

May 3, 2007

MEMORANDUM TO: James A. Gavula, Senior Reactor Inspector
Division of Reactor Safety, Region III

FROM: Luis A. Reyes */RA/*
Executive Director for Operations

SUBJECT: DIFFERING PROFESSIONAL OPINION APPEAL 2006-004
DAVIS-BESSE REPLY TO A NOTICE OF VIOLATION

The purpose of this memorandum is to inform you of my considerations and conclusions regarding the appeal you submitted on January 18, 2007, on the subject Differing Professional Opinion (DPO).

BACKGROUND:

On September 14, 2005, FirstEnergy Nuclear Operating Company (FENOC) provided its response, by letter, to the NRC's Notice of Violation (NOV), to the U.S. Nuclear Regulatory Commission's (NRC) inspections and investigations concerning the significant degradation of the reactor pressure vessel head identified at the FENOC's Davis-Besse Nuclear Power Station in February and March 2002. The FENOC response addressed in part Violation I.E, which states:

10 CFR 50.9 requires that information provided to the Commission by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the licensee shall be complete and accurate in all material respects.

. . . Contrary to the above, the licensee, a holder of an operating license for a pressurized water nuclear power reactor, the Davis-Besse Station, provided the Commission responses to Bulletin 2001-01 which included materially inaccurate and incomplete information . . .

FENOC's response to violation I.E, states:

FENOC denies the alleged violation. 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 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 . . . FENOC's reasons for denying this violation are more fully explained in its several reports and reviews previously provided to the NRC.

You contend that the above statement is not accurate and appears to violate 10 CFR 50.9, "Completeness and Accuracy of Information." Before submitting a DPO you raised this concern through appropriate channels. Region III investigated the validation package submitted by FENOC, which found that the licensee's response to violation I.E was incomplete and

inaccurate. However, on March 22, 2006, NRC rendered a decision based on consultation with the Office of Enforcement (OE) and the Office of the General Counsel (OGC) that the specific statement in question was not material, hence, there was no additional violation.

Subsequently, you submitted a DPO dated May 5, 2006, in which you disagree with the NRC decision that the FENOC statement was not material, and there should be no additional violation.

In the DPO you state:

- (1) I disagree with the agency's lack of regulatory action in this matter for the following reasons:
 - (a) The statement in question was material to the NRC.
 - (b) The licensee's failure to comply with their NRC Communication procedures should have resulted in some type of regulatory action.
 - (c) The lack of regulatory action demonstrates the NRC's continued high tolerance for incomplete and inaccurate information until the next incident occurs and the NRC again responds with righteous indignation.
- (2) The Office of Enforcement and/or the Office of the General Counsel's recent response to this issue may have been made with prejudice. You further recommend that the Agency take actions to correct the current situation.

The DPO Panel (Panel) was established on July 7, 2006 and met with you on July 25, 2006, when they established the statement of concern. On August 2, 2006, you concurred on the statement of concern. The Panel reviewed the FENOC submittal, Enforcement Policy, the Statements of Consideration to 10 CFR 50.9, judicial decisions, decisions of the Atomic Safety and Licensing Boards, internal correspondence, and interviews of the OE, and the General Counsel staff.

The Panel concluded that because of staff's prior understanding of the factual backdrop which attended FENOC's submittal of its response that FENOC's reply to violation I.E of the NOV did not constitute an additional violation of 10 CFR 50.9, and that the agency's final determination concerning this issue was appropriate. The Panel further states, "Given the Panel's conclusions concerning the reply to violation I.E, the submitter's other contentions and his request for other actions are moot." The Panel recommended that the initial correspondence from FENOC's counsel be made publically available, and that no improvements of the enforcement process were needed.

On December 18, 2006, the Director of OE (OD) provided the management decision for the DPO. The decision agreed with the Panel's recommendations. At that time, the FENOC correspondence was made publically available.

On January 18, 2007, you filed an appeal, which the OD denied. However, your appeal identified several administrative deficiencies in the DPO process along with several technical issues. The OD's denial to your appeal states OE will evaluate the administrative deficiencies identified as part of the annual review of the DPO program.

