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RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of	)	Docket No. 50-346-CO
FirstEnergy Nuclear Operating Co.	)	ASLB No. 04-825-01-CO
Davis-Besse Nuclear Power Station, Unit 1	)	May 13, 2004

PETITIONERS' COMBINED REPLY IN OPPOSITION TO 'NRC STAFF RESPONSE TO OBJECTIONS' AND FENOC'S 'ANSWER TO OBJECTIONS'

Now come Michael Keegan, Donna Lueke, Joanne DiRando, and Nuclear Information and Resource Service (by Paul Gunter), Petitioners herein, by and through counsel, and set forth their replies to the matters raised in the "NRC Staff Response to Objections to Confirmatory Order Modifying License," and "FirstEnergy Nuclear Operating Company's Answer to Objections to Confirmatory Order and Request for Hearing."

REPLY CONCERNING PETITIONERS' STANDING TO OBJECT

As this particular Licensing Board well knows, in determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) LBP-02-23 (December 2, 2002), citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably

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protected by the governing statutes (*e.g.*, the Atomic Energy Act of 1954 (AEA)); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *Pacific Gas & Electric Co., supra,* citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29 (1999).

An organization that wishes to intervene in a proceeding may do so by showing that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. *Pacific Gas & Electric Co., supra,* citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

FirstEnergy complains (FirstEnergy Answer to Objections at 9-10) that their inability to demonstrate injury if the Confirmatory Order were adopted is an obstacle to Petitioners' standing. It is the limitations to the very scope of the Order that Petitioners challenge. They that the Order is unduly narrow because it does not appear to have been based upon a complete root cause analysis; because it minimizes fire safety protection concerns that may actually be illegal, as a matter of regulatory law; and because there is a shared cultural indifference on the part of utility and Nuclear Regulatory Commission that inhibits any serious prospective change on the part of either, with ominous portents for the public.

The declarations filed by the individual Petitioners and by NIRS'

member, Charlene Johnston[1] provide evidence in support of the elements to establish legal standing, particularly the customary requirement that intervenors and petitioners live within 50 miles of a nuclear power plant.[2] FirstEnergy asserts that Petitioners seek a "stricter penalty"[3] than the NRC and have not shown how they would be injured because they cannot claim injury from a lack of more extensive relief (FirstEnergy Answer at 10). However, but the bare requirements for standing in an enforcement proceeding are no stricter than those in the usual licensing proceeding. *Dairyland Power Cooperative* (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 374 (1980); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination

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[1]Johnston has provided the Board with her declaration as to standing in support of NIRS' request to be made a party. A corporate environmental group has standing to intervene and represent members who have an interest which will be affected. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-322, 3 NRC 328 (1976). A member's authorization may be presumed when the sole or primary purpose of the organization is to oppose nuclear power in general or the facility at bar in particular. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

There is a presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a plant. *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station, Unit 3), LBP-98-20, 48 NRC 87, 93-94 (1998).

[2]The "proximity presumption" used in reactor construction and operating license proceedings should also apply to reactor license renewal proceedings. For construction permit and operating license proceedings, the NRC recognizes a presumption that persons who live, work or otherwise have contact within the area around the reactor have standing to intervene if they live within close proximity of the facility (*e.g.*, 50 miles). *Duke Energy Corp.* (Oconee Nuclear Station, Units 1,2, and 3), LBP-98-33, 48 NRC 381, 385 n.1 (1998). Residence within 30-40 miles of a reactor site has been held to be sufficient to show the requisite interest in raising safety questions. Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631, 633-634 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 190, 193, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973); Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), aff'd on other grounds, ALAB-893, 27 NRC 627 (1988). Similar-ly, a person whose base of normal, everyday activities is within 25 miles of a nuclear facility can fairly be presumed to have an interest which might be affected by reactor construction and/or operation. Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 (1974).

[3]By its terms, the Confirmatory Order merely confirms arrangements expressly consented to by FENOC in writing - hardly a penalty for FENOC.

and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1994).

With the possible exception of not providing Petitioners' telephone numbers (although they are reachable through their counsel's phone), the individual Petitioners and NIRS have made the requisite showings to establish their legal standing.

