

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DTE ELECTRIC COMPANY

(Fermi 2)

Docket No. 50-341-LA

NRC STAFF'S BRIEF IN OPPOSITION TO CRAFT'S APPEAL OF LBP-20-7

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INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff files this brief in opposition to the Citizens' Resistance at Fermi 2 (CRAFT) appeal of Atomic Safety and Licensing Board Memorandum and Order LBP-20-7.¹ On appeal, CRAFT argues that the Board should have found that CRAFT had proposed at least one admissible contention. But CRAFT fails to show that the Board committed an error of law or abuse of discretion; instead, CRAFT only restates and impermissibly supplements its arguments in the record below or expresses general disagreement with the decision. CRAFT also argues that the Board erred by not reaching a decision on standing. This too is not grounds for reversal—the Board is not required by either the NRC's regulations or Commission precedent to make a determination regarding standing when a petitioner has failed to proffer an admissible contention. Because CRAFT has not shown that the Board made an error of law or abused its discretion, the Commission should affirm LBP-20-7.

¹ *DTE Electric Co.* (Fermi 2), LBP-20-7, 92 NRC __ (July 7, 2020) (slip op.).

BACKGROUND

The renewed facility operating license for Fermi 2 includes a condition that requires DTE Electric Company (DTE), before the facility enters the period of extended operation, to remove the spent fuel storage racks in the Fermi 2 spent fuel pool that contain Boraflex and to replace those racks with racks that contain Boral.² Materials such as Boraflex and Boral absorb neutrons in the spent fuel pool to help maintain subcriticality in the pool.³ The purpose of the license condition is to discontinue reliance on Boraflex for neutron absorption in the Fermi 2 spent fuel pool because Boraflex eventually degrades and becomes less capable of absorbing neutrons.⁴ As an alternative to replacing the Boraflex racks with Boral racks—as required by the license condition—DTE submitted a license amendment request (the subject of this proceeding) that would, instead, eliminate the license condition and allow for the use of neutron-absorbing inserts (i.e., NETCO SNAP-IN® rack inserts) in the existing Boraflex racks.⁵ The license amendment request seeks to demonstrate that using the inserts would accomplish the same goal as the license condition—to discontinue DTE’s reliance on Boraflex for neutron absorption.⁶

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

³ See License Amendment Request to Revise Technical Specifications to Utilize Neutron Absorbing Inserts in Criticality Safety Analysis for Fermi 2 Spent Fuel Storage Racks, at Encl. 1, p. 7 (Sept. 5, 2019) (ML19248C679) (LAR); Fermi 2 Updated Final Safety Analysis Report, § 9.1.2.2.1–9.1.2.2.2 (Oct. 2017) (ML17298B265).

⁴ See, e.g., NRC Generic Letter 2016-01, Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools, 2 (Apr. 7, 2016) (ML16097A169).

⁵ LAR at Encl. 1, p. 3–4.

⁶ *Id.* The NRC has approved similar amendments at LaSalle County Station, Peach Bottom Atomic Power Station, Quad Cities Nuclear Power Station, and River Bend Station. LaSalle County Station, Units 1 and 2, Issuance of Amendments Concerning Spent Fuel Neutron Absorbers, Enclosure 3 at p. 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, Enclosure 3 at p. 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, Enclosure 3 at p. 1 (Dec. 31, 2014) (ML14346A306) (replacing “credit for Boraflex in the nuclear criticality safety analysis with NETCO-SNAP-IN® rack inserts”); River

On January 7, 2020, the NRC published a notice of opportunity to request a hearing on the license amendment request.⁷ In response, CRAFT submitted a hearing request, and the Staff and DTE filed answers opposing that request; CRAFT filed a combined reply.⁸ The Board held oral argument on contention admissibility and standing and then issued LBP-20-7, in which it denied CRAFT's hearing request and terminated the proceeding.⁹ CRAFT has now filed its appeal, asserting that the Board should have granted its hearing request.¹⁰

DISCUSSION

I. Legal Standards

Under 10 C.F.R. § 2.311, a Board order denying a hearing request is appealable by the requestor on the question whether the request should have been granted. On threshold matters

Bend Station, Unit 1, Issuance of Amendment No. 201 Re: Change to the Neutron Absorbing Material Credited in Spent Fuel Pool for Criticality Control, Enclosure 3 at 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....").

