

EDO Principal Correspondence Control

FROM: DUE: 04/07/06

EDO CONTROL: G20060245
DOC DT: 03/08/06
FINAL REPLY:

Jay M. Gutierrez
Morgan, Lewis & Bockius LLP

TO:

Chandler, OGC

FOR SIGNATURE OF :

** GRN **

CRC NO:

Johnson, OE

DESC:

Summary of Inspection Activities Related on
FENOC's Response to Violation I.E.

ROUTING:

Reyes
Virgilio
Kane
Silber
Dean
Burns
Caldwell, RIII
Cyr, OGC
Chandler, OGC

DATE: 03/14/06

ASSIGNED TO:

CONTACT:

OE

Johnson

SPECIAL INSTRUCTIONS OR REMARKS:

Coordinate response with Region III and OGC.

Template: EDO-001

E-RIDS: EDO-01

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: 202.739.3000
Fax: 202.739.3001
www.morganlewis.com

Morgan Lewis
COUNSELORS AT LAW

March 8, 2006

VIA E-MAIL AND U.S. MAIL

Mr. Lawrence J. Chandler
United States Nuclear Regulatory Commission
11555 Rockville Pike
Mail Stop: O-15 D21
Rockville, MD 20852

Re: Summary of Inspection Activities Related on FENOC's Response to Violation I.E.

Dear Mr. Chandler:

In light of our many discussions over the past four years on various legal and procedural aspects of the NRC Staff's follow-up to the Davis-Besse RPV head issues, I am writing you in an attempt to resolve an emerging issue reflected in a series of questions posed by NRC Region III inspectors to Davis-Besse site personnel related to FirstEnergy Nuclear Operating Company's ("FENOC") September 14, 2005 response to NRC's April 21, 2005 Notice of Violation and Proposed Imposition of civil penalties - \$5,450,000 ("NOV/CP"). You and I briefly spoke by telephone of this exchange, but because of our inability to put this matter to rest, I want to recap the history of our position. I hope this will facilitate discussions among the appropriate NRC Staff and resolve this matter.

On December 10, 2004, the United States Attorney for the Northern District of Ohio informed FENOC that the Company had been designated as a target of a federal grand jury investigation related to apparent false statements made to the NRC in response to NRC Bulletin 2001. Notwithstanding the ongoing criminal investigation, on April 21, 2005, the NRC Staff issued the "NOV/CP" against FENOC based upon substantially the same set of facts. The NOV/CP also characterized the apparent violations as "a pattern of willful inaccurate or incomplete documentation of information that was required to be maintained or submitted to the NRC." With specific reference to apparent violation I.E., the NRC characterized the apparent violation as willful, significant, and categorized it at Severity Level I in accordance with the Enforcement Policy.

The NOV/CP required a response within 90 days, but offered: "[S]ince the NRC enforcement action is being proposed prior to any final action by the U.S. Department of Justice, consideration may be given to extending the response time for good cause shown." FENOC requested and received one extension of time in which to respond. Within the period of that initial extension, with no change in the status of the criminal investigation, I telephonically inquired of you regarding the NRC Staff's position on a possible request for additional time in

which to respond. You advised, after I believe coordinating with NRC's Office of Enforcement, that no further extensions would be granted.

FENOC's September 14, 2005 reply set out each violation and provided a specific answer to each. FENOC denied violation I.E. because it did not agree that the cited inaccuracies were submitted to the NRC as part of a pattern of willful misconduct and that each went uncorrected and were then relied upon by the NRC Staff.¹

Prior to FENOC's initial denial of violation I.E., you and I spoke of the linkage between the Staff's assertion of a pattern of willful inaccuracies, that alleged patterns' role in the Staff escalating the severity level, and the ongoing federal grand jury proceeding based on substantially the same allegations of fact set forth in violation I.E. In essence, I noted that although arguments could be made that in admitting the violation, FENOC would not be admitting the broader and related assertions in NRC's cover letter, equally good arguments could be made to the contrary. FENOC simply did not agree that the examples cited by the Staff as its basis for violation I.E. constituted a pattern of willful misconduct. You and I specifically discussed the Staff's decision to link willfulness to violation I.E. in the cover letter, and the Staff's basis for assignment of severity level, as well as implications for possible criminal matters.

