

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

September 20, 2012

NOTICE AND ORDER

(Scheduling Oral Argument)

There are currently three motions pending before the Board. First, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively Intervenors) have filed a motion, with five subsequent proposed amendments and/or supplements, seeking to admit a new contention dealing with cracking in the shield building at the Davis-Besse Nuclear Power Station. The second motion, filed by FirstEnergy Nuclear Operating Company (FENOC), seeks to dispose of an existing admitted contention dealing with the analysis of Severe Accident Mitigation Alternatives (SAMAs) and the use of the Modular Accident Analysis Program (MAAP). Finally, FENOC has filed a motion to strike portions of a reply filed by Intervenors. FENOC alleges the reply impermissibly contains new arguments not within the scope of the original contention and makes unsupported allegations against FENOC and the NRC Staff that they deem inappropriate. We briefly address each motion below and will hear oral argument on the Motion for Summary Disposition of Contention 4 and the admissibility of proposed

Contention 5 on Monday, November 5 and Tuesday, November 6, 2012.

I. Motion to Admit proposed Shield Building Cracking Contention

On January 10, 2012 Intervenors filed a proposed Contention 5 in this proceeding that reads as follows:¹

Intervenors contend that FirstEnergy's recently-discovered, extensive cracking of unknown origin in the Davis-Besse shield building/secondary reactor radiological containment structure is an aging-related feature of the plant, the condition of which precludes safe operation of the atomic reactor beyond 2017 for any period of time, let alone the proposed 20-year license period.²

On February 6, 2012 the NRC Staff filed its answer and opposed the admission of Contention 5 as submitted but recognized that a limited portion of Contention 5, as revised by the Staff, could be admitted by the Board as a contention of omission.³ That same day, FENOC filed an answer opposing the admission of Contention 5.⁴ This Board then issued an Order on February 13, 2012 stating that we would hear oral argument on its admissibility.⁵ The oral argument scheduled for May 18, 2012 was vacated in response to an unopposed motion filed by Intervenors on May 14, 2012.⁶

¹ Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012) ("Contention 5").

² Contention 5 at 11.

³ See NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking (Feb. 6, 2012) at 1-2, 16 ("To the extent Contention 5 identifies FENOC's failure to describe how the Structures AMP will account for the shield building cracks during the period of extended operation, Contention 5 is an admissible contention of omission.").

⁴ FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012).

⁵ Licensing Board Order (Denying Unopposed Motion for Leave to Respond to NRC Staff's Answer to Proposed Contention 5 and Setting Contention 5's Admissibility for Oral Argument) (Feb. 13, 2012) at 2 (unpublished) ("Order").

⁶ Intervenors' Unopposed Motion to Vacate and Reschedule Oral Argument on Proposed Contention No. 5 (May 14, 2012). See Licensing Board Order (Granting Unopposed Motion to Vacate Oral Argument) (May 15, 2012) (unpublished).

Since the original contention was filed Intervenor have filed five (5) motions to amend and/or supplement proposed Contention 5. Also, since the original contention was filed, the Applicant has submitted a Root Cause Report⁷ and a Revised Root Cause Report,⁸ attempting to explain the cause of the cracking. The NRC Staff has issued numerous Requests for Additional Information (RAIs) to FENOC and has released other documents concerning its evaluation of the causes of the shield building cracking.⁹

On February 27, 2012 Intervenor filed their first motion to supplement their original motion for admission of Contention 5 based on a claim of new information.¹⁰ On that same day FENOC submitted a Shield Building Root Cause Report (Initial Root Cause Report) to the NRC, which “included the results of the root cause evaluation and corrective actions, including long-term monitoring requirements.”¹¹ The Root Cause Report concluded that the shield building cracking was a result of “the integrated affect [sic] of moisture content, wind speed, temperature, and duration from the blizzard of 1978,” and the root cause “was due to the design specification for construction of the shield building . . . that did not specify application of an exterior sealant from

⁷ See Letter L-12-065 from Barry S. Allen to Cynthia D. Pederson, “Davis-Besse Nuclear Power Station, Unit 1 Docket Number NPF-3 Submittal of Shield Building Root Cause Evaluation,” (Feb. 27, 2012) (ADAMS Accession No. ML120600056) (“Initial Root Cause Report”).

