

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DTE ELECTRIC COMPANY

(Fermi 2)

Docket No. 50-341-LA

NRC STAFF'S ANSWER OPPOSING CRAFT'S HEARING REQUEST

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INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i), the U.S. Nuclear Regulatory Commission Staff files this answer opposing the Citizens' Resistance at Fermi 2 (CRAFT) hearing request¹ challenging a license amendment request (LAR) by DTE Electric Company (DTE) for Fermi 2.² Through the LAR, DTE seeks to install neutron-absorbing inserts into the Fermi 2 spent fuel pool (SFP) in order to replace the neutron-absorption function that is currently being performed by Boraflex.³ CRAFT's challenge to this LAR is insufficient because, first, although CRAFT

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 Extension Condition by a License Amendment Request (dated Mar. 9, 2020; served on the parties March 11, 2020) (ML20071G500) (Hearing Request).

Attached to the Hearing Request is Declaration of Authorized Officer of Citizens' Resistance at Fermi 2 (CRAFT) to File as Pro Se Counsel (dated Jan. 16, 2020; served on the parties March 11, 2020) (ML20071G510) (Declaration of Pro Se Counsel). Also attached to the Hearing Request are: Declaration of Martin R. Kaufman (dated Mar. 7, 2020; served on the parties March 11, 2020) (ML20071G517); Declaration of Hedwig Kaufman (dated Mar. 7, 2020; served on the parties March 11, 2020) (ML20071G523); Declaration of Alisa Barker (dated Mar. 8, 2020; served on the parties March 11, 2020) (ML20071G526); Declaration of Pam Barker (dated Mar. 6, 2020; served on the parties March 11, 2020) (ML20071G530); Declaration of Andrea Pierce (dated Mar. 5, 2020; served on the parties March 11, 2020) (ML20071G534); Declaration of Cass G. Olszta (dated Mar. 6, 2020; served on the parties March 11, 2020) (ML20071G537); Declaration of Janet T Cannon (dated Mar. 5, 2020; served on the parties March 11, 2020) (ML20071G542); and Declaration of [Rita L. Mitchell] (dated Mar. 6, 2020; served on the parties March 12, 2020) (ML20072M940) (collectively, Declarations of Members).

² License Amendment Request to Revise Technical Specifications to Utilize Neutron Absorbing Inserts in Criticality Safety Analysis for Fermi 2 Spent Fuel Storage Racks (Sep. 5, 2019) (ML19248C679) (LAR).

³ *Id.* at Encl. 1, p. 3–5.

appears to base its assertion of standing on the proximity presumption, it does not provide any information to demonstrate that the LAR raises an obvious potential for offsite radiological consequences within a radius of Fermi 2 that encompasses either its central office or its identified members' residences. Further, CRAFT does not discuss a particularized injury to itself or its members or how the changes proposed in the LAR would plausibly lead to this injury. Therefore, CRAFT has not met its burden to show that it has standing to challenge the LAR under 10 C.F.R. § 2.309(d). Second, although CRAFT proposes eight contentions that concern, in general, the Staff's no significant hazards consideration determination, the degradation of Boraflex in the SFP, the conservatism of the subcriticality margin of the SFP, moving spent fuel from the SFP to dry storage, the Fermi 2 crane, an analysis of the SFP as currently loaded, the LAR's evaluation of Global Nuclear Fuel 3, and the fitness of DTE as a licensee, none of these contentions satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f). Therefore, CRAFT has also not met its burden to propose at least one admissible contention. For these reasons, the Atomic Safety and Licensing Board should deny CRAFT's hearing request.⁴

BACKGROUND

The spent fuel in the Fermi 2 SFP is stored in two different types of racks—one that uses Boraflex as a neutron-absorbing material (13 racks with a total storage capacity of 2197 cells)

⁴ The Board should also deny CRAFT's hearing request because, contrary to 10 C.F.R. §§ 2.306(c) and 2.309(b), CRAFT did not serve the hearing request on the Staff and DTE by the deadline and, contrary to 10 C.F.R. § 2.309(c), CRAFT did not demonstrate good cause for its untimeliness. *Cf DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 5 n.18 (2015); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-4, 81 NRC 156, 162–64 (2015); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 468 n.63 (2015). Although some leeway may be given to *pro se* counsel that have not used the NRC's E-Filing system before, see *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC 534, 543–45 (2011) (rev'd in part on other grounds, CLI-12-8, 75 NRC 393 (2012)), counsel for CRAFT is experienced in NRC litigation and has filed via the NRC's E-Filing system as recently as 2017, see *Citizens' Resistance at Fermi 2 (CRAFT) Combined Reply to NRC Staff and DTE Answers to CRAFT Petition for Review of LBP-17-01* (Mar. 9, 2017) (ML17068A010).

and one that uses Boral as a neutron-absorbing material (9 racks with a total storage capacity of 1393 cells).⁵ Neutron-absorbing materials such as Boraflex and Boral are included in SFPs in order to maintain subcriticality in the SFPs, which is an important safety consideration.⁶ Subcriticality refers to conditions that do not support self-sustaining fission reactions.⁷ Subcriticality is achieved when the “estimated ratio of neutron production to neutron absorption and leakage,” or k-effective (k-eff), is less than 1.0.⁸ Essentially, the absorption of neutrons by neutron-absorbing materials in an SFP helps to ensure that in the SFP more neutrons are absorbed or leaked than are produced and thus that the conditions in the SFP remain subcritical (i.e., the neutron-absorbing materials help to ensure that the k_{eff} in the SFP remains less than 1.0). However, neutron-absorbing materials such as Boraflex and Boral can degrade, which can reduce their neutron-absorbing capability.⁹ Therefore, licensees have programs to monitor the condition of the neutron-absorbing materials in their SFPs to ensure that subcritical conditions are maintained.

In 2014, DTE submitted an application to renew the Fermi 2 license for twenty years.¹⁰ The Staff reviewed this license renewal application to determine, among other things, whether DTE would manage aging effects on the functionality of specific structures and components

⁵ See Fermi 2 Updated Final Safety Analysis Report, § 9.1.2.2.1–9.1.2.2.2 (Oct. 2017) (ML17298B265) (UFSAR); LAR at Encl. 1, p. 3.

⁶ NRC Generic Letter 2016-01, *Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools*, 2 (Apr. 7, 2016) (ML16097A169) (GL 2016-01).

⁷ *Id.*; see also *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 824 n.10 (1983).

⁸ 10 C.F.R. § 50.68; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 252 n.4 (2000).

⁹ GL 2016-01 at 2–3.

¹⁰ Fermi 2 License Renewal Application (Apr. 24, 2014) (ML14121A554).

during the 20-year period of extended operation.¹¹ As part of its review, the Staff evaluated DTE's proposed programs to manage the aging effect of the reduction in the neutron-absorbing capability of Boraflex (the Boraflex Monitoring program)¹² and of all other neutron-absorbing material, including Boral (the Neutron-Absorbing Material Monitoring program).¹³

Noting known issues regarding Boraflex degradation,¹⁴ the Staff requested additional information from DTE on its proposed Boraflex Monitoring program.¹⁵ In response, DTE revised its application to state that it would not rely on Boraflex for neutron absorption during the period of extended operation.¹⁶ Instead, DTE committed that, prior to March 20, 2025, when, if approved, its period of extended operation would begin, it would remove the existing Boraflex racks and install in their place new Boral racks,¹⁷ as the NRC had previously approved as part of Amendment No. 141 to the Fermi 2 license.¹⁸ The licensee explained that it would manage the neutron-absorbing capability of the Boral in these new racks, along with the Boral in the existing racks, under the Neutron-Absorbing Material Monitoring program during the period of

¹¹ See 10 C.F.R. § 54.29.

¹² Safety Evaluation Report Related to the License Renewal of Fermi 2, Docket No. 50-341, DTE Electric Company, 3-68-3-71 (Jul. 2016) (ML16190A241) (LRA SER).

¹³ *Id.* at 3-144-3-146.

¹⁴ See, e.g., NRC Information Notice 2012-13, *Boraflex Degradation Surveillance Programs and Corrective Actions in the Spent Fuel Pool* (Aug. 10, 2012) (ML121660156).

¹⁵ See LRA SER at 3-69.

¹⁶ *Id.* at 3-69-3-70; Fermi 2 License Renewal Application Update for the Boraflex Monitoring Program (Sep. 24, 2015) (ML15268A454) (LRA Update).

¹⁷ LRA Update at 2.

