LBP-20-07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Sue H. Abreu
Dr. Gary S. Arnold

In the Matter of	Docket No. 50-341-LA
DTE ELECTRIC COMPANY	ASLBP No. 20-966-02-LA-BD01
(Fermi 2)	July 7, 2020

MEMORANDUM AND ORDER

(Ruling on Petition for Intervention and Request for Hearing)

Before the Board is a petition to intervene and request for a hearing concerning a license amendment request by DTE Electric Company (DTE) regarding its Fermi Nuclear Power Plant, Unit 2 (Fermi 2) spent fuel pool located in Monroe County, Michigan. Petitioner is an organization named Citizens' Resistance at Fermi 2 (CRAFT). Because CRAFT has not proffered an admissible contention, we deny its petition.

I. BACKGROUND

Fermi 2 uses two types of high-density storage racks in its spent fuel pool: one with Boraflex as the neutron absorbing material; the other with Boral as the neutron absorber.[1] Neutron absorption is an important safety component of spent fuel pools in order to maintain

[1] See Fermi 2 Updated Final Safety Analysis Report, § 9.1.2.2.2 (rev. 21 Oct. 2017) (ADAMS Accession No. ML17298B69); 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," encl. 1, at 3 (Sept. 5, 2019) (ADAMS Accession No. ML19248C679) [hereinafter LAR Evaluation].

subcriticality.[2] Subcriticality refers to conditions that do not support self-sustaining fission reactions.[3]

In 2001, the NRC approved DTE's request for License Amendment No. 141, which allowed, but did not require, replacement of the Boraflex racks with Boral racks for the purpose of increasing the capacity of Fermi 2's spent fuel pool.[4] Although the first two phases of this rack replacement occurred in 2001 and 2007, the final phase never took place.[5] After License Amendment No. 141 was approved, the NRC and the industry accumulated operating experience indicating that neutron-absorbing materials such as Boraflex and Boral can degrade, thereby reducing their neutron-absorbing capability.[6]

During the Fermi 2 license renewal process in 2014, DTE committed to completing the rack replacement approved in License Amendment No. 141.[7] The NRC renewed DTE's license subject to License Condition 2.C.(26)(c), which provides that "[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 . . . ."[8] When making this commitment,

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[2] Office of Nuclear Reactor Regulation (NRR) & Office of Nuclear Material Safety and Safeguards, NRC Generic Letter 2016-01, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools (rev. 2 Apr. 2016) at 2 (ADAMS Accession No. ML16097A169) [hereinafter NRC Generic Letter].

[3] Id.

[4] See Letter from J. Lamb, NRR, NRC, to W. O'Connor, Jr., DTE, "Fermi 2 – Issuance of Amendment re: Spent Fuel Pool Rerack (TAC No. MA7233)" (Jan. 25, 2001) (ADAMS Accession No. ML010310205); see also id., encl. 2, § 2.0 (Safety Evaluation).

[5] LAR Evaluation at 4.

[6] See NRC Generic Letter.

[7] 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) (ADAMS Accession No. ML15268A454) [hereinafter Boraflex Commitment Letter].

[8] Fermi 2 Renewed Facility Operating License No. NPF-43, at 8 (Dec. 15, 2016) (ADAMS Accession No. ML16270A526) [hereinafter Renewed License]; see also Boraflex Commitment Letter.

however, DTE alerted the NRC that alternative solutions could arise. It stated 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."[9]

On September 5, 2019, DTE submitted a license amendment request to the NRC for approval of such an alternative plan.[10] Instead of removing and replacing certain spent fuel racks, DTE proposes to install neutron-absorbing NETCO SNAP-IN® rack inserts in the existing Boraflex racks.[11] Although the original Boraflex would remain, after these inserts are installed the Boraflex would no longer be credited as a neutron absorber in DTE's criticality safety analysis.[12]

Unlike the replacement of the Boraflex racks as approved by License Amendment No. 141, DTE's proposed alternative would not change the number of racks or the total capacity of the Fermi 2 spent fuel pool.[13] The NRC has previously approved the installation of NETCO SNAP-IN® rack inserts to replace the neutron-absorption function of Boraflex at several other nuclear power plants.[14]

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[9] Boraflex Commitment Letter at 2.

