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April 23, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of	)	
FirstEnergy Nuclear Operating Company	)	EA-03-214
(Davis-Besse Nuclear Power Station, Unit No. 1)	)	Docket No. 50-346 License No. NPF-3

FIRSTENERGY NUCLEAR OPERATING COMPANY'S ANSWER TO OBJECTIONS TO CONFIRMATORY ORDER AND REQUEST FOR HEARING

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), FirstEnergy Nuclear Operating Company ("FENOC") hereby responds to "Objections to Confirmatory Order Modifying License" (Petition) filed on March 29, 2004, by Michael Keegan, Joanne DiRando, Paul Gunter (as a representative of the Nuclear Information and Resource Service ("NIRS") and Petitioner Keegan), and Donna Lueke (hereinafter "Petitioners").[1] The Petitioners request a hearing on an immediately effective confirmatory order issued by the U.S. Nuclear Regulatory Commission ("NRC") to FENOC on March 8, 2004, "Confirmatory Order Modifying License (Effective Immediately)," 69 Fed. Reg. 12,357 (Mar. 16, 2004) ("Confirmatory Order"). As more fully discussed below, the Petition should be denied because:

- Intervention as of right is not available to Petitioners on the Confirmatory Order;

[1] Although the Petition is titled "Objections to Confirmatory Order Modifying License," the Petition requests a hearing. Therefore, FENOC is responding to it as a petition for hearing and request for leave to intervene under 10 C.F.R. § 2.309(a).

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- Petitioners fail to meet the additional standing requirements set forth in 10 C.F.R. § 2.309(d)(iii) and (iv); and
- Petitioners fail to propose at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).

II. BACKGROUND

On March 6, 2002, during a regularly scheduled refueling outage, FENOC discovered boric acid corrosion on the Davis-Besse Nuclear Power Station ("Davis-Besse") reactor pressure vessel head. Shortly following this discovery, the NRC issued to FENOC a Confirmatory Action Letter ("CAL") on March 13, 2002, confirming FENOC's agreement to seek NRC approval prior to restart of Davis-Besse.[2] In addition, on April 29, 2002, the NRC established an NRC Inspection Manual Chapter 0350 Oversight Panel ("Oversight Panel") to provide enhanced NRC oversight during the Davis-Besse shutdown and during and after plant restart.[3]

The NRC Oversight Panel created a Restart Checklist, which listed the essential issues requiring disposition prior to the restart of Davis-Besse.[4] To address the restart issues and ensure sustained safe plant operation, FENOC developed a Return to Service Plan and the Davis-Besse Nuclear Power Station Operational Improvement Plan, Operating Cycle 14 ("Operational Improvement Plan"). The Operational Improvement Plan contained plans for comprehensive improvement initiatives and independent assessments for operations, engineering, safety culture and corrective actions.[5] Additionally, in a letter to NRC July 30, 2003, FENOC committed to

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[2] CAL No. 3-02-01, March 13, 2002.

[3] Letter from J. E. Dyer (NRC) to Howard Bergendahl (FENOC), dated April 29, 2002, entitled "NRC Oversight Efforts Regarding the Davis-Besse Nuclear Power Station."

[4] Letter from J. E. Dyer (NRC) to Lew W. Myers (FENOC), dated August 16, 2002, entitled "Transmittal of NRC Inspection Manual Chapter 0350 Panel Restart Checklist."

[5] Letter from Mark Bezilla (FENOC) to James Caldwell (NRC), dated February 19, 2004.

perform inspections during the Cycle 14 mid-cycle outage of its incore monitoring instrumentation nozzles at the bottom of the reactor vessel.

On February 26, 2004, in addition to the commitments contained in the Operational Improvement Plan and its July 30, 2003 letter, FENOC agreed to implement additional independent assessments in the areas of operations effectiveness, engineering program implementation, corrective action program effectiveness, safety culture assessment and inspection of key reactor coolant system pressure boundary components, and agreed to have these additional commitments confirmed by an immediately effective Confirmatory Order.[6]

On March 8, 2004, the NRC approved the restart of Davis-Besse. Additionally, the NRC issued the Confirmatory Order[7] to FENOC modifying the Davis-Besse License to add conditions requiring certain self-assessments and inspections of the reactor vessel.[8]

In Section V of the Order, the NRC stated that "Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance." *Id.* at 10. The Order further stated that "If a person requests a hearing, that person shall

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[6] Letter from Lew W. Myers (FENOC) to James L. Caldwell (NRC), dated February 26, 2004, entitled "Response to Conditions to be Confirmed by Order for the Davis-Besse Nuclear Power Station, Unit 1."