¹⁸ See Fermi 2 - Issuance of Amendment Re: Spent Fuel Pool Rerack, 1-2, 22 (Jan. 25, 2001) (ML010310205) (Amendment No. 141 SE) (discussing a proposed "reracking" to "be accomplished in three campaigns" with the third campaign "consisting of the removal of the remaining 13 [Boraflex] racks and the installation of 14 new [Boral] racks (with 3,215 additional storage locations)").

extended operation.¹⁹ The Staff separately found DTE's Neutron-Absorbing Material Monitoring program acceptable as part of its review of the license renewal application.²⁰

Based in part on DTE's commitment to replace the Boraflex racks prior to the period of extended operation, the Staff ultimately approved the license renewal application for Fermi 2 with the imposition of License Condition 2.C.(26)(c), which states:

[DTE] shall fully implement the Boraflex rack replacement approved in Amendment No. 141 before the [period of extended operation] (i.e., March 20, 2025), so that the Boraflex material in the spent fuel pool will not be required to perform a neutron absorption function. [DTE] shall submit a letter to the NRC, within 60 days following completion of the removal of the Boraflex material and installation of the Boral material, as described in Amendment No. 141, confirming the removal of the Boraflex material and discontinued reliance on its neutron absorption function.²¹

As made clear by the terms of this license condition and the Staff statements in the document supporting the approval of the license renewal application, the objective of the Boraflex rack replacement is to ensure that Boraflex material in the Fermi 2 SFP is not required to perform a neutron-absorption function.²²

¹⁹ LRA SER at 3-70.

²⁰ *Id.* at 3-144–3-146.

Prior to their replacement, the neutron-absorbing capability of the Boraflex racks is managed under DTE's existing Boraflex Monitoring program. UFSAR at § B.1.3. Instead of citing the discussion of the existing Boraflex Monitoring program in Appendix B of the Fermi 2 UFSAR, CRAFT claims that "[t]he Boraflex Monitoring Program is described in Fermi 2 Final Safety Analysis Report Appendix S, License Renewal Commitments...." Hearing Request at 8. Both this claim and CRAFT's description of the existing Fermi 2 Boraflex Monitoring program appear to be largely repeated from an unrelated Licensee Event Report for Pilgrim Nuclear Power Station that CRAFT cites on page 10 of its hearing request. *Compare id. with* Licensee Event Report 2016-003-02, Spent Fuel Storage Design Feature Exceeded, Encl. p. 2 (Nov. 18, 2016) (ML16333A006).

²¹ Fermi 2 Renewed Facility Operating License No. NPF-43, 8 (Dec. 15, 2016) (ML16270A526) (Renewed License).

²² See LRA SER at 3-70–3-71 ("[DTE] will discontinue reliance on the Boraflex during the period of extended operation.").

In making the commitment that was to become License Condition 2.C.(26)(c), DTE noted that there could be alternatives to replacing the Boraflex racks that would also accomplish the objective of not crediting Boraflex material for neutron absorption.²³ The LAR at issue in this proceeding proposes one such alternative; specifically, installing neutron-absorbing inserts (i.e., NETCO SNAP-IN® rack inserts) into the existing Boraflex racks.²⁴ In its LAR, DTE seeks to demonstrate that once installed, these NETCO SNAP-IN® rack inserts would provide sufficient neutron absorption such that reliance on the existing Boraflex would no longer be required.²⁵ The NRC has approved the installation of NETCO SNAP-IN® rack inserts to replace the neutron-absorption function of Boraflex at LaSalle County Station, Peach Bottom Atomic Power Station, Quad Cities Nuclear Power Station, and River Bend Station.²⁶ Unlike the replacement

²³ LRA Update at 2.

²⁴ LAR at Encl. 1, p. 3–5.

²⁵ *Id.*

²⁶ LaSalle County Station, Units 1 and 2, Issuance of Amendments Concerning Spent Fuel Neutron Absorbers, 2 (Jan. 28, 2011) (ML110250051) (“The licensee’s long-term solution to the degradation of the BORAFLEX is the proposed use of NETCO SNAP IN® rack inserts....”); Peach Bottom Atomic Power Station, Units 2 and 3, Issuance of Amendments Re: Use of Neutron Absorbing Inserts in Spent Fuel Pool Storage Racks, 2 (May 21, 2013) (ML13114A929) (“The installation of the NETCO-SNAP-IN® inserts is being undertaken by the licensee to address the degradation of the current neutron absorbing material (Boraflex) used in the PBAPS SFP racks.”); Quad Cities Nuclear Power Station, Units 1 and 2, Issuance of Amendments Regarding NETCO Inserts, 1 (Dec. 31, 2014) (ML14346A306) (replacing “credit for Boraflex in the nuclear criticality safety analysis with NETCO-SNAP-IN® rack inserts”); River Bend Station, Unit 1, Issuance of Amendment No. 201 Re: Change to the Neutron Absorbing Material Credited in Spent Fuel Pool for Criticality Control, 10 (Dec. 31, 2019) (ML19357A009) (“Due to degradation of the Boraflex material, [the] proposed amendment would allow the crediting of NETCO-SNAP-IN® neutron absorbing rack inserts....”).

Although this did not replace the neutron-absorption function of Boraflex, the NRC also approved the installation of NETCO SNAP-IN® rack inserts at Palo Verde Nuclear Generating Station. Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Issuance of Amendments to Revise Technical Specifications to Incorporate Updated Criticality Safety Analysis, 10 (Jul. 28, 2017) (ML17188A412) (“The proposed change would credit NETCO-SNAP-IN® rack inserts ... for criticality control in the SFP.”).

of the Boraflex racks as approved by License Amendment No. 141,²⁷ this proposed alternative would not change the number of racks or the total capacity of the Fermi 2 SFP.²⁸

DISCUSSION

I. The Board Should Deny the Hearing Request Because CRAFT Does Not Demonstrate Standing

CRAFT appears to base its assertion of standing on the proximity presumption.

However, even when the hearing request is construed in favor of CRAFT,²⁹ CRAFT has not shown that the LAR raises an obvious potential for offsite radiological consequences within a radius of Fermi 2 that encompasses either its central office or its identified members' residences. Further, CRAFT does not discuss a particularized injury to itself or its members or how the changes proposed in the LAR would plausibly lead to this injury. Therefore, the Board should deny CRAFT's hearing request because CRAFT has not met its burden to show that it has standing to challenge the LAR under 10 C.F.R. § 2.309(d).

A. The Requirements for Standing

Section 189a. of the Atomic Energy Act of 1954, as amended (AEA), states, in relevant part, that "[i]n any proceeding ... for the granting, suspending, revoking, or amending of any license ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding[.]" Under 10 C.F.R. § 2.309(a), the Board will grant a hearing request in a license amendment proceeding if it determines that, among other things, the petitioner has standing under the provisions of 10 C.F.R. § 2.309(d). In turn, 10 C.F.R. § 2.309(d) states, in pertinent part, that:

A request for hearing or petition for leave to intervene must state:

²⁷ Amendment No. 141 SE at 1–2.

²⁸ LAR at Encl. 1, p. 3.

²⁹ *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir.1995)) ("To evaluate a petitioner's standing, [the Commission] construe[s] the petition in favor of the petitioner.").

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

(2) *Rulings.* In ruling on a request for hearing or petition for leave to intervene, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.

1. The Proximity Presumption of Standing

In some NRC licensing proceedings, a petitioner may demonstrate standing through the application of a "proximity presumption." Under this doctrine, the Commission presumes standing in power reactor construction permit, operating license, or license renewal proceedings for people that have demonstrated that they live within, or otherwise have frequent contacts within, approximately 50 miles of the power reactor facility. The Commission has traditionally based the application of this doctrine on "the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of [the] people working or living offsite but within a certain distance of that facility."³⁰ In license amendment proceedings, however, the Commission only applies this doctrine when a person is able to demonstrate that the proposed license amendment "quite obviously" entails an increased potential for offsite radiological consequences.³¹ Moreover, in these license amendment proceedings, the distance

³⁰ *Exelon Generation Co, LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580 (2005); *see also Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915-16 (2009) (citing *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)).