[10] See supra note 1.

[11] LAR Evaluation at 8–9.

[12] Id. at 4–5.

[13] Id. at 3.

[14] See LaSalle County Station, Units 1 and 2, Issuance of Amendments Concerning Spent Fuel Neutron Absorbers, encl. 3, at 2 (Jan. 28, 2011) (ADAMS Accession No. ML110250051); Peach Bottom Atomic Power Station, Units 2 and 3, Issuance of Amendments Re: Use of Neutron Absorbing Inserts in Spent Fuel Pool Storage Racks, encl. 3, at 2 (May 21, 2013) (ADAMS Accession No. ML13114A929); Quad Cities Nuclear Power Station, Units 1 and 2, Issuance of Amendments Regarding NETCO Inserts, encl. 3, at 1 (Dec. 31, 2014) (ADAMS Accession No. ML14346A306); 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, encl. 3, at 10 (Dec. 31, 2019) (ADAMS Accession No. ML19357A009).

Specifically, DTE requests a license amendment that would: (1) eliminate License Condition 2.C.(26)(c) based on DTE's proposal to install neutron absorbing inserts; (2) approve a new criticality safety analysis; and (3) approve an associated revision of technical specification requirements.[15] On January 7, 2020, the NRC published a notice in the Federal Register informing the public of an opportunity to file hearing requests and intervention petitions on DTE's request within 60 days.[16] Petitioner CRAFT filed a hearing request dated March 9, 2020.[17] On April 3, 2020, the NRC Staff and DTE timely filed answers opposing CRAFT's hearing request,[18] and CRAFT timely replied.[19] The Board heard oral argument, by telephone, on June 10, 2020.[20]

II. NRC STAFF PROCEDURAL OBJECTION

Before we consider any aspect of CRAFT's hearing petition, we first address the NRC Staff's claim that we should reject CRAFT's hearing request because of an alleged procedural defect. The NRC Staff (but not DTE) argues that the Board should deny the hearing request

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[15] 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 (Jan. 7, 2020).

[16] Id. at 729–30.

[17] Petition of [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 (Mar. 9, 2020) [hereinafter Petition].

[18] NRC Staff's Answer Opposing CRAFT's Hearing Request (Apr. 3, 2020) [hereinafter NRC Staff Answer]; Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by [CRAFT] (Apr. 3, 2020) [hereinafter DTE Answer].

[19] [CRAFT] Combined Reply to NRC Staff Answer Opposing CRAFT's Leave to Intervene and Request for a Hearing and Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by [CRAFT] (Apr. 10, 2020).

[20] Tr. at 1–65.

because, without demonstrating good cause, "CRAFT did not serve the hearing request on the Staff and DTE by the deadline."[21]

The Staff does not specify, however, when it contends it should have been served, when it was served, or whether it was prejudiced in any way. The NRC Staff's pleading provides no facts beyond the bare assertion that "CRAFT did not serve the hearing request on the Staff and DTE by the deadline."[22]

We decline to dismiss CRAFT's hearing request on the basis of this conclusory, factually unsupported allegation. Moreover, the NRC Staff engages in the disfavored practice of urging dismissal on this ground solely in a footnote.[23] Rarely, if ever, should important decisions be based on such arguments. As the United States Court of Appeals for the District of Columbia Circuit has ruled, "absent extraordinary circumstances" the Court does "not entertain an argument raised . . . in a footnote."[24]

III. STANDING

Both DTE and the NRC Staff contend that CRAFT has not demonstrated standing.[25]

A. Legal Requirements for Standing

In a license amendment proceeding such as this, the NRC must grant a hearing "upon the request of any person whose interest may be affected by the proceeding."[26] However, to determine whether a petitioner has a sufficient interest, the Commission applies

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[21] NRC Staff Answer at 2 n.4.

[22] Id.

[23] See, e.g., D.C. Circuit Handbook of Practice and Internal Procedures at 44 (Dec. 1, 2019) ("The Court prefers that substantive arguments not be made in footnotes.").

