

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chairman  
Jeff Baran  
Annie Caputo  
David A. Wright

In the Matter of  
  
DTE ELECTRIC COMPANY  
  
(Fermi 2)

Docket No. 50-341-LA

CLI-21-05

**MEMORANDUM AND ORDER**

Citizens' Resistance at Fermi 2 (CRAFT) has appealed the Atomic Safety and Licensing Board's decision denying its petition to intervene and request for hearing in this license amendment proceeding.<sup>1</sup> For the reasons described below, we affirm the Board's decision.

**I. BACKGROUND**

This proceeding involves an application by DTE Electric Company (DTE) to amend the Fermi 2 license to eliminate a license condition requiring the removal of spent fuel storage racks containing Boraflex and allow for the installation of neutron-absorbing inserts into the Fermi 2 spent fuel pool.<sup>2</sup> Spent fuel in the Fermi 2 spent fuel pool is stored in two types of high-density

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<sup>1</sup> *Notice of Appeal of LBP-20-07 by Petitioner Citizens' Resistance at Fermi 2 (CRAFT) And Brief in Support of Appeal* (Aug. 3, 2020) (Appeal); see LBP-20-7, 92 NRC \_\_ (Jul. 7, 2020) (slip op.).

<sup>2</sup> See Letter from Paul Fessler, DTE Energy Co., to NRC Document Control Desk (Sept. 5, 2019), Encl. 1 at 3 (ADAMS accession no. ML19248C679) (LAR).

storage racks using two different types of neutron-absorbing material, Boraflex and Boral.<sup>3</sup>

Neutron-absorbing materials such as Boraflex and Boral serve an important safety function in maintaining subcriticality in spent fuel pools by absorbing more neutrons than are produced by the spent fuel, thereby maintaining the pool in a condition that does not allow for self-sustaining fission reactions.<sup>4</sup> But over time these neutron-absorbing materials can degrade, leading to a reduction in their neutron-absorbing capability.<sup>5</sup>

During the Fermi 2 license renewal process in 2014, DTE committed to eliminating its reliance on Boraflex for neutron absorption prior to the period of extended operation by removing the existing Boraflex racks and replacing them with Boral racks.<sup>6</sup> DTE noted that “[i]f, based on further analyses and subject to any necessary NRC approvals, DTE identifies an alternative to implementation of the rack replacement . . . that can be completed in a timely manner, this commitment will be revised accordingly.”<sup>7</sup> DTE’s commitment was memorialized in License Condition 2.C.(26)(c).<sup>8</sup>

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<sup>3</sup> See LAR, Encl. 1 at 3.

<sup>4</sup> See “Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools,” NRC Generic Letter 2016-01 (Apr. 2016), at 2-3 (ML16097A169) (Generic Letter). Subcriticality is achieved when the “estimated ratio of neutron production to neutron absorption and leakage,” or k-effective, is less than 1.0. 10 C.F.R. § 50.68; see *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 252 n.4 (2000).

<sup>5</sup> See Generic Letter at 2-4 (describing operating experience relating to the effects of aging-related degradation on neutron-absorbing materials such as Boraflex).

<sup>6</sup> Letter from Vito A. Kaminskis, DTE Energy Co., to NRC Document Control Desk (Sept. 24, 2015), at 2 (ML15268A454).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See Fermi 2 Renewed Facility Operating License No. NPF-43 (Dec. 15, 2016), at 8 (ML16270A526).