³¹ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999) (internal quotation marks omitted); *see also Florida Power & Light Co.* (St. Lucie, Units 1 & 2), CLI-

at which the petitioner can be presumed to be affected by the proposed action must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source involved.³² Examples of “significant” license amendment proceedings where this doctrine has been applied include increases to spent fuel storage capacities³³ and extended power uprates.³⁴ However, the petitioner bears the burden of showing that a proposed action raises an obvious potential for offsite radiological consequences.³⁵ If the petitioner fails to satisfy this burden, then the standing inquiry becomes one of contemporaneous judicial concepts of standing.³⁶

2. Contemporaneous Judicial Concepts of Standing

In instances where the proximity presumption of standing does not apply, the Commission has “consistently applied ‘contemporaneous judicial concepts’ of standing.”³⁷

These concepts require that the petitioner plead “(1) [an alleged] injury in fact that is (2) fairly

89-21, 30 NRC 325, 329 (1989)(explaining that the proximity presumption applies in license amendment proceedings to “major alterations to the facility with a clear potential for offsite consequences”).

³² *U.S. Dep’t of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 365 (2004); *Peach Bottom*, CLI-05-26, 62 NRC at 580–81.

³³ *St. Lucie*, CLI-89-21, 30 NRC at 329 (citing *Va. Elec. Power Co.* (N. Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979)); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29–30 (1999); *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 27–28 (2000).

³⁴ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-11-29, 74 NRC 612, 619 (2011); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 18 (2007); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553 (2004).

³⁵ *Peach Bottom*, CLI-05-26, 62 NRC at 581.

³⁶ *Id.*; *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 268–69 (2008); *St. Lucie*, CLI-89-21, 30 NRC at 329–30; *Zion*, CLI-99-04, 49 NRC at 191; *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 539 (2008).

³⁷ *St. Lucie*, CLI-89-21, 30 NRC at 329; *see also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015).

traceable to the challenged action, and (3) is likely to be redressed by a favorable decision.”³⁸ Additionally, the alleged injury-in-fact must arguably be within the general interests protected by the statutes governing the challenged action (e.g., the AEA, the National Environmental Policy Act of 1969, as amended (NEPA), etc.).³⁹ The petitioner bears the burden of demonstrating standing in its hearing request.⁴⁰

The injury-in-fact pleading requirement must be satisfied by an injury that is “concrete and particularized, not ‘conjectural,’ or ‘hypothetical.’”⁴¹ Thus, “[p]leadings must be something more than an ingenious academic exercise in the conceivable;” a petitioner must allege that it “will in fact be perceptibly harmed by the challenged agency action, not that [it] can imagine circumstances in which [it] could be affected by the agency’s action.”⁴² Further, a “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.”⁴³

With respect to the traceability requirement, the Commission has held that, in license amendment proceedings, “a petitioner ... must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility.”⁴⁴ Similarly, the

³⁸ *Turkey Point*, CLI-15-25, 82 NRC at 394 (citing *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 71-72 (1994) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992))).

³⁹ *St. Lucie*, CLI-89-21, 30 NRC at 329; see *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001).

⁴⁰ See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 139 (2010); *Peach Bottom*, CLI-05-26, 62 NRC at 581.

⁴¹ *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 72 (footnote omitted).

⁴² *Nuclear Fuel Services, Inc.* (Erwin, Tenn.), CLI-04-13, 59 NRC 244, 248 (2004).

⁴³ *U.S. Enrichment Corp.* (Paducah, Ky.), CLI-01-23, 54 NRC 267, 272 (2001) (quoting *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 333 (1983)); see also *Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 746 (2005); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 174 (1992).

⁴⁴ *Zion*, CLI-99-04, 49 NRC at 188.

Commission has stated that, “[s]ince a license amendment involves a facility with ongoing operations, a petitioner’s challenge must show that the amendment will cause a distinct new harm or threat apart from the activities already licensed” and that “[c]onclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing.”⁴⁵ Moreover, simply “enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences” is not sufficient.⁴⁶ Although “the cause of the injury need not flow directly from the challenged action, ... the chain of causation must be plausible.”⁴⁷

If the petitioner is an organization, then it must satisfy these traditional standing requirements through a demonstration of either organizational standing or representational standing.⁴⁸ The Commission has stated that organizations seeking to establish organizational standing “must satisfy the same ‘standing’ requirements as individuals seeking to intervene” because “an organization, like an individual, is considered a ‘person’ as [the Commission has] defined that word in 10 C.F.R. § 2.4 and as [the Commission has] used it in 10 C.F.R. § 2.309 regarding standing.”⁴⁹ As with an individual, an organization seeking standing must itself have suffered a concrete and particularized injury and not merely assert “general environmental and policy interests.”⁵⁰ For instance, an organization would have organizational standing if it had

⁴⁵ *White Mesa*, CLI-01-21, 54 NRC at 251 (citation and internal quotation marks omitted).

⁴⁶ *Zion*, CLI-99-04, 49 NRC at 192.

⁴⁷ *Turkey Point*, CLI-15-25, 82 NRC at 394.

⁴⁸ *Georgia Tech*, CLI-95-12, 42 NRC at 115.

⁴⁹ *Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411 (2007).

⁵⁰ *Id.* at 411–12; see also *Three Mile Island*, CLI-83-25, 18 NRC at 332; *White Mesa*, CLI-01-21, 54 NRC at 252 (citing *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59-61 (1992)).

suffered or will suffer a “concrete and demonstrable injury to [its] activities[,]with the consequent drain on [its] resources,” as opposed to a mere “setback to [its] abstract social interests.”⁵¹

In order to establish representational standing, an organization must demonstrate how “at least one of its members may be affected by [the proposed action]...., must identify that member, and must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or her behalf.”⁵² “The member seeking representation must qualify for standing in his or her own right; the interests that the ... organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require the individual member to participate in the organization’s [lawsuit].”⁵³ The failure of an organization to identify the member or members that it purports to represent “and to provide proof of authorization” via affidavit or other means precludes the organization from establishing representational standing.⁵⁴

B. CRAFT Has Not Satisfied its Burden of Demonstrating the Existence of a Proximity Presumption of Standing

CRAFT characterizes the LAR as requesting the “NRC’s approval to substitute the insertion of SNAP-IN neutron conductors,⁵⁵ into [the Fermi 2] spent fuel pool[], and thereby obtain relief from [the] current license extension [condition] to replace the degraded Boraflex storage racks with Boral racks.”⁵⁶ CRAFT provides the address and distance from Fermi 2 of its

⁵¹ *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015).

⁵² *Palisades*, CLI-07-18, 65 NRC at 409.

⁵³ *Id.*; *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999) (citing *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)).

⁵⁴ *Palisades*, CLI-07-18, 65 NRC at 409–10.

⁵⁵ The Staff does not understand the use of the term “conductors” in this context and assumes that, when writing “conductors,” CRAFT means something like “absorbers.”

⁵⁶ Declarations of Members; see *a/so* Hearing Request at 6 (characterizing the LAR as “set[ting] aside the[] License Condition ... and add[ing] additional materials into an over-crowded [SFP] in order to save time and money”).

central office⁵⁷ and the addresses and distances from Fermi 2 of the residences of eight individuals who each declare that they are members of CRAFT.⁵⁸ CRAFT then asserts that the “continued operation of the Fermi 2 nuclear reactor with degraded Boraflex neutron absorbers continues to present a tangible ... harm to the health and well-being of members living within 50 miles of the site”⁵⁹ and that it is “concerned that Fermi’s proposed use of SNAP-IN neutron conductors could jeopardize [its members’] safety and the safety of other residents in the vicinity.”⁶⁰ CRAFT also states that granting the LAR “could adversely affect the health and safety and the integrity of the environment in which CRAFT members live and recreate”⁶¹ and “endanger[] all life within a 50-mile radius.”⁶²

Because CRAFT discusses the distances of its central office and various of its members’ residences from Fermi 2, it appears to be relying on a proximity presumption of standing. Moreover, CRAFT asserts that it and its identified members “have presumptive standing by virtue of ... proximity[.]”⁶³ In support of this assertion, CRAFT cites *Turkey Point*, LBP-01-06, and *Diablo Canyon*, LBP-02-23.⁶⁴ These cases, though, do not stand for this proposition and are readily distinguishable from the circumstances of the instant proceeding.⁶⁵

⁵⁷ Hearing Request at 5.

⁵⁸ Declarations of Members.

⁵⁹ Hearing Request at 6.

⁶⁰ Declarations of Members.

⁶¹ Declaration of Pro Se Counsel. Notably, this declaration discusses “the attached declaration” of a Wanda Hess, but no such declaration is attached, and discusses seeking intervention in “any rulemaking proceeding,” but the current proceeding is not a rulemaking proceeding.

⁶² Hearing Request at 6.

⁶³ *Id.* at 5–6.

