UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 50-341-LA
DTE ELECTRIC COMPANY,	)	
	)	August 28, 2020
(Fermi Nuclear Power Plant, Unit 2)	)	

DTE ELECTRIC COMPANY'S ANSWER OPPOSING CITIZENS' RESISTANCE AT FERMI 2'S (CRAFT'S) APPEAL OF LBP-20-7

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), DTE Electric Company ("DTE") submits this Answer opposing Citizens' Resistance at Fermi 2's ("CRAFT") August 3, 2020 Appeal.[1] CRAFT appeals the Atomic Safety and Licensing Board ("Board") July 7, 2020 Order (LBP-20-7),[2] which denied CRAFT's hearing request and petition for leave to intervene in the above-captioned proceeding ("Petition").[3] The Board denied the Petition because CRAFT failed to propose an admissible contention, as required by 10 C.F.R. § 2.309(a). For the reasons explained below, the Commission should deny the Appeal and affirm the Board's decision because CRAFT has not satisfied its affirmative burden, under the appellate standard of review, to identify an error of law or abuse of discretion in LBP-20-7.

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1 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"). Notably, CRAFT's Appeal lacks a table of contents and table of authorities, as required by 10 C.F.R. § 2.341(c)(3).

2 *DTE Elec. Co.* (Fermi 2), LBP-20-7, 91 NRC __ (July 7, 2020) (slip op.) (ML20189A065).

3 Petition of Citizens' Resistance at Fermi 2 (CRAFT) for Leave to Intervene and for a Hearing on DTE's License Amendment Request to Invalidate a License Extention [sic] Condition by a License Amendment Request (Mar. 9, 2020) (ML20071G500) ("Petition"). The Petition package (ML20071G493) includes eight declarations of CRAFT members.

II. BACKGROUND & PROCEDURAL HISTORY

This proceeding involves DTE's December 5, 2019 license amendment request ("LAR") pertaining to spent fuel storage racks in the Fermi Nuclear Power Plant, Unit 2 ("Fermi 2") spent fuel pool ("SFP").[4] As relevant here, the SFP contains two types of racks. The first type uses Boraflex as the neutron absorbing material; the second uses Boral as the neutron absorber.[5] Following the initial installation of the Boraflex racks at Fermi 2, the U.S. Nuclear Regulatory Commission ("NRC") and the industry accumulated operating experience from other plants indicating that, over time, Boraflex may become less effective as a neutron absorber.[6] So when the NRC issued a renewed operating license for Fermi 2 in December 2016, it included a condition in the license requiring DTE to remove the Boraflex racks in the SFP and replace them with racks that use Boral as the neutron absorber.[7] DTE's LAR asks that the NRC modify Fermi 2's license to remove that condition (and approve corollary changes to the plant's technical specifications and SFP criticality analysis) as part of an alternative plan to install neutron-absorbing *inserts* (which use BORALCAN^{TM} as the neutron absorber) onto the existing Boraflex racks, so that DTE will no longer need to remove those racks, and will no longer rely on Boraflex to perform a neutron-absorbing function.[8]

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

[5] *Id.*, Encl. 1, "Evaluation of the Proposed License Amendment" at 3.

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

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

[8] LAR at 1-2; *see also id.*, Encl. 1 at 3-6. The NRC has already approved the use of such inserts at several other units. *Id*., Encl. 1 at 33.

In early January, the NRC published a notice in the *Federal Register* providing the public an opportunity to file written petitions requesting a hearing and seeking leave to intervene in the instant proceeding.[9] To be granted, such petitions must (1) demonstrate standing, *and* (2) proffer at least one admissible contention.[10] CRAFT filed its Petition on March 9, 2020, claiming entitlement to standing under a Commission-established shortcut known as the "proximity presumption," and proposing eight contentions purporting to challenge the LAR.

Following full briefing, the Board held oral arguments on June 10, 2020,[11] and issued its ruling (LBP-20-7) on July 7, 2020, denying CRAFT's Petition.[12] The Board concluded that none of CRAFT's proposed contentions satisfied all the criteria in 10 C.F.R. § 2.309(f)(1). Because this alone required the Board to deny the Petition under NRC's contention admissibility rules, the Board did not—and did not need to—rule on CRAFT's standing arguments. On August 3, 2020, CRAFT filed the instant Appeal, asking the Commission to overturn the Board's decision.

III. SUMMARY OF ARGUMENT

On appeal, CRAFT argues that the Board's decision to reject the Petition without ruling on standing somehow violated the Atomic Energy Act of 1954, as amended ("AEA"),[13] and CRAFT's Constitutional due process rights.[14] CRAFT also claims that the Board wrongly

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

10 10 C.F.R. § 2.309(a).

11 10 June 2020 Proceedings Transcript (June 16, 2020) ("Tr.") (ML20168A514).