⁷ 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).

⁸ 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) (ML20071G500) (attached are: Declaration of Authorized Officer of Citizens' Resistance at Fermi 2 (CRAFT) to File as Pro Se Counsel (dated Jan. 16, 2020) (ML20071G510); Declaration of Martin R. Kaufman (dated Mar. 7, 2020) (ML20071G517); Declaration of Hedwig Kaufman (dated Mar. 7, 2020) (ML20071G523); Declaration of Alisa Barker (dated Mar. 8, 2020) (ML20071G526); Declaration of Pam Barker (dated Mar. 6, 2020) (ML20071G530); Declaration of Andrea Pierce (dated Mar. 5, 2020) (ML20071G534); Declaration of Cass G. Olszta (dated Mar. 6, 2020) (ML20071G537); Declaration of Janet T Cannon (dated Mar. 5, 2020) (ML20071G542); and Declaration of [Rita L. Mitchell] (dated Mar. 6, 2020) (ML20072M940)) (Hearing Request). NRC Staff's Answer Opposing CRAFT's Hearing Request (Apr. 3, 2020) (ML20094L884). Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request filed by Citizens' Resistance at Fermi 2 (CRAFT) (Apr. 3, 2020) (ML20094L107). Citizens' Resistance at Fermi 2 (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 Citizens' Resistance at Fermi 2 (CRAFT) (Apr. 10, 2020) (ML20101S577).

⁹ *DTE Electric Co.* (Fermi 2), Official Transcript of Proceedings (Jun. 10, 2020) (ML20168A514). LBP-20-7, 92 NRC at __ (slip op. at 22).

¹⁰ Notice of Appeal of LBP-20-07 by Petitioner Citizens' Resistance at Fermi 2 (CRAFT) and Brief in Support of Appeal (Aug. 3, 2020) (ML20216A458) (Appeal).

such as contention admissibility and standing, the Commission “generally defer[s] to the Board ... unless an appeal demonstrates an error of law or abuse of discretion.”¹¹ Similarly, the Commission “generally defer[s] to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.”¹² Therefore, an appeal of a Board’s decision on contention admissibility or standing that does not point to an error of law or abuse of discretion by the Board but rather consists of a “[r]ecitation of an appellant’s prior positions in a proceeding or statement of general disagreement with a decision’s result is not sufficient....”¹³ It is also not sufficient to “present[] arguments and evidence never provided to the Board.”¹⁴ Further, an argument that was previously made before the presiding officer but not “reiterate[d] or explain[ed]” on appeal is considered abandoned.¹⁵

II. The Commission Should Affirm the Board’s Decision Regarding Contention Admissibility Because CRAFT Does Not Identify an Error of Law or Abuse of Discretion by the Board

The Commission should affirm the Board’s decision regarding contention admissibility because, instead of identifying a specific error of law or abuse of discretion by the Board,

¹¹ *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC __, __ (Apr. 23, 2020) (slip op. at 3); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, LLC* (Private Fuel Storage Facility), CLI-00-21, 52 NRC 261, 265 (2000).

¹² *Holtec*, CLI-20-4, 91 NRC at __ (slip op. at 3); see also *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 574 (2016); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 354–55 (2015); *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 26 (2014).

¹³ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

¹⁴ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503–05 (2007) (quoting *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)).