CONTENTIONS

(1)(a) Fire Safety/Operator Manual Actions

The NRC and FirstEnergy both contend that, facially, the fire safety and other contentions raised by the Petitioners are beyond the scope of this enforcement proceeding (NRC Staff Response at 11; FENOC Answer at 5). Petitioners disagree.

The Davis-Besse Oversight Panel clearly made fire safety a restart issue, and root cause analysis was a focal element of its oversight mission. Objection to the Confirmatory Order on the ground that it is improperly exclusive and does not address these topics, which are relevant to the Davis-Besse restart, is the only means by which Petitioners may obtain relief on the contentions they have raised.

NIRS directly requested the Davis-Besse Oversight Panel by letter dated December 29, 2003 to investigate the matter of alleged *de facto*, unlicensed "operator manual actions" being implemented to replace physical fire suppression measures. John Grobe, Chairman of the Davis-Besse Oversight Panel, responded by letter of March 4, 2004, noting that the resolution of the "licensee's procedure for anticipated fires in the Davis-Besse control room and cable spreading room" was added to the Oversight Panel's review of the 0350 Restate Checklist item 5.b,

"Systems Readiness for Restart." The Office of Nuclear Reactor Regulation provided its assessment of fire-readiness in a February 6, 2004 memo to Grobe, ADAMS Accession No. ML040490220.

The March 8, 2004 Confirmatory Order, noting the "nontechnical root cause analysis" provided by FENOC, cites the company's conclusion that the corrosion problem was caused by "a lack of sensitivity to nuclear safety and the focus was to justify existing conditions, saying, "The overall conclusion is that Management ineffectively implemented processes and thus failed to detect and address plant problems as opportunities arose." The Order comments on FirstEnergy's "less-than-adequate nuclear safety focus - A production focus established by management, combined with minimum action to meet regulatory requirements" and FirstEnergy's "less-than-adequate analyses of safety implications," and refers to NRC inspections discovering problems "not originally found by the Licensee, most notably in safety culture, in the corrective action program, and in the quality of engineering calculations and analyses." Being mindful of these concerns, the Order proceeds to modify Davis-Besse's operating license to require FENOC's retention of consultants to "conduct comprehensive assessments of the Davis-Besse operations performance, organizational safety culture, including safety conscious work environment. . . ."

The dozen-year bungling of fire safety measures by FirstEnergy coincides with the period wherein the corrosion hole problem at Davis-Besse festered for want of an appropriately concerned management structure. FirstEnergy's serial noncompliance with the NRC's

progressive discipline on fire safety through the decade of the 1990's stems from the very same corporate culture deficiencies that resulted in the corrosion debacle. The 0350 Panel may have consciously kept NIRS' fire safety complaint outside the process that produced the Confirmatory Order so as to head off a legal challenge, but the Panel's admitted inclusion of the matter in its Restart Checklist lends the impression that fire safety properly should fall under the penumbra of concerns covered by the Order. FENOC argues that it is inappropriate for the petitioners to raise Fire Protection issues in the context of the Davis-Besse restart and instead should seek to raise their concerns under the license amendment process (FENOC's Answer at 12-13). But fire protection at Davis-Besse was part of the Restart Checklist and did not receive a complete and thorough review of identified violations of 10 CFR § 50.48, which reflect a systemic failure on the part of the both the licensee and the NRC to redress long standing fire protection violations that carry significant and undue adverse impact on the health and safety of the Petitioners (and in the case of NIRS, some of their membership). NRC regulation 10 CFR § 50.48 imposes upon licensees fire protection requirements in Appendix R III.G.2, specifying three approved methods for protecting the reactor's safe shutdown power, instrumentation and control electrical cables so as to preserve the remote shutdown from the control room. The only approved methods are 1) separation of redundant systems with a passive fire barrier rated to withstand fire for at least three (3) hours; 2) separation of redundant systems by at least twenty (20) feet with no intervening combustibles and used in

conjunction with smoke detectors and automated suppression and; 3) separation of redundant systems with a passive fire barrier rated to withstand fire for at least one (1) hour, used in conjunction with smoke detectors and automated suppression systems. Any other methods of fire suppression employed by a licensee require formal approval from the NRC through the exemption or deviation process.

