

March 5, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FIRSTENERGY NUCLEAR OPERATING CO.) Docket No. 50-346-LRA
)
(Davis-Besse Nuclear Power Station, Unit 1))
)

NRC STAFF'S ANSWER TO FENOC'S MOTION TO STRIKE
PORTIONS OF INTERVENORS' REPLY FOR THE PROPOSED CONTENTION 5
ON SHIELD BUILDING CRACKING

INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") files its Answer to "FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking" ("FENOC's Motion"). "Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5" ("Intervenors' Reply")¹ impermissibly includes new arguments not within the scope of the original pleading without any attempt to satisfy the standards governing late-filed contentions as set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). Accordingly, these new arguments should be stricken and FENOC's Motion granted.

BACKGROUND

This proceeding concerns FirstEnergy's August 27, 2010 application to renew its operating license for Davis-Besse for an additional twenty years from the current expiration date

¹ See "Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5," (Feb. 13, 2012) ("Intervenors' Reply") (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12044A361).

of April 22, 2017.² The Staff accepted the LRA for review, and on October 25, 2010, published a *Federal Register* Notice providing a Notice of Opportunity for Hearing.³ On December 27, 2010, Joint Petitioners filed a petition to intervene.⁴ On April 26, 2011, the Atomic Safety and Licensing Board (“Board”) admitted in part two of four originally proffered contentions. On January 10, 2012, Intervenors filed a new contention on shield building cracking in the Davis-Besse license renewal proceeding.⁵ On February 13, 2012, the Intervenors’ filed their reply to the Staff’s and Applicant’s answers that contained new arguments and supporting facts not present in the initial petition to add the new contention.⁶ On February 27, 2012, Intervenors’ filed their answer to FENOC’s Motion.⁷

DISCUSSION

I. The Standards Governing Arguments Raised For the First Time In A Reply Brief

Under the Commission’s rules, petitioners may file a reply to any answer filed in response to its petition.⁸ The scope of that reply, however, is not unlimited.⁹ In *Palisades*, the Commission explained that

² Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse (Agencywide Document Access and Management System (“ADAMS”) (ADAMS Accession No. ML1024505650) (“LRA”) at 1.2-1. If the LRA is approved, Davis-Besse’s new license expiration date would be April 22, 2037.

³ Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License No. NPF–003 for an Additional 20-Year Period; FirstEnergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, Unit 1, 75 Fed. Reg. 65,528 (Oct. 25, 2010).

⁴ Beyond Nuclear, Citizens Environment 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).

⁵ See “Motion for Admission of Contention No. 5 On Shield Building Cracking,” (Jan. 10, 2012) (ADAMS Accession No. ML12010A172).

⁶ See “Intervenors’ Combined Reply in Support of Motion for Admission of Contention No. 5,” (Feb. 13, 2012) (“Intervenors’ Combined Reply”) (ADAMS Accession No. ML12044A361).

⁷ See “Intervenors’ Answer to FENOC’s ‘Motion to Strike,’” (Feb. 27, 2012) (“Intervenors’ Answer”) (ADAMS Accession No. ML12058A260).

⁸ 10 C.F.R. § 2.309(h)(2).

[i]t 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 present in the original petition or raised in the answers to it. New bases for [the] contention cannot be introduced in a reply brief ... unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. 2.309(c), (f2).¹⁰

These pleading requirements form the cornerstone of the Commission's effort to "avoid unnecessary delays and increase the efficiency of NRC adjudication,"¹¹ and ensure the fundamental fairness of the proceedings.¹² "Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims."¹³ Therefore, petitioners are precluded from using a reply to present entirely new facts or arguments in an attempt to "reinvigorate thinly supported contentions."¹⁴ Any improper arguments and factual support should be stricken.¹⁵

II. The Board Should Grant FENOC's Motion to Strike Portions of Intervenors' Combined Reply

Intervenor's Answer asserts that FENOC is raising "petty disagreements" that supply "no basis for the severe step of striking Intervenors' statements."¹⁶ Intervenors argue, incorrectly, that because FENOC's Motion failed to contain the terms "'relevant,' 'relevance,' 'irrelevant' and 'irrelevance' ..."¹⁷ that FENOC is raising issues without consequence. But, Intervenors assert

⁹ See *Nuclear Management Co. (Palisades Nuclear Plant)*, CLI-06-17, 63 NRC 727, 732 (2006).