¹⁵ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

CRAFT simply restates and impermissibly supplements its arguments in the record below or merely expresses general disagreement with the decision.¹⁶

A. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 1

The Board determined that CRAFT's proposed Contention 1, to the extent that it challenges the Staff's significant hazards consideration determination, is barred by 10 C.F.R. § 50.58(b).¹⁷ The Board also determined that CRAFT's proposed Contention 1, to the extent that it argues that the NRC cannot consider a modification to a condition imposed upon license renewal, is "simply wrong."¹⁸ Therefore, the Board held that proposed Contention 1 does not satisfy 10 C.F.R. § 2.309(f)(1)(iii)–(vi).¹⁹

On appeal, CRAFT either simply restates or attempts to impermissibly supplement prior contention admissibility arguments and merely expresses general disagreement with the Board. CRAFT first restates the premise of its proposed Contention 1.²⁰ CRAFT then repeats its unsupported concerns that Boraflex degradation could result in failures of the spent fuel and spent fuel pool.²¹ Further, CRAFT impermissibly attempts to introduce two new documents that

¹⁶ See *Turkey Point*, CLI-17-12, 86 NRC at 219; *Shieldalloy*, CLI-07-20, 65 NRC at 503–05 (quoting *American Centrifuge Plant*, CLI-06-10, 63 NRC at 458).

¹⁷ LBP-20-07, 92 NRC at __ (slip op. at 13–14).

¹⁸ *Id.* at __ (slip op. at 14–15).

¹⁹ *Id.* at __ (slip op. at 15).

²⁰ *Compare* Appeal at 13 ("By not physically removing the degraded Boraflex from the spent fuel pool[,] Fermi 2 will be out of compliance with [the license condition]."), *with* Hearing Request at 13. ("[B]y not physically removing the degraded Boraflex from the spent fuel [pool] itself Fermi 2 will be out of compliance with [the license condition].").

²¹ *Compare, e.g.*, Appeal at 13 ("[T]he basis for the contention is the inadequacy of analysis" of "all failure modes for Boraflex degradation that could lead to a spent fuel [pool] fire and potential for failure when the time comes to transfer to dry cask storage...."), *with* Hearing Request at 9–10, 13. ("[T]here is potential for a significant increase in the probability or consequences of an accident previously evaluated. [The condition in the Fermi 2 renewed facility operating license] calls for the removal of Boraflex and replacement.... 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.... Therefore, the proposed change does create the possibility of a new or different kind of accident from any previously evaluated.")

were not part of the record below.²² But CRAFT's only discussion of the Board's decision is its statement that "[w]hile it is true that the [Board], granting the licensing amendment, will relieve DTE of the burden of this license condition, the basis for the contention is the inadequacy of analysis."²³ This statement merely expresses general disagreement with the Board's decision. Because CRAFT's arguments do not identify any specific error of law or abuse of discretion, the Commission should affirm the Board's ruling.

B. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 2

The Board determined that CRAFT's proposed Contention 2, which claims that the continued presence of the original Boraflex racks might lead to corrosion and "unaccounted[-]for debris" in the spent fuel pool, fails to provide support for this claim or to explain what hazards the debris might cause and, therefore, does not satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).²⁴

On appeal, CRAFT generally asserts that the Board's analysis of its proposed contention was inadequate.²⁵ CRAFT also restates its concern that Boraflex degradation could cause the fuel to adhere to the racks and fail when transferred to dry storage.²⁶ Further, CRAFT impermissibly introduces a new argument in an attempt to tie these concerns to "a criticality accident" and a "spent fuel pool fire."²⁷ CRAFT also impermissibly attempts to introduce new

²² Appeal at 13 ("Boraflex, RACKLIFE, and BADGER: description and Uncertainties' (□ ML12216A307)" and "Initial Assessment of Uncertainties Associated with BADGER Methodology' (□ ML12254A064)").

²³ Appeal at 13.

²⁴ LBP-20-07, 92 NRC at __ (slip op. at 15–16) (quoting Hearing Request at 10).