In 2019, DTE submitted the license amendment request at issue in this proceeding. The license amendment proposes an alternative to the approach prescribed in License Condition 2.C.(26)(c). Instead of removing the racks containing Boraflex and replacing them with racks containing Boral, DTE proposes to leave the Boraflex in place and install neutron-absorbing inserts—NETCO SNAP-IN® rack inserts—into the existing Boraflex racks.<sup>9</sup> The NETCO SNAP-IN® rack inserts would fully replace the neutron absorption function performed by the Boraflex.<sup>10</sup> On the basis of this alternative approach, DTE seeks to modify the Fermi 2 license to eliminate License Condition 2.C.(26)(c).<sup>11</sup> DTE also seeks approval of a new criticality safety analysis and an associated revision of technical specification requirements based on the new criticality safety analysis.<sup>12</sup>

The NRC Staff published a notice of opportunity to request a hearing on DTE’s license amendment request in January 2020.<sup>13</sup> CRAFT filed a petition to intervene, proffering eight

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<sup>9</sup> See LAR, Encl. 1 at 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 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, 729-32 (Jan. 7, 2020).

contentions.<sup>14</sup> DTE and the Staff opposed the petition to intervene on the grounds that CRAFT had not established standing and none of CRAFT's contentions were admissible.<sup>15</sup>

In LBP-20-7, the Board held that CRAFT's petition to intervene did not offer an admissible contention. Because it found that none of CRAFT's contentions were admissible, the Board did not make a determination on whether CRAFT had demonstrated standing.<sup>16</sup> CRAFT has filed the instant appeal, which DTE and the Staff oppose.<sup>17</sup>

## II. DISCUSSION

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.<sup>18</sup> We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.<sup>19</sup> Likewise, we generally defer to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.<sup>20</sup>

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<sup>14</sup> See *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* (Mar. 9, 2020), at 9-20 (Petition to Intervene).

<sup>15</sup> *Applicant's Answer Opposing Petition for Leave to Intervene and Hearing Request Filed by Citizens' Resistance at Fermi 2 (CRAFT)* (Apr. 3, 2020); *NRC Staff's Answer Opposing CRAFT's Hearing Request* (Apr. 3, 2020).

<sup>16</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 9-10).

<sup>17</sup> *DTE Electric Company's Answer Opposing Citizens' Resistance at Fermi 2's (CRAFT's) Appeal of LBP-20-7* (Aug. 28, 2020) (DTE Answer to Appeal); *NRC Staff's Brief in Opposition to CRAFT's Appeal of LBP-20-7* (Aug. 28, 2020).

<sup>18</sup> 10 C.F.R. § 2.311(c).

<sup>19</sup> See, e.g., *Holtec International* (HI-STORE Consolidated Interim Storage Facility), CLI-20-4, 91 NRC \_\_\_, \_\_\_ (2020) (slip op. at 3); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, and 3), CLI-18-4, 85 NRC 87, 91 (2017).

<sup>20</sup> *Holtec International*, CLI-20-4, 91 NRC at \_\_\_ (slip op. at 3).

CRAFT appeals the Board's denial of seven of its eight proffered contentions.<sup>21</sup> As explained below, CRAFT's appeal does not demonstrate Board error.

### **A. CRAFT's Contentions**

In several of its contentions, CRAFT objected to the Staff's no significant hazards consideration determination on DTE's license amendment request.<sup>22</sup> As the Board observed, however, this determination is a procedural one that "can only be made by the NRC Staff or the Commission" and cannot be challenged in an adjudicatory proceeding.<sup>23</sup> Accordingly, the Board did not err in finding that CRAFT's challenges to the Staff's no significant hazards consideration determination are not admissible in this proceeding.<sup>24</sup> Further, as explained below, we find that CRAFT has not demonstrated the Board committed an error of law or abuse of discretion in denying admission of its seven appealed contentions.

#### **1. Contention 1**

In Contention 1, CRAFT argued that there is the "potential for a significant increase in the probability or consequences of an accident previously evaluated" if the license amendment

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<sup>21</sup> See Appeal at 12-16.

<sup>22</sup> See, e.g., Petition to Intervene at 9-10, 13, 17; *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), at 20 (Reply); Tr. at 14.