⁶⁴ *Id.*

⁶⁵ CRAFT also cites to *Turkey Point*, CLI-01-17, stating that it affirmed LBP-01-6, but this is not correct with respect to standing; on the contrary, in CLI-01-17, the Commission explicitly stated, “we do not

Turkey Point, LBP-01-06, stands for the proposition that, since it is analogous to construction and initial operating license proceedings where a proximity presumption of 50 miles applies, a license renewal proceeding entails a 50-mile proximity presumption.⁶⁶ CRAFT argues that the LAR at issue in this proceeding should be treated similarly to a license renewal application and also afforded a 50-mile proximity presumption because it is, in effect, an amendment to the Fermi 2 license renewal application because it “seeks to renege on a license condition that allowed [DTE] to gain [the] license extension.”⁶⁷ However, the Fermi 2 license renewal application and the LAR at issue here are entirely separate actions. When the NRC approved the Fermi 2 license renewal application in 2016, it issued a renewed license for Fermi 2.⁶⁸ From that point on, all changes to the Fermi 2 license, including those proposed by the LAR, are amendments under 10 C.F.R. § 50.90.⁶⁹ An action completed in 2016 cannot be revisited as part of this LAR. Therefore, the *Turkey Point*, LBP-01-06, discussion of a 50-mile proximity presumption for petitioners in license renewal proceedings is not relevant to the instant license amendment proceeding.

Diablo Canyon, LBP-02-23, stands for the proposition that a proximity presumption applies to applications for permission to construct and operate an independent spent fuel storage installation (ISFSI) as well as to requests to expand SFPs.⁷⁰ This case does not support

decide whether the Board's application of a proximity presumption was correct.” *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 26 n.20 (2001).

⁶⁶ *Florida Power & Light Co.* (Turkey Point, Units 3 and 4), LBP-01-06, 53 NRC 138, 147–49 (2001).

⁶⁷ Hearing Request at 6.

⁶⁸ See Renewed License.

⁶⁹ See, e.g., 10 C.F.R. § 54.21(b) (explaining that, following the submittal of a license renewal application, the application must be amended to identify any changes to the current licensing basis of the facility that materially affect the contents of the application; however, this obligation ends 3 months before the scheduled completion of the NRC review).

⁷⁰ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 419, 428 (2002).

CRAFT's reliance on the proximity presumption, however, because DTE does not seek either of these things with its LAR. DTE already has permission to construct and operate an ISFSI⁷¹ and has already constructed and is operating an ISFSI.⁷² Additionally, with the LAR, DTE is seeking to maintain, not expand, the current Fermi 2 SFP capacity.⁷³ For these reasons, the proximity presumptions discussed in *Diablo Canyon*, LBP-02-23, are not relevant to the instant proceeding and do not support CRAFT's standing argument.

The remainder of CRAFT's standing argument also does not demonstrate that the proximity presumption applies in the instant proceeding. For the proximity presumption to apply in a license amendment proceeding, the proposed action must entail an obvious potential for offsite radiological consequences.⁷⁴ A determination of an obvious potential for offsite radiological consequences takes into account the nature of the proposed action and the significance of the radioactive source.⁷⁵ CRAFT, however, does not discuss these issues in its standing argument. Instead, CRAFT only summarizes the proposed action and claims without support that installing NETCO SNAP-IN® rack inserts into the existing Boraflex racks will "endanger[] all life within a 50-mile radius" including that of CRAFT's members within "the Fermi

⁷¹ See Notification of Intent to Store Spent Fuel at an Independent Spent Fuel Storage Installation (ISFSI) and Notification of Intent to Apply a Previously Approved 10 CFR Part 50 Quality Assurance Program to ISFSI Activities (Dec. 10, 2007) (ML073521312); see also *Detroit Edison Co.* (Fermi Power Plant Independent Spent Fuel Storage Installation), LBP-09-20, 70 NRC 565, 567 (2009) (explaining that DTE holds a general license for the storage of spent fuel at an onsite ISFSI).

⁷² See, e.g., UFSAR at § 1.2.2.4 (identifying the ISFSI Equipment Storage Building, the ISFSI Pad, the ISFSI Fabrication Pad, the ISFSI Transfer Pad, and the ISFSI Cask Transfer Facility as among the principal structures located on the Fermi 2 site).

⁷³ LAR at Encl. 1, p. 3 ("No changes are being proposed in this [LAR] to the number of racks or to the total capacity of the Fermi 2 SFP.").

⁷⁴ See *Peach Bottom*, CLI-05-26, 62 NRC at 580–81; *Zion*, CLI-99-04, 49 NRC at 191 ("[I]n an operating license amendment proceeding, 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.") (quoting *St. Lucie*, 30 NRC at 329-30).

⁷⁵ *Peach Bottom*, CLI-05-26, 62 NRC at 580–81.

2 radiation zone[.]”⁷⁶ Moreover, even if the Board were to sift through the rest of the hearing request,⁷⁷ it would not find any support for these conclusory statements. For instance, whereas CRAFT discusses the consequences of “a worst case reactor accident scenario” and of an SFP fire⁷⁸ and discusses, separately, that if the Boraflex remains in the SFP, then it will degrade,⁷⁹ it provides no explanation for how the degradation of the Boraflex poses an obvious potential for offsite radiological consequences from a reactor accident or an SFP fire.

Because CRAFT has failed to show that the LAR raises an obvious potential for offsite radiological consequences within a radius of Fermi 2 that encompasses either its central office or its identified members’ residences, CRAFT has not demonstrated the existence of a proximity presumption of standing.

C. CRAFT Has Not Satisfied its Burden of Demonstrating Contemporaneous Judicial Concepts of Standing

CRAFT correctly identifies that “[i]n determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing”;⁸⁰ however, it does not demonstrate such a showing of standing for either itself (i.e., organizational standing) or one of its members (i.e., representational standing). The Commission has consistently held that, in license amendment proceedings, standing arguments that assert generic radiological harm and do not explain how such harm might result from the proposed amendment are insufficient to demonstrate contemporaneous judicial concepts of standing.⁸¹ In its hearing request, though, CRAFT raises exactly such an argument; it

⁷⁶ Hearing Request at 5–6.

⁷⁷ See *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

⁷⁸ Hearing Request at 15–16.

⁷⁹ *Id.* at 9–11.

⁸⁰ *Id.* at 6.

⁸¹ *E.g.*, *Zion*, CLI-99-04, 49 NRC at 192 (ruling that a hearing request alleging that a license amendment would increase the risk of, among other things, “LOCA (loss of Coolant Accident) ... radiological

summarizes the LAR, states that it and its members are within the vicinity of Fermi 2, and states that it and its members will be harmed as a result of the LAR.⁸² CRAFT's argument is devoid of any discussion of a particularized injury to CRAFT or its members and how the changes proposed in the LAR would plausibly lead to this injury. Therefore, CRAFT's hearing request does not demonstrate that it meets contemporaneous judicial concepts of standing.

II. The Board Should Deny the Hearing Request
Because CRAFT Does Not Propose at Least One Admissible Contention

CRAFT proposes eight contentions that concern, in general, the Staff's no significant hazards consideration determination, the degradation of Boraflex in the SFP, the conservatism of the subcriticality margin of the SFP, moving spent fuel from the SFP to dry storage, the Fermi 2 crane, an analysis of the SFP as currently loaded, the LAR's evaluation of Global Nuclear Fuel 3, and the fitness of DTE as a licensee. However, none of these contentions satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f) and, therefore, the Board should deny CRAFT's hearing request.

A. Contention Admissibility Requirements

A Board will grant a hearing request only if the Board, in addition to determining that the petitioner has standing, also determines that the petitioner has "proposed at least one admissible contention that meets the requirements of" 10 C.F.R. § 2.309(f).⁸³ The contention admissibility requirements of 10 C.F.R. § 2.309(f) "focus litigation on concrete issues and result

concerns, unsafe levels of radiation for employees at the plant and general public, ... contamination of the local community and the environment, ... increase[d] risk of accident at [the facility], and ... contamination of Lake Michigan ... failed to indicate *how* these various harms might result from the license amendments" and noting that "[a] petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences").

⁸² Hearing Request at 5–7.

⁸³ 10 C.F.R. § 2.309(a).

in a clearer and more focused record for decision.”⁸⁴ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f) requirements.⁸⁵ Thus, the Commission has consistently emphasized that the 10 C.F.R. § 2.309(f) requirements are “strict by design.”⁸⁶ The failure to comply with any one of the 10 C.F.R. § 2.309(f) requirements is grounds for the dismissal of a contention⁸⁷ and attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”⁸⁸

Under 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission’s hearing notice.⁸⁹ Thus, a proposed contention that challenges a license amendment must confine itself to “health, safety or environmental issues fairly raised by [the license amendment].”⁹⁰ Challenges to the current licensing basis of a plant are not within the scope of a license amendment proceeding—

⁸⁴ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (Final rule).