[7] Letter from James L. Caldwell (NRC) to Lew W. Myers (FENOC), dated March 8, 2004, entitled "Approval to Restart the Davis-Besse Nuclear Power Station, Closure of Confirmatory Action Letter, and Issuance of Confirmatory Order."

[8] The corrective actions set forth in Section IV of the Orders are:

(a) FENOC shall contract with independent outside organizations to conduct comprehensive assessments of the Davis-Besse operations performance, organizational safety culture, including safety conscious work environment, the corrective action program implementation, and the engineering program effectiveness. Ninety days prior to the assessments, FENOC shall inform the Regional Administrator, NRC Region III, in writing, of the identity of its outside assessment organizations, including the qualifications of the assessors, and the scope and depth of the assessment plans. These outside independent assessments at Davis-Besse shall be completed before the end of the 4th calendar quarter of 2004 and annually thereafter for 5 years. Within 45 days of completion of the assessments, the Licensee shall submit by letter to the Regional Administrator, NRC Region III, all assessment results and any action plans necessary to address issues raised by the assessment results.

(b) FENOC shall conduct a visual examination of the reactor pressure vessel upper head bare metal surface, including the head-to-penetration interfaces; the reactor pressure vessel lower head bare metal surface, including the head-to-penetration interfaces; and the control rod drive mechanism flanges, using VT-2 qualified personnel and procedures during the Cycle 14 mid-cycle outage. The results and evaluation of the inspections will be reported by letter to the Regional Administrator, NRC Region III, prior to restart from the midcycle outage, and any evidence of reactor coolant leakage found during the inspections will be reported by telephone within 24 hours of discovery to the Regional Administrator, NRC Region III, or designee.

set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 C.F.R. § 2.309(d)." *Id.* at 11. The Order clarified that should a hearing be held, the only issue to be considered "shall be whether this Order should be sustained." *Id. (emphasis added).*

On March 29, 2004, the Petitioners filed the subject Petition titled "Objections to Confirmatory Order Modifying License" and requested a hearing and leave to intervene under 10 C.F.R. § 2.309. The Petition requests: (1) an evidentiary hearing on the allegations raised by Petitioners; (2) suspension of the Davis-Besse Operating license and halt to the restart of Davis-Besse; and (3) a requirement that FENOC satisfy all licensing criteria prior to being authorized to operate Davis-Besse for the commercial generation of electricity. Petition at 11.

III. ARGUMENT

Under applicable NRC and judicial precedents, the right of members of the public to intervene in enforcement proceedings is extremely limited. In this case, Petitioners have not satisfied the criteria for intervention established by these precedents and the terms of the Confirmatory Order itself.

Additionally, under the Commission's recently amended rules of practice published in 69 Fed. Reg. 2182 (Jan. 14, 2004), petitioners seeking to intervene in a Commission proceeding must meet two fundamental requirements: (1) establish standing under the provisions of 10 C.F.R. § 2.309(d), and (2) propose at least one admissible contention under 10 C.F.R. § 2.309(f). Petitioners can do neither.

For these reasons, the Petition should be denied, as explained in more detail in the following sections.

A. Intervention as of Right in this Enforcement Proceeding is Not Available to Petitioners under the Confirmatory Order and Applicable Precedents

Petitioners seek to raise issues and request remedies that go well beyond the license conditions specified in the Confirmatory Order. Under such circumstances, intervention as of right is not available to Petitioners.

The Confirmatory Order states that any hearing will be limited to a consideration of a single issue. As the Confirmatory Order states, "the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained."[9] The Petitioners do not contest the terms of the Confirmatory Order itself. Instead, they seek to litigate issues that are outside the scope of the Confirmatory Order, and they seek remedies that go beyond the conditions imposed by the Confirmatory Order. Therefore, under the terms of the Confirmatory Order, the Petitioners have no right to a hearing on the matters that they seek to litigate.

