

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
DTE ELECTRIC COMPANY)	Docket No. 50-341-LR
)	
(Fermi Nuclear Power Plant, Unit 2))	
)	

NRC STAFF ANSWER TO CRAFT'S PETITON FOR REVIEW OF LBP-17-01

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February 28, 2017

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INTRODUCTION

In accordance with 10 C.F.R. § 2.341(b)(3), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) respectfully submits this answer in opposition to Citizen's Resistance at Fermi 2 (CRAFT) Appeal to NRC Commission Decision Set Forth in LBP-17-01¹ (Petition) challenging the Atomic Safety and Licensing Board's (Board) Memorandum and Order LBP-17-01² (LBP-17-01) filed in the Fermi Nuclear Power Plant Unit 2 (Fermi 2) license renewal proceeding on February 3, 2017. In LBP-17-01, the Atomic Safety and Licensing Board (Board) denied CRAFT's Motion to Reopen the Record (Motion to Reopen) and for Leave to File a New Contention. CRAFT had asserted that the Fermi 2 Final Supplemental Environmental Impact Statement (FSEIS) was inadequate because it did "not adequately address [severe accident mitigation alternatives (SAMA)] Analysis as it pertains to potassium iodide [KI] distribution in the Primary Emergency Planning Zone (EPZ) and Secondary EPZ."³ The Board found that

¹ See CRAFT Appeal to NRC Commission Decision Set Forth in LBP-17-01 (Feb. 3, 2017) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML17037D352) (Petition).

² See *DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2)*, LBP-17-01, 85 NRC __ (Jan. 10, 2017) (slip op.) (ADAMS Accession No ML17010A322) (LBP-17-01).

³ CRAFT's Consolidated Motion to Reopen the Record of License Renewal Proceeding and to File a New Contention for Fermi Unit 2 Nuclear Power Plant at 1 (Nov. 21, 2016) (Motion to Reopen); see also, CRAFT Motion Requesting Leave to File a New Contention Based On New and Existing SAMA Considerations of Potassium Iodide Distribution In the Primary EPZ and Secondary EPZ at 8 (Nov. 21, 2016) ("Petition to Intervene"). On November 25, 2016, CRAFT filed an errata and corrected Motion to Reopen available at ADAMS Accession No. ML16330A688 and ML 16330A689, respectively. This answer refers to the corrected Motion to Reopen. "Mitigation alternatives, or 'SAMAs,' refer to potential

inclusion of the analysis that CRAFT proffered would not have given rise to a materially different result in the SAMA analysis and that CRAFT had failed to support its motion with an affidavit and, on those bases, denied the motion to reopen.⁴

CRAFT's Petition should be denied because CRAFT has failed to explain why the Commission should review the Board's decision in accordance with the criteria in 10 C.F.R. § 2.341(b) and, most importantly under 10 C.F.R. § 2.341(b)(4), has failed to identify any clear error by the Board in its determination that CRAFT did not meet the reopening standards under 10 C.F.R. § 2.326(a)(3) and (b).

BACKGROUND

On April 24, 2014, DTE Electric Company ("DTE") submitted a license renewal application ("LRA") to renew its operating license for Fermi 2 for an additional twenty years from the current expiration date of March 20, 2025.⁵ The LRA included a SAMA analysis as required by 10 C.F.R. § 51.53(c)(3)(ii)(L).⁶ CRAFT timely filed a petition to intervene, proffering several contentions;⁷ the Board found that CRAFT had standing and admitted two contentions submitted by CRAFT and one submitted by another intervenor.⁸ Upon review, the Commission

safety enhancements intended to reduce the risk of severe accidents." *Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322 (2012).

⁴ See *Fermi*, LBP-17-01, 85 NRC at ___ (slip op. at 1, 6-11).

⁵ LRA at 1-1. Fermi 2's renewed license has an expiration date of March 20, 2045. Fermi 2 is a boiling-water reactor designed by General Electric and is located near Frenchtown Township, Monroe County, Michigan.

⁶ DTE's SAMA analysis, submitted as part of its LRA, is available at ADAMS Accession No. ML14121A540. "The SAMA analysis is an environmental mitigation analysis under NEPA, and is not part of the license renewal safety review." *Seabrook*, CLI-12-5, 75 NRC at 323.

⁷ See CRAFT Petition for Leave to Intervene and Request for a Public Hearing Upon DTE Electric's Request of 20-Year License Extension for the Enrico Fermi 2 Nuclear Reactor (Aug. 18, 2014) (ADAMS Accession No. ML14231B142).

