

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

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

In the Matter of:

FIRSTENERGY NUCLEAR OPERATING
COMPANY

(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-346-LR

ASLBP No. 11-907-01-LR-BD01

February 18, 2011

MEMORANDUM AND ORDER

(Granting Motion To Strike and Requiring Re-filing of Reply)

FirstEnergy Nuclear Operating Company (FENOC) has moved to strike¹ the reply (Combined Reply) filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (Joint Petitioners).² FENOC alleges that the Combined Reply includes "new arguments, references, and an attachment not within the scope of [Joint Petitioners'] original Petition." Motion To Strike at 1. FENOC also alleges the Combined Reply does not satisfy the standards governing late-filed contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). Id. Therefore, according to FENOC, the new information in the Combined Reply should be stricken. Id. In the alternative, FENOC asks that if the Board decides to consider the new arguments, references, and attachment contained in the Combined Reply, then it "requests an opportunity to respond to the admissibility of the new information in writing and/or during the oral argument currently scheduled for March 1, 2011." Id. at 2 n.3.

¹ FirstEnergy's Motion To Strike Portions of Petitioners' Combined Reply (Feb. 7, 2011) [hereinafter Motion To Strike].

² Joint Intervenors' Combined Reply in Support of Petition for Leave To Intervene (Jan. 28, 2011) [hereinafter Combined Reply].

On February 17, 2011 the Joint Petitioners filed an Answer to the motion to strike.³ Joint Petitioners state that they “raised no ‘new contention’ or ‘new facts’ whatsoever in the cited parts of their Reply. [They contend] FENOC’s argument is specious and incomprehensible.” Id. at 7-8. The Joint Petitioners ask that the material not be struck and that their arguments be heard as part of the adjudicatory process. Id. at 9.

I. Legal Standards

In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.⁴ The reply brief “should be ‘narrowly focused on the legal or logical arguments presented in the applicant[] or the NRC staff answer.’”⁵ The Commission will not consider evidence presented for the first time in a reply brief.⁶ The Commission’s regulations provide for the filing of only three pleadings as of right with regard to standing and admissibility of contentions. 10 C.F.R. § 2.309(h). The reply brief is the final of the three. Id. § 2.309(h)(2). Therefore, consideration of new evidence in or appended to a reply brief would deprive other parties of an opportunity to challenge the new evidence.⁷

II. Board Analysis

FENOC argues the following four portions of the Combined Reply and an attachment to the Combined Reply should be stricken:

1. Page 45: “In the aftermath of Davis-Besse’s 2002 hole in-the-head

³ Joint Intervenors’ Combined Reply in Opposition To FENOC’s ‘Motion To Strike’ (Feb. 17, 2011).

⁴ Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

⁵ La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (quoting 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)), reconsideration denied, CLI-04-35, 60 NRC 619, 620 (2004).

⁶ Cf. Palisades Nuclear Plant, CLI-06-17, 63 NRC at 732 (“[I]f the petition as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.”).

⁷ See Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261 (2008) (noting that if an affidavit filed with a reply brief were considered, the applicant “would have no right under our regulations to challenge its adequacy”).

fiasco, NRC's Office of Inspector General reported in December, 2002, that not only FENOC, but also the NRC itself, had prioritized the company's profits over public safety, risking a major radiological disaster. FENOC's committing to 95th percentile confidence levels in its SAMA analyses would be a small but important step in the right direction towards redressing its past "profit of safety" excesses, one of many it should undertake."

2. Pages 46-48: The text beginning "In addition to population density" on page 46 through the sentence ending "downwind over vast areas" on page 48.
3. Pages 48 – 55: The text beginning "We again point" on the bottom of page 48 through the text ending "forty-year mark of age-related degradation" at the bottom of page 55.
4. Page 78: The following phrase at the end of the last sentence of the first full paragraph: "as well as NRC OIG's very serious finding in the aftermath of the Davis-Besse hole in the head fiasco of 2002 that profit had been prioritized over safety."

Attachment: Kevin Kamps, Beyond Nuclear, "Davis-Besse Atomic Reactor: 20 MORE Years of Radioactive Russian Roulette on the Great Lakes shore?!" at 7 (Nov. 19, 2010).

The four above cited portions of the Combined Reply and the Attachment impermissibly attempt to expand the scope of Contention 4 and attempt to add new bases and supporting material for the contention. The Combined Reply does not address the required criteria for late-filed or amended contentions in 10 C.F.R. § 2.309(c) and (f)(2). Joint Petitioners cannot now add new bases and supporting material to their initial petition. This material, first seen in the Combined Reply, is not "narrowly focused" or responsive to the legal or factual arguments presented in the FENOC and NRC Staff answers. The Attachment to the Combined Reply was available well before the Joint Petition was filed⁸ and could have (or perhaps should have) been included as an Exhibit to the Joint Petition so that FENOC and/or the NRC Staff would have had an opportunity to

⁸ Compare Kevin Kamps, Beyond Nuclear, "Davis-Besse Atomic Reactor: 20 MORE Years of Radioactive Russian Roulette on the Great Lakes shore?!" at 7 (Nov. 19, 2010) with Beyond Nuclear Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave To Intervene (Dec. 27, 2010).

respond to it in their answers. Accordingly, the new arguments, references, and attachment identified above are stricken.

FENOC notes that the pagination on the Combined Reply ceases at page 28. Motion To Strike at 4 n.13. FENOC explains that, “for ease of reference” in its motion to strike, it added page numbers to the Combined Reply, including the Attachment. Id. This is not their responsibility. Further, on February 9, 2011 Joint Petitioners filed, “[a]s a follow up” to their Combined Reply, “an Errata to correct errors contained in that particular document.”⁹ The Errata acknowledges the pagination error and proffers five additional pages of “corrections” to the Joint Reply. Id. at 2-6. This approach is unacceptable. All pleadings filed in this proceeding shall be carefully proof-read and cite-checked before filing. Proposed corrections, if necessary, shall be submitted in the form of a motion consistent with 10 CFR § 2.323, especially § 2.323(b) and § 2.323(d).

III. Board Order

1. The FENOC motion to strike is GRANTED.

2. The Joint Petitioners are directed to re-file and re-serve on all parties, no later than February 24, 2011, their revised Combined Reply consistent with this Order. The revised Combined Reply should delete the four sections delineated in the FENOC motion to strike as well as the Attachment.

3. All the errata noted in the February 9, 2011 filing shall be corrected and all pages in the revised Combined Reply shall include page numbers.

4. All future filings in this docket shall be proof-read, cite-checked, and filed in strict conformance with 10 C.F.R. § 2.323.

⁹ Letter from Kevin Kamps, representative for Beyond Nuclear, to Annette Viette-Cook, NRC (Feb. 9, 2011).

5. Oral argument on March 1, 2011 will focus on the issues raised in the December 27, 2010 Joint Petition, the answers thereto and the Combined Reply, as re-filled.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 18, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FIRST ENERGY NUCLEAR OPERATING)
COMPANY)
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(Davis-Besse Nuclear Power Station, Unit 1)) Docket No. 50-346-LR
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Granting Motion To Strike and Requiring Re-filing of Reply) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of February 2011