Petitioners acknowledge that NRC has conducted several inspections during the reactor vessel head outage with a limited and selective focus on fire protection at Davis-Besse including Davis Besse nuclear power station NRC Integrated Inspection Reports 05346/02-19 [ML030310226], 05000346/2004006 [ML0412700700] and Report 05000346/2003018 [ML033080433] where "no findings of significance were identified." However, the Triennial Fire Protection Inspection scheduled for Davis-Besse in 2003 during the extended outage for the reactor pressure vessel head repair was cancelled and rescheduled to take place in the period August 30 - September 17, 2004 (see "Declaration of Paul Gunter" (attached), based upon conversations with Jack Grobe, NRC Region III IMC 0350 Panel Chairman and Christine Lipa, NRC Region III). Petitioners submit that Triennial Fire Protection Inspections are a thorough and focused fire inspection regime that has uncovered significant fire protection issues at other nuclear power stations. But of the nation's 100 reactors, Davis-Besse - certainly the most dubious performer since 2000 - has yet to have its first triennial inspection under the NRC's program, which commenced in 2000.

Petitioners point to NRC's "Special Inspection - System Health Assurance Followup," Report No. 0500346/2003003 (DRS) dated October

21, 2003, which identified that on September 9, 2003, NRC completed a special inspection of Davis-Besse Nuclear Power Station wherein actions to resolve restart checklist items were reviewed. That inspection focused on a review of activities associated with the discovery phase of the System Health Assurance Plan (SH-DAP-5A-01) and the subsequent program for Resolution of Open Design Questions. Since April 2002, Davis-Besse has been under the Inspection Manual Chapter 0350 process. The intent behind the System Health Assurance Plan (SHA) was to provide assurance that important plant systems were able to perform their safety functions and support station restart and operation. It was designated as one of seven building blocks identified in the licensee's Return-to-Service Plan following identification of severe degradation of the Reactor Vessel Head. The Plan consisted of three review programs: (1) an Operational Readiness Review; (2) a System Health Readiness Review (SHRR) and (3) a Latent Issue Review (LIR).

The aforementioned NRC Special Inspection dated October 21, 2003 revealed that during the three phase inspection "the collective reviews identified numerous discrepancies in five design-related programmatic areas (station flooding, high energy line break, environmental qualification, seismic qualification and Appendix R-Safe Shutdown) within each of the five LIR systems."[4] It is the referenced Appendix R, "Safe Shutdown Discrepancies," that are of concern to the Petitioners in this proceeding.

[4] NRC Special Inspection-System Health Assurance Follow-up Report No. 0500346/2003003 (DRS), October 21, 2003 [ML032950012] page 3.

The October 21 Special Inspection Report further identified that FirstEnergy developed the Safety Function Validation Project (SFVP) to determine the extent of design basis calculation discrepancies in safety-related systems that were not subject to an LIR and to determine whether these systems could perform their accident mitigation functions. The Special Inspection Report notes, "The report specifically noted that there were other aspects of system design, maintenance, and operation that could affect the ability of the systems to perform their safety functions."[5]

Respecting the five design-related programmatic areas with the potential to affect systems beyond those examined in the LIR program identified in the "Discovery Phase Collective Significance Report" - High Energy Line Break (HELB), Station Flooding, Seismic Qualification, Environmental Qualification (EQ), and Appendix R - Safe Shutdown"[6] - plans were then developed to determine and address the extent of condition of each area. In the Report at § b.4.5, Appendix R: Safe Shutdown CR 03-00179, it states:

> The inspectors performed an independent review of safe shutdown capability to assess the quality of the Appendix R - Safe Shutdown Analysis, Collective Significance Review.
>
> The Appendix R - Safe Shutdown CSR examined 281 CRs [Condition Reports] from 2002 through January 2003. Each CR was evaluated and assigned to one of six categories:
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> -Calculation/analysis;
> -Documentation and procedures;
> -Emergency Lighting;
> -Barrier and door;
> -Administrative and other miscellaneous; and
> -Fire Protection features.
>
> The Appendix R - Safe Shutdown CSR identified issues in all six areas, the most significant being related to lack of

[5] *Id.* p. 3.
[6] *Id.*, pp. 15-16.

documented basis to support evaluations in the Fire Hazards Analysis Report, weakness in transient analyses, hydraulic analyses, Appendix R loading of the diesel generators, and safe shutdown procedure deficiencies.[7]

