

October 6, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	Docket No. 50-346
First Energy Nuclear Operating Company)	
(Davis-Besse Nuclear Power Station, Unit)	
1))	
(Regarding the Renewal of Facility)	
Operating License NPF-003 for a 20-Year)	
Period))	

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**INTERVENORS' OPPOSITION TO FENOC AND NRC STAFF MOTIONS
TO STRIKE PORTIONS OF INTERVENORS' REPLY IN SUPPORT
OF ADMITTING CONTENTION CONCERNING FUKUSHIMA DAI-ICHI ACCIDENT**

Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio ("Intervenors"), by and through counsel, hereby reply to the "CORRECTED NRC STAFF'S MOTION TO STRIKE PORTIONS OF INTERVENOR'S REPLY MEMORANDUM TO STAFF AND APPLICANT OPPOSITIONS TO ADMISSION OF NEW CONTENTION" and "FIRSTENERGY'S MOTION TO STRIKE PORTIONS OF INTERVENORS' REPLY". The reply arguments raised by Intervenors were legitimate responses to the opposing parties' assertions.

The basis for the motions to strike appears to be that FENOC and the NRC Staff believe they were somehow blindsided because a motion which incorporated by reference the extensive

memorandum on adding a Fukushima Task Force-related contention which was filed by intervenors in the Seabrook proceeding did not raise Davis-Besse-specific implications. Intervenors in the instant matter saw no need to change the references from Seabrook to Davis-Besse which appeared in the Seabrook memorandum, for it was the legal arguments they were borrowing to support their proposed new contention of omission in the Davis-Besse relicensing.

FENOC and the Staff can ill maintain that they were not put on notice of the scope, motivation and purposes of the proposed contention, given this passage appearing at pp. 1-2 of Intervenors' "Motion to Admit New Contention:"

[Intervenors] move to admit a new contention challenging the adequacy of the Davis-Besse Nuclear Power Station ("Davis-Besse") Operating License Renewal Application, Environmental Report (the "ER") on the basis that it fails to address the extraordinary environmental and safety implications of the findings and recommendations raised by the Nuclear Regulatory Commission's Fukushima Task Force (the "Task Force") in its report, "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"). Intervenors respectfully submit that admitting the new contention is necessary to ensure that the Nuclear Regulatory Commission ("NRC" or the "Commission") fulfills its nondiscretionary duty under the National Environmental Policy Act ("NEPA") to consider the new and significant information set forth in the Task Force Report before it issues a Combined License ("COL") for Davis-Besse.

On its face, the thrust of the new contention is a "contention of omission." The Staff and FENOC engage in the odd notion that the rest of the world must remain as blinkered as they wish to be: they urge that there can be no permissible inferences made from the undisputed absence from the Davis-Besse relicensing record of any references to the Fukushima Task Force, indeed, zero mention of Fukushima in the array of NRC-FENOC communications, discussions, minutes, notes and correspondence amassed in ADAMS since March 2011. The motions to strike urge that judicially-noticeable facts be excised from Intervenors' reply presumably to keep

a hint of reality from tainting FENOC's faith-based Environmental Report.

The unforgivable irony is that the NRC Staff does not perceive its responsibility on this issue to be found in joining Intervenor's motion and assuring that the Task Force information is immediately addressed by FENOC under NEPA.

While as a general matter, a party may not present a new contention, or a new basis for a proposed contention, in its reply, the NRC's "contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission." See *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied* by LES, CLI-04-35, 60 NRC 619 (2004). By stating factual comments on the state of the record - that a search of the current Davis-Besse ER contains no reference to the Fukushima Task Force and that the document appears not to have been updated since August 2010 to reflect significant new information - Intervenor's have not asserted anything unknown to or not ascertainable by the other parties. The suggestion that potentially costs and risks have not been analyzed by FENOC by earthquake and flood, or some other external or internal cause (the lessons to be learned from Fukushima) is legitimate reply argument by Intervenor's and it is predicated on obvious, unsurprising givens. By pointing out that FENOC has not updated its SAMA analyses in light of Fukushima, Intervenor's are not providing new supporting facts, but have articulated a wholly-logical inference arising from indisputable facts which were asserted in their original petition for the new contention.

In *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), ASLB No. 09-880-05-BD01, LBP 10-09 (June 15, 2010), slip opinion, the ASLB addressed a similar issue. There, the intervenors had petitioned for addition of a quality assurance contention based on an NRC

Notice of Violation citing quality assurance deficiencies on the part of Detroit Edison Company.

The NRC Staff answered that the intervenors had exaggerated the seriousness of the NRC enforcement action. In reply, the intervenors provided an expert affidavit which cited and analyzed the significance of certain NRC staff emails pertaining to the QA deficiencies. The ASLB declined to strike the expert affidavit and reliance on the emails as evidence:

By citing this and other NRC Staff e-mails, Intervenors have not attempted to amend or provide a different basis for Contention 15. Instead, they have responded to NRC Staff's argument that they significantly overstated the extent of DTE's QA violations, and they have provided additional factual support for Contention 15's assertion that DTE 'appears to be serially in violation of NRC regulations requiring the implementation of a Quality Assurance program' *Although Intervenors did not cite the June 2009 e-mails in Contention 15, our contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission. When the NRC Staff's Answer accused Intervenors of overstating the extent of the violations identified in the NOV, it was appropriate for Intervenors to respond by citing statements of NRC Staff that appear consistent with Intervenors' position.* (Emphasis supplied)

At bottom, NRC Staff's argument concerns the interpretation of debatable evidence and is therefore inappropriate in the context of a contention admissibility ruling, where we do not decide the merits or draw factual inferences in favor of the party opposing the admission of a contention. We therefore are not persuaded by NRC Staff's argument that we should ignore its June 2009 e-mails. Such arguments belong at the evidentiary stage of this proceeding. We therefore conclude that Contentions 15A and 15B satisfy 10 C.F.R. § 2.309(f)(1)(v).

Id. pp. 23, 25.

The objections posed by the FENOC and NRC Staff motions to strike have less legitimacy than those in the Fermi case: Intervenors have proffered certain factual observations here about the state of the record, and have made legitimate arguments of inferences derived from those indisputable factual observations. Though the evidence may be debatable, it cannot be excluded from the reply arguments of Intervenors.

Both motions to strike should themselves be stricken.

Respectfully submitted this 6th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "INTERVENORS' OPPOSITION TO FENOC AND NRC STAFF MOTIONS TO STRIKE PORTIONS OF INTERVENORS' REPLY IN SUPPORT OF ADMITTING CONTENTION CONCERNING FUKUSHIMA DAI-ICHI ACCIDENT" have been served on the following persons via Electronic Information Exchange this 6th day of October, 2011:

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