In light of the above considerations, FENOC denied violation I.E., indicated the reasons for denying this violation are more fully explained in its several reports and reviews previously submitted to the NRC, and further explained:

Although, in hindsight, letters Serial Number 2731 and Serial Number 2735 could have been more clear, when read in context and when further considered with the totality of the information provided to the NRC over the fall of 2001, FENOC's collective response to Bulletin 2001-01 was complete and accurate in all material respects.

As you know, on January 20, 2006, FENOC amended its response to violation I.E., admitting the violation and referencing a deferred prosecution agreement recently entered into with the Department of Justice. However, because FENOC had initially denied that violation, NRC Region III personnel and the Davis-Besse Resident Inspector have posed a number of questions to FENOC related to the basis for its original denial of violation I.E. The inspectors have focused upon the introductory sentence to FENOC's explanation for the initial denial, in which FENOC said that the reasons for denying the violation had been more fully explained in earlier submittals to the NRC. These inspectors have questioned whether FENOC was required to address each specific example cited in violation I.E. and whether the statement referring to previous submittals was a violation of 10 CFR 50.9.

¹ This letter is an attempt to explain FENOC's position in denying violation I.E. in September 2005, and should not be construed as contradicting, or in any way repudiating, the Deferred Prosecution Agreement entered into with the DOJ on January 19, 2006.

Mr. Lawrence J. Chandler
March 8, 2006
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Morgan Lewis
COUNSELORS AT LAW

FENOC has attempted to explain, on several occasions, that this introductory sentence to the basis for denial made no reference to the specific examples cited in the violation. The level of detail in FENOC's initial answer was consistent with the requirements of 10 CFR 2.202 (b) and the NOV/CP. Moreover, FENOC explained to the inspectors that the introductory sentence intended to convey FENOC's position that the alleged false statements did not reflect a pattern of willful false information, and that the basis for FENOC's position had been explained to NRC on multiple occasions. During February 2006, FENOC in-house nuclear counsel, Mr. David Jenkins, participated in discussions with the NRC inspectors C. Lipa, J. Rutkowski and others. Mr. Jenkins noted two letters – my November 7, 2002 letter to Richard Paul, and a June 6, 2003 letter from R. Saunders – as examples of where FENOC had previously explained its views: (a) of the conduct of individuals that led to the initial inaccuracies; (b) that individuals did not intentionally mislead the NRC; and (c) that when FENOC employees identified deficiencies, they supplemented the record to correct them.

I hope this explanation helps to facilitate resolution of this matter. In summary, I respectfully submit that the ongoing NRC inspection activities related to this matter should be resolved because: (a) FENOC had a good-faith basis for initially denying violation I.E. and in any event has amended its answer to the violation, admitting the violation – hence the inspection predicate no longer exists; and (b) FENOC already has provided to NRC the basis for its initial denial, including two specific examples of the basis for the position the Company had taken consistently throughout the NRC OI and grand jury investigations.

I hope this puts this matter in context, I would be happy to discuss this issue further if necessary to resolve any remaining Staff questions.

Sincerely,



Jay M. Gutierrez

JMG/emh

cc: Christine A. Lipa
John E. Rutkowski
Michael R. Johnson



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 15, 2006

Jay M. Gutierrez, Esq.
Morgan, Lewis and Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Dear Mr. Gutierrez:

This is in reference to your letter dated March 8, 2006, concerning FirstEnergy Operating Company's September 14, 2005 response to Violation I.E, cited in the NRC's Notice of Violation and Proposed Imposition of Civil Penalties dated April 21, 2005. In keeping with our discussions, I have referred your letter to the NRC staff for response.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lawrence J. Chandler".

Lawrence J. Chandler
Associate General Counsel
for Hearings, Enforcement and Administration

cc: M. Johnson, OE