

October 18, 2006

MEMORANDUM TO: Cynthia A. Carpenter, Director
Office of Enforcement

FROM: Michael D. Tschiltz, Chairman */RA/*
Differing Professional Opinion Review Panel

SUBJECT: FINDINGS OF THE DIFFERING PROFESSIONAL REVIEW PANEL (ON
THE DIFFERING PROFESSIONAL OPINION CONCERNING
DAVIS-BESSE'S REPLY TO THE U.S. NUCLEAR REGULATORY
COMMISSION'S APRIL 21, 2005, NOTICE OF VIOLATION)
(DPO-2006-004)

In a memorandum dated July 7, 2006, your predecessor appointed me to serve as Chair of a panel convened to review a Differing Professional Opinion (DPO) involving FirstEnergy Nuclear Operating Company's (FENOC or licensee) September 14, 2005, response to the Notice of Violation and Proposed Imposition of Civil Penalties that was issued to the Davis Besse Nuclear Plant on April 21, 2005. Carolyn Evans and William Troskoski served as panel members. The Panel reviewed the DPO in accordance with the guidance outlined in U.S. Nuclear Regulatory Commission Management Directive 10.159, "The NRC Differing Professional Opinions Program." The enclosed report summarizes the findings of the Panel.

Enclosure:
DPO-2006-004 Differing Professional Opinion (DPO) on Davis-Besse Reply to a Notice of Violation

cc: R. Pedersen, DPO/PM

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DPO-2006-004 Differing Professional Opinion (DPO) on Davis-Besse Reply to a Notice of Violation

cc: R. Pedersen, DPO/PM

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DATE	10/18/06	10/18/06	10/17/06

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**Differing Professional Opinion (DPO)
on Davis-Besse Reply to a Notice of Violation
(DPO-2006-004)**

DPO Panel Report

/RA/

Michael D. Tschiltz, Panel Chair

Concurrence via email

Carolyn A. Evans, Panel Member

Concurrence via email

William M. Troskoski, Panel Member

October 18, 2006

ENCLOSURE

Introduction

The Differing Professional Opinion (DPO) concerns FirstEnergy Nuclear Operating Company's (FENOCs) response to one of five (5) escalated, apparent violations cited in the agency's April 21, 2005, Notice of Violation (NOV) (Notice), violation 1.E, and the manner in which the staff addressed issues the submitter raised concerning the completeness and accuracy of this response and associated violations he identified. The DPO was submitted on May 22, 2006, and received by the Office of Enforcement on May 30, 2006. The DPO panel was established on July 7, 2006. The issues in dispute are the U.S. Nuclear Regulatory Commission's (NRC's) determinations that: 1) FENOC did not violate Title 10 of the *Code of Federal Regulations* Part 50.9, "Completeness and Accuracy of Information," in its September 14, 2005, letter in response to an NRC NOV, and 2) FENOC's procedure for "NRC Communication" did not pertain to a safety related structure system or component, therefore, inaccuracies in its September 14, 2005 letter, associated with the denial of violation 1.E, did not constitute a violation of 10 CFR 50, Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants."

The DPO Panel was tasked to: 1) review the DPO and determine whether there was enough information for a detailed review of the issue; 2) schedule and conduct a meeting with the submitter to discuss the scope of the issue; 3) consult with the Director of Enforcement to establish a timeliness goal for the disposition of the DPO; 4) document the panel's understanding of the submitter's issues and provide the submitter a copy of the documented Statement of Concerns for the submitter's review and comment; 5) request technical assistance through the Director of the Office of Enforcement (if needed); 6) perform a detailed review of the issues and conduct any record reviews deemed necessary by the panel for a complete, objective, independent, and impartial review; 7) provide monthly status updates to the DPO Project Manager; and 8) issue a DPO Panel report including conclusions and recommendations to the Director of the Office of Enforcement regarding the issues presented in the DPO.

The DPO Panel met with the submitter on July 17, 2006, to establish a concise statement of the submitter's concerns. The submitter concurred on a revised statement of concerns on August 2, 2006.

Statement of Concerns

The DPO Panel and the submitter agreed upon the following statement of concerns:

The statement denying violation 1.E in FENOC's September 14, 2005, letter in response to NRC NOV (EA-05-072) was inaccurate and violated 10 CFR 50.9, "Completeness and Accuracy of Information." Specifically, the statement that "FENOCs reasons for denying the violation are more fully explained in its several reports and reviews previously provided to the NRC," is inaccurate since these reports addressed willfulness which was not an issue in violation 1.E. Furthermore, the NRC failed to take any regulatory actions because it was incorrectly concluded; 1) that there was no violation of 10 CFR 50.9 because FENOC's inaccurate statement was not material to the NRC; 2) that there was no violation of any 10 CFR 50, Appendix B criteria since FENOC's procedure, "NRC Communication," for verifying the completeness and accuracy of information submitted to the NRC did not pertain to a safety related structure, system, or component and therefore 10 CFR 50 Appendix B did not apply; and 3) that there was no concern identified, during the NRC's recent inspection associated with FENOC's September 14, 2005, response to violation 1.E, even though FENOC did not comply with their "NRC

Communication” procedure, and Davis-Besse’s restart in March 2004 was authorized by the NRC based, in part, on FENOC’s compliance with this procedure.