⁸ On May 16, 2012, FENOC submitted a Revised Root Cause Analysis, which addressed observations made by NRC during its March 2012 on-site inspection. See Letter from Barry S. Allen to Cynthia D. Peterson, “Davis-Besse Nuclear Power Station, Unit 1 Docket Number NPF-3 Submittal of Revision 1 of Shield Building Root Cause Evaluation,” (May 16, 2012) (ADAMS Accession No. ML12142A053) (“Revised Root Cause Report”).

⁹ The Staff issued an inspection report on June 21, 2012, regarding the evaluation of FENOC’s root cause analysis and corrective actions related to the cracking in the shield building. See Letter from Steven A. Reynolds, Director, Division of Reactor Safety, to Barry Allen, Site Vice President, FirstEnergy Nuclear Operating Company (June 21, 2012) (ADAMS Accession No. ML12173A023).

¹⁰ Intervenor’s Motion to Amend ‘Motion for Admission of Contention No. 5’ (Feb. 27, 2012).

¹¹ See Initial Root Cause Report. See also CAL No. 3-11-001 (Dec. 2, 2011) (ADAMS Accession No. ML11336A355) (noting that “FENOC will provide the results of the root cause evaluation and corrective actions to the NRC, including any long-term monitoring requirements, by February 28, 2012.”).

moisture.”¹² On March 8, 2012 FENOC and the NRC Staff filed answers opposing Intervenors’ first motion to supplement their motion for admission of proposed Contention 5.¹³

On April 5, 2012, in response to the NRC Staff’s December 27, 2011 RAI,¹⁴ FENOC provided details of its Shield Building Monitoring Aging Management Plan (AMP).¹⁵ On June 4, 2012 Intervenors filed a second motion to amend and supplement proposed Contention 5 based on the Shield Building Monitoring AMP.¹⁶ On June 29, 2012 the NRC Staff and FENOC filed answers opposing this motion.¹⁷ Intervenors filed a combined reply on July 6, 2012.¹⁸

On May 16, 2012 FENOC filed a Revised Root Cause Report.¹⁹ Intervenors filed a third motion to amend and/or supplement proposed Contention 5 on July 16, 2012 which claimed that the Revised Root Cause Report contained new and material information which indicated that the Shield Building Monitoring AMP was inadequate.²⁰ Intervenors filed their fourth motion to amend

¹² Initial Root Cause Report at 59.

¹³ See NRC Staff’s Answer to Intervenors’ Motion to Amend ‘Motion for Admission of Contention No. 5’ (Mar. 8, 2012); FENOC’s Answer Opposing Intervenors’ Motion to Amend Proposed Contention 5 on Shield Building Cracking (Mar. 8, 2012).

¹⁴ See NRC Staff’s Request for Additional Information for the Review of the Davis-Besse Nuclear Power Station License Renewal Application (Dec. 27, 2011) (ADAMS Accession No. ML11333A396).

¹⁵ See FENOC’s Notification of Filing Related to Proposed Shield Building Cracking Contention (April 5, 2012).

¹⁶ See Intervenors’ Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 4, 2012).

¹⁷ See NRC Staff’s Answer to Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 29, 2012); FENOC’s Answer Opposing Intervenors’ Motion to Amend and Supplement Contention No. 5 (Shield Building Cracking) (June 29, 2012).

¹⁸ See Intervenors’ Combined Reply to FENOC and NRC Staff Opposition to ‘Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking)’ (July 6, 2012).

¹⁹ See Revised Root Cause Report.

²⁰ See Intervenors’ Third Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 16, 2012).

and/or supplement proposed Contention 5 on July 23, 2012²¹ claiming that Performance Improvement International's April 20, 2012 Root Cause Report²² contained new and materially different information than previously available which indicated that the Shield Building Monitoring AMP was inadequate. Pursuant to a Board order issued July 17, 2012,²³ the NRC Staff and FENOC each filed on August 17, 2012 answers in opposition to the third and fourth motions to amend and/or supplement proposed Contention 5.²⁴ Intervenors filed a combined reply on August 24, 2012.²⁵

On August 16, 2012 Intervenors filed a fifth motion to amend and/or supplement proposed Contention 5.²⁶ The NRC Staff and FENOC filed answers on September 11, 2012.²⁷

II. Motion for Summary Disposition of Contention 4

Also pending before this Board is a July 26, 2012 FENOC Motion for Summary Disposition of Contention 4²⁸ which concerns FENOC's SAMA analysis under the National Environmental

²¹ See Intervenors' Fourth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 23, 2012).