[24] United States v. Whren, 111 F.3d 956, 958 (D.C. Cir. 1997) (citations omitted).

[25] See DTE Answer at 13–16; NRC Staff Answer at 7–17.

[26] Atomic Energy Act § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A).

contemporaneous judicial concepts of standing.[27] Although the Commission instructs us to construe the petition in favor of the petitioner when we determine standing,[28] it is nonetheless each petitioner's burden to demonstrate that standing requirements are met.[29] As relevant here, a petitioner may satisfy this burden in one of three ways.

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[30]—here primarily the Atomic Energy Act (AEA).[31]

Second, a petitioner may take advantage of 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 the area within a 50-mile radius of the site.[32] In other proceedings, such as this license amendment proceeding, a "proximity plus" standard is applied on a "case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."[33] The smaller the risk of offsite consequences, the

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

[28] Id.

[29] See Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-05, 51 NRC 90, 98 (2000). 10 C.F.R. § 2.309(d) specifies information that a petitioner should include in its petition to establish standing but does not set the standard the Board must apply when deciding whether that information is sufficient.

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

[31] AEA §§ 1–1201, 42 U.S.C. §§ 2011–297.

[32] PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 138–39 (2010).

[33] Ga. Inst. of Tech. (Ga. Tech Res. Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 116–17 (1995); see Sequoyah Fuels Corp. and Gen. Atomics (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994) ("[A] presumption based on geographic proximity is not confined solely to Part 50

closer a petitioner must be for a realistic threat to exist. Licensing boards have stated in other license amendment proceedings involving spent fuel pools: "[A]lthough the 50-mile presumption does not apply in spent-fuel pool cases, persons living 'little more than a stone's throw from the facility' . . . meet the proximity test."[34]

Third, like petitioners here, an organization may try 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 requires an individual member's participation in the organization's legal action.[35]

B. CRAFT Standing Analysis

CRAFT asserts it is a "grassroots organization" based in Redford, Michigan that publishes a monthly newspaper concerning DTE's Fermi 2 reactor.[36] It submitted sworn declarations from several members, verifying that they live within a 50-mile radius (two within five miles) of Fermi 2.[37] In addition to authorizing CRAFT to represent their interests in this proceeding, these members express concern that DTE's requested license amendment risks

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reactor licenses, but is also applicable to materials cases where the potential for offsite consequences is obvious.").

[34] Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), LBP-00-02, 51 NRC 25, 28 (2000) (quoting Va. Electric and Power Co. (N. Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54, 56 (1979)). The Millstone board also pointed out that petitioners living up to 17 miles away had previously been granted standing in spent fuel pool cases. See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Plant), LBP-99-25, 50 NRC 25 (1999); Fla. Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 455, aff'd, ALAB-893, 27 NRC 627 (1988).

[35] Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

[36] Petition at 5.

[37] See id. at 5–7.

harm to the health and well-being of members living within 50 miles of the site.[38] CRAFT bases its standing claim on its understanding that "petitioners who live within 50 miles of a proposed nuclear power plant are presumed to have standing."[39]

CRAFT is incorrect. As explained above, a 50-mile proximity presumption of standing applies only to challenges to reactor construction permits, operating licenses and license amendments that present an obvious potential for offsite consequences at that distance. In other situations, the appropriate distance is determined on a case-by-case basis, "taking into account the nature of the proposed action and the significance of the radioactive source."[40]

Thus, we must decide whether DTE's requested license amendment could plausibly lead to offsite radiologic consequences 4.75 miles away (the closest documented residence of a CRAFT member).[41] In some cases, such as Peach Bottom, the Commission has stated that "[t]he burden falls on the petitioner to demonstrate" the plausibility of such offsite consequences.[42] CRAFT has not expressly done this.

On the other hand, the Commission directs that we generally construe standing in favor of the petitioner.[43] The requirements for standing are not "strict by design," in contrast to the NRC's contention admissibility requirements.[44] This is especially so when we have a pro se

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[38] See, e.g., id. at 6.

[39] Id.

[40] Ga. Inst. of Tech., CLI-95-12, 42 NRC at 116–17.