12 *Fermi*, LBP-20-7, 91 NRC __.

13 Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011 et seq.).

14 Appeal at 9-11.

rejected its proposed Contentions 1 through 7 as inadmissible.[15] All of these claims, however, are meritless. As detailed below, the applicable standard of review specifies that the Commission will not overturn a Board's decision unless an appellant satisfies its affirmative burden to demonstrate an "error of law" or "abuse of discretion" in the underlying decision. CRAFT's Appeal provides no such demonstration. In simple terms, CRAFT merely disagrees with the outcome but fails to engage meaningfully with the Board's well-reasoned conclusions.

As a general matter, CRAFT's assertion that the Board must adjudicate a claim of standing even if it would make *no difference* in the outcome of the proceeding does not withstand reasoned scrutiny. That CRAFT identified no legal requirement for the Board to engage in the meaningless exercise it demands here is no surprise; the Commission has not imposed such a hollow requirement. As explained in more detail below, CRAFT's unsupported claim contradicts the plain text of NRC regulations and disregards well-settled adjudicatory precedent. Simply put, legally irrelevant standing determinations are not required by any law, and CRAFT has not met its affirmative burden to show otherwise.

As further detailed below, the Board's decision to reject each of CRAFT's proposed contentions is correct and fully supported by fact and law. On appeal, CRAFT does little more than repeat its earlier arguments, and raise for the first time new arguments that the Board never even had a chance to consider. But neither of these provides a valid basis to overturn a decision on appeal. More fundamentally, CRAFT appears to be under the misimpression that, to be admissible, its contentions only needed to "'articulate . . . the specific issues [it] wish[ed] to

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[15] CRAFT did not appeal the Board's rejection of proposed Contention 8, thus waiving any argument. *See Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 257 n.70 (2010) ("We will deem waived arguments made before the Board that are abandoned on appeal.") (citing *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 414 (1990)).

litigate.'"[16] But this is an incorrect statement of the law; the NRC's contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) require far more than mere notice pleading.[17] At bottom, CRAFT has neither satisfied the standard of review, nor identified any reason to disturb the Board's ruling in LBP-20-7. Thus, the Appeal should be denied.

IV. LEGAL STANDARDS

A. License Amendments

The AEA and NRC regulations unequivocally permit the NRC to amend operating licenses.[18] The AEA also grants the NRC authority to issue and make immediately effective any amendment to an operating license "upon a determination by the Commission that such amendment involves no significant hazards consideration" ("NSHC").[19] To support an NSHC determination, the proposed amendment must not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (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.[20]

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16 Appeal at 12 (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 359 (2001)).

17 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) (codifying amendments to the NRC's contention admissibility requirements after the *Millstone* case quoted by CRAFT) ("Changes to Adjudicatory Process").

18 AEA § 187 (codified at 42 U.S.C. § 2237); 10 C.F.R. § 50.90.

19 *Id.* § 189a.(2)(A) (codified at 42 U.S.C. § 2239(a)(2)(A)).

20 10 C.F.R. § 50.92(c).

B. Contention Admissibility

Petitions to intervene must "set forth with particularity" the contentions a petitioner seeks to have litigated in a hearing.[21] The six requirements for an admissible contention are set forth in 10 C.F.R. § 2.309 (f)(1)(i)-(vi). The petitioner, alone, bears the burden[22] of demonstrating that a proposed contention is within the scope of the proceeding, is material to (i.e., would make a difference in the outcome of) the proceeding, is adequately supported at the outset to justify further inquiry, and presents a genuine dispute with the licensing application at issue on a material issue of fact or law.[23] Failure to satisfy even one of the six admissibility requirements in Section 2.309(f)(1) renders a proposed contention inadmissible.[24] As particularly relevant here, various NRC regulations explicitly prohibit certain challenges in adjudicatory proceedings, including 10 C.F.R. § 50.58(b)(6), which prohibits challenges to proposed NSHC determinations,[25] and 10 C.F.R. § 2.335(a), which forbids challenges to NRC regulations. Such challenges therefore are facially inadmissible.

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

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

23 10 C.F.R. § 2.309(f)(1)(i)-(vi).

24 *See* Changes to Adjudicatory Process at 2221 ("[N]o contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met."); *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

25 10 C.F.R. § 50.58(b)(6). This regulation has long been a jurisdictional bar to intervenor challenges regarding NSHC determinations. *See, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001).