²⁵ Appeal at 13.

²⁶ *Compare* Appeal at 13 ("This problematic potential could result in stuck fuel assemblies which could break during removal."), *with* Hearing Request at 10–11 ("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 and this has not been evaluated.").

²⁷ Appeal at 13–14 ("Because of the cumulative longitudinal degradation, a criticality accident could result when there is malfunction of fuel during transfer [and there is] the potential for a spent fuel pool fire if [the] pool cannot be kept sub-critical.").

documents that were not part of the record below.²⁸ Finally, CRAFT asserts the general concern that the Board “must acknowledge the potential for a spent fuel pool fire if [the] pool cannot be kept sub-critical.”²⁹ Because CRAFT’s arguments do not identify any specific error of law or abuse of discretion, the Commission should affirm the Board’s ruling.

C. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board’s Rejection of Proposed Contention 3

The Board determined that CRAFT’s proposed Contention 3, which challenges the method described in the license amendment request for ensuring subcriticality as insufficiently conservative, is a challenge to the NRC’s regulations and, therefore, does not satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).³⁰

On appeal, CRAFT restates its concern that the spent fuel pool will not remain subcritical under the approach in the license amendment request.³¹ Further, CRAFT impermissibly attempts to provide additional support for its argument by stating that “DTE evaluations are based on an analysis that says the [spent fuel pool] reactivity is prevented by Boral, which is an incomplete assumption because there is no modeling of the ‘as-built’ design of the current Fermi 2 [s]pent [f]uel [p]ool.”³² CRAFT then asserts its general disagreement with the Board’s decision by stating that the Board “must accept [proposed C]ontention 3 because Fermi 2’s [spent fuel pool] condition is unknown, and the margin of safety is not conservative.”³³ Because CRAFT’s

²⁸ *Id.* at 14.

²⁹ *Id.*

³⁰ LBP-20-07, 92 NRC at __ (slip op. at 16–17).

³¹ *Compare* Appeal at 14 (“[T]he license condition change to K-coefficient will not leave a conservative margin of safety to assure the [spent fuel pool] will remain subcritical” and “the [spent fuel pool] in its current and future state would not have a conservative margin to stay subcritical....”), *with* Hearing Request at 14 (“[T]he credit for Boraflex as a neutron absorbing material as required by the ... License Condition, [sic] the effective neutron multiplication factor, k-effective, is less than or equal to 0.95, if the spent fuel pool [] is fully flooded with unborated water [sic] does not leave conservative margin to stay subcritical.”).

³² Appeal at 14.

³³ *Id.* at 15.

arguments do not identify any specific error of law or abuse of discretion, the Commission should affirm the Board's ruling.

D. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 4

The Board determined that CRAFT's proposed Contention 4, which claims that "the more prudent course of action" would be to remove spent fuel from the Fermi 2 spent fuel pool and place it in dry cask storage, is unrelated to the issues in this proceeding and, therefore, does not satisfy 10 C.F.R. § 2.309(f)(1)(iii)–(vi).³⁴

On appeal, CRAFT argues that "[t]he [Board] refused to acknowledge alternate storage (transfer to dry cask storage)" and "that alternate and cheaper methods of storage should be made available, the [Board] need accept [proposed C]ontention 4 on the grounds that more prudent methods are available (dry cask storage) and have been considered an option before."³⁵ The Board, though, did acknowledge CRAFT's arguments and then explained why CRAFT's preference for alternatives was outside the scope of the proceeding and not material to the NRC's decision.³⁶ Accordingly, this vague and unsupported disagreement with the Board's decision does not identify any specific error of law or abuse of discretion and, therefore, the Commission should affirm the Board's ruling.

E. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 5

The Board determined that CRAFT provided no support for its assertion in proposed Contention 5, which raises a concern about the "impact of damaged Boraflex racks on the safe transfer of spent fuel out of the [Fermi 2] spent fuel pool".³⁷ The Board also determined that

³⁴ LBP-20-07, 92 NRC at __ (slip op. at 17–18).