The Board should further examine the NRC-identified "lack of a documented basis to support evaluations in the Fire Hazard Analysis Report" (FHAR) and the identified "safe shutdown procedure deficiencies" for Davis-Besse nuclear generating station. The purpose of the FHAR is to present a comprehensive description of the fire protection features and demonstrate the safe shutdown availabilities of the nuclear power station. The Petitioners contend that during the April 21-25, 2003 fire protection review of Davis-Besse, the previously-referenced NRC "Safety Evaluation of Fire Protection Measures At the Davis-Besse Nuclear Power Station, Unit 1," per Appendix R to 10 CFR 50, dated May 30, 1991 is identified by NRC staff. The Petitioners further contend that NRC Headquarters senior fire protection engineer Phil Qualls in his June 24, 2003 email to Dennis Kubicki, former NRC fire protection engineer and technical reviewer of the 1991 SER, now with the U.S. Department of Energy, identified a number of significant safety-related fire protection deficiencies and non-compliances when he stated, "A Region III inspection recently found a SER dated May 31, 1991 which approves some pretty outrageous stuff" including complete operator manual actions in lieu of lack of compliance with 10 CFR 50 Appendix R III.G.2 and "a variety of fire protection issues."[8] Mr. Qualls further conceded,

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[7] *Id.*, p. 21.
[8] FOIA 2003-0358 Appendix N-19, email from Phil Qualls, US NRC, to Dennis Kubicki, US DOE, June 24, 2003.

"There is no license amendment or exemption granted with the SER (some apparent disconnect there too)."[9]

As identified in NRC SECY-03-100 "Rulemaking Plan for Post-Fire Operator Manual Actions" dated June 17, 2003:

> The staff sought the advice of the Office of General Counsel [OGC] as to whether Appendix R, ¶ III.G.2 permits licensees to rely on operator manual actions in lieu of fire barriers. OGC advised staff that the regulation cannot be reasonably interpreted to permit reliance upon operator manual actions with respect to redundant safe shutdown. Therefore, any pre-1979 licensee that is using operator manual actions *in lieu* of fire barrier separation without an NRC-approved exemption is not in compliance with the regulations."[10]

FENOC has submitted neither a license amendment nor exemption requests for its non-compliant and illegal operator manual actions *in lieu* of the requirements of Appendix R ¶ III.G.2 for the years 2004 and 2003. The Petitioners are aware *only after undertaking their own investigation* of FirstEnergy's exemption request from 10 CFR 50 ¶ III.G. 3, to the extent that it requires fixed fire suppression and detection for Fire Area HH in Davis-Besse for which alternate shutdown capability is provided for Control Room Emergency Ventilation System circuits [ML040220470].[11] So far as Petitioners understand, however, the exemption request submittal has never been published in the Federal Register. Petitioners submit that this constitutes a violation of NRC regulations.

Where an intervenor includes in a safety contention that an applicant is not complying with a specified regulation, or alleges

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[9] *Id.*

[10] "Rulemaking Plan for Post Fire Operator Manual Actions," SECY-03-100, U.S. Nuclear Regulatory Commission, June 17, 2003, p.3.

[11] "Request for Exemption from 10 CFR 50 Appendix R Section III.G.3 for Fire Area HH," FENOC, January 20, 2004, ADAMS Access No. ML040220470.

with particularity the existence and detail of a substantial safety issue on which the regulations are silent, there is an admissible contention. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982), citing 10 CFR § 2.758. Serious violations or other incidents may form the basis for a contention challenging the adequacy of management of a facility. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 297 (1995).

Moreover, an alleged injury to a *purely legal interest* is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a of the Atomic Energy Act. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990).

Reversal of FENOC's documented safety culture problems as exemplified in the reactor head corrosion fiasco purportedly lie at the heart of the NRC's confirmatory order. But the NRC itself has here enabled, through its superficial regulatory approach, the very corporate indifference it criticizes in FENOC. The NRC's handling to date of the fire issue has effectively deprived the public of the opportunity to examine and question the adequacy of fire protection at Davis-Besse within the context of a public license amendment proceeding. If indeed the philosophy of the regulations is to use public input to produce a better result, then it is a serious omission and regulatory violation to implement substantial fire protections apart

from the license amendment process.