C. Standard of Review on Appeal

Board orders rejecting hearing requests and petitions to intervene are appealable "on the question as to whether the request and/or petition should have been granted."[26] When considering such an appeal, the Commission generally defers to the licensing board's decisions on standing and contention admissibility, but will reverse a ruling if there has been an "error of law or abuse of discretion."[27] The Commission reviews questions of law de novo,[28] and will "reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'"[29] To prevail on a claim of abuse of discretion, the petitioner must persuade the Commission "that a reasonable mind could reach no other result."[30]

To constitute a valid appeal, the petitioner must point to an error of law or an abuse of discretion and not simply restate the claims and arguments in their petition.[31] Thus, when a licensing board holds that a contention is inadmissible for failing to meet one or more of the requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vi), a petitioner's failure to acknowledge and rebut each ground for the board's ruling is sufficient justification for the Commission to reject the

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26 10 C.F.R. § 2.311(c).

27 *Tenn. Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 121 (2018) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)); *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608 (2012) ("[W]e will defer to the Board's rulings on standing absent an error of law or abuse of discretion.") (citations omitted).

28 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

29 *Id*. (citation omitted).

30 *In re Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 715 (2006) (citation omitted); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-952, 33 NRC 521, 532 (1991), *aff'd*, CLI-91-13, 34 NRC 185 (1991) (citation omitted).

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

appeal.[32] The Commission is also free to affirm a board decision on any ground finding support in the record, whether or not relied on by the Board.[33]

An appeal is not an opportunity for a petitioner to remedy deficiencies in its original petition.[34] The Commission "will not consider on appeal 'either new arguments or new evidence supporting the contention[s], which the Board never had the opportunity to consider.'"[35] New claims on appeal are prohibited because "[a]llowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of [the NRC's] contention-pleading rules."[36] This aligns with the purpose of an appeal, which "is to point out error made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board."[37]

V. THE COMMISSION SHOULD DENY CRAFT'S APPEAL BECAUSE IT IDENTIFIES NO ERROR OF LAW OR ABUSE OF DISCRETION BY THE BOARD

CRAFT argues that the Commission should overturn LBP-20-7 because CRAFT "should have been accorded legal standing to proceed," and because "one or more" of its contentions were admissible.[38] Yet CRAFT fails to show that the Board's decision departs from or conflicts with any established law or legal precedent,[39] and identifies no portion of the ruling for which a

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[32] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

[33] *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

[34] *See USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

[35] *Id.* (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004)).

[36] *Id.* (citing *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004)).

[37] *Id.* (citation omitted).

[38] Appeal at 4.

[39] *Oyster Creek*, CLI-09-7, 69 NRC at 259.

"reasonable mind could reach no other result."[40] Because CRAFT has not met the standard necessary to overturn the Board's decision, CRAFT's appeal should be denied.

A. CRAFT Identifies No Error of Law or Abuse of Discretion In the Board's Decision to Reject the Petition Without Ruling on Standing

In LBP-20-7, the Board discussed—but did not decide—whether CRAFT had established standing.[41] The Board declined to "rule unnecessarily" on the question of standing because "CRAFT plainly has failed to submit an admissible contention."[42] On appeal, CRAFT argues that the Board was "required by NRC regulations" to make a determination on standing, and that the Board's "deliberate failure to rule on standing denied CRAFT due process under the AEA and the Fifth Amendment."[43] As explained below, CRAFT's arguments are baseless and do not show that the Board committed an error of law or abused its discretion.

CRAFT argues that the Board "confused" its "standing determination" with its case on the merits.[44] But this argument is illogical for two reasons. First, the Board did not *make* a "standing determination." It *declined* to make one.[45] Thus, a non-existent standing determination was not "confused" with merits considerations—or anything else. Second, CRAFT appears to misunderstand the Board's reasoning. CRAFT claims the Board declined to

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40 *Siemaszko*, CLI-06-16, 63 NRC at 715 (citation omitted).

41 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 5-10).

42 *Id.* at __ (slip op. at 9-10).

43 Appeal at 11-12.

44 *Id.* at 11. CRAFT also argues that the declarations from its members established its standing. *See id.* at 8-9. But this portion of CRAFT's appeal is an entirely new argument that was not raised below. Thus, it is improper for an appeal. *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. Even so, this argument does not show that the Board's decision was based on an error of law or an abuse of discretion, and fails to resolve the Board's question on standing—whether a pro se petitioner, whose members live near the plant, must make specific allegations about radiation concerns related to the LAR to demonstrate standing. *See Fermi,* LBP-20-7, 91 NRC at __ (slip op. at 9).

45 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 7-10).

rule on standing because it determined that "CRAFT would lose on the merits."[46] But CRAFT cites nothing in LBP-20-7 to support this baseless claim. Nor could it, because the Board did not discuss the merits of CRAFT's contentions—rather, it determined that CRAFT "failed to submit an admissible contention."[47] CRAFT thus appears to conflate the contention admissibility requirements with the separate concept of evidentiary merit.[48] Even though CRAFT misread the Board's decision and conflates the two concepts, CRAFT identified no error of law or abuse of discretion in the Board's decision.