³⁵ Appeal at 15.

³⁶ See LBP-20-07, 92 NRC at __ (slip op. at 17) (Specifically, the Board explained that "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....").

³⁷ *Id.* at __ (slip op. at 18).

CRAFT has not demonstrated that its claims about historical concerns with the spent fuel crane are related to the license amendment request.³⁸ Therefore, the Board held that proposed Contention 5 does not satisfy 10 C.F.R. § 2.309(f)(1)(iii)–(vi).³⁹

On appeal, CRAFT, by its own admission, repeats its previous arguments regarding the Fermi 2 crane and the consequences of spent fuel pool fires.⁴⁰ CRAFT then asserts that “[t]he [Board] refused to acknowledge ... historical rating/operation of Fermi 2 spent fuel crane” and that “[i]t is in the public[']s best interest and interest of safety that a crane used to move waste and insert ‘snap-in’s’ be rated properly for safety, for this reason, the [Board] need admit Contention 5.”⁴¹ The Board, though, did acknowledge CRAFT’s arguments and then explained why they failed to meet multiple contention admissibility criteria, including that CRAFT’s assertions about damage from spent fuel transfer were factually unsupported and that concerns about the spent fuel crane are outside the scope of the proceeding.⁴² While CRAFT’s

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Appeal at 15 (“This was brought up in our initial filing and as well as briefly in questioning during oral argument proceeding.”). *Compare* Appeal at 15 (“There were hundreds of missing welds revealed in 2010 just as Dry Cask Storage was to begin. The load on the crane would have exceeded ability of Fermi structure to support the crane weight because of missing welds.” ... “The pedigree and certification of the fuel removal crane has not been demonstrated.”), *with* Hearing Request at 15 (“DTE was to have loaded dry casks in the fall (2010). But when inspections were done on the Crane, it was learned that blueprints from 1970 called for welds on vertical beams that would not meet seismic specifications. It was determined that the ceilings and floors could not support the Crane as the vertical beam welds were missing.” ... “The Fermi 2 Crane must be demonstrated pedigree and be certified for the 125 tons that it will need to lift.”). *Compare* Appeal at 15 (“Professor Frank [v]on [Hippel] from Princeton University and Dr. Ed Lyman with The Union of Concerned Scientists conducted a study on Spent Fuel Fires and said radioactive material could be released during an accident that could contaminate an area twice the size of New Jersey. While displacing up to 8 million people and having Trillion-dollar consequences.”), *with* Hearing Request at 16 (“[R]eport by Professor Frank von Hippel from Princeton University and Dr. Edwin Lyman with the Union of Concerned Scientists. The report has found the public to be at high risk from fires in spent-nuclear-fuel cooling pools at reactor sites. A fire could release enough radioactive material to contaminate an area twice the size of New Jersey. On average, radioactivity from such an accident could force approximately 8 million people to relocate and result in \$2 trillion in damages.”).

⁴¹ Appeal at 15–16.

⁴² LBP-20-07, 92 NRC at __ (slip op. at 18).

statements express general disagreement with the Board, this is not sufficient to show a specific error of law or abuse of discretion. Therefore, the Commission should affirm the Board's ruling.

F. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 6

The Board determined that CRAFT's proposed Contention 6, which claims that an analysis of the Fermi 2 spent fuel pool as currently loaded needs to be completed prior to the consideration of the license amendment request, is unsupported and unrelated to the request and, therefore, does not satisfy 10 C.F.R. § 2.309(f)(1)(iii)–(vi).⁴³

On appeal, CRAFT repeats its prior concerns regarding the spent fuel pool at Fermi 2.⁴⁴ Specifically, CRAFT asserts that "[t]he [Board] has ignored and overlooked the need for Fermi 2 specific analysis of [spent fuel pool]"; "CRAFT agrees and supports the [Board's] advocacy to take things case by case, and for this reason [proposed] Contention 6 must be admitted"; and that "[t]his is the most prudent course of safety and moves in the direction that would be most cost effective in long run."⁴⁵ While CRAFT's statements express general disagreement with the Board's decision, mere disagreement is not sufficient to show a specific error of law or abuse of discretion. Therefore, the Commission should affirm the Board's ruling.