The Petitioners acknowledge that the October 2003 Special Inspection Report identifies that the April 21-25, 2003 fire protection inspection team reviewed a single operator manual action procedure identified as DB-OP-02519, Serious Control Room Fire.[12] However, the identified "complete operator manual actions [*in lieu* of barriers per ¶ III.G.2] "without license amendments or exemptions granted as "pretty outrageous stuff" are of grave concern to the Petitioners in this requested proceeding.[13]

"Information provided to the Commission by . . . a licensee or information required by statute or by the Commission's regulation, orders, or the licensee shall be complete and accurate in all material respects. 10 CFR § 50.9(a) [52 FR 49372, Dec.31, 1987].

A signal as to FENOC's institutional veracity emerged on May 7, 2004 in an NRC determination entitled "Davis-Besse Nuclear Power Station - Notice of Violation NRC Special Inspection - Completeness and Accuracy of Required Records and Submittals to the NRC," Report

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[12] NRC Special Inspection, October 21, 2003, page 23.

[13] Consider this scenario, conjectured by Ron Gardner, Chief, Electrical Engineering Branch, Division of Reactor Safety, Region III, whose supervisor is John Grobe, at "Meeting: Plant Operations and Fire Protection," 6/14/00, http://www.nrc.gov/reading-rm/doc-collections/acrs/tr/subcommittee/2000/po000614.html:

"[I]f you stop and think, with the fire, you can have a plant transient, you could have a reactor trip, you could have a loss of off-site power, you can -- we talked about self-induced station blackout. All those require fairly significant reactor operator actions. You can go beyond that, though, with the high-low pressure interface problem or a stuck-open PORV, a spurious operation of an SRV, and you enter a LOCA condition. Compound that with a loss of off-site power and you've got very numerous operator actions. Then with a fire, you may have smoke, which could inhibit or prevent operator actions. You have flooding, you have the heat of the fire. The fire itself is a very significant area of NRC historical perspective and it looks like it's going to continue, that we're going to maintain our focus on this. There were a number of years where we backed off. Information Notice 92-18 and the subsequent problems we had with the implementation of that, that was regarding motor-operated valves and the potential for spurious operation and control room fires, to have the valves not only go to the wrong position, but to be destroyed mechanically because of the bypassing of the torque switches."

No. 50-346/03-19(DR). In it, the NRC concluded that there was no reasonable confidence that FENOC personnel had provided the agency with complete and accurate docketed information in all material respects, nor that Davis-Besse personnel had taken appropriate corrective actions to ensure that future regulatory submittals are complete and accurate. The NRC had identified an apparent FENOC violation for the failure to provide complete and accurate information in the November 11, 1998 response to NRC Generic Letter (GL) 98-04 regarding protecting coating deficiencies and foreign material in containment, but in its May 7, 2004 finding the NRC found it could take no enforcement action because the time for issuing civil penalties had exceeded the statute of limitations.[14]

Such public spankings do not inspire confidence in the Petitioners that FENOC (in light of the mishandling of the corrosion hole incident) has, or can, resuscitate a shred of credibility and veracity in its docketed material to the agency.[15] FirstEnergy's *un*-sworn, *un*-docketed fire protection plans using operator manual actions should be accorded even less credence.

The Commission has admitted contentions in the past based on claims of poor licensee character or integrity. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001). When the allegations of management improprieties or lack of integrity are of more than historical

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[14] ***By one day!*** "Davis-Besse Nuclear Power Station - Notice of Violation NRC Special Inspection - Completeness and Accuracy of Required Records and Submittals to the NRC," Report No. 50-346/03-19(DR), U.S. Nuclear Regulatory Commission, May 07, 2004, [ML041280232O].

[15] Nor, for that matter, has, or can, the NRC, see fn. 11, *infra*.

interest and relate directly to the proposed licensing action, the contention is admissible. *Id.; Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

These identified noncompliances with federal fire protection regulations, including the lack of a documented basis to support evaluations in the Davis-Besse Fire Hazard Analysis Report, identified safe shutdown procedure deficiencies and the use of complete operator manual actions *in lieu* of operable fire barriers per 10 CFR 50 Appendix R ¶ III.G.2 without the requisite NRC approval through the exemption and license amendment process induce these conclusions. The Confirmatory Order is unduly exclusive, the Restart process has not reasonably considered the health and safety of the Petitioners and has placed them at undue risk from the conse-quences of reactor core damage as the result of a fire at Davis-Besse, and so the fire safety contention should be admitted.

