

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Stephen G. Burns

In the Matter of

DTE ELECTRIC COMPANY

(Fermi Nuclear Power Plant, Unit 2)

Docket No. 50-341-LR

CLI-17-07

MEMORANDUM AND ORDER

Citizens' Resistance at Fermi 2 (CRAFT) has filed a petition for review of the Atomic Safety and Licensing Board's denial of its motion to reopen this closed license renewal adjudication.¹ For the reasons set forth below, we deny the petition for review.

I. BACKGROUND

In 2014, DTE Electric Company applied to renew the operating license for Fermi Nuclear Power Plant, Unit 2, for an additional twenty years.² CRAFT filed a timely request for a hearing

¹ *Citizens' Resistance at Fermi 2 (CRAFT) Appeal to NRC Commission Decision Set Forth in LBP-17-01* (Feb. 3, 2017) (unnumbered) (Petition for Review); LBP-17-1, 85 NRC __ (Jan. 10, 2017) (slip op.).

² See DTE Electric Company; Fermi 2, 79 Fed. Reg. 34,787, 34,787 (June 18, 2014).

on DTE's application.³ The Board granted CRAFT's hearing request and admitted two contentions for hearing.⁴ The Board also granted a separate hearing request and admitted one contention filed jointly by Don't Waste Michigan, Citizens Environment Alliance of Southwestern Ontario, and Beyond Nuclear.⁵ On appeal, we reversed the Board's decision granting the hearing requests, and the Board terminated the adjudicatory proceeding at our direction.⁶

In the meantime, the NRC Staff continued its review of DTE's license renewal application. The Staff issued the Safety Evaluation Report in July 2016 and the Final Supplemental Environmental Impact Statement (Final SEIS) in September 2016.⁷ In early November 2016, the Staff notified us of its intent to issue the renewed license.⁸ Shortly thereafter, CRAFT filed a motion to reopen the proceeding with an accompanying motion for leave to file a new contention.⁹ CRAFT argued that the Final SEIS is inadequate because the

³ *Citizens' Resistance at Fermi 2 (CRAFT) Petition for Leave to Intervene and Request for a Public Hearing Upon DTE Electric's Request of 20-Year License Extension for the Enrico Fermi 2 Nuclear Reactor* (Aug. 18, 2014; corrected Sept. 3, 2014).

⁴ LBP-15-5, 81 NRC 249, 254, 308 (2015).

⁵ *Id.* at 254, 307.

⁶ CLI-15-18, 82 NRC 135, 150 (2015); LBP-15-25, 82 NRC 161, 161 (2015).

⁷ Safety Evaluation Report Related to the License Renewal of Fermi 2 (July 2016) (ADAMS accession no. ML16190A241); "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Fermi 2 Nuclear Power Plant" (Final Report), NUREG-1437, Supplement 56, vols. 1 and 2 (Sept. 2016) (ML16259A103, ML16259A109). The Staff issued the Draft Supplemental Environmental Impact Statement for public comment in October 2015. "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Fermi 2 Nuclear Power Plant" (Draft Report for Comment), NUREG-1437, Supplement 56, vols. 1 and 2 (Oct. 2015) (ML15300A064, ML15300A073).

⁸ Memorandum from William M. Dean, Director, Office of Nuclear Reactor Regulation, to the Commission (Nov. 9, 2016) (ML16270A270).

⁹ *[Citizens'] Resistance at Fermi 2 (CRAFT)'s Consolidated Motion to Reopen the Record of License Renewal Proceeding and to File a New Contention for Fermi Unit 2 Nuclear Power*

severe accident mitigation alternatives (SAMA) analysis “relies on the input assumption that the [potassium iodide] distribution program is largely effective and adequately protective of public health” and therefore “errs by significantly underestimating the economic costs and consequences of a severe accident.”¹⁰

DTE and the Staff opposed CRAFT’s motions. Both argued that CRAFT had not satisfied the standards for reopening a closed record or the standards for an admissible contention.¹¹ On December 6, 2016, the Staff requested our permission to issue the renewed

Plant (Nov. 21, 2016; corrected Nov. 25, 2016) (Motion to Reopen); *Citizens’ Resistance at Fermi 2 (CRAFT) Motion Requesting Leave to File a New Contention Based on New and Existing SAMA Considerations of Potassium Iodide Distribution in the Primary EPZ [Emergency Planning Zone] and Secondary EPZ* (Nov. 21, 2016; corrected Nov. 25, 2016) (New Contention). We will refer to the corrected versions of CRAFT’s filings.