⁴³ *Id.* at __ (slip op. at 19).

⁴⁴ *Compare, e.g.*, Appeal at 16 ("[T]he need for Fermi 2 specific analysis of SFP as it is currently overloaded with more than twice as was designed (4608 assemblies instead of 2300 fuel assemblies)", *with* Hearing Request at 9 ([T]he spent nuclear fuel pool at Fermi 2 will have been filled to double the capacity of its design to 4608 fuel assemblies. The spent fuel pool was designed for 2300 fuel assemblies. The utilization of the spent fuel pool at twice designed capacity remains the case today...."); Appeal at 16 (DTE's calculations "do not reflect the current actual spent fuel pool" ... "[F]ukushima accident could have been a hundred times worse had there been a loss of water covering in the spent fuel pools associated with each reactor,['] according to Dr. von [Hippel] ... [']That almost happened at Fukushima Unit 4.['] [']Regulators greatly underestimate potential for nuclear disaster['] by B. Rose Kelly, March US Nuclear 25, 2017, source Woodrow Wilson School."), *with* Hearing Request at 16 ("[T]here 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. [']The 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,['] Dr. Frank von Hippel said. [']That almost happened at Fukushima in Unit 4.['] [']Regulators Greatly Underestimate Potential for Nuclear Disaster By: B. Rose Kelly, March U.S. Nuclear 25, 2017 Source: Woodrow Wilson School").

⁴⁵ Appeal at 16.

G. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rejection of Proposed Contention 7

The Board determined that CRAFT's proposed Contention 7, which discusses the "potential use of a newer form of NRC-approved fuel" at Fermi 2, is unrelated to the license amendment request and, therefore, does not satisfy 10 C.F.R. § 2.309(f)(1)(iii)–(vi).⁴⁶ On appeal, CRAFT simply restates and impermissibly supplements its arguments in the record below.⁴⁷ CRAFT does not discuss the Board's decision, much less identify any specific error of law or abuse of discretion. Therefore, the Commission should affirm the Board's ruling.

H. CRAFT Abandons Proposed Contention 8

CRAFT does not address the Board's ruling on proposed Contention 8 in its appeal. An argument that was previously made before the Board but that is not "reiterate[d] or explain[ed]" on appeal is considered abandoned.⁴⁸ Accordingly, the Commission should affirm the Board's decision declining to admit proposed Contention 8.

III. The Commission Should Affirm the Board's Determination that it Was Unnecessary to Rule on CRAFT's Standing

CRAFT argues that the Board erred in declining to make a determination on standing.⁴⁹ Specifically, CRAFT asserts that the Board "[s]hirked [i]ts [r]esponsibility [t]o [r]ule [c]onclusively [o]n CRAFT's [s]tanding."⁵⁰ Further, CRAFT argues that the Board "conflated standing and a subtle merits determination to reach the anomalous conclusion that because CRAFT had no

⁴⁶ LBP-20-07, 92 NRC at __ (slip op. at 19–20).

⁴⁷ *Compare, e.g.*, Appeal at 16–17 ("CRAFT raised concern about the use of Higher Burnup fuel of GNF-3. This [] amounts to an experiment with fuel that is enriched from 5% to 8% U-235. The NRC has not gone through proper Petition for Rule Change on the use of Higher Burnup fuel."), *with* Hearing Request at 16–17 ("[T]he 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.").

⁴⁸ *White Mesa*, CLI-01-21, 54 NRC at 253.