⁸ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), LBP-15-5, 81 NRC 249, 254, 308 (2015) (admitting narrowed versions of CRAFT's contentions 2 (notice to the Walpole Indian Tribe) and 8 (SAMAs are materially deficient)). The Board also admitted a contention proffered by another petitioner. *Id.* at 307.

reversed the Board's contention admissibility decision.⁹ The Commission held that the three contentions failed to demonstrate a genuine dispute with the SAMA analysis, failed to establish a genuine dispute with the license renewal application, and raised untimely environmental justice concerns.¹⁰ In accordance with the Commission's direction, the Board terminated the proceeding on September 11, 2015.¹¹

On November 25, 2016, CRAFT filed a corrected Motion to Reopen to which DTE and NRC staff filed answers on December 1, 2016.¹² On December 8, 2016, CRAFT filed a Combined Reply to DTE and NRC Answers.¹³ The NRC Staff approved the LRA and issued the Renewed Facility License on December 15, 2016.¹⁴

As relevant here, on January 10, 2017, the Board issued a decision denying CRAFT's Motion to Reopen and Leave to File a New Contention.¹⁵ The Board found that CRAFT failed to demonstrate that a materially different result would have been likely had the proffered SAMA analysis evidence been considered initially, failed to support its motion with an affidavit, and thus, failed to satisfy the Commission's requirements for reopening a closed record.¹⁶ On February 3, 2017, CRAFT filed for Commission review.¹⁷

⁹ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 136, 150 (2015).

¹⁰ *Id.* at 143-149.

¹¹ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), LBP-15-25, 82 NRC 161, 161 (2015).

¹² DTE Answer Opposing CRAFT Motion to Reopen and Proposed New Contention (Dec. 1, 2016) (ADAMS Accession No. ML16336A728); NRC Staff Answer to CRAFT's Motion to Reopen the Record and Petition to Intervene (Dec. 1, 2016) (ADAMS Accession No. ML16336A632); *see infra* at n. 3.

¹³ [CRAFT's] Combined Reply to DTE and NRC Staff Answers to CRAFT Consolidated Motions and Proposed New Contention (Dec. 8, 2016) (ADAMS Accession No. ML16343B068).

¹⁴ Renewed Facility Operating License (Fermi Nuclear Power Plant, Unit 2), No. NPF-43 (Dec. 15, 2016) (ADAMS Accession No. ML16351A459).

¹⁵ *Fermi*, LBP-17-01, 85 NRC at __ (slip op.).

¹⁶ *Id.* at 1, 6-11.

¹⁷ *See* Petition at 1.

ARGUMENT

I. Legal Standards

A. Petitions for Review

Pursuant to 10 C.F.R. § 2.341(b)(4), a petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a “substantial question” with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Regarding petitions for review of Board determinations on threshold matters such as standing, contention admissibility, and motions to reopen, the Commission gives Boards “substantial deference” and regularly affirms their determinations on these matters where the petitioner “points to no error of law or abuse of discretion.”¹⁸ The Commission is able to affirm a board’s decision on any ground finding support in the record, whether previously relied on or not.¹⁹ Additionally, the Commission will reverse a board’s legal conclusions only “if they are a

¹⁸ *Calvert Cliffs 3 Nuclear Project, LLC*. (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 N.R.C. 911, 914 (2009) *citing* *USEC, Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 439 n.32, (2006) (internal citations omitted); *see, Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Plant), CLI-12-15, 75 NRC 704, 710, 713-14 (2012) (finding that a petition for review did not point to an error or abuse warranting review of a Board decision that a proffered contention did not satisfy the Commission contention admissibility standards and was untimely and did not meet the criteria for reopening the evidentiary record).

¹⁹ *Private Fuel Storage, L.L.C.* (Private Fuel Storage Facility), CLI-05-1, 61 NRC 160, 166 (2005)(PFS).

departure from or contrary to established law.”²⁰ Consequently, an appeal of a threshold determination that does not point to an error of law or abuse of discretion by the Board, but simply restates the contention with additional support will not meet the requirements for a valid appeal.²¹ Similarly, a petition that sets forth a series of general grievances going to the correctness of a board decision is insufficient to warrant review.²²

B. Reopening Requirements

A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). The Board, citing the Commission, also stated that the “burden of satisfying the reopening requirements is a heavy one, [and] proponents of a reopening motion bear the burden of meeting all of [these] requirements.”²³

Additionally, a motion to reopen must be accompanied by one or more affidavits that “set forth the factual and/or technical bases for the [petitioner’s] claim” that the three criteria of 10

²⁰ *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 1, Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), CLI-04-24, 60 NRC 160, 190 (2004)(internal quotes omitted).

²¹ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

²² *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337 (2011) (finding that a petition for review of a Board’s denial of a motion to reopen that did not specify error on the part of the board was insufficient).