It is well-established that the Commission has the authority under Section 189a of the Atomic Energy Act of 1954 (AEA) to define the scope of a hearing on an enforcement order, and that the scope of such a hearing is limited to those issues set out in the subject order. See *Bellotti v. NRC*, 725 F.2d 1380, 1381-82 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-05, ___ NRC ___, slip op. at 5 (February 18, 2004); *Public Service Co. of Indiana* (Marble Hill Nuclear Generation Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). As such, "[t]he Commission may lawfully limit a hearing to consideration of the remedy or sanction proposed in the order." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40

[9] Confirmatory Order at 11.

NRC 64, 70 (1994), citing *Bellotti*, 725 F.2d at 1381-82; *Marble Hill*, 11 NRC at 440-41; *see also Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 206 (1997) (stating that the Commission "remain[s] mindful that the enforcement context of [a] proceeding necessarily restricts the scope of remedies that intervenors may demand to those set out by the NRC staff in its ... order") (citations omitted).

In *Bellotti*, the Commission, which had found deficiencies in management of the Pilgrim nuclear power plant, issued an enforcement order to the licensee, amending the Pilgrim operating license to require development of a plan for reappraisal and improvement of management functions and imposing a civil penalty on the utility. The Attorney General of Massachusetts, petitioned to intervene and requested a hearing to address the adequacy of the plan, the plant's continued operation, the nature of necessary improvements, and the adequacy of implementation of required changes. Noting its authority to limit the issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts, the Commission denied the petition. On appeal, the court of appeals held that Massachusetts had no cognizable adverse interest in the license amendment proceeding, which involved only the issue of the Commission's order to the utility to develop a safety plan.

The *Bellotti* court upheld the Commission's authority under the AEA to limit the scope of its hearings to the precise issue at stake:

> To read the statute very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations... [T]he Commission's substantive discretion to decide what is important enough to merit examination would be subverted by a procedural provision requiring the Commission to consider any issue any intervenor might raise. Such a reading of the statute is plainly untenable...[10]

[10] *Bellotti*, 725 F.2d at 1381. *See also Sequoyah Fuels Corp.* (UF_6 Production Facility), CLI-86-19, 24 NRC 508, 513 (1986).

The court affirmed the Commission's authority to define the scope of the proceeding and its denial of the intervention petition, holding that the "petitioner is not affected by the proceedings as the Commission has limited it, and so he is not entitled to intervene pursuant to section 189(a) [of the AEA]." *Id.* at 1383.

Like Massachusetts in *Bellotti*, the Petitioners do not oppose the order in the instant proceeding. Instead, the Petitioners allege deficiencies in fire protection requirements at Davis-Besse, as well as shortcomings in the NRC's handling of issues related to the root causes of the degradation of the reactor vessel head for Davis-Besse. In addition, the Petitioners fault the NRC for not issuing a civil penalty against Davis-Besse and "request the Commission to suspend the operating license and halt the restart of Davis-Besse, and require FirstEnergy Nuclear Operating Company to satisfy all licensing criteria prior to being authorized to operate Davis-Besse..." None of these issues is within the scope of this enforcement proceeding as specified in the Confirmatory Order. Furthermore, the additional measures sought by the Petitioners are clearly outside the scope of the Confirmatory Order. As held in *Bellotti* and the other precedents cited above, the scope of an enforcement proceeding is limited to whether the specified conditions should be imposed, not whether other conditions or civil penalties should be imposed.

In this regard, the Commission's ruling in *Marble Hill*, 11 NRC at 441-42, is especially apropos to this proceeding involving the Confirmatory Order for Davis-Besse:

> We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions. Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subject to formal proceedings possibly leading to more severe or different enforcement actions. Rather than consent and risk a hearing on whether more drastic relief was called for, licensees would, to protect their own interests, call for a hearing on each enforcement order to ensure that the possibility of less severe action would also be considered. The end result would be a major diversion of agency resources from project inspections and engineering investigations to the conduct of hearings.