¹⁰ *Id.*

¹¹ *Louisiana Energy Services (National Enrichment Facility)*, CLI-04-35, 60 NRC 619, 623 (2004).

¹² *Palisades*, CLI-06-17, 63 NRC at 732.

¹³ *Id.*

¹⁴ *Louisiana Energy Services (National Enrichment Facility)*, CLI-04-32, 60 NRC 223, 224 (2004).

¹⁵ 10 C.F.R. § 2.319. See, e.g., *Tenn. Valley Auth. (Bellefonte Nuclear Power Plant Units 3 and 4)*, LBP-08-16, 68 NRC 361, 376-77, 399-400, 407, 429 (2008).

¹⁶ Intervenors' Answer at 2.

¹⁷ Intervenors' Answer at 1-2.

only two reasons for denying FENOC's Motion, namely fraudulent conduct of the NRC Staff and FENOC and that Intervenor's Combined Reply only legitimately amplified their original contention.¹⁸

A. The Board Should Strike the Portions of Intervenor's Reply That Assert Unsupported Accusations of Fraud

Intervenor's Combined Reply accused the Staff and FENOC of committing fraud. The Intervenor's Answer to FENOC's Motion repeats these unsupported accusations. These baseless accusations appear to be meant to inflame rather than address any legitimate argument for contention admissibility or address any of the arguments advanced by the Staff or FENOC. In the Combined Reply, Intervenor asserts but do not cite to any specific statements made by the Staff that were false. Intervenor's repeated claims of fraud in their answer to FENOC's Motion are equally unsupported. Again, Intervenor claims that the NRC said that "there would be no restart until the root cause of the cracking had been isolated, there was a grasp of how extensive the cracking was"¹⁹ But, here again, Intervenor does not identify any specific statements made by the NRC to that effect.

In fact, Intervenor's Combined Reply contradicts their assertions that FENOC somehow misled them. For example, Intervenor asserted that FENOC "active[ly] conceal[ed] ... the true nature of the cracking problem throughout the months of October through December 2011 by pretending that only the 'decorative' and 'architectural' features of the shield building were showing concrete fissures."²⁰ Intervenor's very next sentence credits FENOC for disclosing that cracks had been discovered in areas of the shield building that were not decorative or architectural on October 31, 2011.²¹ It appears that Intervenor's complaints are not that FENOC

¹⁸ See Intervenor's Answer at 2-3, 7.

¹⁹ See Intervenor's Answer at 8.

²⁰ Intervenor's Combined Reply at 2.

²¹ Intervenor's Combine Reply at 2.

materially misled them or committed fraud but that they wanted a different disclosure that would alleviate them of their “iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention.” *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

Intervenors’ Answer to FENOC’s Motion is similarly silent as to a specific NRC statement that was fraudulent. Intervenors’ argue that their “purpose for raising the aspect of fraud in FENOC[‘s] disclosures is to show that FENOC cannot be heard to rely on its misleading concealments and omissions to answer as authority for the objection that Intervenors missed the 60-day filing window for the cracking contention.”²² Intervenors assert that the time for filing should be tolled until the fraud is discovered, if the party was without fault and exercised due diligence.²³ As discussed above, Intervenors have already acknowledged in the Combined Reply that they knew that the cracking was not limited to the decorative or architectural as of October 31, 2011.²⁴ Even if Intervenors theory of fraud was true, they admit to discovering the fraud on October 31, 2011. Therefore, Intervenors should have filed their proposed contention 5 no later than December 29, 2012.²⁵

Because Intervenors have pointed to no information that would support their claims of fraudulent conduct by the Staff or FENOC and their own filings before the Board indicate that they were in fact not deceived by the disclosures, FENOC’s motion to strike the portions of Intervenors’ Reply should be granted.

²² Intervenors’ Answer at 9.

²³ *Id.*

²⁴ Intervenors’ Combined Reply at 2.

²⁵ As discussed in the answer to Intervenors’ proposed Contention 5, the Staff suggested that a portion of the contention as revised by the Staff would meet the late-filed criteria of 10 C.F.R. § 2.309(c).

B. Portions of Intervenors' Combined Reply Were Wholly New Theories Not Within the Scope of the Proposed Contention 5

Instead of focusing narrowly on the scope of proposed contention 5 as Intervenors originally proffered it to this Board, Intervenors' Combined Reply attempts to recast and add additional bases to support their proposed contention 5.