CRAFT also argues that the lack of a "standing determination" *per se* requires LBP-20-7 to be overturned.[49] But CRAFT cites no legal authority requiring a standing determination where a presiding officer rejects a petition on *contention admissibility* grounds—because no such authority exists.[50] The NRC's regulations state that a petition may be granted only if a petitioner has demonstrated standing "*and* has proposed at least one admissible contention."[51] Here, the Board determined that CRAFT failed to satisfy the latter requirement. The Board was therefore required—under NRC regulations—to reject the Petition. Put differently, a determination on

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46 Appeal at 11.

47 *Id.* at 12; *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 9-10).

48 Contention admissibility is governed by 10 C.F.R. § 2.309(f)(1); *see also generally Fermi,* LBP-20-7, 91 NRC at __ (slip op. at 10-22) (determining CRAFT's proposed contentions were inadmissible for failing to satisfy these standards).

49 Appeal at 10,11 (claiming that Section 189a of the AEA "obliges the licensing board to make the standing determination" "so that the public can know the degree of agency compliance with statutory and constitutional criteria governing public participation in the licensing and oversight processes of the NRC.").

50 *See, e.g.*, *U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 367 (2004) (holding that Section 189a does not provide a right to a hearing simply because a petitioner has standing).

51 10 C.F.R. § 2.309(a) (emphasis added); *see also Pac. Gas & Elec Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-15-21, 82 NRC 295, 301 (2015) ("[A] petitioner must, in addition to demonstrating standing, propose as least one contention that [satisfies 10 C.F.R. § 2.309(f)(1)(i)-(vi)]."); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (A petition "must demonstrate standing under 10 C.F.R. § 2.309(d), *and* must proffer at least one admissible contention as required by 10 C.F.R. § 2.309(f)(1)(i)-(iv).") (emphasis added).

standing was unnecessary because it would not have changed the outcome—the denial of CRAFT's Petition—which is the only relevant issue on appeal.[52]

The NRC has long declined to require Boards to issue superfluous standing determinations. For example, longstanding precedent shows that a licensing board "commit[s] no error in pretermitting the question of petitioners' standing" where the petitioner has failed to satisfy *other* intervention criteria, because "no purpose would [be] served by such an exercise."[53] Indeed, just a few months ago, the Commission affirmed a Board decision that applied this same logic. As CRAFT noted in its Appeal,[54] the Board in the *Holtec* proceeding declined to "rule unnecessarily" on the standing of one of the petitioners for precisely the same reason the Board did so here—because the petitioner failed to proffer an admissible contention.[55] On appeal, the Commission explicitly acknowledged that the *Holtec* Board did not rule on the petitioner's standing,[56] and affirmed the Board's decision to reject the petition.[57] In sum, because CRAFT failed to submit an admissible contention, no further inquiry into standing was required. Thus, CRAFT's claim does not identify any error of law or abuse of discretion in LBP-20-7.

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52 The sole issue on appeal is "whether the . . . petition should have been granted." 10 C.F.R. § 2.311(c).

53 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 496 (1991).

54 Appeal at 10.

55 *Holtec Int'l* (HI-STORE Consol. Interim Storage Facility), LBP-19-4, 89 NRC __, __ (May 7, 2019) (slip op. at 18-19, 125-31).

56 *Holtec Int'l* (HI-STORE Consol. Interim Storage Facility), CLI-20-4, 91 NRC __, __ (Apr. 23, 2020) (slip op. at 3).

57 *Id.* at __ (slip op. at 32-39, 56). *Accord, e.g., All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately)*, CLI-13-2, 77 NRC 39, 43 (2013) (finding no error in the Board's decision rejecting a petition in which the Board declined to rule on standing as "unnecessary").

B. CRAFT Identifies No Error of Law or Abuse of Discretion in the Board's Rulings on Contention Admissibility

1. Contention 1 (NSHC Determination & License Amendments)

In Contention 1, CRAFT challenged the Staff's proposed determination (as to the first NSHC criterion) that the LAR does not involve "a significant increase in the probability or consequences of an accident previously evaluated."[58] DTE and NRC Staff both opposed this contention because challenges to the Staff's proposed NSHC determination are explicitly prohibited by 10 C.F.R. § 50.58(b)(6), and CRAFT failed to seek or obtain a waiver to challenge this regulation.[59] The Board agreed that the contention was inadmissible on these grounds.[60]

CRAFT also noted that the Fermi 2 license, as it exists now, requires DTE to remove and replace the Boraflex racks; CRAFT then argued that the LAR cannot be approved because the alternative approach proposed in it would not satisfy this requirement in the license.[61] The Board held that, if CRAFT was alleging that NRC licenses are immutable, then Contention 1 is not admissible for the additional reason that the AEA, which cannot be challenged in adjudicatory proceedings, "expressly authorizes" the NRC to amend operating licenses.[62] For these reasons, the Board ruled that Contention 1 did not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).[63]

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58 Petition at 9, 13.