[41] See Petition, encl., Decl. of Hedwig Kaufman (Mar. 7, 2020); see also id., encl., Decl. of Martin Kaufman (Mar. 7, 2020).

[42] Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 581 (2005).

[43] Turkey Point, CLI-15-25, 82 NRC at 394.

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

petitioner, such as CRAFT. Although pro se petitioners may not ignore our rules, the Commission instructs us to allow them some degree of leeway.[45]

Although CRAFT incorrectly invokes a 50-mile proximity presumption, in actuality CRAFT has demonstrated, through sworn declarations, that at least two of its concerned members live less than five miles from Fermi 2.[46] Must a pro se petitioner demonstrate to the NRC that avoiding criticality in a spent fuel pool is reasonably of concern to a person who lives less than five miles away?[47]

Unlike in Peach Bottom (which involved the NRC's approval of the transfer of a 50% non-operating ownership interest in a nuclear facility), the Commission's recent affirmance of the Licensing Board's standing ruling in Holtec suggests such a demonstration may not be necessary.[48] In Holtec, which concerned licensing an interim spent fuel storage facility, the board had found standing on the basis of Sierra Club's members who lived several miles away and expressly rejected the applicant's claim that Sierra Club "must first demonstrate with specificity just how radiation might reach them."[49]

In these circumstances, and because one side of the issue has not been briefed by experienced legal counsel, we are reluctant to rule unnecessarily on whether CRAFT has established standing. Because, for multiple reasons, CRAFT plainly has failed to submit an

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[45] 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).

[46] See Petition, encl., Decl. of Hedwig Kaufman (Mar. 7, 2020); see also id., encl., Decl. of Martin Kaufman (Mar. 7, 2020).

[47] Contrary to DTE's claims, see DTE Answer at 15–16, this is not a situation in which standing is in doubt because the requested license amendment would merely add a safety feature. Here, the amendment proposes to replace one safety feature with a different one.

[48] See Holtec Int'l (HI-STORE Consolidated Interim Storage Facility), CLI-20-04, 91 NRC __, __ (slip op. at 10) (Apr. 23, 2020).

[49] Holtec Int'l (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC 353, 367 (2019).

admissible contention, we deny its hearing request on that ground alone and make no determination of its standing.

IV. CONTENTION ADMISSIBILTY STANDARDS

For its hearing request to be granted, in addition to demonstrating standing, a petitioner must proffer at least one admissible contention.[50] Both DTE and the NRC Staff contend that CRAFT has not proffered an admissible contention.[51] We agree.

An admissible contention must: (1) state the specific legal or factual issue to be raised or controverted; (2) provide a brief explanation for the basis of the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) concisely state the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely at an evidentiary hearing, including references to the specific sources and documents on which the petitioner intends to rely; and (6) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes or, if the application is alleged to be deficient, by identifying such deficiencies and the supporting reasons for this allegation.[52]

A proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission's hearing notice.[53] Thus, a proposed contention that challenges a license amendment must confine itself to "health, safety or environmental issues

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[50] 10 C.F.R. § 2.309(a).

[51] See DTE Answer at 16–32; NRC Staff Answer at 17–35.

[52] 10 C.F.R. § 2.309(f)(1)(i)–(vi).

[53] See 10 C.F.R. § 2.309(f)(1)(iii); Pub. Serv. Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170–71 (1976).

fairly raised by [the license amendment]."[54] Challenges to the current licensing basis of a plant are not within the scope of a license amendment proceeding; they are more properly challenged through the process prescribed by 10 C.F.R. § 2.206.[55]

A further requirement applies to several contentions addressed infra. No NRC rule or regulation may be challenged in a contention unless the petitioner seeks and obtains a waiver from the Commission in accordance with 10 C.F.R. § 2.335. CRAFT has not sought such a waiver.

Although CRAFT correctly points out that the NRC's contention admissibility standards are not intended as a "fortress to deny intervention,"[56] nonetheless, the contention admissibility standards are "strict by design."[57] They result from the Commission's conscious effort to "raise the threshold bar for an admissible contention."[58] Failure to satisfy even one of the six pleading requirements requires the Board to reject a contention.[59] Rather than expend agency time and resources on litigating vague and unsupported claims, the Commission strengthened the contention admissibility standards to what they are today—standards that afford evidentiary hearings only to those who "proffer at least some minimal factual and legal foundation in support of their contentions."[60]

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

[55] 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.").

