

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) FIRSTENERGY NUCLEAR OPERATING COMPANY) (Davis-Besse Nuclear Power Station, Unit 1)))	Docket No. 50-346-LR September 23, 2011
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FIRSTENERGY’S MOTION TO STRIKE PORTIONS OF INTERVENORS’ REPLY

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), FirstEnergy Nuclear Operating Company (“FirstEnergy” or “FENOC”) files this motion to strike portions of the Reply filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (“Intervenors”) on September 13, 2011.¹ The Reply purports to respond to FirstEnergy’s and the NRC Staff’s Answers to Intervenors’ proposed New Contention,² which allegedly is based on new and significant information presented by the NRC in its Fukushima

¹ Intervenors Reply Memorandum to Staff and Applicant Oppositions to Admission of New Contention” (Sept. 13, 2011) (“Reply”). Intervenors also attached to their Reply a “Reply Memorandum” prepared by counsel for intervenors/petitioners in other proceedings. See Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011) (“Reply Memorandum”).

² Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) (“Motion”); Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 12, 2011) (“New Contention”); FirstEnergy’s Answer Opposing Joint Petitioners’ Motion to Admit and Proposed Contention Regarding Fukushima Task Force Report (Sept. 6, 2011) (“FirstEnergy Answer”); NRC Staff’s Answer in Opposition to Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) (“NRC Staff’s Answer”).

Task Force Report.³ The portions of the Reply identified below should be stricken by the Board. In short, they contain new arguments that exceed both the scope of the proposed New Contention and the proper scope of a reply, in clear contravention of NRC regulations and legal precedent.

Counsel for FirstEnergy has consulted with the Joint Petitioners and the NRC Staff as required under 10 C.F.R. § 2.323(b). The NRC Staff does not object to this filing; it intends to file its own Motion to Strike. Joint Petitioners object to the Motion to Strike but did “not oppose a surrebuttal filing by FENOC and the NRC Staff, in lieu of motions to strike.”⁴

II. LEGAL STANDARDS

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, to expand the scope of arguments set forth in the original petition, or to cure an otherwise deficient contention.⁵ As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).⁶

The Commission’s prohibition on new arguments in replies is rooted in the Commission’s interest in conducting adjudicatory hearings efficiently and on basic principles

³ Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (“Task Force Report”), *available at* ADAMS Accession No. ML112510271.

⁴ E-mail from T. Lodge, Counsel for Intervenors, to A. Polonsky, Counsel for FirstEnergy (Sept. 22, 2011).

⁵ *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and finding that petitioners impermissibly “expand[ed] their arguments” by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63 (2006), *aff’d*, CLI-06-17, 63 NRC 727 (2006) (refusing to consider references to various documents identified in a petitioner’s reply that were not included in the original petition).

⁶ *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

of fairness. The Commission has recognized that “[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.”⁷ It has further stated:

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.⁸

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a petitioner to amend or supplement its pleadings in reply to the applicant’s or NRC Staff’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.⁹

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner’s reply,¹⁰ principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the applicant’s or NRC Staff’s answer. “Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other

⁷ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“LES”).

⁸ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (internal quotation marks omitted) (*quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25).

⁹ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

¹⁰ *See* 10 C.F.R. § 2.309(h)(3).

participants of an opportunity to rebut the new claims.”¹¹ Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”¹² Any improper arguments should be stricken.¹³

III. BASES FOR MOTION TO STRIKE

Below, FirstEnergy sets forth three specific bases for striking portions of the Intervenor’s Reply. At the outset, it bears emphasis that the New Contention filed by Intervenor in August 2011, merely incorporated by reference and attached a contention filed by another intervenor in the *Seabrook* license renewal proceeding.¹⁴ That contention alleges that the environmental report (“ER”) for the *Seabrook* license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC’s Fukushima Task Force Report. Importantly, the Intervenor here made no effort to raise a dispute with the Davis-Besse license renewal application (“LRA”) or ER in the New Contention, a fact noted by FirstEnergy and the NRC Staff in their respective oppositions to the New Contention.¹⁵

In an attempt to bolster the New Contention, Intervenor now present several new arguments in their Reply. Those arguments do not focus either on the arguments presented in the New Contention, or raised in the Answers to it. Intervenor also fail to meet the NRC’s late-

¹¹ *Palisades*, CLI-06-17, 63 NRC at 732.

¹² *LES*, CLI-04-25, 60 NRC at 225; *see also* Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (“Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”).

¹³ A licensing board has the authority to strike individual arguments and exhibits. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”); *see also Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 376-77, 399-400, 407, 429 (2008) (granting the applicant’s motion to strike portions of petitioner’s reply that contained new arguments and factual allegations (including a new affidavit and reports) in an attempt to cure deficiencies in the proposed contentions in the petition to intervene).