59 Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request filed by Citizens' Resistance at Fermi 2 (CRAFT) at 21-22 (Apr. 3, 2020) (ML20094L107); NRC Staff's Answer Opposing CRAFT's Hearing Request at 21-22 (Apr. 3, 2020) (ML20094L884).

60 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 15).

61 Petition at 8-9, 13.

62 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 14-15).

63 *Id.* at __ (slip op. at 15).

On appeal, CRAFT fails to address *any* (much less all) of the specific grounds on which the Board rejected Contention 1. This failure, by itself, justifies the rejection of CRAFT's Appeal as to Contention 1.[64] Moreover, the Board's ruling is manifestly correct: neither NSHC determinations[65] nor the AEA are subject to challenge in adjudicatory proceedings.[66]

Rather than address the Board's ruling, the Appeal merely repeats CRAFT's baseless and legally incorrect assertion from the proceedings below that operating licenses cannot be amended. But simply restating claims and arguments from the original Petition does not satisfy the appellate standard of review.[67] CRAFT also seeks to recharacterize Contention 1 as an entirely new challenge to the adequacy of some unspecified analysis of "failure modes"—a topic never mentioned in the proceedings below—and claims this new argument is supported by certain documents that, likewise, are cited for the first time in the Appeal.[68] But as the Commission has explained, raising new arguments and evidence for the first time on appeal is improper.[69] New arguments simply cannot reveal an error of law or abuse of discretion by the Board, because the Board did not even have an opportunity to *consider* these new and untimely

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64 *See Millstone*, CLI-04-36, 60 NRC at 638 (petitioner's failure to challenge the Board's ruling on contention admissibility factors "is, in and of itself, sufficient justification to reject [petitioner's] appeal.").

65 10 C.F.R. § 50.58(b)(6); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 144-45 (2016) (agreeing with the Board's finding that a NSHC determination is not subject to challenge).

66 *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.").

67 *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

68 Appeal at 13 (citing Technical Letter Report – Boraflex, RACKLIFE, and BADGER: Description and Uncertainties (Sept. 30, 2012) (ML12216A307) and Technical Letter Report – Initial Assessment of Uncertainties Associated with the BADGER Methodology (Sept. 30, 2012) (ML12254A064)).

69 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

arguments and documents.[70] In sum, CRAFT identifies no error of law or abuse of discretion in the Board's reasons for rejecting Contention 1.

2. Contention 2 (Boraflex Degradation)

In Contention 2, CRAFT claimed that "corrosion leads to degradation and can result in unanticipated consequences and unaccounted for debris in the spent fuel pool" and that "[t]here have been problems at other U.S. nuclear power plants revolving around Boraflex."[71] The Board ruled that CRAFT failed to support its claims, and failed to demonstrate a genuine dispute with the LAR, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).[72] On appeal, CRAFT identifies no error of law or abuse of discretion in the Board's findings.

First, as the Board noted, the existence of operating experience suggesting the possibility of Boraflex degradation "is not in dispute."[73] Indeed, it is the impetus for the LAR.[74] On appeal, CRAFT never explains why the Board's ruling in this regard constitutes an error of law or abuse of discretion. Rather, it simply restates its general assertion that Boraflex degradation is a known

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[70] Moreover, it is entirely unclear how these documents would have provided the requisite support for an admissible contention even if they *had* been raised below. The reports contain general discussions and illustrative examples related to computer models and measurement systems used to quantify Boraflex degradation, but neither discuss nor identify any deficiency in the LAR at issue in this proceeding.

[71] Petition at 10, 13.

[72] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 15-16).

[73] *Id.* at 15.

[74] *Id.* at 15-16.

phenomenon, and cites new documents (never cited in the proceedings below) as alleged support.[75] But recycled arguments and new documents are insufficient grounds for an appeal.[76]

Second, the Board rejected Contention 2 because CRAFT "provide[d] 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,'"[77] and failed to "explain what hazards such debris might cause."[78] On appeal, CRAFT *still* fails to provide the requisite support for its incorrect claims. More importantly, it does not point to any such support that it allegedly supplied in the proceedings below. In other words, it identifies no error of law or abuse of discretion in the Board's decision to reject Contention 2 for failing to satisfy 10 C.F.R. § 2.309(f)(1)(v).