⁸⁵ *Id.*

⁸⁶ *E.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (pet. for recons. denied, CLI-02-01, 55 NRC 1 (2002)).

⁸⁷ *Private Fuel Storage, L.L.C.* (Independent Irradiated fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010).

⁸⁸ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

⁸⁹ *See Pub. Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170–71 (1976).

⁹⁰ *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

they are properly challenged through the process prescribed by 10 C.F.R. § 2.206.⁹¹ Additionally, a proposed contention must be rejected if it challenges the NRC's regulations because such a challenge is necessarily beyond the scope of the proceeding⁹² unless (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.⁹³ Otherwise, the petitioner may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.⁹⁴ The adequacy of the Staff's review, as opposed to the adequacy of the application, is not subject to challenge⁹⁵ and a Board lacks the "authority to supervise the Staff's review."⁹⁶ Finally, a proposed contention must be rejected if it raises an issue that the Board is not authorized to adjudicate.⁹⁷ For example, a Board has no

⁹¹ See, e.g., *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-07, 90 NRC 1, 14 (2019) ("If [the petitioner] seeks to challenge the ongoing operation of [the facility], it may file a petition seeking enforcement action under 10 C.F.R. § 2.206.").

⁹² See *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974) ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.") (citing *Florida Power & Light Co.* (Turkey Point Units No. 3 and 4), 4 AEC 787, 788 (1972)).

⁹³ 10 C.F.R. § 2.335.

⁹⁴ 10 C.F.R. § 2.335(e); see, e.g., *Exelon Generation Co., LLC* (Byron Nuclear Power Station, Units 1 & 2; Braidwood Nuclear Power Station, Units 1 & 2), CLI-14-6, 79 NRC 445, 448–49 (2014) ("the proper avenue for challenging an NRC rule is to file a petition for rulemaking").

⁹⁵ See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 n.56 (2010) ("The contention ... inappropriately focused on the Staffs [sic] review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications.") (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); 69 Fed. Reg. at 2202).

⁹⁶ *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-12-4, 75 NRC 154, 156 (2012) (citing LBP-11-30, 74 NRC 627, 632–33 (2011)).

⁹⁷ See *Marble Hill*, ALAB-316, 3 NRC at 170–71.

jurisdiction to rule on the propriety of a Staff determination that a proposed license amendment presents no significant hazards considerations.⁹⁸

Under 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not “material to the findings the NRC must make to support the action that is involved in the proceeding.” The proponent of a proposed contention in a licensing proceeding “must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application.”⁹⁹ In other words, the issue in the proposed contention “must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief.”¹⁰⁰

Under 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.¹⁰¹ While a Board may view a petitioner’s supporting information in a light favorable to the petitioner, if a petitioner neglects to provide the requisite support for its contentions, the Board cannot make assumptions or draw inferences to supply the information that is lacking.¹⁰² Additionally, simply attaching material or documents as a basis for a contention, without setting

⁹⁸ See *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-05, 83 NRC 131, 144–45 (2016).

⁹⁹ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 62 (2008).

¹⁰⁰ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998) (reconsid. granted in part on other grounds LBP-98-10, 47 NRC 288 (1998)) (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (Final Rule)).

¹⁰¹ See *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

¹⁰² See *Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553–54 (2009); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI 91-12, 34 NRC 149, 155–56 (1991).

forth an explanation of that information's significance, is inadequate to support the admission of the contention.¹⁰³ The Board is not expected to sift through attached material and documents in search of factual support.¹⁰⁴

Under 10 C.F.R. § 2.309(f)(1)(vi), a proposed contention must be rejected if it does not "show that a genuine dispute exists with the applicant[] on a material issue of law or fact." This requires that petitioners "read the pertinent portions of the application, ... state the applicant's position[,] and state the petitioner's opposing view."¹⁰⁵

B. CRAFT's Proposed Contention 1 (Significant Hazards Consideration)
Is Not Admissible

In its proposed Contention 1, CRAFT challenges the Staff's no significant hazards consideration determination on the LAR.¹⁰⁶ Specifically, CRAFT prefaces its proposed Contention 1 by quoting the first significant hazards consideration criterion, which is whether the amendment "[i]nvolve[s] a significant increase in the probability or consequences of an accident previously evaluated...."¹⁰⁷ Later in its hearing request, CRAFT prefaces its discussion labeled "Again Contention 1" by quoting the second significant hazards consideration criterion, which is whether the amendment "[c]reate[s] the possibility of a new or different kind of accident from any accident previously evaluated...."¹⁰⁸ In its discussion labeled "Again Contention 1," CRAFT

¹⁰³ See *Fansteel*, CLI-03-13, 58 NRC at 204–05.

¹⁰⁴ *Seabrook*, CLI-12-5, 75 NRC at 332.

¹⁰⁵ *Millstone*, CLI-01-24, 54 NRC at 358.

¹⁰⁶ See 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, 731–32, (Jan. 7, 2020) ("The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.").

¹⁰⁷ Compare Hearing Request at 9 with 10 C.F.R. § 50.92(c)(1).

¹⁰⁸ Compare Hearing Request at 13 with 10 C.F.R. § 50.92(c)(2).

quotes the third significant hazards consideration criterion, which is whether the amendment “[i]nvolve[s] a significant reduction in a margin of safety.”¹⁰⁹ CRAFT then argues that the Staff and DTE incorrectly found that the LAR involves no significant hazards consideration.¹¹⁰

CRAFT’s challenge to the Staff’s no significant hazards consideration determination is prohibited by 10 C.F.R. § 50.58(b)(6), which states that “[n]o petition or other request for review of or hearing on the [S]taff’s significant hazards consideration determination will be entertained by the Commission” and that this determination is “final, subject only to the Commission’s discretion, on its own initiative, to review the determination.” The Commission did not exercise its discretion to review this determination.¹¹¹ Therefore, the Board should find that CRAFT’s proposed Contention 1 is not admissible.

C. CRAFT’s Proposed Contention 2 (Impact of Degradation of Boraflex) Is Not Admissible

In its proposed Contention 2, CRAFT argues that if the LAR is approved, then the Boraflex racks will remain in the Fermi 2 SFP and corrode, which “can result in unanticipated consequences and unaccounted for debris in the [SFP].”¹¹² Specifically, CRAFT discusses Boraflex racks corroding and adhering to spent fuel.¹¹³ CRAFT also asserts that “[c]umulative longitudinal degradation to the spent fuel ... could lead to failure in the spent fuel pool and

¹⁰⁹ Compare Hearing Request at 13 with 10 C.F.R. § 50.92(c)(3).

¹¹⁰ Hearing Request at 9, 13, 14.

¹¹¹ See Memorandum from Annette L. Vietti-Cook, Secretary, NRC, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Request for Hearing Submitted with Respect to the License Amendment Application of Fermi 2, (Docket No. 50-341-LA) (Mar. 18, 2020) (ML20078M321) (Referral Memorandum) (“[T]his referral memorandum is not to be construed as reflecting a determination that CRAFT is entitled to a review of, or hearing on, the [S]taff’s no significant hazards consideration determination.”).

¹¹² Hearing Request at 9–11, 13.

¹¹³ *Id.*

potential for failure when transferred to [dry storage]....”¹¹⁴ CRAFT states that these issues have “not been evaluated.”¹¹⁵ In summary, CRAFT argues that the LAR does not consider that the Boraflex racks will remain in the SFP during the period of extended operation, that the Boraflex will degrade, and that corrosion products from the Boraflex could affect the fuel such that (1) the fuel may fail in the SFP, (2) the fuel may fail when transferred to dry storage, or (3) the fuel may adhere to the racks. These arguments of omission do not amount to an admissible contention.