FENOC has voluntarily consented to the Confirmatory Order for Davis-Besse. It would be especially perverse if, having consented to the Confirmatory Order, FENOC were now to be subjected to hearings on the Order.

In sum, granting the Petition would be contrary to the terms of the Confirmatory Order, Commission precedent in cases such as *Marble Hill*, and the Court of Appeals decision in *Bellotti*. Consequently, Petitioners' request for hearing should be denied.

B. Petitioners Fail to Meet the Additional Standing Requirements set forth in 10 C.F.R. § 2.309(d)(iii) and (iv).

The Commission's well-established standing requirements, now codified in 10 C.F.R. § 2.309(d), include:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the proceeding on requestor's/petitioner's interest.

Petitioners have failed to meet the additional standing requirements in 10 C.F.R. § 2.309(d)(iii) and (iv).

Petitioners Keegan, DiRando and Lueke all assert that their residences are within a range of 18 to 30 "straight-line miles" from Davis-Besse and that they have a concern for their personal health and safety, as well as that of the public and the living environment. Petitioner Gunter, in his role as the representative of the Reactor Watchdog Project of the Nuclear Information and Resource Service ("NIRS") also expresses a generic concern for public health and safety.

The Commission has consistently applied "contemporaneous judicial concepts" of standing to determine whether a petitioner has a sufficient interest in a proceeding to be entitled to intervene

as a matter of right. *Florida Power & Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989), citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976). Judicial concepts of standing require a petitioner to allege (1) a particularized injury; (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision. *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998).

Petitioners cite a general concern for *public* health and safety and the environment. Such an academic concern does not meet the requirements for standing under 10 C.F.R. § 2.309(d)(iii). For standing, a petitioner must allege "injury in fact" from the action being challenged, and this injury must be an interest arguably within the zone of interest protected by the governing statute. The alleged injury must be concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As the Commission has held, "a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing." *Portland General Electric Co.*, 4 NRC at 613. Thus, in this proceeding, Petitioners' general concern for public health and safety is not sufficient to establish standing.

Petitioners' assertion of residence within 18 to 30 miles of the plant, coupled with a generalized concern for their health and safety, is also not a sufficient basis for standing in this enforcement proceeding. As the NRC has long recognized, outside of the context of a construction permit or operating licensing proceeding, mere proximity to a plant is not sufficient to confer standing in every proceeding involving the plant. In proceedings with a limited scope, a petitioner must show that an outcome of the proceeding itself (as distinct from operation of the plant) will adversely affect the petitioner's interests. For example, in an exemption proceeding, the Commission held that a bare claim that petitioners resided within 50 miles of the plant and that

operation would impact their health and safety, was not sufficient to establish standing; the petitioners were required to show a causal link between the proceeding and harm to their interests. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000). Similarly, in a license amendment proceeding, *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188-93 (1999), the Commission held that petitioner's residence approximately 10 miles from the Zion plant could not establish standing, because the petitioner could not show that the license amendment entailed an obvious potential for offsite radiological releases or would otherwise adversely affect his interests. In sum, in this proceeding, the Petitioners must show that the Confirmatory Order will adversely affect their interests.

Petitioners fail to demonstrate that they would be injured if the Confirmatory Order is sustained, and therefore have failed to satisfied the requirements of 10 C.F.R. § 2.309(d)(iv). The mere allegation that operation of Davis-Besse may affect their health and safety is not sufficient for standing in this proceeding, since the Confirmatory Order does not authorize operation of Davis-Besse. Instead, Petitioners must show that the new conditions imposed by the Confirmatory Order would adversely affect their specific interests. As Section V of the Confirmatory Order clearly states, only those persons "adversely affected by this Confirmatory Order" may request a hearing, and a petitioner must "set forth with particularity the manner in which his interest is adversely affected by this Order." In this regard, a petitioner who seeks a stricter penalty than specified in an order has no standing to intervene, because it has no right under the order to claim injury from a failure to grant the more extensive relief. *Marble Hill* 11 NRC at 442. Since the Petitioners have not alleged that the Confirmatory Order would affect their interests, they have not provided a sufficient basis for standing to intervene in this proceeding.

