But as discussed above, the snap-in inserts are not plastic, and when installed, become a permanent part of the stainless steel rack.

Taken together, CRAFT's Proposed Contention is an impermissible attack on DTE's character and integrity, lacks factual support, and does not show a genuine dispute with the LAR.

* * *

Accordingly, Proposed Contention 8 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

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151 LAR, Encl. 1 at 3.

152 Petition at 17.

153 *See, e.g.*, Fermi 2 Updated Final Safety Analysis Report, Rev. 21 at 1.2-12 (Oct. 16, 2017) (ML17298B244) ("A secondary barrier (containment) is provided that completely encloses both the primary containment and the *fuel storage areas*.") (emphasis added).

154 Petition at 19.

V. CONCLUSION

As established above, CRAFT failed to demonstrate standing and failed to proffer a contention that satisfies the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). As a result, the Board should reject the Petition in its entirety.

Respectfully submitted,

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Dated in Washington, D.C.
this 3rd day of April 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
DTE ELECTRIC COMPANY,	)	Docket No. 50-341-LA
(Fermi Nuclear Power Plant, Unit 2)	)	April 3, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Applicant's Answer Opposing the Petition for Leave to Intervene and Hearing Request Filed by Citizens' Resistance at Fermi 2 (CRAFT)" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

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