Instead, CRAFT argues that "the ASLB has not adequately analyzed the potential of corrosion leading to degradation and potential unanticipated consequences of unaccounted debris in the spent fuel pool."[79] This statement fundamentally misapprehends the role of the Board at the contention admissibility stage, which is not to conduct technical analyses, but rather to determine whether CRAFT submitted an admissible contention. It is CRAFT's burden—not the

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[75] Appeal at 14 (referencing Information Notice 87-43: Gaps in Neutron-Absorbing Material in High-Density Spent Fuel Storage Racks (Sept. 8, 1987); Information Notice 97-70: Potential Problems with Fire Barrier Penetration Seals (Sept. 19, 1997); Information Notice 98-38: Metal-Clad Circuit Breaker Maintenance Issues Identified by NRC Inspections (Oct. 15, 1998); Information Notice 12-13: Boraflex Degradation Surveillance Programs and Corrective Actions in the Spent Fuel Pool (Aug. 10, 2012); and Generic Letter 96-04: Boraflex Degradation in Spent Fuel Pool Storage (June 26, 1996)). In point of fact, two of these documents (IN 97-70 and IN 98-38) do not even address Boraflex degradation.

[76] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05; *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

[77] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 16).

[78] *Id.*

[79] Appeal at 13.

Board's[80]—to present some factual basis for its claim that Boraflex corrosion could lead to "unaccounted for debris in the spent fuel pool" and subsequent "unanticipated consequences."[81] CRAFT's fundamental misunderstanding of the adjudicatory process provides no reason to disturb the Board's decision.

3. Contention 3 (Criticality Analysis Acceptance Criterion)

In Contention 3, CRAFT claimed 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."[82] As explained below, the Board properly rejected Contention 3 on multiple grounds—none of which CRAFT disputes in its Appeal.

First, the Board ruled that, if CRAFT intended the contention as a challenge to the LAR's revised criticality analysis for allegedly crediting Boraflex as a neutron absorber, it was inadmissible because CRAFT's underlying premise is "simply wrong."[83] As the Board noted, the LAR requests approval for precisely the *opposite*.[84] More specifically, the LAR proposes to modify the Fermi 2 SFP criticality analysis to *eliminate* credit for the neutron absorbing capacity

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80 *See Palisades*, CLI-15-23, 82 NRC at 325, 329 ("[I]t is Petitioners' responsibility . . . to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission.") (citation omitted).

81 As a factual matter, the Fermi 2 SFP has an existing system that is designed, specifically, to filter "corrosion product buildup" and other particulate matter in the SFP water; and DTE maintains water purity within specified chemical limits via weekly monitoring, sampling, and analysis. *See* Fermi 2 Updated Final Safety Analysis Report, Rev. 21 at 9.1-18 to -21 (Oct. 2017) (ML17298B269). Thus, even if CRAFT had supplied support for its hypothesized "debris," it still failed to engage with this relevant portion of the Fermi 2 licensing basis or offer a plausible explanation as to how it would be insufficient to address the "unintended consequences" of which it speculates.

82 Petition at 11, 14.

83 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 16).

84 *Id.*

of the Boraflex that will remain in the SFP.[85] Thus, the Board held that Contention 3 was unsupported and failed to dispute the LAR, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

On Appeal, rather than dispute the Board's reasoning, CRAFT presents a completely new argument. More specifically, CRAFT purports to challenge DTE's "analysis that says the SFP reactivity is prevented by Boral."[86] In other words, CRAFT went from claiming that DTE was wrongly taking credit for Boraflex as a neutron absorber (which DTE did not do), to arguing that DTE's reliance on *Boral* as a neutron absorber is somehow inadequate, in some unspecified way, in some unspecified analysis.[87] As noted above, arguments raised for the first time on appeal cannot demonstrate an error of law or abuse of discretion in the Board's conclusions on the *original* arguments presented in the proceedings below.[88]

The Board also held that, to the extent that CRAFT intended Contention 3 as a challenge to the "conservative margin" of the acceptance criterion in the revised criticality analysis (*i.e.*, k-effective less than or equal to 0.95), then the contention was also inadmissible as an impermissible challenge to NRC regulations.[89] This is because the Commission, in 10 C.F.R. § 50.68(b), codified its generic determination that k-effective less than or equal to 0.95 is the appropriate acceptance criterion for SFP criticality analyses. Because CRAFT failed to seek or obtain a waiver to challenge this codified finding, the Board ruled that Contention 3 also violated

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85 *See* LAR, Encl. 1 at 4-5.

86 Appeal at 14.

87 *Compare* Petition at 11-12, 14 *with* Appeal at 14. Of course, CRAFT fails to explain how DTE's reliance on Boral is inadequate or why modeling of the "as built" SFP is necessary. Nor does CRAFT show that the Board's decision was an error of law or an abuse of discretion.

88 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

89 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 16-17).