CRAFT’s proposed Contention 2 is not admissible because, contrary to 10 C.F.R. § 2.309(f)(v), it is not supported by alleged facts or expert opinions. Although this contention of omission alleges that, during the period of extended operation, corrosion products from the Boraflex could cause the fuel to fail or adhere to the racks, CRAFT provides no evidence to support these posited phenomena. Instead, CRAFT cites a notice of violation for a different facility that discusses the separate issue of the degradation of Boraflex with respect to its neutron-absorbing capability.¹¹⁶ CRAFT also cites a licensee event report from a third facility that is also related to the degradation of Boraflex with respect to its neutron-absorbing capability and not with the degradation of Boraflex affecting fuel within the SFP.¹¹⁷ Moreover, the Staff is not aware of any support for the phenomena posited by CRAFT; on the contrary, the Fermi 2 SFP has a Fuel Pool Cooling and Cleanup System that is designed, in part, to “[m]inimize

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Final Significance Determination of White Finding and Notice of Violation; Notice of Violation and Proposed Imposition of Civil Penalty - \$70,000 (NRC Inspection Report 05000250/2010009, Turkey Point Nuclear Plant), at Encl. p. 1–2 (Jun. 21, 2010) (ML101730313) (“[D]issolution of Boron-10 from Boraflex panels in ... the ... spent fuel pool resulted in a reduction in the nominal Boron-10 areal density in excess of 50 percent, such that K_{eff} would not have been maintained less than 1.0 for all cases if the spent fuel pool had been flooded with unborated water.”).

¹¹⁷ Licensee Event Report 2016-003-02, Spent Fuel Storage Design Feature Exceeded, at Encl. p. 2–3 (Nov. 18, 2016) (ML16333A006) (discussing the discovery of a cumulative gap in a Boraflex panel that challenged compliance with the requirement to maintain K_{eff} less than or equal to 0.95).

corrosion product buildup ... through filtration and demineralization....”¹¹⁸ Because CRAFT’s proposed Contention 2 is not supported, it does not satisfy 10 C.F.R. § 2.309(f)(v).

Second, CRAFT’s proposed Contention 2 is not admissible because, contrary to 10 C.F.R. § 2.309(f)(1)(iv), it is not material to the findings that the NRC must make on the LAR. The LAR seeks, in part, to eliminate License Condition 2.C.(26)(c) and install NETCO SNAP–IN® rack inserts.¹¹⁹ The objective of License Condition 2.C.(26)(c) is to not credit Boraflex material for neutron absorption.¹²⁰ Therefore, what would “impact the grant[ing] or denial of [the] pending license application”¹²¹ is whether the NETCO SNAP–IN® rack inserts provide sufficient neutron absorption such that the Boraflex material would not need to be credited for neutron absorption and, thus, the license condition could be eliminated. Contention 2, however, does not discuss neutron absorption but, instead, discusses the different issue of the effect of the degradation of Boraflex on fuel. If CRAFT wishes to raise concerns with the effect of the degradation of the Boraflex currently in the SFP on fuel, then it may file a request for action under 10 C.F.R. § 2.206.¹²²

Finally, CRAFT’s proposed Contention 2 is not admissible because, contrary to 10 C.F.R. § 2.309(f)(vi), CRAFT does not show that a genuine dispute exists with DTE on a material issue of law or fact. Although CRAFT asserts that the LAR will make Fermi 2 “out of compliance” with License Condition 2.C.(26)(c),¹²³ this is not the case. Consistent with 10

¹¹⁸ See UFSAR at 9.1-18. This system’s “filter-demineralizers” maintain water purity within specified chemical limits as monitored by weekly sampling and analysis and remove particulate matter by “powdered ion-exchange resin-fiber mixtures.” *Id.* at 9.1-20–9.1-21.

¹¹⁹ LAR at Encl. 1, p. 3–4.

¹²⁰ See Renewed License at 8 (requiring that Boraflex “not be required to perform a neutron absorption function”).

¹²¹ *Indian Point*, LBP-08-13, 68 NRC at 62.

¹²² *DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2)*, CLI-17-7, 85 NRC 111, 118 (2017).

¹²³ Hearing Request at 10, 13.

C.F.R. § 50.90, after the issuance of the Fermi 2 renewed license, whenever DTE desires to amend this license, it can file a license amendment request with the NRC. Thus, the terms of a license, whether they are license renewal conditions such as License Condition 2.C.(26)(c) or otherwise, can be changed at any time upon application to and approval by the NRC. Therefore, contrary to CRAFT's assertion, seeking to amend its license would not necessarily mean that DTE is out of compliance with its license and, accordingly, this assertion is not a genuine dispute on a material issue of law or fact.

For these reasons, the Board should find that CRAFT's proposed Contention 2 is not admissible.

D. CRAFT's Proposed Contention 3 (Subcriticality Margin Not Conservative) Is Not Admissible

CRAFT's proposed Contention 3 is:

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. There is no conservative buffer, DTE proposes to play on the margin to stay subcritical with less than or equal to 0.95 being subcritical and measurement of 1.00 being supercritical. CRAFT Contends that this is not Conservative. Therefore, the proposed change does involve a significant reduction in a margin of safety and should not be allowed.¹²⁴

As an initial matter, this contention appears to be a challenge to the Staff's no significant hazards consideration determination on the LAR. Specifically, CRAFT prefaces it by quoting the third significant hazards consideration criterion, which is whether the amendment "[i]nvolve[s] a significant reduction in a margin of safety."¹²⁵ CRAFT then concludes its Contention 3 argument with language similar to that of the third criterion; specifically, it states that "the proposed

¹²⁴ *Id.* at 14.

¹²⁵ *Compare* Hearing Request at 13 *with* 10 C.F.R. § 50.92(c)(3).

change does involve a significant reduction in a margin of safety and should not be allowed.”¹²⁶ Such a challenge to the Staff’s no significant hazards consideration determination is prohibited by 10 C.F.R. § 50.58(b)(6) and the Commission has not exercised its discretion to allow review of this determination.¹²⁷ Therefore, for this reason alone, Contention 3 is not admissible.

In addition to being prohibited by 10 C.F.R. § 50.58(b)(6), none of CRAFT’s arguments in Contention 3 meet the contention admissibility criteria in 10 CFR § 2.309(f). For instance, CRAFT argues that crediting Boraflex as a neutron-absorbing material is not conservative;¹²⁸ however, contrary to 10 C.F.R. § 2.309(f)(1)(vi), this is not a genuine dispute with the LAR on a material issue of law or fact because through the proposed installation of NETCO SNAP-IN® rack inserts, the LAR, in fact, seeks to not credit Boraflex as a neutron-absorbing material.¹²⁹ CRAFT also argues that a k_{eff} of “less than or equal to 0.95, if the [SFP] is fully flooded with unborated water” is not conservative.¹³⁰ Contrary to 10 C.F.R. § 2.309(f)(1)(v), however, CRAFT does not provide any support for this assertion. Further, contrary to 10 C.F.R. § 2.309(f)(1)(iii), the standard that CRAFT asserts as not conservative is an existing requirement of the Fermi 2 license¹³¹ that the LAR does not propose to change¹³² and, therefore, is not within the scope of this proceeding. If CRAFT wishes to challenge DTE’s ongoing compliance with this requirement,

¹²⁶ Hearing Request at 14.

¹²⁷ See Referral Memorandum (“[T]his referral memorandum is not to be construed as reflecting a determination that CRAFT is entitled to a review of, or hearing on, the [S]taff’s no significant hazards consideration determination.”).

¹²⁸ Hearing Request at 11, 14.

¹²⁹ LAR at Encl. 1, p. 4.

¹³⁰ Hearing Request at 11, 14.

¹³¹ Renewed License at App. A, § 4.3.1 (“The spent fuel storage racks are designed and shall be maintained with ... $K_{\text{eff}} \leq 0.95$ if fully flooded with unborated water, which includes an allowance for uncertainties as described in Section 9.1 of the UFSAR....”).

¹³² See LAR at Encl. 2 (including a marked-up version of Appendix A of the Fermi 2 license with no proposed changes to the § 4.3.1 k_{eff} discussion).

it may file a request for action under 10 C.F.R. § 2.206.¹³³ Similarly, the issue material to the findings that the NRC must make in this proceeding is whether Fermi 2 will meet this standard with the installation of NETCO SNAP-IN® rack inserts and not whether the standard itself is conservative; therefore, to the extent that Contention 3 challenges this standard, it does not satisfy 10 C.F.R. § 2.309(f)(1)(iv). Moreover, the standard that CRAFT asserts as not conservative is essentially the same as a requirement in the NRC's regulations¹³⁴ and that rule is not subject to challenge in this proceeding without a petition for waiver,¹³⁵ which CRAFT has not made.¹³⁶

For these reasons, the Board should find that CRAFT's proposed Contention 3 is not admissible.

E. CRAFT's Proposed Contention 4 (Request to Move Fuel to Dry Storage) Is Not Admissible

CRAFT's proposed Contention 4 advances various arguments related to storing the spent fuel at Fermi 2 in dry storage instead of in the SFP. As discussed below, CRAFT has failed to present a contention that meets the contention admissibility criteria in 10 CFR § 2.309(f).