[56] Petition at 20 (quoting Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 335 (1999)).

[57] Millstone, CLI-01-24, 54 NRC at 358.

[58] Oconee, CLI-99-11, 49 NRC at 334.

[59] See Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-05, 83 NRC 131, 136 (2016).

[60] Oconee, CLI-99-11, 49 NRC at 334.

Therefore, although a petitioner need not prove its contention at this stage, mere notice pleading of proffered contentions is insufficient.[61] The NRC requires a petitioner to read the pertinent portions of the license application or amendment request, state the applicant or licensee's position and the petitioner's opposing view, and explain why it disagrees with the applicant or licensee.[62]

Finally, several of CRAFT's proffered contentions address the NRC Staff's "no significant hazards consideration determination." This determination is "a procedural one" that "can only be made by the NRC Staff or the Commission."[63]

Specifically, section 189a(2) of the AEA permits the NRC to make a license amendment immediately effective "upon a determination by the Commission that such amendment involves no significant hazards consideration."[64] To support such a determination, the proposed amendment 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.[65]

NRC regulations provide 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

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[61] Fansteel, Inc. (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 203 (2003).

[62] Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170–71 (Aug. 11, 1989).

[63] Vt. Yankee Nuclear Power Corp. (Vt. Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987).

[64] AEA § 189a(2)(A), 42 U.S.C. § 2239(a)(2)(A).

[65] 10 C.F.R. § 50.92(c)(1)–(3).

Commission."[66] The NRC Staff's determination is "final, subject only to the Commission's discretion, on its own initiative, to review the determination."[67]

Thus, the NRC Staff's no significant hazards consideration determination is not subject to challenge in this adjudicatory proceeding.[68] Indeed, when referring this matter to the Atomic Safety and Licensing Board Panel, the Office of the Secretary expressly clarified that "this referral memorandum is not to be construed as reflecting a determination that CRAFT is entitled to a review of, or hearing on, the staff's no significant hazards consideration determination."[69]

V. CONTENTION ADMISSIBILTY ANALYSIS

A. CRAFT Contention 1

CRAFT Contention 1 states:

> CRAFT Contends (Contention 1) that there is potential for a significant increase in the probability or consequences of an accident previously evaluated. License Condition No. 3 for License Renewal calls for the removal of Boraflex and replacement.[70]

If CRAFT Contention 1 is intended to challenge the NRC Staff's determination that DTE's proposed license amendment does not involve a significant increase in the probability or

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[66] Id. § 50.58(b)(6).

[67] Id.

[68] See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 NRC 113, 118 (2001) (holding that intervenor challenges to no significant hazards consideration (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 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).

[69] Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (March 18, 2020).

[70] Petition at 9–10.

consequences of an accident previously evaluated, it is barred by 10 C.F.R. § 50.58(b), as explained supra. (Insofar as Contention 1 is subsequently described as also charging that, contrary to the NRC Staff's determination, DTE's requested amendment creates the possibility of a new or different kind of accident,[71] that claim is barred for the same reason.)[72]

If the second sentence in Contention 1 is intended to assert an entirely different claim—that is, by DTE's not physically removing the Boraflex storage racks from the spent fuel pool, Fermi 2 will be out of compliance with what CRAFT mistakenly calls "License Condition No. 3"[73]—it is also not admissible. If its request for a license amendment is granted, of course DTE need no longer comply with the original license condition. That is why it is asking for a license amendment.

The AEA expressly authorizes the NRC to amend operating licenses.[74] NRC regulations establish a process by which licensees may request license amendments.[75] If CRAFT claims that the NRC has no discretion to consider modification of a condition imposed upon license

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[71] Id. at 13.

[72] This proceeding does not raise the issue of when, without violating 10 C.F.R. § 50.58(b)(6), a petitioner might be able to challenge the facts underlying the NRC Staff's determination, separate from a challenge to the Staff's determination itself. As shown infra, CRAFT has not proffered any admissible contention that could be interpreted to present such a claim.