¹⁰ New Contention at 8; see also Motion to Reopen at 1. As we explained in CLI-15-18, SAMA analyses are not safety analyses; they are conducted as part of the NRC’s environmental review under the National Environmental Policy Act. CLI-15-18, 82 NRC at 139 n.16. The SAMA analysis focuses “on potential additional mitigation measures that could be implemented to further reduce severe accident risk (probability or consequences).” *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 322 (2012) (emphasis omitted). And by practice, the SAMA analysis has been performed as “a cost-benefit analysis, examining whether particular hardware or procedural changes may be cost-beneficial to implement, given the degree of risk reduction that reasonably could be expected from the change.” *Id.*; see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 41 (2012). DTE used the MACCS2 code to perform its SAMA analysis. See *DTE Electric Company Answer Opposing CRAFT Motion to Reopen and Proposed New Contention* (Dec. 1, 2016), at 3 (DTE December 2016 Answer). The code uses a series of inputs that can be varied by the code user, including an input that considers the effect of the ingestion of potassium iodide; potassium iodide may be used to block the thyroid’s uptake of radioactive iodine in the event of a severe accident. See *id.* at 3 n.3; see also *id.*, attach. 1, at 103. See generally *Guidance on Use of Potassium Iodide as a Thyroid Blocking Agent in Radiation Emergencies*; Availability, 66 Fed. Reg. 64,046 (Dec. 11, 2001).

¹¹ See DTE December 2016 Answer at 2; *NRC Staff Answer to CRAFT’s Motion to Reopen the Record and Petition to Intervene* (Dec. 1, 2016), at 1-2. CRAFT filed a reply. *Citizens’ Resistance at Fermi 2 (CRAFT) Combined Reply to DTE and NRC Staff Answers to CRAFT*

license.¹² We granted the Staff's request, and the Staff issued the renewed license on December 15, 2016.¹³

Thereafter, the Board denied CRAFT's motion to reopen the proceeding.¹⁴ The Board found that CRAFT had not met the reopening standards in 10 C.F.R. § 2.326, and thus the Board did not address the admissibility of CRAFT's proposed new contention.¹⁵ CRAFT now petitions for review of the Board's decision. DTE and the Staff oppose the petition and argue that CRAFT has not raised a substantial question for review under 10 C.F.R. § 2.341(b)(4).¹⁶

Consolidated Motions and Proposed New Contention (Dec. 8, 2016) (CRAFT December 2016 Reply).

¹² "Request for Authorization to Issue Renewed Full-Power Facility Operating License for Fermi 2 Nuclear Power Plant," Commission Paper SECY-16-0138 (Dec. 6, 2016) (ML16333A309); see also Memorandum from William M. Dean, Director, Office of Nuclear Reactor Regulation, to the Commission (Nov. 28, 2016) (ML16330A117).

¹³ Staff Requirements—SECY-16-0138—Request for Authorization to Issue Renewed Full-Power Facility Operating License for Fermi 2 Nuclear Power Plant (Dec. 14, 2016) (ML16349A553); Letter from David E. Roth, Counsel for NRC Staff, to the Administrative Judges (Dec. 16, 2016) (ML16351A458); Letter from Lois M. James, NRC, to Keith Polson, DTE (Dec. 15, 2016) (ML16351A459). Our authorization reflected no judgment on CRAFT's motion to reopen. See 10 C.F.R. § 54.31(c); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) ("A license renewal may be set aside (or appropriately conditioned) even after it has been issued, upon subsequent administrative or judicial review.").