C. Petitioners Fail to Meet the Additional Requirements for Contentions in 10 C.F.R. § 2.309(f).

The Petition also fails to meet the NRC's well established requirements for contentions. Under 10 C.F.R. § 2.309(f), proposed contentions must satisfy the following requirements:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The Petition does not specifically identify any contentions. Instead, the Petition offers three "objections" to the Confirmatory Order. As discussed in Section A above, these objections do not fall within the scope of the Confirmatory Order, which imposes conditions related to inspection of the reactor vessel and periodic independent assessments of various aspects of Davis-Besse activities. Therefore, Petitioners' objections are inconsistent with 10 C.F.R. § 2.309(f)(1)(iii) and (iv), which require contentions to be within the scope of the proceeding and material to NRC's findings in the proceeding. Furthermore, as demonstrated below, Petitioners' objections fail to satisfy other requirements for contentions in 10 C.F.R. § 2.309(f).

1. Objection Related to Manual Actions under Fire Protection Program

Petitioners' first objection states that FENOC engaged in "illegal substitution of operator manual actions for meaningful fire protection" under 10 C.F.R. Part 50, Appendix R, Section III.G.2.[11] In support of this objection, the Petition refers to an internal NRC e-mail from P. Qualls, which states that an NRC Safety Evaluation (SE) for Davis-Besse in May 1991 approved "operator manual actions (in lieu of [fire] barriers under III.G.2)." The Petition then argues that manual actions are not alternatives allowed by Section III.G.2, and that NRC's approval was not properly granted as a license amendment or exemption.[12] For several reasons, this objection does not constitute an appropriate contention for litigation in this proceeding.

First, the Petitioners' objection lacks specificity. Contrary to Petitioners' allegation, the May 1991 SE itself does not state that manual actions will be used in lieu of fire barriers under III.G.2. Furthermore, the Petition does not identify any manual actions that allegedly were approved in lieu of fire barriers under Section III.G.2. As a result, Petitioners' objection does not satisfy the requirements for specificity in 10 C.F.R. § 2.309(f)(1)(i), (ii), and (v), because it does not specifically identify any inappropriate manual actions.

Second, as the Petition itself indicates,[13] the NRC has previously considered and rejected the Petitioners' concerns:[14]

> QUESTION: "Has the 0350 Panel inspection of the 1991 Safety Evaluation Report as referenced in Mr. Qualls's email established that the licensee is in non-compliance with fire protection requirements per 10 C.F.R. 50 Appendix R Section III.G.2?"
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> ANSWER: No. Issues concerning anticipated fires in the control room and cable spreading room at Davis-Besse as documented in the Nuclear Regulatory Commission (NRC) safety evaluation (SE) on May 30, 1991, were inspected as part of the Manual

[11] Petition at 3.

[12] Petition at 4. The Petition refers to a May 31, 1991 Safety Evaluation Report (SER). In actuality, the document in question is a May 30, 1991 Safety Evaluation.

[13] Petition at 6.

[14] Letters from John A. Grobe (NRC) to Paul Gunter (NIRS) and Terry J. Lodge, dated March 4, 2004, Enclosure 1, p. 1.

> Chapter (MC) 0350 oversight process. Following the inspection, the Office of Nuclear Reactor Regulation (NRR) technical staff was requested to review the licensee's procedure for anticipated fires in the control room and cable spreading room in accordance with the NRC task interface agreement (TIA) process. The NRR technical staff reviewed the May 30, 1991, SE as well as the licensee's procedure, and found that the procedure continues to assure that the plant can be safely shut down following anticipated fires in the control room or cable spreading room at Davis-Besse.
>
> Further, the NRR technical staff found that the licensee continues to be within their design and licensing basis for anticipated fires in the control room and cable spread room as documented in the May 30, 1991, SE.

The Petition does not dispute this conclusion, nor does it provide any factual basis for concluding that Davis-Besse is in noncompliance with Section III.G.2. Therefore, the Petitioners' objection does not satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi), which require the Petitioners to provide sufficient information to show a genuine dispute on a material issue of fact.