In your appeal, you raised the following issues:

Administrative Deficiencies in the DPO Process

- The ad hoc panel chair did not choose the third panel member from the list of three potential panel members submitted by the submitter
- A fourth panel member was not chosen by the OE OD
- The panel did not have periodic discussions with the submitter
- The Management decision was not provided within 10 calendar days after receipt of the panels final report
- OE did not submit to the EDO an extension request to meet the timeliness goals
- The DPO decision was not issued within 190 days

Administrative Deficiencies in the DPO Panel Report

- Incorrect Date of Licensee's response
- Incorrect Date of Panel meeting with submitter
- Misquoted OE Director's statement to FENOC's Attorney
- ADAMS profile has the incorrect date

Technical Deficiencies in the OD's Decision

- The OD's decision only addressed one of the three issues raised in the DPO
- The OD's decision failed to address the Region III Allegation Closure Information (two issues)
- The OD's decision relied on the obtuse basis for determining materiality
- The OD's decision did not reconcile the deficiencies in the NRC's enforcement policy
- The OD's decision was based on interviews of only HQs personnel and did not include Region III personnel who were responsible for evaluating the adequacy of the FENOC response.

EXECUTIVE DIRECTOR FOR OPERATIONS REVIEW AND DECISION

When I received your appeal, I initiated an extensive review of the available information related to DPO-2006-004. I reviewed several documents, including, but not limited to, the DPO, the DPO Panel Report, the DPO decision, and your appeal. To understand the issues fully, I also met with the members of the DPO panel on March 23, 2007, and I met with you on April 11, 2007. My review was limited to the technical issues you raised. As noted in the February 12, 2007, memorandum from the OD of OE, the administrative deficiencies that you noted will be reviewed as part of the OE DPO Program annual review.

First, I would like to commend you on a package that was well-researched, and insightful. However, based on all the available information I have reviewed, I agree with the Panel decision that FENOC's reply to violation I.E of the NOV did not constitute an additional violation of 10 CFR 50.9, and that the agency's final determination concerning this issue was appropriate. Therefore, no additional action by the NRC is warranted.

As such, there is no need to reopen your DPO on the Davis Besse Reply to a Notice of Violation (DPO-2006-004).

The basis for my decision is as follows:

- (1) Regarding your statement that the OD's decision relied on the obtuse basis for determining materiality, I reviewed several decisions on the use of Materiality that have withstood judicial review, and conferred with OGC. In light of the facts discussed in the panel's report, I agree that FENOC's statement was not material because the information was not capable of influencing an Agency regulatory decision.
- (2) Regarding your concern that the licensee's failure to comply with their NRC Communication procedures should have resulted in some type of regulatory action, I believe that the panel addressed this concern. The licensee attempted to verify the statements made in the response, but was limited because legal counsel prepared the statement, which was determined to be client privilege information. Therefore, a good faith effort was made to adhere to their procedure. Hence, no further action is warranted.
- (3) Lastly, in response to your concern that the OD's decision failed to address the Region III Allegation Closure Information (two issues). I agree that the Inspection Manual Chapter 0350 is important. Nevertheless, I agree that the statement was not material, and I agree with the OE letter indicating that no violations existed. Therefore, Region III Allegation Closure Information does not need to be changed.

Based on these considerations, I have concluded that the actions taken by staff in response to your DPO, including release of the letter from the Counsel for FENOC, and evaluation of the administrative deficiencies identified as part of the annual review of the DPO program, are adequate.

I want to thank you for bringing your concerns to my attention. Your DPO was well thought out and researched. As you know, our agency relies on its staff members to raise concerns regarding decisions so that they can be properly considered. Your perseverance in raising these concerns demonstrates your dedication to safety that is the foundation of the agency's excellent staff, and I applaud your efforts in this regard. I take concerns such as the ones you raised very seriously, and hope that my interactions with you have shown my complete and thorough review of your concerns in making my decision.

The basis for my decision is as follows:

- (1) Regarding your statement that the OD's decision relied on the obtuse basis for determining materiality, I reviewed several decisions on the use of Materiality that have withstood judicial review, and conferred with OGC. In light of the facts discussed in the panel's report, I agree that FENOC's statement was not material because the information was not capable of influencing an Agency regulatory decision.
- (2) Regarding your concern that the licensee's failure to comply with their NRC Communication procedures should have resulted in some type of regulatory action, I believe that the panel addressed this concern. The licensee attempted to verify the statements made in the response, but was limited because legal counsel prepared the statement, which was determined to be client privilege information. Therefore, a good faith effort was made to adhere to their procedure. Hence, no further action is warranted.
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DISTRIBUTION: (DPO-2006-004)

EDO r/f

T. Bloomer

R. Pedersen

ADAMS ACCESSION NO: ML071200090

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