²³ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009) (internal quotations omitted).

C.F.R. § 2.326(a) have been satisfied.²⁴ The evidence supporting the motion must satisfy the Commission's admissibility standards in 10 C.F.R. § 2.326(a); it must be "relevant, material, reliable."²⁵ The Commission has stated, in response to a petition for review of a Board's denial of a motion to reopen, that, "[a]t the threshold contention admission stage, the burden for providing support for a contention is on the petitioner [a]nd the *added* 'burden of satisfying the reopening requirements' is, deliberately, 'a heavy one.'"²⁶ In order to overcome the strict re-requirements, the movant must provide "more than mere allegations; it must be tantamount to evidence."²⁷

II. CRAFT's Petition Fails to Establish a Basis for Commission Review

In its Petition, CRAFT fails to address the criteria for a petition for review set forth in 10 C.F.R. § 2.341(b). The Petition merely sets forth a series of general grievances going to the correctness of the Board's decision denying its Motion to Reopen.²⁸ The Petition does not readily identify or "specify the subsections of 10 C.F.R. § 2.341(b) upon which it relies to satisfy the standards for granting a petition for review."²⁹ The Commission has found that an appeal that sets forth a series of general grievances going to the correctness of a Board decision is

²⁴ 10 C.F.R. § 2.326(b).

²⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-12, 68 NRC 5, 16 (2008).

²⁶ *Pilgrim*, CLI-12-15, 75 NRC at 714 (emphasis in original) (quoting *Oyster Creek*, CLI-09-7, 69 NRC at 287).

²⁷ *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984).

²⁸ Petition at 1-2.

²⁹ *Vermont Yankee*, CLI-11-2, 73 NRC at 337 (2011) (The Commission held that the Petitioner failed to "specify the subsections upon which it relies, but instead sets forth a series of general grievances fundamentally going to the correctness of the Board's decision denying its Motion to Reopen.")

insufficient to warrant review.³⁰ CRAFT failed to provide a clear statement of its position on the criteria in 10 C.F.R. § 2.341(b)³¹ and its Petition should, therefore, be rejected.

III. CRAFT Fails to Identify Any Clear Error or Abuse of Discretion by the Board

Pursuant to 10 C.F. R. § 2.341, the Commission should deny the Petition because, as set forth below, CRAFT has failed to identify any “clear error or abuse of discretion” by the Board. As the Commission has stated, in response to a petition for review of a Board’s denial of a motion to reopen, that, “[a]t the threshold contention admission stage, the burden for providing support for a contention is on the petitioner [a]nd the added ‘burden of satisfying the reopening requirements’ is, deliberately, ‘a heavy one.’”³² The Board correctly found that CRAFT did not meet the reopening standards under 10 C.F.R. § 2.326(a)(3) and (b), committed no error of law or procedure in reaching this determination.³³

³⁰ See *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station, CLI-12-21, 76 NRC 491, 498 (2012); *Virginia Elec. & Power Co. d/b/a Dominion Virginia Power & Old Dominion Elec. Coop.* (North Anna Power Station, Unit 3, CLI-12-14, 75 NRC 692, 699-700 (2012) (“The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last ‘live’ contention, and of holding new contentions to the higher ‘reopening’ standard.”).

³¹ *Vermont Yankee*, CLI-11-2, 73 NRC at 336-38. While a *pro se* petitioner such as CRAFT is held to a less rigorous standard of pleading, CRAFT’s *pro se* status does not excuse it from addressing the substantive criteria for review. See *US Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 192 (2010) (holding that *pro se* litigants must still meet the substantive requirements for standing and contention admissibility).

³² *Pilgrim*, CLI-12-15, 75 NRC at 714 (emphasis in original) (quoting *Oyster Creek*, CLI-09-7, 69 NRC at 287).

³³ In LBP-17-01, the Board found that CRAFT had not met the materiality requirement for reopening and had not provided support for its motion. The Board did not address the remaining criteria for reopening: timeliness and the submission of a significant safety or environmental issue. Nevertheless, these two criteria provide additional grounds for affirming the Board’s decision. *Private Fuel Storage*, CLI-05-1, 61 NRC at 166. CRAFT’s motion was not timely. NRC Staff Answer to CRAFT’s Motion to Reopen the Record and Petition to Intervene (Dec. 1, 2016) (ADAMS Accession No. ML16336A632). Moreover, its cursory and unsupported reference to environmental justice did not raise a significant environmental issue.