In summary, the Petition does not contest that Davis-Besse is in conformance with its design and licensing basis for fire protection. Furthermore, Petition does not identify any manual actions that allegedly are inconsistent with Section III.G.2. Instead, Petition only references a single, unspecific line within an internal NRC e-mail. The issue raised by that e-mail has been inspected and resolved by the NRC staff, and Petition does not provide any basis for contesting the staff's resolution. Therefore, Petitioners' objection does not provide a sufficient grounds for admission of a contention under 10 C.F.R. § 2.309(f).

2. Objection related to NRC's Alleged "Regulatory Indifference"

Petitioners' second objection alleges that the NRC has displayed a continued pattern of "regulatory indifference" and "passive regulation."[15]

As a threshold matter, this objection is not admissible as a contention because it seeks to litigate matters related to the performance of the NRC staff, rather than the licensee. As the Commission has held, proposed contentions related to the performance of the NRC staff in

[15] Petition at 7-8.

overseeing a plant are not admissible in hearings on that plant. *See, e.g., Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 171 (2000); *Power Authority of the State of New York* (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 318 (2000).

As a basis for its objection, Petitioners cites to a letter dated March 4, 2004 from NRC to Davis-Besse, which refers to concerns that had been recently raised regarding FENOC's root cause analysis on cracking of nozzles and corrosion of the Davis-Besse reactor vessel head. The concerns in question were raised in a letter dated December 18, 2003 from the Union of Concerned Scientists (UCS) to the NRC. The UCS letter mentions a vent line in the Davis-Besse reactor vessel head, and questions whether the cracking in the nozzles in the reactor vessel could be attributed to "thermal effects resulting from the 6.9 pounds mass per hour flow rate" through the vent. NRC's March 4, 2004 letter essentially repeats the UCS concern and asks FENOC to respond to it. In particular, NRC asked FENOC to address whether flow through the vent line could have led to the cracked nozzles in the old reactor vessel head and whether such flow could impact the new reactor vessel head. Petitioners allege that these questions indicate that neither FENOC nor NRC have fully identified the root causes of the corrosion of the Davis-Besse reactor vessel head nor defined means of preventing its recurrence.[16]

As a threshold matter, Petitioners' objection is not admissible as a contention because it is nothing more than a recitation of a question posed by the NRC staff. A petitioner may not rely solely on an NRC request for additional information (RAI) as the basis for a contention. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335-37 (1999); *see also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146-47 (1993). As the Commission stated in *Duke Energy:*

[16] Petition at 7.

> To satisfy the Commission's contention rule...Petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. RAIs generally "indicate[] nothing more than that the staff requested further information and analysis from the Licensee." The NRC's issuance of RAIs does not alone establish deficiencies in the application, or that the NRC staff will go on to find any of the applicant's clarifications, justifications, or other responses to be unsatisfactory.

Duke Energy Corp., 49 NRC at 336 (citations omitted); *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348-50 (1998). As the Commission went on to explain in *Duke Energy*, merely citing an RAI is "a far cry from the reasonable specificity our contention rule demands."[17] As the Commission noted:

> RAIs are not always "irrelevant to the adjudicatory process." They can, for instance, provide a jumping-off point for the petitioners to focus upon particular parts of the application and thereby develop potential issues of concern. The extent to which an RAI might help support a contention must be considered on a case by case basis, but the Commission expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding.

Id. at 341. Since the Petitioners' objection adds nothing to the question posed by the NRC, it does not provide an adequate basis for a contention.

Furthermore, Petitioners' objection does not raise any safety concern that warrants enforcement action. First, contrary to Petitioners' claim, this issue does not raise a dispute regarding the root causes of the degradation of the reactor vessel head. As stated in FENOC's root cause report on the reactor vessel head degradation and as confirmed by the NRC staff, the root causes involved primary water stress corrosion cracking (PWSCC) of the nozzles, leading to leakage of primary coolant and boric acid corrosion of the carbon steel head.[18] As indicated in

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[17] *Duke Energy Corp.*, 49 NRC at 336.