First, CRAFT asserts that the Fermi 2 SFP "was not designed to hold 4608 fuel assemblies" and "currently places undue risk on Public Health and Safety."¹³⁷ In raising this argument, contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(iv), CRAFT challenges current operation at

¹³³ *Fermi 2*, CLI-17-7, 85 NRC at 118.

¹³⁴ See 10 C.F.R. § 50.68(b)(4) ("[T]he k_{eff} of the spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95, at a 95 percent probability, 95 percent confidence level, if flooded with unborated water.").

¹³⁵ See 10 C.F.R. § 2.335(a).

¹³⁶ Additionally, to the extent that CRAFT argues that a k_{eff} of 0.95 provides no "buffer," this is, contrary to 10 C.F.R. § 2.309(f)(1)(vi), not a genuine dispute with the LAR on a material issue of law or fact because, as discussed in the LAR, a k_{eff} of 0.95 has a "five percent subcriticality margin...." LAR at Encl. 1, p. 27.

¹³⁷ Hearing Request at 11.

Fermi 2, not DTE's license amendment. Any concerns that CRAFT may have with the current safety of the Fermi 2 SFP are not pertinent to this license amendment proceeding. Instead, if CRAFT wishes to challenge DTE's ongoing compliance with NRC requirements, it may file a request for action under 10 C.F.R. § 2.206.¹³⁸

Second, CRAFT asserts that "responsible regulators would manage the risk [of SFP criticality] by moving spent fuel assemblies into [dry storage]" because dry storage provides "[b]etter protection against criticality; [b]etter protection against spent fuel pool heat up events; [and] [b]etter protection against spent fuel pool accidents" and because "reducing the inventory of spent fuel in the [SFP] also reduces the consequences of an accident, should one occur."¹³⁹ Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(iv), this generic discussion of how CRAFT thinks that the NRC should regulate is not within the scope of this proceeding or material to the findings that the NRC must make on the LAR. Instead, the question of whether the NRC should require the expedited transfer of spent fuel from SFPs to dry storage is more appropriately the subject of a 10 C.F.R. § 2.802 petition for rulemaking.¹⁴⁰ The NRC, though, has already considered and decided against pursuing such a rulemaking.¹⁴¹

¹³⁸ *Fermi 2*, CLI-17-7, 85 NRC at 118.

Moreover, CRAFT's argument regarding the capacity of the Fermi 2 SFP does not show that a genuine dispute exists with the LAR on a material issue of law or fact because the Fermi 2 license explicitly states that "[t]he spent fuel storage pool is designed and shall be maintained with a storage capacity limited to no more than 4608 fuel assemblies." Renewed License at App. A, § 4.3.3. Additionally, CRAFT does not support its claim that the Fermi 2 SFP is currently unsafe; instead, CRAFT points to an article as support for the statement that "[f]or 20 years the Emergency Diesel Generators (EDGs) were unavailable at Fermi 2" and then only asserts that, had the EDGs been needed during that time for "Emergency Recirculation of the [SFP] they would not have been available." Hearing Request at 12.

¹³⁹ Hearing Request at 12.

¹⁴⁰ *See Seabrook*, CLI-19-07, 90 NRC at 12.

¹⁴¹ *See, e.g.*, COMSECY-13-0030, Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (Nov. 12, 2013) (ML13273A601) (the Staff concluding that SFPs are robust structures and that regulatory action to require the expedited transfer of spent fuel from SFPs to dry storage is not warranted); SRM-COMSECY-13-0030, Staff Evaluation and

Finally, CRAFT asserts that, instead of using NETCO SNAP-IN® rack inserts as a “prophylactic bandage,” DTE should have considered moving spent fuel from the Fermi 2 SFP to dry storage.¹⁴² Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(iv), this argument is not within the scope of this proceeding or material to the findings that the NRC must make on the LAR. Consistent with NRC regulations, when the Staff reviews a license amendment request, it does not determine whether the request could be achieved in some other, arguably better, manner; instead, its decision is guided by the considerations that govern the issuance of initial licenses.¹⁴³ These include finding that there is reasonable assurance that the activities authorized by the amendment can be conducted without endangering the health and safety of the public and that such activities will be conducted in compliance with the NRC’s regulations.¹⁴⁴ Thus, CRAFT’s argument that DTE, if it were a “wise owner[],” should have taken some other action “as an [a]lternative” to submitting the LAR¹⁴⁵ is not admissible.

For these reasons, the Board should find that CRAFT’s proposed Contention 4 is not admissible.

F. CRAFT’s Proposed Contention 5 (Concerns about the Fermi 2 Crane)
Is Not Admissible

CRAFT’s proposed Contention 5 advances various arguments related to the Fermi 2 crane.¹⁴⁶ As discussed below, CRAFT has failed to present a contention that meets the contention admissibility criteria in 10 CFR § 2.309(f).

Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel (May 23, 2014) (ML14143A360) (the Commission agreeing with the Staff conclusion in COMSECY-13-0030).

¹⁴² Hearing Request at 12.

¹⁴³ 10 C.F.R. § 50.92(a).

¹⁴⁴ 10 C.F.R. § 50.57(a).

¹⁴⁵ Hearing Request at 12.

¹⁴⁶ CRAFT’s proposed Contention 5 also repeats its arguments from proposed Contention 2 that (1) by not removing the Boraflex racks, Fermi 2 will be out of compliance with License Condition 2.C.(26)(c) and (2) the racks will degrade and corrosion products from the racks will somehow affect the fuel such that the

CRAFT asserts that “there are historically concerns about the rating of the ... [c]rane”; namely, that the crane must “be certified for the 125 tons that it will need to lift” but that unspecified “evaluations and documentation indicate that the [c]rane is only certified for 117 tons.”¹⁴⁷ Additionally, CRAFT asserts that “[t]he [c]rane is rated at 125 tons” and that “the weight of fuel bundle and basket [is] 125 tons” and, thus, there is “[n]ot much [of] a margin of error.”¹⁴⁸ CRAFT also asserts that welds related to the crane were found to be missing at one point in the past, but it is unclear whether CRAFT believes that this issue has been resolved.¹⁴⁹ Finally, CRAFT discusses the consequences of a reactor accident and of an SFP fire.¹⁵⁰

As an initial matter, contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(iv), CRAFT’s discussion of the Fermi 2 crane is outside the scope of this proceeding and immaterial to the findings that the NRC must make on the LAR. Through its LAR, DTE seeks to install NETCO SNAP-IN® rack inserts into the Boraflex racks in the Fermi 2 SFP instead of replacing those racks with Boral racks.¹⁵¹ CRAFT, though, does not explain how the crane that it discusses in this contention or the alleged deficiencies with that crane relate to the installation of the inserts. Additionally, although CRAFT discusses the consequences of a reactor accident and of an SFP fire, CRAFT does not link either of these things to the LAR. Effectively, CRAFT is challenging an aspect of DTE’s ongoing compliance with NRC requirements that it has not demonstrated as being

fuel may fail in the SFP or when transferred to dry storage or that the fuel may adhere to the racks. *Compare* Hearing Request at 14–15 *with* Hearing Request at 10–11. As discussed in the Staff’s answer to proposed Contention 2, these arguments do not form an admissible contention because they do not satisfy the contention admissibility requirements.

¹⁴⁷ Hearing Request at 15.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (making the unclear and potentially contradictory statements that DTE could not “unload fuel from the [SFP]” in 2010 because “vertical beams / superstructure was missing (may still be) seismic qualification” and that “[r]emedial work at Fermi 2 was required”).

¹⁵⁰ *Id.* at 15–16.

¹⁵¹ LAR at Encl. 1, p. 3–4.

related to the LAR and, therefore, this contention is not admissible. If CRAFT wishes to challenge DTE's ongoing compliance with NRC requirements, it may file a request for action under 10 C.F.R. § 2.206.¹⁵²

Moreover, in support of its arguments regarding the Fermi 2 crane, CRAFT only alludes to unspecified "Inspection Reports."¹⁵³ This is not sufficient to satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(v) that a petitioner "reference[] to the specific sources and documents on which [it] intends to rely" and the Board cannot be expected to sift through decades of Fermi 2 inspection reports to find the asserted factual support that CRAFT has not specified.¹⁵⁴ Additionally, CRAFT's citation to documents discussing the consequences of a reactor accident and of an SFP fire does not satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(v) that a petitioner provide alleged facts or expert opinions that support its "position on the issue[.]" CRAFT provides no explanation for how information on the consequences of a reactor accident and of an SFP fire supports its position on the issue of alleged deficiencies of the Fermi 2 crane.¹⁵⁵

For these reasons, the Board should find that CRAFT's proposed Contention 5 is not admissible.