10 C.F.R. § 2.335(a), which forbids such challenges.[90] On appeal, CRAFT merely repeats its impermissible challenge to the codified acceptance criterion. This provides insufficient grounds for an appeal.[91] Ultimately, CRAFT identifies no error of law or abuse of discretion by the Board because it fails to even address the Board's reasons for rejecting the contention. For these reasons, CRAFT's challenge to the Board's ruling on Contention 3 must be rejected.[92]

4. Contention 4 (Dry Cask Storage)

In Contention 4, CRAFT claimed that "the more prudent course of action to ensure subcriticality in the spent fuel is to remove spent fuel from the pool" and place it into dry cask storage.[93] The Board denied Contention 4, ruling that "DTE's [LAR] does not imbue this Board with plenary jurisdiction to consider whether '[w]ise owners and responsible regulators' would prefer dry cask storage."[94] For this reason, the Board ruled that Contention 4 did not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).[95]

This ruling is plainly correct. CRAFT's demand for an analysis of an alternative method of regulatory compliance is not an issue within the scope of the proceeding. The sufficiency of the *LAR* is the only matter at issue.[96] Moreover, a petitioner's mere articulation of its preferred

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90 *Id.*

91 *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

92 *Millstone*, CLI-04-36, 60 NRC at 638.

93 Petition at 11.

94 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 17) (citation omitted).

95 *Id.* at __ (slip op. at 18).

96 *See* Hearing Opportunity Notice.

approach is not sufficiently probative to demonstrate an adequately supported, genuine, material dispute with the LAR.[97]

On appeal, CRAFT identifies no error of law or abuse of discretion by the Board. Instead, CRAFT repeats its arguments that loading spent fuel into dry casks is "more prudent,"[98] and complains that the Board "refused to acknowledge" its preferred alternative.[99] But CRAFT makes no attempt to explain why the Board's decision constitutes an error of law or an abuse of discretion.[100] Again, restated arguments from the proceedings below are not a valid basis for an appeal.[101] Thus, CRAFT has provided no reason to disturb the Board's decision on Contention 4.

5. Contention 5 (Spent Fuel Crane)

In Contention 5, CRAFT claimed 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."[102] CRAFT also claimed that "[c]umulative 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."[103] As the Board correctly noted, these statements merely repeat CRAFT's inadmissible challenges from

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97 *See, e.g.*, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 548 (1988), *aff'd in part, vacated in part, remanded by* ALAB-905, 28 NRC 515 (1988) (an application is not insufficient merely because "other data and methods might have been used.").

98 Appeal at 15; Petition at 11.

99 Appeal at 15.

100 *Compare* Petition at 16 *with* Appeal at 15 (both discussing the report by F. von Hippel and E. Lyman).

101 *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

102 Petition at 14.

103 *Id*.

Contentions 1, 2, and 4, and are inadmissible in Contention 5 for the same reasons.[104] On appeal, CRAFT does not dispute the Board's characterization and does not allege, much less explain how, the Board's ruling somehow entails an error of law or an abuse of discretion.

Additionally, Contention 5 asserted that the LAR did not evaluate "loading complications" that allegedly would result from "damaged" Boraflex racks that purportedly will "adhere to the fuel assemblies."[105] The Board correctly found that CRAFT provided no support for these various, layered, speculative assertions, and therefore failed to satisfy 10 C.F.R. § 2.309(f)(1)(iii)-(vi). On appeal, CRAFT still fails to identify any support that it allegedly supplied in the proceedings below, or otherwise identify any error of law or abuse of discretion in the Board's decision to reject Contention 5.

Finally, CRAFT also included statements in Contention 5 alleging "historical[] concerns about the rating of the spent fuel Crane."[106] The Board found these statements inadmissible because CRAFT failed to show that they were related "in any way" to the LAR, and therefore rejected them as outside the scope of the proceeding and for failing to demonstrate a genuine dispute with the LAR.[107] Again, in its Appeal, CRAFT utterly fails to engage with the Board's reasoning. At most, CRAFT merely repeats its arguments from the pleadings below, which is an insufficient basis for an appeal. A petitioner's failure to acknowledge and rebut each ground for the Board's ruling is sufficient justification for the Commission to reject the petitioner's

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104 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 18).

105 Petition at 14-15.

106 *Id.* at 15.

107 *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 18).

appeal.[108] Ultimately, CRAFT identifies no reason to reverse the Board's multiple and correct bases for rejecting Contention 5.

6. Contention 6 (Unspecified "Analysis")

In Contention 6, CRAFT claimed 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 [the] License Amendment put forth."[109] The Board noted that the only support CRAFT offered was "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.'"[110] The Board rejected this contention because, once again, CRAFT failed to articulate a connection to the LAR and thus did not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).[111]

On appeal, CRAFT identifies no error of law or abuse of discretion by the Board. Instead, CRAFT simply repeats its assertion about the Fukushima accident, and also repeats a factually erroneous[112] assertion that the Fermi 2 SFP "is currently overloaded with more than twice [sic] as was designed (4608 assemblies instead of 2300 fuel assemblies)."[113] As stated

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[108] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05; *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

[109] Petition at 16.