[18] Letter from FENOC to NRC, dated September 23, 2002, enclosing Revision 1 to Root Cause Analysis Report, Section 5.1; letter from John A. Grobe (NRC) to Lew W. Myers (FENOC), dated May 9, 2003, enclosing Inspection Report 50-346/03-04, Attachment 1.

various NRC documents including NRC's recent Order (EA-03-009) to all pressurized water reactors (PWRs), PWSCC is a temperature-related and time-related phenomenon, with PWSCC susceptibility increasing with increasing temperatures and increasing operating duration.[19] Petitioners do not contest that PWSCC was in fact the cause of the cracking of the nozzles in the old reactor vessel head for Davis-Besse. Instead, Petitioners' objection relates to the degree of susceptibility of the nozzles to PWSCC given the possible thermal effects of flow through the vent. Therefore, Petitioners objection does not present a genuine issue of material fact regarding the root cause of the nozzle cracking - - all parties agree that PWSCC was the cause.

Furthermore, even if it is assumed that the vent line does have some impact on the temperature of the nozzles and thus their susceptibility to PWSCC, that assumption would not raise any dispute regarding the safety of the current reactor vessel head for Davis-Besse. During the recent outage, FENOC replaced the degraded head with a new head purchased from the unfinished Midland Plant. It is undisputed that the new reactor vessel head for Davis-Besse has a low susceptibility to PWSCC given its low operating time. In particular, the new reactor vessel head for Davis-Besse has had no operating time (except for the very limit period after approval of restart on March 8, 2004), and therefore has low susceptibility to PWSCC at this time based upon the formula provided in NRC's recent Order (EA-03-009) to all PWRs. Furthermore, under the Order, the new reactor vessel head for Davis-Besse will remain in the low susceptibility category for many years.[20] Therefore, the issue raised by the Petitioners, even if true, does not raise an immediate safety issue and does not provide any basis for prohibiting restart or the other relief

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[19] *See, e.g.*, EA-03-009, Revision 1 (February 20, 2004), *First Revised Order Modifying Licensees* of all pressurized water reactors, pp. 1 and 6.

[20] *Id.* Under the NRC's revised Order, p. 7, a plant will remain in the "Low" susceptibility category until it reaches 8 total effective years of degradation. While effective years of degradation depends upon factors such as operating temperature and capacity factor and therefore only roughly corresponds to calendar years, the 8-year period does indicate that there is a substantial period of time before Davis-Besse is no longer in the Low susceptibility category.

requested by Petitioners. As a result, Petitioners' objection is not sufficient basis for a contention in this enforcement proceeding.

As a second basis for its objection, Petitioners refer to a license amendment issued by the NRC on February 26, 2004, which authorized Davis-Besse to extend the time for the next inspection of its steam generator tubes. The Petition does not identify any safety issue with respect to this amendment, nor does it identify any basis for enforcement action based upon this amendment.

Furthermore, the license amendment is outside the scope of this proceeding. If the Petitioners had objections to this amendment, they had an opportunity to request a hearing in response to the notice on the amendment that was published by the NRC. *See* 69 Fed. Reg. 691 (Jan. 6, 2004). Having failed to do so, Petitioners cannot now seek a hearing on the amendment as part of this enforcement proceeding. In this regard, it has long been held that an enforcement proceeding may not be used to seek relitigation of an issue that has already been decided or to avoid an existing forum in which the issue is being or is about to be litigated. *See, e.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 & 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-81-6, 13 NRC 443, 446 (1981); *Consolidated Edison Co.* (Indian Point, Units 1, 2 & 3), CLI-75-8, 2 NRC 173, 177 (1975).

3. Objection related to Lack of Civil Penalties

Petitioners' third objection alleges that there has been a "suspicious lack of civil monetary and non-monetary penalties against FENOC for the corrosion failures." As a basis for this objection, the Petitioners refer to certain hardware issues (*i.e.*, corrosion of the reactor vessel head, the potential for clogging of the containment sump with debris, and inoperable hydrogen detection equipment), and criticize the NRC for deferring enforcement action pending completion of

ongoing criminal investigations.[21] As discussed below, Petitioners' arguments represent inappropriate challenges to NRC's Enforcement Policy and Memorandum of Understanding (MOU) with the Department of Justice (DOJ).