¹⁵² *Fermi 2*, CLI-17-7, 85 NRC at 118.

¹⁵³ Hearing Request at 15.

¹⁵⁴ *See Seabrook*, CLI-12-5, 75 NRC at 332.

¹⁵⁵ Moreover, contrary to 10 C.F.R. § 2.309(f)(1)(v), CRAFT's "references to the specific sources and documents on which [it] intends to rely" regarding reactor accident and SFP fire consequences are unclear. Although CRAFT discusses a report that "[t]he U.S. Congress commissioned," Hearing Request at 15–16, its citation for this report is a hyperlink to an un-sourced document that claims to summarize the report. Similarly, whereas CRAFT refers to "the following report by Professor Frank von Hippel from Princeton University and Dr. Edwin Lyman with the Union of Concerned Scientists," *id.* at 16, its citation for this report is a hyperlink to an article discussing the report. Finally, CRAFT cites to "NUREG-0340," *id.*, but provides no further discussion or explanation of this document.

G. CRAFT's Proposed Contention 6 (Request for Analysis of Current Spent Fuel Pool) Is Not Admissible

CRAFT's proposed Contention 6 is:

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.¹⁵⁶

By its own terms, this contention does not challenge the LAR at issue in this proceeding. Specifically, CRAFT makes clear that the requested "specific analysis on the [SFP] at Fermi 2" needs to be completed "prior to consideration of [the LAR]."¹⁵⁷ Moreover, CRAFT indicates that its concern is for the safety of the Fermi 2 SFP "as currently loaded" and not for the safety of the SFP as it would be affected by the LAR.¹⁵⁸ Again, contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(iv), CRAFT is effectively challenging an aspect of DTE's ongoing compliance with NRC requirements that is unrelated to the LAR. If CRAFT wishes to challenge DTE's ongoing compliance with NRC requirements, it may file a request for action under 10 C.F.R. § 2.206.¹⁵⁹ For these reasons, the Board should find that CRAFT's proposed Contention 6 is not admissible.

¹⁵⁶ Hearing Request at 16.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Fermi 2*, CLI-17-7, 85 NRC at 118.

Moreover, CRAFT's proposed Contention 6: does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) because instead of disputing the LAR, it requests unrelated actions of DTE; does not satisfy 10 C.F.R. § 2.309(f)(1)(ii) because it does not explain what is meant by a "specific analysis on the [SFP] at Fermi 2"; and does not satisfy 10 C.F.R. § 2.309(f)(1)(v) because its quotation from an article that "[t]he Fukushima accident could have been a hundred times worse had there been a loss of the water covering the spent fuel in pools associated with each reactor," Hearing Request at 16, does not support its assertion that DTE needs to perform an unspecified type of analysis on the Fermi 2 SFP now.

H. CRAFT's Proposed Contention 7 (Inadequate Evaluation of Global Nuclear Fuel 3) Is Not Admissible

CRAFT's proposed Contention 7 states, in pertinent part,

the proposed use of Global Nuclear Fuel – 3 [(GNF3)], an experimental, higher enriched and longer burn-up fuel has not undergone adequate evaluation as it pertains to being placed into spent fuel pool and subsequent impact on criticality coefficient of 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. In conclusion a spent fuel fire can happen here. Different triggers but same result. Please begin accelerated removal of highly irradiated spent fuel from the spent fuel pool at Fermi 2.¹⁶⁰

The LAR includes a summary of a criticality safety analysis that, according to DTE, “demonstrates that the effective neutron multiplication factor, k-effective, does not exceed 0.95, at a 95 percent probability, 95 percent confidence level....”¹⁶¹ This analysis includes the consideration of GNF3.¹⁶² CRAFT disputes the adequacy of the criticality safety analysis's consideration of GNF3 by stating that GNF3 “has not undergone adequate evaluation as it

¹⁶⁰ Hearing Request at 16–17. The argument that “the effective neutron multiplication factor, k-effective, is less than or equal to 0.95, if the [SFP] is fully flooded with unborated water does not leave conservative margin to stay subcritical” is repeated from proposed Contention 3. *Compare* Hearing Request at 16–17 *with* Hearing Request at 11, 14. As discussed in the Staff's answer to proposed Contention 3, this argument does not form an admissible contention because it does not satisfy the contention admissibility requirements. The argument for the “accelerated removal of highly irradiated spent fuel from the [SFP] at Fermi 2” is repeated from proposed Contention 4. *Compare* Hearing Request at 17 *with* Hearing Request at 11–12. As discussed in the Staff's answer to proposed Contention 4, this argument does not form an admissible contention because it does not satisfy the contention admissibility requirements. CRAFT also states in Contention 7 that it “does not agree with DTE and does not agree with the NRC staff analysis that the three standards of 10 CFR 50.92(c) are satisfied” and that, therefore, it “does not accept NRC staff determination [of] no significant hazards consideration.” Hearing Request at 17. Such a challenge to the Staff's no significant hazards consideration determination is prohibited by 10 C.F.R. § 50.58(b)(6) and the Commission has not exercised its discretion to allow review of this determination. See Referral Memorandum. Therefore, this argument does not form an admissible contention.

¹⁶¹ LAR at Encl. 1, p. 11.

¹⁶² *Id.* (“Although 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 was therefore considered in the [criticality safety] analysis.”).

pertains to being placed into” the SFP.¹⁶³ CRAFT, however, provides no alleged facts or expert opinions to support this claim but merely asserts without support that “a spent fuel fire can happen here.”¹⁶⁴ Neither mere speculation nor bare or conclusory assertions suffice to allow the admission of a proposed contention.¹⁶⁵ Therefore, CRAFT’s proposed Contention 7 does not satisfy 10 C.F.R. § 2.309(f)(1)(v) and the Board should find that it is not admissible.

I. CRAFT’s Proposed Contention 8 (Claim that DTE Is an Irresponsible Operator) Is Not Admissible

CRAFT’s proposed Contention 8 advances various miscellaneous arguments.¹⁶⁶ As discussed below, CRAFT has failed to present a contention that meets the contention admissibility criteria in 10 CFR § 2.309(f).

CRAFT argues that the LAR should be “rejected as part of an ongoing pattern of irresponsible and dangerous decisions to lower costs at the risk of catastrophic impacts to the public and the environment.”¹⁶⁷ As the Commission has stated, such an allegation of “management improprieties or poor ‘integrity’” must “relate directly to the proposed licensing action.”¹⁶⁸ Apart from vague references to “minor flaws and ad hoc design changes compound[ing] and interact[ing] in unforeseen ways to trigger a cascade effect that initiates beyond design basis accidents,”¹⁶⁹ CRAFT makes no attempt to connect its argument to the

¹⁶³ Hearing Request at 16–17.

¹⁶⁴ *Id.* at 17.

¹⁶⁵ See *USEC*, CLI-06-10, 63 NRC at 472; *Fansteel*, CLI-03-13, 58 NRC at 203.

¹⁶⁶ Hearing Request at 17–20.

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

¹⁶⁹ Hearing Request at 17.

LAR. Instead, CRAFT's argument amounts to an impermissible attempt to litigate historical allegations or past events with no direct bearing on the challenged licensing action.¹⁷⁰

CRAFT also makes a wide variety of other arguments related to such issues as renewable energy, DTE's lobbying efforts in Michigan, and CRAFT's own wishes for the future of Fermi 2.¹⁷¹ CRAFT's contention raises arguments that are unconnected to the LAR, unrelated to the findings that the Staff must make on the LAR, and unsupported by facts or expert opinions. CRAFT's Contention 8 does not, therefore, meet the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (v).

For these reasons, the Board should find that CRAFT's proposed Contention 8 is not admissible.

CONCLUSION

The Board should deny CRAFT's hearing request because it does not show standing or propose at least one admissible contention.

Respectfully submitted,

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¹⁷⁰ *Millstone*, CLI-01-24, 54 NRC at 366 (citing, *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 36 n.22 (1993)).

¹⁷¹ Hearing Request at 19–20.

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Dated at Rockville, Maryland
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

(Fermi 2)

Docket No. 50-341-LA

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC Staff's Answer Opposing CRAFT's Hearing Request," dated April 3, 2020, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 3rd day of April 2020.

/Signed (electronically) by/

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