1(b) Response to NRC Argument Concerning § 2.206 Petition on Fire Safety Issues

The NRC Staff argues that the Petitioners should instead raise the fire safety issues in a 10 CFR § 2.206 petition (NRC Staff Response at 7). On August 25, 2003, Petitioner NIRS did, in fact, jointly file a 10 CFR § 2.206 petition with Greenpeace and the Union of Concerned Scientists regarding FirstEnergy's failure to complete the design basis document validation program which FirstEnergy had committed to complete in response to the NRC's October 9, 1996 letter issued under 10 CFR § 50.54(f) regarding the adequacy and availability of Davis-Besse design basis information. The Commission not only required that the FENOC's chief executive officer provide this

information, but that he do so under oath.

The NRC characterized this petition in a Federal Register notice of October 15, 2003 (Vol. 68, Number 199) at pp. 59419-59420 thus:

> Petitioners state that FirstEnergy has failed to complete commitments related to the NRC's § 50.54(f) design basis letter (issued on October 9, 1996), and refer to numerous design basis violations dating back to plant licensing. The petitioners request that the NRC suspend the Davis-Besse license and prohibit plant restart until all design basis deficiencies identified in response to the NRC's § 50.54(f) design basis letter are adequately addressed, the plant probabilistic risk assessment (PRA) is updated to reflect design flaws, and no systems are in a 'degraded but operable' condition.[16]

As part of FENOC's response to the October 1996 NRC § 50.54(f) letter, FENOC was to conduct the Design Basis Document Validation Program. However, according to NRC's Special Inspection - Systems Health Assurance report dated February 26, 2003, "the program had not been completed and a portion of the deficiencies identified had not been properly corrected."[17] The Special Report also noted that "[t]he collective significance review revealed a number of problem areas common to all five LIR. Among these problems areas were design basis validation, environmental qualification, high energy line break, missing and flawed calculations, calculation control, accident analysis, system descriptions and configuration management."[18]

On April 20, 2004 the NRC Director rejected the § 2.206 petition, wherein NIRS and the others had requested emergency enforcement action at Davis-Besse and prohibition of restart unless and until FENOC had

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[16] Federal Register: October 15, 2003 (Volume 68, Number 199)] [Notices] [Page 59419-59420]

[17] Davis-Besse Nuclear Power Station NRC Special Inspection - Systems Health Assurance-Reports No. 50-346/02-13 (DRS) and 50-346/02-14(DRS), February 26, 2003, p. 11. [ML030630291]

[18] *Id.* p.11.

adequately addressed all identified design basis deficiencies.[19]

A decision under § 2.206 on a request for a show cause order is no more than the decision of an NRC staff Director and thus does not constitute an adjudicatory order under section 189b of the Atomic Energy Act and cannot serve as the basis of a valid contention in an enforcement proceeding. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-9, 37 NRC 433 (1993). Hence the converse must also be true: the decision cannot have *res judicata* or collateral estoppel effect to bar the admissibility of Petitioners' contention.

2. Failure to Require FENOC to Close of Significant Safety Items Ahead of Restart

Though FENOC trivializes Petitioners' contention as being "nothing more than a recitation of a question posted by the NRC staff" (Answer at 14), there is a pervasive problem of safety-significant items remaining open and unresolved, well after restart at Davis-Besse.

Concerning root cause analysis, the Confirmatory Order states that

> [T]he probable cause of the degradation was primary water stress corrosion cracking of the nozzle. The physical factors that caused corrosion of the RPV head were the CRDM nozzle leakage associated with through-wall cracking, followed by boric acid corrosion of the RPV low-alloy steel. The Licensee further concluded that the large-scale corrosion occurred as a result of a failure to detect and arrest the leakage until advanced symptoms had appeared.