Discussion

As stated above, the DPO concerns FENOC’s response to one of five (5) escalated, apparent violations cited in the agency’s April 21, 2005, NOV, violation 1.E, and the manner in which the staff addressed issues the submitter raised concerning the completeness and accuracy of this response and associated violations he identified.

The Notice was issued in response to the February and March 2002 identification of significant degradation of the reactor vessel head at the Davis-Besse Nuclear Plant. This event called into question the accuracy of information previously submitted by FENOC in response to NRC Bulletin, 2001-01, “Circumferential Cracking of Reactor Vessel Head Penetration Nozzles.” Issued on August 3, 2001, the Bulletin required all holders of operating licenses for pressurized water nuclear power reactors to provide information related to the structural integrity of the reactor vessel head penetration (VHP) nozzles for their respective facilities, including the extent of VHP nozzle leakage and cracking that had been found to date, the inspections and repairs that were undertaken to satisfy regulatory requirements, and the basis for concluding that plans for future inspections would ensure compliance with applicable regulatory requirements.

FENOC responded to the Bulletin in five (5) serial letters. The serial letters at issue in violation 1.E, letters 2731 and 2735, were submitted to the NRC in September and October 2001, respectively and contained representations which contributed to the agency’s conclusion that the reactor vessel head penetration nozzles were sound, when in fact, they were not as evidenced by the February and March events and subsequent, substantial reviews conducted by Augmented Inspection Teams (AIT) convened in March and September of 2002.

Following review of the findings developed by the AIT (in particular, the findings documented in the October 2, 2002, AIT Inspection Report) and the information developed by the Office of Investigations which also reviewed the facts and circumstances associated with these events, on April 21, 2005, the agency issued the Notice which documented multiple violations of 10 CFR 50.9, “Completeness and Accuracy of Information.” Violation 1.E of the Notice charged that FENOC provided materially inaccurate and incomplete statements in responding to the Bulletin, categorized the violation at Severity Level I and proposed a \$120,000 civil penalty.

By letter of September 14, 2005, FENOC replied to the Notice. In its response to violation 1.E, FENOC denied the violation stating, “Although in hindsight, the 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 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.” In the portion of its response captioned, “Reasons for the Denial of the Alleged Violation,” FENOC stated in pertinent part, *“FENOC’s reasons for denying the violation are more fully explained in its several reports and reviews previously provided to the NRC.”*

The submitter identified this aspect of the FENOC response as false (and an additional violation of 10 CFR 50.9) as the reports and reviews previously provided to the NRC did not more fully explain FENOC’s reasons for denying the violation. The submitter also contended that this violation evidenced inadequacies in the procedure FENOC implemented for validating the

accuracy of information submitted to the agency. This procedure was developed in response to the January 2003 decision of the Inspection Manual Chapter 0350 Oversight Panel for Davis-Besse to include, as a checklist item for the licensee to address prior to the grant of restart approval, a requirement to develop a process for assuring that information contained in future submittals was complete and accurate. FENOC developed a procedure, "NRC Communication," for validating the accuracy of information submitted to the agency, and it is this procedure which the submitter contends was inadequate to prevent the inaccurate information he believes FENOC provided in response to violation 1.E.

As a result of the submitter's contentions in this regard, Region III staff conducted an inspection to review FENOC's validation package for its September 14, 2005, reply to the Notice. With respect to the specific statement in question, there was no indication in the package to establish that it had been validated. However, a note was appended to the package which stated that [FENOC staff] could not validate client privilege information (10 CFR 50.9 documents related to NRC investigation and Department of Justice [proceedings]).

The inspection staff found, based on its review of the validation package and discussions with FENOC personnel, that the licensee's response to violation 1.E was incomplete and inaccurate, in violation of 10 CFR 50.9. The staff also concluded that FENOC violated 10 CFR 50, Appendix B, Criterion V for failing to follow its procedure for validating information submitted to the agency.