<sup>23</sup> LBP-20-7, 92 NRC at \_\_\_ (slip op. at 12) (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-87-17, 25 NRC 838, 844 (1987)); see also 10 C.F.R. § 50.58(b)(6); Memorandum from Annette L. Vietti-Cook, Office of the Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Mar. 18, 2020).

<sup>24</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 13-14, 17, 20) (dismissing Contentions 1, 3, and 7 as impermissible challenges to Staff's no significant hazards consideration determination).

request is granted.<sup>25</sup> The Board found that, to the extent CRAFT intended this argument as a challenge to the Staff's no significant hazards consideration determination—specifically, the Staff's determination that the proposed license amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated and would not create the possibility of a new or different kind of accident—it was beyond the scope of the proceeding.<sup>26</sup> CRAFT also argued that because License Condition 2.C.(26)(c)<sup>27</sup> calls for the removal and replacement of Boraflex material in the spent fuel pool, by not physically removing the Boraflex from the pool, DTE would be out of compliance with its license.<sup>28</sup> Observing that the Atomic Energy Act of 1954, as amended (AEA), explicitly authorizes the NRC to amend operating licenses, the Board found this argument, an apparent challenge to the AEA and NRC's regulations, also beyond the scope of the proceeding.<sup>29</sup> More broadly, the Board found

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<sup>25</sup> Petition to Intervene at 9.

<sup>26</sup> LBP-20-7, 92 NRC at \_\_\_ (slip op. at 13-15).

<sup>27</sup> CRAFT referred in Contention 1 and other contentions to “License Condition No. 3,” which the Board interpreted as a mistaken reference to License Condition 2.C.(26)(c), the license renewal condition that calls for the Boraflex rack replacement. See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 14 n.73). In its appeal, CRAFT has amended its references to “License Condition No. 3” to refer to “License Condition 2.C.(26)(c),” signaling its apparent agreement with the Board's interpretation. See Appeal at 5, 6, 13. Therefore, for the sake of clarity, we refer to License Condition 2.C.(26)(c) in place of the original references to “License Condition No. 3” in CRAFT's Petition and other pleadings.

<sup>28</sup> Petition to Intervene at 9-10.

<sup>29</sup> CRAFT did not seek a waiver to challenge the NRC's regulations governing the license amendment process. LBP-20-7, 92 NRC at \_\_\_ (slip op. at 15). See *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-20-1, 91 NRC at \_\_\_ (Apr. 13, 2020) (slip op. at 18-19) (“Our rules of procedure do not permit parties to challenge NRC regulations during adjudicatory proceedings absent a waiver . . .”).

that Contention 1 was not supported by an adequate factual basis and did not show a genuine dispute with DTE's application.<sup>30</sup>

In its appeal, CRAFT does not address the Board's reasoning in dismissing Contention 1. Instead, CRAFT largely repeats and expands upon the arguments raised in its petition to intervene. For example, CRAFT reasserts that DTE will be out of compliance with License Condition 2.C.(26)(c) if it does not physically remove the "degraded" Boraflex from the spent fuel pool.<sup>31</sup> But CRAFT then acknowledges that, should the license amendment be granted, DTE would no longer have to satisfy this requirement.<sup>32</sup> CRAFT also asserts that DTE and the NRC have not considered "all failure modes for Boraflex degradation that could lead to a spent fuel fire and potential for failure" when spent fuel is transferred to dry cask storage, as well as "aging and failure modes that alter regular movement of fuel rods and cooling . . . includ[ing] cracking, embrittlement, swelling, structural failures[,] and chemical reactions."<sup>33</sup> CRAFT states, "Boraflex panels are known for degrading and shedding silica into [spent fuel pool] water from gaps and localized washout of Boron."<sup>34</sup>

CRAFT does not explain how these arguments, which appear to expand upon concerns about Boraflex degradation raised by CRAFT in several places in its petition to intervene, demonstrate Board error in dismissing Contention 1.<sup>35</sup> To the extent CRAFT suggests that the

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<sup>30</sup> LBP-20-7, 92 NRC at \_\_\_ (slip op. at 15).