⁴⁹ Appeal at 9–12.

⁵⁰ *Id.* at 9–11.

admissible contentions, it was ‘unnecessary’ to rule on standing.”⁵¹ To support these arguments, CRAFT cites to, among other things, 10 C.F.R. § 2.309(a).⁵² But none of CRAFT’s arguments show that the Board committed an error of law or abused its discretion. Rather, these arguments are without merit—the approach taken by the Board is permitted by 10 C.F.R. § 2.309(a) and is consistent with Commission precedent. And even if the Board had found that CRAFT demonstrated standing in this matter, that would not have affected the Board’s ultimate decision to deny CRAFT’s hearing request.⁵³

Contrary to CRAFT’s arguments, the Board’s decision to stop short of ruling on standing is not an error of law or abuse of discretion. The regulation governing the granting of hearing requests, 10 C.F.R. § 2.309(a), states, in pertinent part, that a presiding officer “will grant the request[] if it determines that the requestor[] has standing under the provisions of [10 C.F.R. § 2.309(d)] **and** has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].”⁵⁴ Consistent with case law and the canons of statutory interpretation, the use of the term “and” generally signifies a conjunctive list, meaning that each condition in the list must be satisfied in order to comply with the requirement. Conversely, if any one of the conditions in the list is not satisfied, then the requirement is not met.⁵⁵ As applied to 10 C.F.R.

⁵¹ *Id.* at 11–12.

⁵² *Id.* at 12.

⁵³ In its appeal, CRAFT also impermissibly attempts to supplement its prior standing argument by stating that “[i]n NRC jurisprudence, it is a given that avoiding criticality in a spent fuel pool is reasonably of concern to a person who lives less than ten (much less five) miles away,” Appeal at 8, and that an amendment to replace one safety feature with another “is a significant finding of fact that makes the likelihood of a serious spent fuel pool mishap cognizable enough that standing should be accorded the [spent fuel pool’s] nearby neighbors,” Appeal at 9. Such supplementation, though, is not sufficient because it does not point to an error of law or abuse of discretion by the Board. *Shieldalloy*, CLI-07-20, 65 NRC at 503–05 (quoting *American Centrifuge Plant*, CLI-06-10, 63 NRC at 458).

⁵⁴ 10 C.F.R. § 2.309(a) (emphasis added)

⁵⁵ See, e.g., *Loving v. IRS*, 742 F.3d 1013, 1018–19 (D.C. Cir. 2014) (calling statutory use of “the conjunctive ‘and’—not the disjunctive ‘or’—when listing various requirements, a strong indication that Congress did not intend the requirements as alternatives”); *Qwest Commc’ns Int’l Inc. v. FCC*, 398 F.3d 1222, 1236 (10th Cir. 2005) (“The use of the conjunctive ‘and’ in the phrase ‘preserve and advance universal service,’ or ‘preservation and advancement of universal service,’ clearly indicates that the [Federal Communications Commission (FCC)] cannot satisfy the statutory mandate by simply doing one or the other. The [FCC] is

§ 2.309(a), both the standing requirement of 10 C.F.R. § 2.309(d) and the contention admissibility requirement of 10 C.F.R. § 2.309(f) must be satisfied to grant a hearing request.⁵⁶ Because 10 C.F.R. § 2.309(a) “requir[es] intervenors to demonstrate standing and submit an admissible contention,” there is no need for a Board to reach the question of standing when it has determined that there is no admissible contention⁵⁷ (and vice-versa).⁵⁸ The Board’s denial