Discussions concerning these findings ensued between regional staff, the Office of Enforcement (OE) and the Office of General Counsel (OGC). OE and legal staff in OGC and the region concluded that the specific statement in question did not constitute a violation of 10 CFR 50.9, as it did not have the ability to influence the agency in the conduct of its regulatory responsibilities. By letter of April 4, 2006, the Director of OE replied to correspondence received from FENOC counsel which questioned the basis for the regional staff's inspection activities associated with the licensee's reply to the Notice. He advised FENOC that no additional violations were identified in FENOC's September 14, 2005, response. Resolution of this DPO turns on a legal issue, namely, whether the FENOC statement at issue was incomplete and inaccurate in a material respect. To inform the Panel's analysis of this issue, the Enforcement Policy, the Statements of Consideration to 10 CFR 50.9, judicial decisions, and decisions of the Atomic Safety and Licensing Boards were reviewed. On the basis of our review of these sources of information, the following considerations were deemed dispositive:

A statement is material if it has a natural tendency or capability to influence the decision of the decision makers to whom it is addressed. Virginia Electric & Power Company, (North Anna Power Station, Units 1 & 2), CLI 76-22, 4 NRC 480, 491 (1976), aff'd 571 F.2d. 1289 (4th Cir. 1978);

Determinations regarding materiality require careful, common sense judgments of the context in which the information appears and the stage of the process involved. In Re North Anna, 4 NRC @487, 491; In the Matter of Consumers Power Co., 16 NRC 897 (1982).

With these considerations in mind, the Panel deemed it necessary to review the factual backdrop against which FENOC submitted its response to violation 1.E, including the

information known to the decision maker (OE, in coordination and consultation with OGC and the regional staff) at the time the response was submitted.

Interviews of the Associate and Assistant General Counsel and reviews of internal correspondence generated by OE staff established that at the time the Notice was issued, the agency was aware that FENOC was the subject of a federal grand jury investigation that also was reviewing (for prosecutorial purposes) the apparent, false representations FENOC made to the NRC in response to NRC Bulletin 2001-01.¹ It was further established, through interviews and document reviews, that OE and OGC understood that FENOC's response to violation 1.E would be worded in a manner that would avoid compromising FENOC's position before the Department of Justice (DOJ) at the conclusion of the grand jury's investigation of the issues. Indeed, the licensee, in its response to the Notice, specifically stated that it would be paying the civil penalty in full, and not addressing the allegations of willfulness. This suggests that the response was, in part, influenced by the pending, prosecutorial review at DOJ. It was further established that regional inspection staff reviewing the validation package for the September 14, 2002, response to the Notice, was informed by counsel for FENOC, that he (counsel) had drafted the wording in violation 1.E in an attempt to balance ongoing deliberations by DOJ.

Thus, it appears that FENOC's response to violation 1.E was not being offered to seriously dispute the facts set forth in violation 1.E or to influence the agency's conclusions regarding the validity of this violation. Rather, the response was submitted at a point in time where a duly convened grand jury was essentially reviewing the same facts referenced in violation 1.E for prosecutorial merit. This placed the licensee in a position of having to respond to the violation in a manner that would not compromise its position before DOJ. Because OE and OGC were fully aware of the factual and legal backdrop against which FENOC replied to the Notice, they did not view the information provided in violation 1.E as material.

Conclusion

On the basis of the foregoing, in particular, the staff's prior understanding of the factual backdrop which attended FENOC's submittal of its response, the DPO Panel concludes that FENOC's reply to violation 1.E of the Notice did not constitute an additional violation of 10 CFR 50.9 and that the agency's final determination concerning this issue was appropriate. Given the Panel's conclusions concerning the reply to violation 1.E, the submitter's other contentions and his request for other actions are moot.

Recommendation

In response to comments in the submitter's DPO concerning the staff's failure to make initial

¹The Notice referenced this fact stating, "...since the NRC enforcement action is being proposed prior to any final action by the U.S. Department of Justice, consideration will be given to extending the time for responding to the Notice for good cause shown." FENOC requested and was granted one extension of time for responding to the Notice. Because there was no change in the status of DOJ's prosecutorial activities during this time, FENOC made an additional inquiry regarding its chances for securing another extension of time and was advised that no other extensions would be forthcoming from the agency.

correspondence received from FENOC counsel on this issue publicly available, the Panel recommends that this document be made publicly available so that any appearance of impropriety may be avoided. The DPO Panel carefully considered whether possible improvements could be made to the enforcement process regarding the handling of potentially incomplete and inaccurate statements. The DPO Panel notes that Section IX of the Enforcement Policy and the respective supplements already provide adequate guidance on this topic. In this case, both OE and OGC reviewed the facts associated with this and reached a determination. Although the submitter did not agree with that determination, he did not provide any additional information not already considered or otherwise demonstrate an error in the determinations made or the review process. Since the process adequately functioned as intended, the DPO Panel has identified no recommendations for process revision.