When on March 4, 2004 the NRC asked FENOC several "root cause"

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[19] Director's Decision Under 10 CFR 2.206, U.S. Nuclear Regulatory Commission, April 22, 2004, [ML04098367].

questions concerning a vent line problem unique to Davis-Besse which potentially could cause "cracking of nearby nozzles . . . [and] . . . could impact the cracking assumptions for the new RPV head,"[20] it betrayed a continuing lack of complete understanding about the chain of events, miscellaneous mistakes, sloppy decisions and possibly deliberate coverups created the recent disastrous history of Davis-Besse. This indifference to completion of analysis before allowing reactor restart sends the wrong message to the utility, which must provably change the place safety concerns occupy in its management priorities. That recent history has serious portents for the present and immediately future safe operation of the reactor should be obvious. Thus it is not the questions which the NRC asks about root cause, but the *very fact it is still asking questions at all about root cause,* which, of course, proves that the root cause investigation is not completed, that safety concerns remain open.

This contention should be admitted.

3. Lack of Enforcement Action
In the Face of Evidence of Misconduct

New evidence has surfaced since Petitioners' filing which may depict interference by the Commission with the Department of Justice - NRC Memorandum of Understanding. In the "Oversight Panel Restart Action Matrix Closures - Concerns" (ADAMS Accession No. ML040820928) at RAM Item No. C-01, the 0350 Panel discusses the completeness and accuracy of FirstEnergy's response to Generic Letter 97- 01, "Degradation of CRDM/CEDM Nozzle and Other Vessel Closure Head

[20]Letter, Jon B. Hopkins, (NRC) to Lew W. Myers (FENOC), "Request for Additional Information Re: Root Cause Analysis", Accession No.ML0406404.

Penetrations." FirstEnergy (by Toledo Edison) formally endorsed "B&WOG integrated response to Generic Letter 97- 01: Degradation of CRDM/CEDM Nozzle and Other Vessel Closure Head Penetrations." The Topical Report provided the justification and schedule for an integrated vessel head penetration inspection program for all B&W Owners' Group plants. The Report determined that Davis-Besse was not considered at significant risk to require inspections of the reactor vessel nozzles from beneath the head in the near term (1998- 2000), but did require Davis-Besse to continue to comply with 10 CFR § 50.55a and Appendix A General Design Criterion 14, which required visual inspections to be performed on the reactor head and further, mandated inspections of the required number of control rod housings during each inspection interval per ASME Code requirements, during each refueling outage. This apparently did not occur at Davis-Besse.

FENOC responded through the B&WOG to a Request for Additional Information (RAI) and the NRC approved FENOC's response to the generic letter in a letter dated November 29, 1999, which stated the integrated program provides an acceptable basis for evaluating VHPs based on FENOC's having endorsed the NEI Submittal of December 11, 1998, (integrated response to RAI) and indicated its participation in the NEI/B& WOG integrated program. NEI 99- 04, "Guidelines for Managing NRC Commitment Changes, defined "Regulatory Commitment" as "an explicit statement to take a specific action agreed to, or volunteered by, a licensee and submitted in writing on the docket to the NRC." In addition, the guidance states " A Regulatory Commitment is an intentional undertaking by a licensee to ... (2) complete a

specific action to address an NRC issue or concern (*e.g.*, generic letter, bulletin, order, etc.)." In this matter, the Generic Letter became part of Davis-Besse's licensing basis.

However, staff at FirstEnergy acknowledged to the NRC on August 15, 2002 that the utility did not recognize that its response to Generic Letter 97-01 and also Generic Letter 88-05 on the Boric Acid Control Program were licensing commitments. Hence the licensee did not recognize the commitments made to these generic letters were regulatory commitments and did not control them as such, and the required inspections were not performed. The NRC, based solely on a review of transcripts of that August 15, 2002 meeting, concluded there were no false statements and the utility's failure to be able to distinguish a licensing "commitment" was not intentional.