[73] In referring to "License Condition No. 3," CRAFT appears to mean License Condition 2.C.(26)(c), which is the license renewal condition that calls for the Boraflex rack replacement. See Renewed License at 8.

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

[75] 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 "to the extent applicable and appropriate." See 10 C.F.R. § 50.92(a). Indeed, this authority, along with the authority to grant regulatory exemptions, see id. § 50.12, are important tools that allow the agency to address changed or unusual circumstances, albeit subject to adjudicatory challenge regarding the substance of the proposed revision or exemption. See Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), CLI-16-12, 83 NRC 542, 549–54 (2016) (finding within the scope of the proceeding an emergency planning exemption request that would be implemented by a requested license amendment to reflect reactor facility's permanently shutdown and defueled status).

renewal,[76] it is simply wrong. Provisions of the AEA may not be challenged in an NRC adjudicatory proceeding.[77] Nor, absent a waiver (which CRAFT has not requested), may a petitioner challenge the NRC's regulations.[78]

Therefore, contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), CRAFT Contention 1 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application. Because CRAFT did not seek a waiver to challenge a regulation, it violates 10 C.F.R. § 2.335(a) as well.

CRAFT Contention 1 is not admitted.

B. CRAFT Contention 2

CRAFT Contention 2 states:

> By not physically removing the [Boraflex] CRAFT Contends (Contention 2) that corrosion leads to degradation and can result in unanticipated consequences and unaccounted for debris in the spent fuel pool. Exacerbating corrosion through prolonged exposure and reliance on faulty Boraflex must be examined and considered as potentially problematic when loading into the Dry Cask Storage. That evaluation has not been provided.[79]

In support, CRAFT claims "[t]here have been problems at other U.S. nuclear power plants revolving around Boraflex."[80] But that is not in dispute. That is why, initially, the NRC required replacement of Boraflex storage racks as a condition of license renewal and, now, DTE

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[76] As noted supra, although not required to do so, at the time its license was renewed DTE expressly alerted the NRC that, "based on further analysis," it might later propose an alternative to fuel rod replacement "subject to any necessary NRC approvals." Boraflex Commitment Letter at 2.

[77] 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).

[78] 10 C.F.R. § 2.335(a).

[79] Petition at 10.

[80] Id.

proposes instead to provide adequate neutron absorption in the spent fuel pool by installing NETCO SNAP-IN® neutron absorbing inserts. Any remaining neutron absorption resulting from the original Boraflex racks would merely be in addition to that supplied by the new inserts.

CRAFT provides no support for its claim that the continued presence of the original Boraflex storage racks might lead to corrosion and "unaccounted for debris in the spent fuel pool."[81] Nor does CRAFT explain what hazards such debris might cause. Contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi), CRAFT Contention 2 fails to provide adequate factual support or raise a genuine dispute with DTE's license application.

CRAFT Contention 2 is not admitted.

C. CRAFT Contention 3

CRAFT Contention 3 states:

> 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. 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.[82]

Insofar as CRAFT challenges DTE's taking "credit for Boraflex as a neutron absorbing material," CRAFT is, again, simply wrong. DTE's requested license amendment proposes installing inserts that would provide adequate neutron absorption by themselves, and DTE would take no credit at all for any remaining neutron absorption capacity in the existing Boraflex storage racks.[83] If CRAFT is challenging the described method for ensuring subcriticality as

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[81] Id.

[82] Id. at 11.

[83] See LAR Evaluation at 4–5.

insufficiently conservative, it challenges (without seeking a waiver) the method prescribed by 10 C.F.R. § 50.68(b).

Therefore, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi), CRAFT Contention 3 fails to set forth an adequate factual basis or raise a genuine dispute with DTE's license amendment application. Because CRAFT did not seek a waiver to challenge a regulation, it violates 10 C.F.R. § 2.335(a) as well.

Moreover, if Contention 3 is intended to challenge the NRC Staff's determination that DTE's proposed license amendment does not involve a significant reduction in a margin of safety,[84] it is barred by 10 C.F.R. § 50.58(b)(6).

CRAFT Contention 3 is not admitted.