[110] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 19).

[111] *Id.*

[112] *See* DTE Renewed License No. NPF-43 at [PDF page 361/396] (Technical Specification ("TS") 4.3.3) ("The spent fuel storage pool is designed and shall be maintained with a storage capacity limited to no more than 4608 fuel assemblies.").

[113] Appeal at 16. CRAFT confuses the design capacity of the spent fuel pool with its physical capacity. Under the current rack configuration—which the LAR does not seek to change—the SFP has a physical capacity of 3,590 assemblies. This is *less* than the SFP design capacity limit of 4,608 assemblies. *See* LAR, Encl. 1 at 7 (stating that the SFP has a *physical* capacity of 3,590 assemblies); DTE Renewed License No. NPF-43 at [PDF page 361/396] (TS 4.3.3) (stating the SFP design capacity is 4,608 assemblies).

many times in this Answer, CRAFT's restatement of arguments from its Petition is not a valid basis for an appeal,[114] and CRAFT's failure to address or even acknowledge the Board's reasoning is sufficient justification for rejecting its Appeal.[115]

7. Contention 7 (GNF3)

In Contention 7, CRAFT observed that DTE was planning to use a different type of NRC-approved fuel known as "GNF3" at Fermi 2, and argued that GNF3 has "not undergone adequate evaluation."[116] The Board ruled that CRAFT failed to show "how the potential use of a newer form of NRC-approved fuel is related in any way to DTE's [LAR]," and thus did not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).[117] Contention 7 also repeated CRAFT's challenges from other contentions as to the Staff's NSHC determination and the acceptance criterion in the criticality safety analysis (*i.e.*, k-effective less than or equal to 0.95).[118] In LBP-20-7, the Board, again, rejected these arguments as impermissible challenges to NRC regulations.[119]

On appeal, CRAFT disregards the Board's reasoning for rejecting Contention 7. CRAFT appears to present a new argument that "[t]he NRC has not gone through [the] proper Petition for Rule Change on the use of Higher Burnup fuel."[120] It is unclear what this statement even

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[114] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05; *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

[115] *Millstone*, CLI-04-36, 60 NRC at 638.

[116] Petition at 16-17.

[117] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 20).

[118] Petition at 16-17.

[119] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 20).

[120] Appeal at 16-17.

purports to challenge.[121] Still, new arguments, which the Board never had a chance to consider, present insufficient grounds to overturn a Board decision.[122] In short, the Board was correct to reject Contention 7 for the reasons stated in LBP-20-7, as discussed above, and CRAFT has identified no error of law or abuse of discretion Board's decision.

8. Contention 8 (DTE Operations)

In Contention 8, CRAFT presented a sprawling and derogatory narrative of its perception of various events over the past several decades.[123] The Board ruled that Contention 8 did not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).[124] CRAFT's Appeal is silent on Contention 8. Thus, CRAFT has waived its opportunity to challenge the Board's decision to reject this contention.[125]

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In sum, the Appeal disregards, rather than disputes, the Board's factual and legal reasons for rejecting each of the proposed contentions. CRAFT's mere disagreement with the outcome does not demonstrate any error of law or abuse of discretion in the Board's contention admissibility rulings in LBP-20-7.

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[121] To the extent CRAFT is attempting to argue that DTE must obtain a license amendment prior to using GNF3 fuel, its argument is beyond the scope of this proceeding. DTE has determined that GNF3 fuel may be used without a license amendment under the provisions of 10 C.F.R. § 50.59—a determination that simply is not subject to challenge here. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994).

[122] *Shieldalloy*, CLI-07-20, 65 NRC at 503-05; *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140.

[123] Petition at 17-20.

[124] *Fermi*, LBP-20-7, 91 NRC at __ (slip op. at 21).

[125] *See Shearon Harris*, CLI-10-9, 71 NRC at 257 n.70 ("We will deem waived arguments made before the Board that are abandoned on appeal.") (citing *Int'l Uranium*, CLI-01-21, 54 NRC at 253; *Seabrook*, ALAB-942, 32 NRC at 414).

VI. CONCLUSION

Because CRAFT has not identified any error of law or abuse of discretion in LBP-20-7, either as to the Board's decision to reject the petition without ruling on standing, or as to the Board's rulings on contention admissibility, it has not satisfied the applicable standard of review. Accordingly, the Commission should deny the Appeal and affirm LBP-20-7.

Respectfully submitted,

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Dated in Washington, D.C.
this 28th day of August 2020

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
DTE ELECTRIC COMPANY,	)	Docket No. 50-341-LA
(Fermi Nuclear Power Plant, Unit 2)	)	August 28, 2020

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "DTE Electric Company's Answer Opposing Citizens' Resistance At Fermi 2's (CRAFT's) Appeal Of LBP-20-7" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

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