<sup>31</sup> Appeal at 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For example, CRAFT raises concerns in its petition to intervene about "cumulative longitudinal degradation" and "corrosion and degradation" in its restatement of Contention 1 and

Board failed to address the “inadequacy of analysis” of possible impacts from Boraflex degradation, we note that the Board considered this concern in connection with Contention 2 and found it inadmissible because CRAFT had not supported its claim that leaving Boraflex in place would cause the impacts CRAFT stated could occur.<sup>36</sup> In its appeal, CRAFT refers for the first time to two reports concerning surveillance methodologies for identifying Boraflex degradation.<sup>37</sup> These reports cannot supply the factual support found lacking by the Board. The purpose of an appeal “is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”<sup>38</sup> CRAFT has not pointed to any errors in the Board’s ruling on Contention 1.

## **2. Contention 2**

CRAFT argued in Contention 2 that allowing DTE to leave Boraflex in place in the Fermi 2 spent fuel pool would cause “corrosion [that] leads to degradation and can result in unanticipated consequences and unaccounted for debris.”<sup>39</sup> CRAFT asserted that this corrosion must be and has not been examined and considered as a potential problem in connection with the eventual loading of the spent fuel at Fermi 2 into dry cask storage.<sup>40</sup> In

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under Contentions 2, 4, and 5. See Petition to Intervene at 10, 13, 14-15; see also Reply at 5, 20 (addressing similar concerns in connection with Contentions 1, 2, 4, 5, and 6).

<sup>36</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 15).

<sup>37</sup> See Appeal at 13 (discussing NRC reports “Boraflex, RACKLIFE, and BADGER: Description and Uncertainties” (Sept. 2012) (ML12216A307) and “Initial Assessment of Uncertainties Associated with BADGER Methodology” (Sept. 2012) (ML12254A064)).

<sup>38</sup> *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 504 (2007) (quoting *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006)).

<sup>39</sup> Petition to Intervene at 10.

<sup>40</sup> *Id.*



support of its contention, CRAFT pointed to examples of problems licensees at other facilities had with the use of Boraflex as a neutron-absorbing material.<sup>41</sup>

The Board dismissed Contention 2 because CRAFT did not provide evidence for its claim that leaving the Boraflex racks in place could lead to corrosion and debris in the Fermi 2 spent fuel pool and CRAFT did not specify the hazards that it expected would result from such debris.<sup>42</sup> The Board found that the premise of Contention 2 that “[t]here have been problems at other U.S. nuclear power plants revolving around Boraflex” did not establish the existence of a material dispute with the application because it was, in fact, the reason why the NRC required that DTE replace the Fermi 2 Boraflex racks as a condition of license renewal and why DTE now seeks to install NETCO SNAP-IN® racks.<sup>43</sup>

On appeal, CRAFT does not challenge the Board’s determination that its contention did not satisfy our admissibility standards. Instead, CRAFT reframes its original claim, stating that the Board did not adequately analyze the potential of corrosion to cause degradation of the Boraflex material or the consequences of “unaccounted debris” in the spent fuel pool. For the first time, CRAFT argues that “[a]ddressing all failure modes must be a part of the examination before moving forward.”<sup>44</sup> CRAFT also asserts that the Board “must acknowledge the potential for a spent fuel pool fire if [the] pool cannot be kept sub-critical.”<sup>45</sup> The role of the Board, however, is to determine whether CRAFT has submitted an admissible contention.<sup>46</sup>

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<sup>41</sup> See *id.* at 10-11; Reply at 20-21.

<sup>42</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 16).

<sup>43</sup> See *id.* at \_\_\_ (slip op. at 15-16) (quoting Petition to Intervene at 10).

<sup>44</sup> Appeal at 13-14.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> See 10 C.F.R. § 2.309(f)(1)(v), (vi).