As FENOC's Motion clearly explained, Intervenors Proposed Contention 5 did not seek a waiver in accordance with 10 C.F.R. § 2.335 and did not originally assert that cumulative effects had not been properly considered in the Environmental Report. Intervenors' Answer acknowledges that they did not seek a waiver in accordance with 10 C.F.R. § 2.335 in their original pleading. Because Intervenors did not seek a waiver in their original Proposed Contention 5, they cannot cure the deficiency by arguing that contention satisfies the waiver requirements in their reply. Thus, this portion of Intervenors' Combined Reply should be stricken, and FENOC's Motion granted.

Intervenors also assert that "[they] have consistently advanced their belief, beginning with the original cracking motion filing, that the concept of 'age-related degradation' includes consideration of cumulative effects ..."²⁶ without providing any citation to portions of their previous filing that raised that issue. Because Intervenors have not identified any portion of their original pleading as raising the issue of cumulative effects, this portion of Intervenors' Combined Reply should be stricken.

Allowing Intervenors to argue new legal theories and facts in their Combined Reply defeats the fundamental fairness of the proceeding and the Commission's clear precedent regarding pleading requirements and the scope of replies. The Commission has warned intervenors that they need to be prepared to meet the high standards of participating in an NRC proceeding. Specifically, the Commission has stated that:

²⁶ Intervenors' Answer at 6.

As we have stressed previously, our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, “who must examine the publicly available material and set forth their claim and the support for their claim at the outset.”²⁷

Quite clearly, Intervenors’ Combined Reply demonstrated the lack of discipline and preparation that the Commission and this Board explained would not be acceptable going forward.²⁸ Each of these new legal theories and facts could have been identified in Intervenors’ motion proposing Contention 5. Because Intervenors failed to raise these theories and facts in their initial pleading, they should be stricken from the Combined Reply and FENOC’s Motion granted.

CONCLUSION

For the foregoing reasons, the unsupported accusations of fraud and new arguments and facts should be stricken from Intervenors’ Combined Reply and FENOC’s Motion should be granted.

Respectfully submitted,

Signed (electronically) by

Brian G. Harris
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
Telephone: (301) 415-1392
E-mail: brian.harris@nrc.gov
Date of signature: March 5, 2012

²⁷ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (quoting *Louisiana Energy Services, L.P.*, CLI-04-25, 60 NRC at 224-25).

²⁸ See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP11-13, 73 NRC ____ (April 26, 2011) (slip op. at 7 – 8); Licensing Board Order (Granting Motion To Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) at 4 (unpublished). (granting motion to strike portions of Intervenors’ Reply).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO FENOC'S MOTION TO STRIKE PORTIONS OF INTERVENORS' REPLY FOR THE PROPOSED CONTENTION 5 ON SHIELD BUILDING CRACKING" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 5th day of March, 2011.

William J. Froehlich, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: william.froehlich@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAEmail.resource@nrc.gov

Nicholas G. Trikorous, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: nicholas.trikorous@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

William E. Kastenber, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: william.kastenber@nrc.gov

David W. Jenkins, Esq.
First Energy Service Company
Mail Stop A-GO-15
76 South Main Street
Akron, OH 44308
E-mail: djenkins@firstenergycorp.com

Hillary Cain, Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hillary.cain@nrc.gov

Morgan, Lewis & Bockius
Pennsylvania Avenue, NW
Washington, D.C. 20004
Stephen Burdick, Esq.
E-mail: sburdick@morganlewis.com
Alex Polonsky, Esq.
E-mail: apolonsky@morganlewis.com
Kathryn M. Sutton, Esq.
E-mail: ksutton@morganlewis.com
Timothy Matthews, Esq.
E-mail: tmatthews@morganlewis.com
Mary Freeze, Legal Secretary
E-mail: mfreeze@morganlewis.com

Derek Coronado
Citizens Environmental Alliance (CEA)
of Southwestern Ontario
1950 Ottawa Street
Windsor, Ontario Canada N8Y 197
Email: dcoronado@cogeco.net

Michael Keegan
Don't Waste Michigan
811 Harrison Street
Monroe, Michigan 48161
E-mail: mkeeganj@comcast.net

Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Paul Gunter
E-mail: paul@beyondnuclear.com
Kevin Kamps
Email: Kevin@beyondnuclear.com

Anita Rios
Green Party of Ohio
2626 Robinwood Avenue
Toledo, Ohio 43610
Email: rhannon@toast.net

/Signed (electronically) by/

Brian G. Harris
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1392
E-mail: Brian.Harris@nrc.gov