A. CRAFT Fails to Identify Any Error by the Board on the Materially-Different Result Factor in 10 C.F.R. § 2.326(a)(3)

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen a closed record “must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.” While “the quality of evidence presented for reopening must be at least of a level sufficient to withstand a motion for summary disposition, [the Commission has also] made clear that the reopening standard requires more.”³⁴ Under that standard, “[t]he evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate proceeding.”³⁵ CRAFT asserted that it had new evidence concerning KI tablet distribution that warranted reopening under 10 C.F.R. § 2.326(a)(3). The Board reasoned, however, “[g]iven that the SAMA analysis assumed that KI tablet distribution in the EPZ would be completely ineffective ... reopening the record to admit evidence that the KI tablet distribution in the EPZ reaches 10-15% of the population would not lead to materially different cost-benefit conclusions for the SAMA candidates.”³⁶ Therefore, the Board concluded that CRAFT failed to satisfy the materiality requirement of 10 C.F.R. § 2.326(a)(3).

CRAFT’s Petition does not, with any specificity, identify or explain how the Board erred on its factual or legal findings. Instead, CRAFT asks the Commission to provide a “discretionary exception” in accordance with 10 C.F.R. 2.326(a)(1) “in the event CRAFT has failed to satisfy the Commission’s stringent requirements for reopening the record.”³⁷ CRAFT asserts that its Petition is yet another piece in the “ongoing attempt by citizens with legal standing to oppose a federal relicensing action which must be denied by the Commission on the statutory grounds

³⁴ *Pilgrim*, CLI-12-10, 75 NRC at 398.

³⁵ *Id.*

³⁶ *Fermi Nuclear Power Plant, Unit 2*, LBP-17-01, 85 NRC __ (Jan. 10, 2017) (slip op. at 9)

³⁷ *Id.*

that such action is inimical to the public health.”³⁸ Additionally, CRAFT asserts that “[t]he record shows [it] has raised a genuine material dispute with DTE’s [LRA].”³⁹ These assertions do not constitute the demonstration CRAFT must make to demonstrate materiality under 10 C.F.R. § 2.341(b)(4).

B. CRAFT Fails to Identify Any Error by the Board on the Failure to Support the Motion to Reopen with an Affidavit in Accordance with 10 C.F.R. § 2.326(b)

CRAFT also does not explain how the Board erred in its conclusion that CRAFT failed to meet its burden of providing an affidavit in support of its Motion to Reopen as required by 10 C.F.R. § 2.326(b). A motion to reopen “must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the ... [three criteria for reopening] have been satisfied.”⁴⁰ The Board did not agree with CRAFT’s argument that it was not required to submit an affidavit because the basis for its motion was purely legal.⁴¹ The Board concluded that CRAFT’s Motion to Reopen was based on purportedly new facts, since the basis for the Motion to Reopen involved the factual issue of the KI tablet distribution in the EPZ.⁴²

To support reopening the closed record in this proceeding, CRAFT must do more than make bare assertions that the FSEIS and DTE’s SAMA analysis do not comply with NEPA and that the reopening standards are met.⁴³ CRAFT must provide statements made by “competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 10 C.F.R. § 2.326(b). See *id.* (“Evidence contained in [the] affidavits must meet the admissibility standards [in 10 C.F.R. § 2.337].”).

⁴¹ *Fermi Nuclear Power Plant, Unit 2*, LBP-17-01, 85 NRC __ (slip op. at 9).

⁴² *Id.* at 9-10.

⁴³ Motion to Reopen at 2-3 (asserting that the FSEIS does not comply with NEPA). Petition to Intervene at 9 (stating that “CRAFT is confident that calculations of severe accident consequences are highly sensitive to the proper and due consideration of an affected community’s KI distribution program.”).

issues raised.”⁴⁴ The unsupported statements in CRAFT’s Motion to Reopen and Petition to Intervene do not demonstrate that a materially different result would be obtained or that it would have been likely. Because CRAFT did not provide this support in the form of an affidavit, the Board stated CRAFT failed to satisfy the requirement of 10 C.F.R. § 2.326(b). In its Petition, CRAFT did not address the Board’s decision concerning its failure to provide affidavits. In short, CRAFT has not identified any “clear error or abuse of discretion” by the Board with respect to this basis for its decision, and in the absence of such error or abuse, the Commission should not reverse the Board.⁴⁵

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission deny CRAFT Appeal to NRC Commission Decision Set Forth in LBP-17-01.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th day of February, 2017

⁴⁴ 10 C.F.R. § 2.326(b). See also *Oyster Creek*, CLI-09-7, 69 NRC at 291-93.

⁴⁵ *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO CRAFT'S PETITION FOR REVIEW OF LBP-17-01," dated February 28, 2017, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 28th day of February, 2017.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th day of February, 2017