Since the item is classified as "closed," it appears not to have been referred to the Justice Department in the vaunted grand jury inquest which ostensibly is presently under way. However, it tends to exculpate FirstEnergy without being considered as part of the fuller body of information the grand jury presumably has been asked to consider. Nor is there evidence that in making the determination to close this item whether the Oversight Panel took into account the February 2003 whistleblower allegation of Andrew Siemaszko, former nuclear systems engineer for a FirstEnergy subsidiary, that he obtained company photographs dating to April 1998 which depict a "lavalike flow of boric acid" leaking from the reactor head's weep holes. "Engineer Says Utility Ignored Rust; Fired Employee Files Whistleblower Papers," Toledo Blade,

http://www.ohiocitizen.org/campaigns/electric/2003/nuc2003a.html. Nor apparently did the Oversight Panel consider the FENOC response to Siemaszko's allegation, which was to deny that he had any veracity about the problem, even though a company newsletter lauded him for his efforts following the refueling outage at Davis-Besse in 2000. "Treatment of Ex-Nuclear Plant Staffer Questioned," Toledo Blade, http://www.toledoblade.com/apps/pbcs.dll/article?Date=20030429&Category=NEWS17&ArtNo=104290089&SectionCat=&Template=printpicart. Nor apparently did the Oversight Panel consider Siemaszko's allegation that FirstEnergy was presented by him with a plan in August, not December, 2001 to buy the Midland reactor head.

It appears that the Oversight Panel failed to discharge its responsibility to turn potentially civilly or criminally-incriminating information to the NRC Office of Investigations to be forwarded to the Department of Justice per the Memorandum of Understanding between the two agencies.

CONCLUSION

The petitioner also must provide sufficient information to establish the existence of a genuine dispute with the applicant on a material issue of law or fact. 10 CFR § 2.714(b)(2)(iii). See *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-9121, 33 NRC 419, 422-24 (1991), appeal dismissed, CLI-92-3, 35 NRC 63 (1992). Technical perfection is not an essential element of contention pleading. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 64, 99 (2001). In pleading for the admission of a contention, an intervenor is not required to prove the

contention, but must allege at least some credible foundation for the contention. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987), remanded, *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47-48 (2001).

Petitioners respectfully urge the Board that they have presented perhaps imperfect or incomplete, but nonetheless credible foundational information for all of their contentions to be recognized and admitted for hearing in this proceeding.

Terry Jonathan Lodge

Terry J. Lodge
Counsel for Petitioners

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

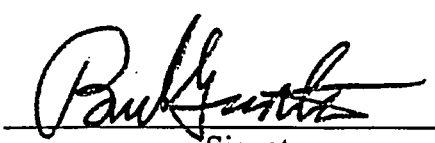
DECLARATION OF PAUL GUNTER, NUCLEAR INFORMATION AND RESOURCE SERVICE

Under the penalty of perjury, Paul Gunter, makes the following statement to be true.

1) My name is Paul Gunter. I am Director of the Reactor Watchdog Project at Nuclear Information and Resource Service, 1424 16th Street NW Suite 404, Washington, DC where I have been employed since 1991.

2) Early in 2004, I had the opportunity to informally speak in person with Mr. Jack Grobe with NRC Region III Headquarters and Chairman of the IMC 0350 Panel for the Davis-Besse Restart at the Nuclear Regulatory Commission's Regulatory Information Conference in Washington, DC where I asked him about the Davis-Besse Triennial Fire Protection Inspection Program. Mr. Grobe informed me that the Triennial Fire Protection Inspection Program for Davis-Besse had originally been scheduled for 2003 but was cancelled due to unexplained reasons. Mr. Grobe said the fire inspection for Davis-Besse would be rescheduled for 2004.

3) On May 11, 2004, I called NRC Region III Headquarters and left a message for Ms. Christine Lipa in request of the date for Davis-Besse's rescheduled Triennial Fire Protection Inspection. On May 11, 2004, Ms. Lipa returned my call and left a message on my telephone voice mail informing me that Davis-Besse's Triennial Fire Protection inspection was rescheduled for August 30 through September 17, 2004.



Signature

05-12-2004

Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
G. Paul Bollwerk, III, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of	)	
FirstEnergy Nuclear Operating Co.	)	Docket No. 50-346-CO
Davis-Besse Nuclear Power Station, Unit 1	)	May 13, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PETITIONERS' COMBINED REPLY IN OPPOSITION TO 'NRC STAFF RESPONSE TO OBJECTIONS' AND FENOC'S 'ANSWER TO OBJECTIONS' were served upon the following persons via deposit of paper copies in the U.S. first-class mail as indicated by an asterisk (*), and via electronic mail as indicated by a double asterisk (**):

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