CRAFT's claim that the continued presence of Boraflex will lead to a fire in the Fermi 2 spent fuel pool and its claim that "all failure modes" must be examined in association with the transfer of spent fuel to dry cask storage do not demonstrate Board error.<sup>47</sup> Moreover, CRAFT's references to several NRC information notices and a generic letter are identified for the first time in CRAFT's appeal and therefore cannot remedy correct the deficiency in factual support identified by the Board.<sup>48</sup> In sum, CRAFT has not shown that the Board erred in dismissing Contention 2.

### **3. Contention 3**

In Contention 3, CRAFT claimed that "the credit for Boraflex as a neutron absorbing material as required by [License Condition 2.C.(26)(c)], 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 does not leave conservative margin to stay subcritical."<sup>49</sup> CRAFT stated that with "DTE propos[ing] to play on the margin to stay subcritical with less than or equal to 0.95 being subcritical and measurement of 1.00 being supercritical," such an approach is not

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<sup>47</sup> See *Shieldalloy*, CLI-07-20, 65 NRC at 504.

<sup>48</sup> See Appeal at 14 (citing NRC Information Notices 87-43, 97-70, 98-38, and [20]12-13, and NRC Generic Letter 96-04). However, NRC Information Notices 97-70 and 98-38 do not address Boraflex or neutron-absorbing materials and appear to be concerned with entirely different topics. See, e.g., "Potential Problems with Fire Barrier Penetration Seals," NRC Information Notice 97-70 (Sept. 1997), <https://www.nrc.gov/reading-rm/doc-collections/gen-comm/info-notices/1997/in97070.html>; "Metal-Clad Circuit Breaker Maintenance Issues Identified by NRC Inspections," NRC Information Notice 98-38 (Oct. 1998), <https://www.nrc.gov/reading-rm/doc-collections/gen-comm/info-notices/1998/in98038.html>.

<sup>49</sup> Petition to Intervene at 11, 14.

conservative.<sup>50</sup> CRAFT concluded that “the proposed change does involve a significant reduction in a margin of safety and should not be allowed.”<sup>51</sup>

The Board ruled that, to the extent that CRAFT intended to challenge the criticality analysis in DTE’s application for taking credit for Boraflex as a neutron absorber, Contention 3 did not raise an admissible issue.<sup>52</sup> The Board noted that DTE’s requested license amendment proposes the reverse—to substitute the neutron-absorbing function of Boraflex with inserts that would provide adequate neutron-absorbing capability on their own.<sup>53</sup> In addition, the Board found inadmissible CRAFT’s arguments that the method described in DTE’s application is insufficiently conservative for ensuring subcriticality (i.e., k-effective less than or equal to 0.95).<sup>54</sup> The Board noted that this method is prescribed by NRC regulation, and CRAFT did not seek a waiver to allow it to challenge this regulation.<sup>55</sup>

On appeal, CRAFT reasserts its argument that the Fermi 2 spent fuel pool does not have a conservative margin for subcriticality and contends that the Board did not acknowledge this concern.<sup>56</sup> CRAFT specifies that its concern stems from an “incomplete assumption” in DTE’s analysis “that says the [spent fuel pool] reactivity is prevented by Boral” because DTE

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 14.

<sup>52</sup> LBP-20-7, 92 NRC at \_\_ (slip op. at 16-17).

<sup>53</sup> *Id.* at \_\_ (slip op. at 16).

<sup>54</sup> *Id.* at \_\_ (slip op. at 16-17).

<sup>55</sup> *Id.* (finding that CRAFT violated 10 C.F.R. § 2.335(a) for challenging an NRC regulation without seeking a waiver). See 10 C.F.R. § 50.68(b) (prescribing that “the k-effective of the spent fuel storage racks loaded with fuel of the maximum fuel assembly reactivity must not exceed 0.95” if flooded with unborated water).