charged under the Act with concurrent duties.”); *Cont’l Ill. Nat’l Bank & Tr. Co. of Chi. v. United States*, 504 F.2d 586, 590 (7th Cir. 1974) (noting that when “the statement of [a] rule is in two-pronged form joined by the conjunctive ‘and’ ... it is essential” that both prongs be met); *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331, 335 (1976) (ruling that “measured by standard English usage and grammar” the best reading of a clause using “or” is disjunctive and that if Congress had intended the clause to be conjunctive, it would have used “and”); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-20, 72 NRC 571, 601 (2010) (“[Applicant] would have us substitute the word ‘or’ for the term ‘and’ in the Commission’s rulings.... Twice, the Commission has said that compliance with 10 C.F.R. § 52.79(a)(3) entails compliance through ‘design, operational organization, and procedures.’ But [applicant] quotes this statement by the Commission and claims that a purely procedural plan suffices, i.e., that compliance may be achieved through a plan consisting solely of design, operational organization, or procedures. This is not what the Commission has stated.” (emphasis in the original)).

⁵⁶ See, e.g., *FirstEnergy Nuclear Operating Co. and FirstEnergy Nuclear Generation, LLC* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Nuclear Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-20-05, 91 NRC ___, __ (slip op.) (Apr. 23, 2020) (slip op. at 2 n.2) (providing that 10 C.F.R. § 2.309(a) “requir[es] intervenors to demonstrate standing and submit an admissible contention”); see also *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 1 and 2), LBP-11-21, 74 NRC 115, 121 (2011) (“In order for a request for hearing and petition to intervene to be granted, a petitioner must (1) establish that it has standing and (2) propose at least one ‘admissible’ contention. We address each of these two requirements in turn.” (footnote omitted)); *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 29 (2002) (“In addition to establishing standing, a petitioner must also proffer at least one admissible contention in order to be admitted as a party to the proceeding.”).

⁵⁷ *Beaver Valley*, CLI-20-5, 91 NRC at ___ (slip op. at 2 n.2). See, e.g., *Susquehanna Nuclear, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-17-4, 85 NRC 59, 75 & n.76 (2017) (denying petitioner’s request for hearing because the Commission did “not discern an admissible contention” and noting that the Commission “need not reach the question whether [petitioner] has demonstrated standing”); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 503 n.19 (2015) (“Because [petitioner’s] contentions all fall far short of our contention admissibility standards, we need not address his standing to intervene.”).

⁵⁸ See, e.g., *Beaver Valley*, CLI-20-5, 91 NRC at ___ (slip op. at 2 & n.2); *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 255 & n.2 (2008) (ruling that “no petitioner has demonstrated standing” and noting that “[b]ecause of this finding, [the Commission] need not reach the question of whether either group has submitted at least one admissible contention”); *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 427 (2007) (“Petitioners’ lack of standing also means that we need not address their contentions....”), *pet. for reh’g denied*, CLI-07-21, 65 NRC 519 (2007); *Consumers Energy Co., Nuclear Mgmt. Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 413 (2007) (ruling that several petitioners had “failed to sufficiently demonstrate their interests and injury” and, therefore, denying their petitions without discussing their proposed contentions).

of CRAFT's hearing request based only on its determination that CRAFT had proffered no admissible contention is consistent with both 10 C.F.R. § 2.309(a) and Commission precedent. And even if the Board had made a positive determination of CRAFT's standing, CRAFT's hearing request would have still been denied for failure to propose at least one admissible contention.

For these reasons, the Board's decision to decline to determine standing was not an error of law or abuse of discretion.

CONCLUSION

For the foregoing reasons, CRAFT has failed to show a specific error of law or abuse of discretion with respect to the Board's decision on contention admissibility. CRAFT further did not show that the Board erred in declining to rule on standing because it found that CRAFT had proffered no admissible contentions. Therefore, consistent with the agency's regulations and Commission precedent, the Commission should affirm the Board's decision in LBP-20-7.

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Executed in Accord with 10 CFR 2.304(d)

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Dated this 28th day of August 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 BRIEF IN OPPOSITION TO CRAFT'S APPEAL OF LBP-20-7," dated August 28, 2020, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 28th day of August 2020.

/Signed (electronically) by/

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Dated 28th day of August 2020