¹⁴ LBP-17-1, 85 NRC at __ (slip op. at 11).

¹⁵ See *id.* at __ (slip op. at 6).

¹⁶ *DTE Electric Company Answer Opposing CRAFT Petition for Review of LBP-17-01* (Feb. 28, 2017), at 1; *NRC Staff Answer to CRAFT's Petition for Review of LBP-17-01* (Feb. 28, 2017), at 2. CRAFT filed a reply to DTE's and the Staff's answers. *Citizens' Resistance at Fermi 2 (CRAFT) Combined Reply to NRC Staff and DTE Answers to CRAFT Petition for Review of LBP-17-01* (Mar. 9, 2017).

II. DISCUSSION

We may grant a petition for review of a licensing board decision at our discretion, giving due weight to the existence of a substantial question with respect to the following considerations:

- (1) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) a substantial and important question of law, policy, or discretion has been raised;
- (4) the conduct of the proceeding involved prejudicial procedural error; or
- (5) any other consideration that we may deem to be in the public interest.¹⁷

We will defer to licensing board determinations on threshold matters, including rulings on motions to reopen, absent error of law or abuse of discretion.¹⁸

After a record has closed, or a proceeding has terminated, finality attaches to the hearing process.¹⁹ Our rules therefore place a heavy burden on those filing a motion to reopen a closed record under 10 C.F.R. § 2.326 of our rules of practice.²⁰ The motion must address a

¹⁷ 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹⁸ See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 710, 713-14 (2012); see also *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 361, 368-72 (2012).

¹⁹ See Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,539 (May 30, 1986) (“The purpose of this rule is not to foreclose the raising of important . . . issues, but to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process.”).

²⁰ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009).

“significant safety or environmental issue” and “demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.”²¹ And the motion must be timely, although there is a timeliness exception for motions that present an issue that is “exceptionally grave.”²²

The level of support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). The motion to reopen “must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the . . . [reopening criteria] have been satisfied.”²³ “Evidence contained in [the] affidavits must meet the [evidence] admissibility standards [in 10 C.F.R. § 2.337].”²⁴ That is, it must be “relevant, material, and reliable.”²⁵ Further, the “[a]ffidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.”²⁶ Additionally, a motion to reopen that pertains to a new contention must also meet the timeliness requirements in 10 C.F.R. § 2.309(c) and show

²¹ 10 C.F.R. § 2.326(a)(2)-(a)(3).

²² *Id.* § 2.326(a)(1).

²³ *Id.* § 2.326(b).

²⁴ *Id.*

²⁵ *Id.* § 2.337(a).

²⁶ *Id.* § 2.326(b).

that the new contention is admissible.²⁷ All of these requirements must be met for a motion to reopen to be granted.²⁸

The Board denied CRAFT's motion to reopen for two independent reasons.²⁹ The Board first found that there was a fundamental flaw in CRAFT's challenge to the SAMA analysis—namely, that CRAFT had asserted that the analysis took too much credit for the effectiveness of the distribution of potassium iodide tablets in the emergency planning zone when in fact the SAMA analysis had taken no credit at all for potassium iodide distribution.³⁰ According to the Board, due to this flaw in the underlying premise of the contention, CRAFT had not demonstrated that a materially different result would have been likely had CRAFT's proffered information on potassium iodide distribution been considered initially and therefore CRAFT's motion did not meet the requirements of section 2.326(a)(3).³¹ Second, the Board found that CRAFT had not provided an affidavit with its motion.³² Although CRAFT had claimed that its motion presented a legal issue that did not require an affidavit, the Board determined that

²⁷ *Id.* §§ 2.309(c)(4), 2.326(d).

²⁸ *See id.* § 2.326; *see also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 143-44 (2012).

²⁹ *See* LBP-17-1, 85 NRC at ___ (slip op. at 6).