<sup>56</sup> Appeal at 14.

has not modeled the “‘as-built design’ of the current [spent fuel pool].”<sup>57</sup> But CRAFT does not explain why such modeling is required or provide support for this claim. Moreover, CRAFT does not challenge the Board’s characterization of its contention or the reasons for the Board’s determination on its admissibility. Further, CRAFT states that it “agree[s] with NRC margins of safety.”<sup>58</sup> Accordingly, CRAFT has not shown that the Board erred in dismissing Contention 3.

#### **4. Contention 4**

CRAFT claimed in Contention 4 that “the more prudent course of action to ensure subcriticality in the spent fuel pool is to remove spent fuel from the pool and reduce the density” of the pool.<sup>59</sup> The Board found these issues to be beyond the scope of the license amendment proceeding.<sup>60</sup> The Board also found that the issues raised in Contention 4 were not material to the NRC’s review of DTE’s application, were unsupported by an adequate factual basis, and did not articulate a genuine dispute with the application.<sup>61</sup>

On appeal, CRAFT does not discuss the Board’s reasoning or show that the Board erred in dismissing Contention 4. Instead, CRAFT presses its argument that the Board must admit Contention 4 because “more prudent methods” of spent fuel storage in the form of dry cask storage “are available . . . and have been considered an option before.”<sup>62</sup> Although CRAFT disagrees with the Board’s determination that Contention 4 is inadmissible, it has not demonstrated that the Board erred in reaching this conclusion.

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 14-15.

<sup>59</sup> Petition to Intervene at 11.

<sup>60</sup> LBP-20-7, 92 NRC at \_\_ (slip op. at 17).

<sup>61</sup> *Id.* at \_\_ (slip op. at 18).

<sup>62</sup> Appeal at 15.

## 5. *Contention 5*

In Contention 5, CRAFT expressed concerns about the lack of an analysis of “loading complications for the lifting of 125 tons” from the transfer of spent fuel due to damaged Boraflex racks “adher[ing] to the fuel assemblies” and claimed that there are historical concerns about the rating of the spent fuel crane due to missing welds.<sup>63</sup> CRAFT also repeated the arguments raised in Contention 2 that DTE would be out of compliance with its license by not physically removing the Boraflex material and 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.<sup>64</sup> The Board dismissed Contention 5, finding it raised issues outside the scope of the proceeding, was not material to the NRC’s review of the license amendment request, was not supported by an adequate factual basis, and did not raise a genuine dispute with the license amendment application.<sup>65</sup>

In its appeal, CRAFT reiterates its concerns that the Fermi 2 spent fuel crane is unsafe for the purpose of transferring spent fuel from the Fermi 2 spent fuel pool, but CRAFT does not address the Board’s ruling that the safety profile of the spent fuel crane is not an issue that falls within the scope of this license amendment proceeding.<sup>66</sup> CRAFT also does not address the Board’s finding that CRAFT failed to provide any factual support for its concern that damaged Boraflex racks can adhere to fuel assemblies and cause complications for the safe transfer of spent fuel out of the spent fuel pool.<sup>67</sup> Therefore, we find no error in the Board’s determination

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<sup>63</sup> Petition to Intervene at 14-15.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> LBP-20-7, 92 NRC at \_\_ (slip op. at 18).

<sup>66</sup> See Appeal at 15-16.

<sup>67</sup> See LBP-20-7, 92 NRC at \_\_ (slip op. at 18).

that these arguments are inadmissible. Likewise, for the reasons explained above, we find no error in the Board's conclusion that CRAFT's concerns about Boraflex degradation and DTE's compliance with License Condition 2.C.(26)(c) do not support admission of this contention.