¹⁴ New Contention at 1.

¹⁵ FirstEnergy Answer at 5-8, 25-27; NRC Staff Answer at 17-27. Instead, the Intervenor simply attached the entire *Seabrook* pleading under cover of a *Davis-Besse* docket number. Intervenor follow a similar course in their Reply, attaching to it a Reply Memorandum prepared by counsel for other parties in other proceedings.

filing criteria in 10 C.F.R. § 2.309(f)(2), because they fail to explain why the new information and arguments contained in their Reply relative to Davis-Besse were not previously available to them.¹⁶ Such issues or alleged facts could have been raised by Intervenors when they filed the New Contention—but they were not. Accordingly, they should be stricken.

Basis 1: The Intervenors’ first transgression stems from their attempt to recast the New Contention as “one of omission” that challenges “the completeness of FENOC’s License Renewal Application and Environmental Report in their entirety.”¹⁷ In support of this argument, Intervenors state that their recent electronic searches of online copies of the Davis-Besse LRA and ER revealed no references to the Fukushima Task Force Report, and suggest that FirstEnergy has acted in derogation of NEPA by not updating these documents to include such references.¹⁸

But Intervenors did not originally argue that there were any deficiencies in FirstEnergy’s ER. As FirstEnergy stated in its Answer:¹⁹

Petitioners’ pleading attempts to raise a dispute with the ER and Draft Supplemental Environmental Impact Statement (“DSEIS”) issued in the Seabrook proceeding. It quotes at length from the Seabrook DSEIS. It alleges that the “values assigned to the cost-benefit analysis for Seabrook SAMAs, as relevantly described in Sections 5.1, 5.30, and 5.35 of the [DSEIS] must be re-evaluated in light of the Task Force’s” alleged conclusions. Again, quite astounding is the fact that none of this discussion references or raises a dispute with the Davis-Besse LRA or ER; *i.e.*, the subject of this proceeding. Indeed, the NRC staff has not even issued a DSEIS in this proceeding.

For this reason, the New Contention was not cast as a contention of omission with respect to the Davis-Besse ER, and cannot be done so now because it deprives FirstEnergy of any opportunity

¹⁶ *Palisades*, CLI-06-17, 63 NRC at 732

¹⁷ Reply at 3.

¹⁸ *See id.* at 4-5.

¹⁹ FirstEnergy Answer at 7 (citations omitted).

to respond. Therefore, Intervenor's "contention of omission" argument should be stricken because it is both new and unauthorized.

Basis 2: Intervenor's argue that FirstEnergy has not analyzed the potentially catastrophic costs and risks that could ensue from a long-term station blackout at Davis-Besse, whether caused by an earthquake combined with a flood (such as by a seiche on Lake Erie, immediately adjacent to Davis-Besse) or "some other internal or external cause."²⁰ Intervenor's did not attempt to provide any Davis-Besse-specific arguments in their New Contention or make any reference to the occurrence (past or future) of "seiches" on Lake Erie. Therefore, this argument, too, should be stricken as newly-raised and beyond the proper scope of a reply.

Basis 3: Intervenor's also newly assert that "new and significant" information in the Task Force Report about the catastrophic consequences of an earthquake and/or flood-induced station blackout must "be incorporated into new, carefully executed FENOC SAMA[] [analyses]."²¹ They further contend that catastrophic expenses on the order of \$200 billion or greater can be prevented through "relatively inexpensive fixes" at Davis-Besse, but that "FENOC has refused to undertake any such post-Fukushima 'lessons-learned' analysis."²² Here, again, arguments that FirstEnergy must redo its SAMA analyses for Davis-Besse or conduct some other post-Fukushima "lessons learned" assessment to comply with NEPA grossly exceed the proper bounds of the reply.

For the foregoing reasons, FirstEnergy respectfully requests that the Board strike those portions of the Reply specifically identified in the table below.

²⁰ Reply at 5-6.

²¹ *Id.* at 6-7.

²² *Id.*

In the event the Board declines to strike any portion of the text identified below, FirstEnergy requests the opportunity to provide a substantive surreply to the legal and factual arguments contained in that text.