³⁰ *See id.* at ___ (slip op. at 8-9 & n.43) (citing DTE December 2016 Answer, attachs. 1-2) (observing that the input parameter for potassium iodide was set to "NOKI," which meant that the calculation of severe accident consequences assumed that resulting doses were not mitigated by potassium iodide ingestion).

³¹ *Id.* at ___ (slip op. at 9).

³² *Id.*

CRAFT's challenge to the SAMA analysis raised a factual issue, thus requiring an affidavit under section 2.326(b).³³

In briefing before the Board, CRAFT also claimed that the SAMA analysis was faulty for not taking credit for potassium iodide distribution.³⁴ The Board found that CRAFT had improperly raised this argument for the first time in its reply, and therefore the Board did not consider it.³⁵ CRAFT also asserted that it had raised an environmental justice issue concerning a purported disparity in the distribution of potassium iodide in the Canadian, as compared to the American, portion of the emergency planning zone.³⁶ According to CRAFT, there is a higher rate of potassium iodide distribution in the Canadian portion of the emergency planning zone.³⁷ But the Board found that CRAFT's "brief reference to environmental justice" was provided not as a stand-alone environmental justice contention, but rather "solely as a potential implication of its proposed new [SAMA] contention."³⁸ Because CRAFT had not explained how the claimed disparity in potassium iodide distribution between the United States and Canada would materially alter the SAMA analysis, the Board found that it did not change the Board's decision to deny the motion.³⁹

³³ *Id.* at __ (slip op. at 9-10).

³⁴ See CRAFT December 2016 Reply at 3, 6.

³⁵ LBP-17-1, 85 NRC at __ (slip op. at 10).

³⁶ CRAFT December 2016 Reply at 6-7; New Contention at 10.

³⁷ New Contention at 10.

³⁸ LBP-17-1, 85 NRC at __ (slip op. at 11).

³⁹ *Id.*

In its petition for review, CRAFT argues that the Board's ruling "relies primarily on procedural and technical arguments to counter the validity of the premise of CRAFT's new contention."⁴⁰ As described above, however, the Board applied the standards for reopening a closed record in section 2.326 and found that CRAFT had not met them. CRAFT has not pointed to any error or abuse of discretion in the Board's application of our rules of practice.

Although CRAFT initially styled its proposed new contention as a challenge to the SAMA analysis, CRAFT's later filings have expressed concerns with DTE's Emergency Planning efforts and assert that "carving out the vital issue of emergency preparedness from a license renewal proceeding is arbitrary and capricious, and makes for a wholly disingenuous agency review."⁴¹ As CRAFT acknowledged in its proposed contention and the Board noted in its decision, emergency planning issues are outside the scope of the proceeding.⁴² Emergency planning issues, however, are addressed as part of the agency's continuing oversight of licensees.⁴³ If CRAFT wishes to challenge DTE's ongoing compliance with NRC emergency planning requirements, it may file a request for action under 10 C.F.R. § 2.206.⁴⁴ With respect to this license renewal proceeding, however, CRAFT has not raised a substantial question that would warrant review of the Board's decision.

⁴⁰ Petition for Review at 3.

⁴¹ *Id.*

⁴² New Contention at 7; LBP-17-1, 85 NRC at ___ (slip op. at 9 n.44) (citing 10 C.F.R. § 50.47(a)(1)(i)).

⁴³ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9-10 (2001); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005).

⁴⁴ 10 C.F.R. § 2.206 (providing that "[a]ny person may file a request to institute a proceeding pursuant to [10 C.F.R.] § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper"); see also *Millstone*, CLI-05-24, 62 NRC at 563.

III. CONCLUSION

CRAFT has not raised a substantial question that warrants our review of LBP-17-1. We therefore *deny* the petition for review.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of April, 2017.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-17-07)** have been served upon the following persons by Electronic Information Exchange.

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FERMI 2 (Docket No. 50-341-LR)
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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of April, 2017