## **6. Contention 6**

CRAFT claimed in Contention 6 that a "Fermi 2 specific analysis on the spent fuel pool at Fermi 2 as currently loaded" must be performed before DTE's license amendment request is considered.<sup>68</sup> The Board dismissed Contention 6 for not satisfying the contention admissibility criteria, including that the contention raise issues within the scope of the proceeding.<sup>69</sup>

On appeal, CRAFT argues that the Board's ruling ignored its call for an analysis of the Fermi 2 spent fuel pool "as it is currently overloaded with more than twice as was designed (4608 assemblies instead of 2300 fuel assemblies)."<sup>70</sup> CRAFT claims that it has raised concerns that the NRC has accepted calculations from DTE "that do not reflect the current actual spent fuel pool."<sup>71</sup> CRAFT does not, however, explain how these concerns fall within the scope of DTE's license amendment request. If CRAFT's reference to "DTE calculations" is intended as a challenge to DTE's revised criticality safety analysis, CRAFT has not provided factual support for its claim that these calculations are inaccurate.<sup>72</sup> Therefore, we find no basis for overturning the Board's ruling on Contention 6.

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<sup>68</sup> Petition to Intervene at 16.

<sup>69</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 19).

<sup>70</sup> Appeal at 16.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* CRAFT appears to misunderstand both the design capacity of the Fermi 2 spent fuel pool and its physical capacity under the current rack configuration (which the LAR does not seek to change). See LAR, Encl. 1 at 3, 7 (stating that current physical capacity of the spent fuel pool is 3590 fuel assemblies); DTE Answer to Appeal at 21 & nn.112-13 (noting that the

## **7. Contention 7**

In Contention 7, CRAFT argued that “the proposed use of Global Nuclear Fuel – 3 [GNF3], an experimental, higher enriched and longer burn-up fuel,” has not been adequately evaluated as it pertains to the method for ensuring subcriticality in the spent fuel pool and sought the “accelerated removal of highly irradiated spent fuel from the spent fuel pool at Fermi 2.”<sup>73</sup> The Board dismissed Contention 7 because CRAFT had not demonstrated how the potential use of that fuel bore any relationship to DTE’s license amendment request.<sup>74</sup> CRAFT’s appeal does not provide a basis for disturbing the Board’s decision. CRAFT does not challenge the Board’s rationale for rejecting its contention, but instead argues that “[t]he NRC has not gone through [a] proper Petition for Rule Change on the use of Higher Burnup fuel” and that the use of such fuel will result in its placement in the spent fuel pool without performing validation and verification of its impact on criticality.<sup>75</sup> Neither the NRC’s approval of GNF3 fuel nor its use at Fermi 2 is the subject of the instant license amendment proceeding. Accordingly, we affirm the Board’s determination that this contention is inadmissible.

In sum, we find that the Board considered the record and reasonably determined that CRAFT’s Contentions 1 through 7 did not meet our contention admissibility standards. We find

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spent fuel pool is designed with a storage capacity limited to no more than 4608 fuel assemblies (citing Fermi 2 Renewed Facility Operating License No. NPF-43, Technical Specification 4.3.3)).

<sup>73</sup> Petition to Intervene at 16-17.

<sup>74</sup> LBP-20-7, 92 NRC at \_\_\_ (slip op. at 20). The Board also found inadmissible CRAFT’s statements under the heading of Contention 7 that CRAFT “does not agree with the NRC staff analysis that the three standards of 10 C.F.R. § 50.92(c) are satisfied” and “does not accept NRC staff determination [of no] significant hazards consideration.” As explained above, the Board correctly found that CRAFT’s challenges to these findings are not justiciable in an adjudicatory proceeding such as this one. See 10 C.F.R. § 50.58(b)(6).