Page Citation to Reply	Basis for Striking Text (See Explanation Above)	Actual Text to Be Stricken from the Reply
3	Basis 1	“However, the contention is one of omission. We are challenging the completeness of FENOC’s License Renewal Application and Environmental Report in their entirety, for FENOC has not incorporated any ‘lessons learned’ from the new and significant information revealed by the NRC Near-Term Fukushima Task Force Report dated July 12, 2011.”
4	Bases 1 & 3	“In both cases, the Applicant has failed to incorporate ‘lessons learned’ from the NRC’s Fukushima Task Force Near Term Report dated July 12, 2011 into the NEPA documents, including their respective Environmental Reports.”
4-5	Basis 1	“A PDF search on FENOC’s 648 page long ER posted at NRC’s website (http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-enviro.pdf) for the terms ‘Fukushima’ and ‘Task Force’ revealed that the Fukushima Daiichi accident is mentioned nowhere throughout the entire voluminous document. Although other task forces are mentioned a few places, no mention is made of the NRC’s Fukushima Task Force, created shortly after the Fukushima nuclear catastrophe began on March 11, 2011, nor its Near-Term Report published on July 12, 2011. It appears that FENOC’s ER, dated August 2010, has not been updated in any way, shape, or form since the catastrophe began on March 11, 2011, nor since the NRC’s Fukushima Task Force Near-Term Report published its findings on July 12, 2011. Likewise, FENOC’s August 2010, 1810-page License Renewal Application posted at NRC’s website (http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-lra.pdf) does not mention the Fukushima nuclear catastrophe, nor NRC’s Fukushima Task Force Near-Term Report.”
5-6	Bases 1 & 2	“FENOC has not analyzed the potentially catastrophic costs and risks that could be unleashed by a very long term station black out at Davis-Besse, whether caused by earthquake combined with flood (as has occurred at Fukushima Daiichi) or some other internal or external cause. Without examining the consequences that would result from a

Page Citation to Reply	Basis for Striking Text (See Explanation Above)	Actual Text to Be Stricken from the Reply
		long term station blackout, meltdown, and catastrophic radioactivity release into the environment, FENOC has violated its legally binding NEPA obligations.”
6	Basis 3	“Despite the lessons to be learned, and applied at Davis-Besse in its LRA and ER SAMA analyses, from the significant and new information coming from the Fukushima Daiichi Nuclear Catastrophe (which began on March 11, 2011, just ten days after the March 1, 2011 ASLB oral pre-hearing in Port Clinton, Ohio for this proceeding), such as reflected in the NRC Near-Term Task Force Report dated July 12, 2011, FENOC has done no such updated SAMA analyses. Given that the ASLB has not scheduled hearings on the admitted contentions (including SAMA contentions) in this proceeding until far into the future, and given that Davis-Besse’s current operating license does not expire until March, 2017, there is plenty of time for FENOC to carry out such updated SAMAs based on the significant and new information contained in the NRC Near-Term Task Force Report. To not do such updated SAMA analyses is a dereliction of FENOC’s NEPA-related obligations.”
6-7	Bases 2 & 3	“[I]t is precisely the new and significant information revealed by the NRC Near-Term Task Force Report about the catastrophic consequences that could be unleashed by a long term station blackout, due to an earthquake and flood (as by a seiche on Lake Erie, immediately adjacent to Davis-Besse; in fact, in the early 1970s, during Davis-Besse’s early construction activities, just such a seiche occurred on-site, causing significant flooding), that needs to be incorporated into new, carefully executed FENOC SAMAs. The Fukushima Daiichi Nuclear Catastrophe, months ago, had a ballpark figure of \$200 billion in property damage, recovery costs, etc. Since estimated radioactivity releases have been revised upward a number of times since March 11th, and since even this \$200 billion ball park figure is already months old, and radioactivity releases have continued since then, even this catastrophic figure will likely climb even higher. This is the very heart of the SAMA NEPA requirement, to determine if such catastrophic expenses can be prevented through relatively inexpensive fixes to the Davis-Besse vulnerabilities that could lead to such catastrophic damages. Yet FENOC has refused to undertake any such post-Fukushima “lessons learned” analysis.”

IV. CONCLUSION

For the foregoing reasons, the Board should strike the unauthorized new arguments advanced by the Intervenors in their September 13, 2011 Reply. If the Board declines to strike any portion of the text identified above, FirstEnergy requests the opportunity to provide a substantive surreply to the legal and factual arguments contained in that text.

Respectfully submitted,

Signed (electronically) by Martin J. O'Neill

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COUNSEL FOR FIRSTENERGY

Dated in Washington, D.C.
this 23rd day of September 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		
FIRSTENERGY NUCLEAR OPERATING COMPANY)		Docket No. 50-346-LR
(Davis-Besse Nuclear Power Station, Unit 1))		September 23, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FirstEnergy’s Motion to Strike Portions of Intervenor’s Reply” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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