D. CRAFT Contention 4

CRAFT Contention 4 states:

> 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. That highly irradiated spent fuel should be placed into Dry Cask Storage, placed on ISFSI pad and bunkered with Hardened On-Site Storage (HOSS).[85]

CRAFT's claim that "the more prudent course of action" would be to remove spent fuel from the pool and place it in dry cask storage is unrelated to the question at hand: that is, whether the NRC should permit DTE to install neutron absorbing inserts in the spent fuel pool, rather than replace the existing Boraflex storage racks. DTE's license amendment request does not imbue this Board with plenary jurisdiction to consider whether "[w]ise owners and responsible regulators" would prefer dry cask storage, or to address CRAFT's allegations that DTE's poor quality assurance "spans decades."[86]

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[84] Petition at 14.

[85] Id. at 11.

[86] Id. at 12.

Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), CRAFT Contention 4 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application.

CRAFT Contention 4 is not admitted.

E. CRAFT Contention 5

CRAFT Contention 5 states:

> Again, CRAFT Contends (Again Contention 4, and Contention 5) that by not physically removing the degraded Boraflex from the spent fuel itself Fermi 2 will be out of compliance with License Condition No. 3. Cumulative longitudinal degradation to the spent fuel has not been evaluated for corrosion and degradation which could lead to failure in the spent fuel pool and potential for failure when transferred to Dry Cask Storage has not been evaluated. The Boraflex racks can become damaged and adhere to the fuel assemblies resulting in loading complications for the lifting of 125 tons, and this has not been evaluated. CRAFT Contends that there are historically concerns about the rating of the spent fuel Crane.[87]

To the extent CRAFT Contention 5 appears to repeat in part earlier contentions (including Contentions 1 and 2, as well as Contention 4), it is inadmissible for the same reasons. To the degree it raises an additional concern about the impact of damaged Boraflex racks on the safe transfer of spent fuel out of the spent fuel pool, it provides no support for that assertion. And insofar as CRAFT Contention 5 claims that "there are historically concerns about the rating of the spent fuel Crane,"[88] CRAFT fails to demonstrate how this is related in any way to DTE's requested license amendment.

Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), CRAFT Contention 5 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application.

CRAFT Contention 5 is not admitted.

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[87] Id. at 14–15.

[88] Id. at 15.

F. CRAFT Contention 6

CRAFT Contention 6 states:

> 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.[89]

The sole support for CRAFT Contention 6 is a citation for the proposition 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."[90] CRAFT fails to demonstrate how Contention 6 is related in any way to DTE's requested license amendment.

Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), CRAFT Contention 6 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application.

CRAFT Contention 6 is not admitted.

G. CRAFT Contention 7

CRAFT Contention 7 states:

> In addition CRAFT Contends (Contention 7) that the proposed use of Global Nuclear Fuel - 3, 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.[91]

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[89] Id. at 16.

[90] Id. (quoting B. Rose Kelly & Frank Von Hippel, "U.S. Nuclear Regulators Greatly Underestimate Potential for Nuclear Disaster," Woodrow Wilson School (May 25, 2017), http://wws.princeton.edu/news-and-events/news/item/us-nuclear-regulators-greatly-underestimate-potential-nuclear-disaster).

[91] Id. at 16–17.

CRAFT fails to demonstrate how the potential use of a newer form of NRC-approved fuel is related in any way to DTE's requested license amendment. Therefore, contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), this aspect of CRAFT Contention 7 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application.

CRAFT Contention 7's claim that CRAFT "does not agree with the NRC staff analysis that the three standards of 10 C.F.R. § 50.92(c) are satisfied" and "does not accept NRC staff determination [of no] significant hazards consideration"[92] is clearly barred by 10 C.F.R. § 50.58(b)(6), as explained supra.

Insofar as CRAFT Contention 7 criticizes the described method for ensuring subcriticality, CRAFT again challenges the method prescribed by 10 C.F.R. § 50.68 (without seeking a waiver), and therefore violates 10 C.F.R. § 2.335(a).

CRAFT Contention 7 is not admitted.