<sup>75</sup> Appeal at 16-17.

no error of law or abuse of discretion and defer to the Board's judgment on the inadmissibility of these contentions.<sup>76</sup>

## **B. CRAFT's Standing**

The Board declined to rule on whether CRAFT had established standing because it found that CRAFT had not proposed an admissible contention.<sup>77</sup> CRAFT argues on appeal that the Board erred in declining to make this determination.<sup>78</sup> Specifically, CRAFT argues that the Board "conflated standing and a subtle merits determination to reach the anomalous conclusion that because CRAFT had no admissible contentions, it was 'unnecessary' to rule on standing."<sup>79</sup> By declining to rule on its standing, CRAFT asserts, the Board "denied CRAFT due process under the AEA and the Fifth Amendment."<sup>80</sup> In addition, CRAFT argues that it has established representational standing to participate in this proceeding on behalf of its members, several of whom reside within fifty miles and two of whom reside within five miles of Fermi 2.<sup>81</sup>

The Commission has consistently interpreted section 189a. of the AEA to require that a petitioner both show an interest in a proceeding and put forward concrete issues that are appropriate for adjudication.<sup>82</sup> Therefore, our rules for intervention state that a petitioner must

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<sup>76</sup> Because CRAFT did not appeal the Board's ruling on Contention 8, we make no determination on whether the Board erred in dismissing that contention.

<sup>77</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 9-10).

<sup>78</sup> Appeal at 9-12.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 11-12; see AEA, § 189a., 42 U.S.C. § 2239(a) ("[T]he Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . .").

<sup>81</sup> Appeal at 7-8 (citing Petition to Intervene, Encl., Decl. of Hedwig Kaufman (Mar. 7, 2020); *id.*, Encl., Decl. of Martin Kaufman (Mar. 7, 2020)).

<sup>82</sup> See, e.g., *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 191-92 (1973), *aff'd*, CLI-73-12, 6 AEC 241, 241-42 (1973); Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,



show both that it has standing to intervene and that it has proposed at least one admissible contention.<sup>83</sup> As explained above, the Board correctly found that CRAFT's Contentions 1 through 7 were not admissible. The Board also declined to admit CRAFT's Contention 8, a ruling that CRAFT has not challenged.<sup>84</sup> The Board's finding that CRAFT did not propose at least one admissible contention was not, as CRAFT suggests, a *de facto* finding that CRAFT had not established standing or an improper conflation of CRAFT's standing and the merits of the case.<sup>85</sup> On the contrary, the Board carefully considered the information CRAFT provided in support of its claim of standing in light of relevant caselaw. In a separate analysis, the Board considered whether CRAFT's contentions met our requirements for admissibility and determined they did not, a determination which we uphold today. Accordingly, we do not find that the Board committed an error of law or abuse of discretion in declining to decide whether CRAFT had established standing. Further, because we uphold the Board's ruling on the admissibility of CRAFT's contentions, we likewise need not reach the question of whether CRAFT has established standing to participate in this proceeding.

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54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (“[T]he right to intervention under section 189a for a member of the public is explicitly conditioned upon a ‘request’ that properly ‘shall include a statement of the facts supporting each contention together with references to the sources and documents on which the intervenor relies to establish those facts.’”); *cf. Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), ALAB-208, 7 AEC 959, 964-65 (1974) (rejecting argument that petitioners had statutory entitlement to intervene under AEA section 189a. upon establishing nothing more than their standing).

<sup>83</sup> See 10 C.F.R. § 2.309(a).

<sup>84</sup> See LBP-20-7, 92 NRC at \_\_\_ (slip op. at 20-21); see generally CRAFT Appeal. An argument made before the Board but not “reiterate[d] or explain[ed]” on appeal is considered abandoned. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

<sup>85</sup> See Appeal at 10-12.

### III. CONCLUSION

For the foregoing reasons, we *affirm* the Board's decision in LBP-20-7.

IT IS SO ORDERED.

For the Commission



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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of February 2021.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-21-05)** have been served upon the following persons by Electronic Information Exchange.

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FERMI 2 (Docket No. 50-341-LA)

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Dated at Rockville, Maryland  
this 18<sup>th</sup> day of February 2021

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Office of the Secretary of the Commission