Under the NRC's Enforcement Policy, hardware issues typically do not warrant civil penalties. Instead, a hardware issue is assessed under NRC's Significance Determination Process (SDP), a finding is made regarding the safety significance of the issue and a color-code is assigned to the finding, and NRC takes follow-up action (including increased regulatory scrutiny) as appropriate based upon the significance of the finding. As stated in NRC's Enforcement Policy, "Civil penalties are not proposed for violations associated with low to moderate, or greater safety significant findings absent actual consequences."[22]

In accordance with the Enforcement Policy, the NRC issued a "Red" finding (the highest significance level) for issues related to the corrosion of the reactor vessel head,[23] a "Yellow" finding related to the containment sump,[24] and a "Green" finding related to hydrogen detection equipment.[25] It is undisputed that these issues had no actual safety consequences. Therefore, under NRC's Enforcement Policy, these issues did not warrant a civil penalty. In short, the NRC has complied with its Enforcement Policy, and Petitioners' objection essentially represents in inappropriate challenge to the Enforcement Policy.

The NRC has made a conscious decision to defer consideration of civil penalties related to certain non-hardware issues pending completion of the pending criminal investigations by the

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21 Petition at 8.

22 *GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS*, Sections IV.A.5 and VI.C.2.

23 EA-03-025, letter dated May 29, 2003, from J. E. Dyer (NRC) to Lew W. Myers (FENOC).

24 EA-03-131, letter dated October 7, 2003 from James L. Caldwell (NRC) to Lew W. Myers (FENOC).

25 Letter dated September 29, 2003, from John A. Grobe (NRC) to Lew W. Myers (FENOC), attaching Inspection Report 50-346/03-17, p. 2.

Department of Justice. That decision is fully in accord with the MOU between the NRC and DOJ. As that MOU states:

> If the NRC concludes that it is necessary to propose a civil penalty, it shall notify DOJ of its contemplated action, and shall defer the initiation of such proceeding until DOJ either concludes its criminal investigation/prosecution or consents to the action . . .[26]

Therefore, Petitioners' objection essentially constitutes an inappropriate attack on the MOU.

Petitioners also argue that it is against public health and safety to allow Davis-Besse to restart until the grand jury has completed its investigation and civil penalties have been assessed against Davis-Besse. However, Petitioners do not identify any basis for this claim. To the contrary, in making its restart decision, the NRC staff has fully considered the information developed by the NRC Office of Investigations which led to the referral to DOJ, and has determined that the information does not raise any current safety concern regarding the operation of Davis-Besse. As the NRC has recently stated in response to a petition submitted under 10 C.F.R. § 2.206 with respect to the ongoing criminal investigation related to Davis-Besse:

> In accordance with Section III.C. of the MOU, after notifying DOJ, the NRC may take immediate actions necessary to protect the public health and safety. Absent such circumstances, the NRC shall normally defer actions such as civil penalties until DOJ concludes its activities. The staff concluded that immediate actions to protect the health and safety of the public are not necessary at this time. A senior NRC manager is monitoring the ongoing federal investigation for any emerging safety concerns.

FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), DD-04-0X, Director's Decision under 10 C.F.R. 2.206 (Proposed) (February 5, 2004), p. 15. The Petition does not present any facts that would indicate that immediate action is needed to protect safety pending completion of the ongoing criminal investigation. Therefore, Petitioners' objection does not provide a sufficient basis for a contention on this issue.

[26] Memorandum of Understanding between the Nuclear Regulatory Commission and the Department of Justice, Section III.C.3, 53 Fed. Reg. 50317 (Dec. 14, 1988).

IV. CONCLUSION

For reasons set forth above, Petitioners' request for a hearing does not satisfy applicable requirements for intervention in enforcement proceedings or the requirements of 10 C.F.R. § 2.309. Accordingly, the Petition should be denied.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FirstEnergy Nuclear Operating Company	)	EA-03-214
	)	Docket No. 50-346
(Davis-Besse Nuclear Power Station,	)	License No. NPF-3
Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "FirstEnergy Nuclear Operating Company's Answer to Objections to Confirmatory Order and Request for Hearing" were served upon the persons listed below by U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, on this 23th day of April, 2004.

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