H. CRAFT Contention 8

CRAFT Contention 8 states:

> Detroit Edison's request for regulatory relief to nullify their re-licensing agreements concerning their spent fuel pool safety 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.[93]

In support, CRAFT Contention 8 sets forth a four-page description of alleged misdeeds by DTE, spanning a period of over 50 years.[94] CRAFT asserts that, not only should DTE's license amendment request be denied, but operation of DTE's facility "should be turned over to

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[92] Id. at 17.

[93] Id.

[94] Id. at 17–20.

a publicly responsive body to assess the environmental and economic viability of the future operation of the plant as compared to the adoption of clean, renewable energy generation."[95]

CRAFT fails to demonstrate how these generalized complaints about DTE's operations relate to the specific license amendment at issue in this proceeding, or how this proceeding could possibly result in the transfer of control of DTE's facility.[96] Contrary to 10 C.F.R. § 2.309(f)(1)(iii)–(vi), CRAFT Contention 8 is beyond the scope of this proceeding, is not material to a decision the NRC must make, is not supported by an adequate factual basis, and raises no genuine dispute with DTE's license application.

CRAFT Contention 8 is not admitted.

The Board makes a final observation. As explained supra, to rule a contention is admissible, a licensing board must determine that, at a minimum, the contention satisfies each of the six requirements of 10 C.F.R. § 2.309(f)(1)(i)–(vi). Strictly speaking, there is no requirement in our regulations that a petitioner must explicitly address how each proffered contention satisfies each of those six requirements.[97] Knowing, however, that a licensing board must make those six determinations for each proffered contention, a petitioner places the sufficiency of its hearing request at risk by choosing not to explicitly address them.

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[95] Id. at 20.

[96] To the degree that CRAFT seeks to make the "character and integrity" of DTE the basis for this contention, the Commission has emphasized that every agency licensing action does not "throw[] open an opportunity to engage in a free-ranging inquiry into the 'character' of the licensee." Ga. Power Co. (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 32 (1993). Instead, for such an inquiry to be warranted, there must be some "direct and obvious relationship" between the licensing action and the potential character issues. Exelon Generation Co., LLC (Oyster Creek Nuclear Generating Station), CLI-19-06, 89 NRC 465, 477 & n.62 (2019) (quoting Millstone, CLI-01-24, 54 NRC at 365–66); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 189 (1999) (quoting Vogtle, CLI-93-16, 38 NRC at 32). Nothing referenced by CRAFT in its contention provides a reasonable basis to suggest the character and integrity of DTE is relevant to the technical issue of whether to approve DTE's alternative plan regarding Boraflex replacement.

[97] But see U.S. Dep't of Energy (High-Level Waste Repository), LBP-08-10, 67 NRC 450, 453–56 (2008) (requiring by order such a showing by all petitioners in the Yucca Mountain repository proceeding).

Petitioners appear to make that choice surprisingly often. Here, for example, CRAFT makes passing reference to two of the six requirements,[98] but never mentions four of them and fails to demonstrate how each of its eight contentions satisfies each of the six requirements.

At oral argument, CRAFT's representative candidly acknowledged that "[w]e're not saying that we have proof" of all CRAFT's claims, but that CRAFT has "concerns enough" that CRAFT feels its claims "should be addressed more."[99] To merit an evidentiary hearing under the NRC's rules, however, merely expressing "concerns" is not sufficient. Petitioners in future proceedings would be well advised to address the specific requirements that licensing boards must apply under 10 C.F.R. § 2.309(f)(1).

VI. ORDER

For the foregoing reasons:

A. CRAFT's petition is denied. CRAFT's contentions are not admitted.

B. This proceeding is terminated.

Any appeal of this decision to the Commission shall be filed in conformity with 10 C.F.R. § 2.311.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 7, 2020

[98] Petition at 7, 21.

[99] Tr. at 52–53.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DTE ELECTRIC COMPANY	)	Docket No. 50-341-LA
	)	
(Fermi 2)	)	
	)	
(License Amendment)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Petition for Intervention and Request for Hearing) (LBP-20-07)** have been served upon the following persons by Electronic Information Exchange.

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FERMI 2 (Docket No. 50-341-LA)
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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 7th day of July 2020