²² This is the report that was sent by FENOC to NRC on May 16, 2012. See supra note 9.

²³ See Licensing Board Order (Setting Dates for Answers and Reply to Motions to Amend Contention 5) (July 17, 2012) (unpublished).

²⁴ See NRC Staff's Answer to Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 17, 2012); FENOC's Answer Opposing Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 17, 2012).

²⁵ Intervenors' Combined Reply to NRC and FENOC Answers to Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 24, 2012).

²⁶ See Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012).

²⁷ NRC Staff's Answer to Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Sept. 10, 2012); FENOC's Answer Opposing Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Sept. 10, 2012).

Policy Act (NEPA). Contention 4 challenges FENOC's use of the Modular Accident Analysis Program (MAAP) computer code to determine plant-specific radiological source terms for use in its SAMA analysis.²⁹ Contention 4 alleges that FENOC's SAMA analysis "underestimates the true cost of a severe accident at Davis-Besse."³⁰ Intervenors allege that FENOC has minimized the potential amount of radioactive material released in a severe accident by using MAAP-generated source terms that are smaller for key radionuclides than the releases fractions specified in NRC guidance.³¹

FENOC states its Motion for Summary Disposition is based on its revised SAMA analysis for Davis-Besse, which it submitted to the Nuclear Regulatory Commission (NRC) on July 16, 2012.³² FENOC states it has prepared a revised SAMA analysis to reflect revised MAAP code runs that include plant-specific values for the masses of the relevant fission product elements instead of the isotopic activities of the elements, consistent with MAAP User's Group guidance. The updated MAAP code runs updated the release characteristics and radionuclide release fractions of the 34 release categories considered in the Davis-Besse SAMA analysis and, combined with other revisions, increased the total calculated severe accident cost. FENOC argues that it is entitled to summary disposition of Contention 4 because its revised SAMA analysis

²⁸ See FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (July 26, 2012). FENOC states its Motion has been timely filed because it was filed within 10 days of its submittal of its revised SAMA analysis on July 16, 2012. Id. at 6.

²⁹ See LBP-11-13, 73 NRC 534, 577-80 (2011).

³⁰ Id. at 586.

³¹ See id. at 577-58.

³² Letter from John C. Dominy, Director, Site Maintenance, FirstEnergy, to Document Control Desk, U.S. NRC, "Correction of Errors in the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application (TAC No. ME4613) Environmental Report Severe Accident Mitigation Alternatives Analysis, and License Renewal Application Amendment No. 29 (July 16, 2012) (ADAMS Accession No. ML12200A024).

demonstrates that “there is no genuine issue of material fact arising from any of Intervenors’ claims.”³³

On September 14, 2012 the NRC Staff filed an answer supporting the motion, and Intervenors filed an answer opposing it.³⁴

III. FENOC Motion to Strike Intervenors’ Combined Reply

On February 23, 2012 FENOC filed a motion to strike³⁵ portions of Intervenors’ February 13, 2012 Combined Reply in Support of Motion for Admission of Contention No. 5 (Reply). FENOC alleges “the Reply impermissibly includes new arguments not within the scope of the original proposed Contention 5 . . . without satisfying the standards governing late-filed contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2).”³⁶ Additionally, FENOC argues “Intervenors make unsupported allegations against FENOC and the [NRC] Staff that are contrary to the standards of practice for NRC adjudicatory proceedings.”³⁷ Intervenors and the NRC Staff filed answers on February 27, 2012 and March 5, 2012, respectively.³⁸

IV. Time and Place for Oral Argument

This Board will convene an oral argument on the Motion for Summary Disposition of Contention 4 and the Motion to Admit Proposed Contention 5 (and the proposed supplements and/or amendments thereto) on Monday, November 5, 2012 and continuing on Tuesday,

³³ Motion at 3.

³⁴ NRC Staff’s Answer to FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (Sept. 14, 2012); Intervenors’ Reply in Opposition to ‘FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)’ (Sept. 14, 2012).

³⁵ FENOC’s Motion to Strike Portions of Intervenors’ Reply for the Proposed Contention 5 on Shield Building Cracking (Feb. 23, 2012).

³⁶ Id. at 1.

³⁷ Id.

³⁸ See Intervenors’ Answer to FENOC ‘Motion to Strike’ (Feb. 27, 2012); NRC Staff’s Answer to FENOC’s Motion to Strike Portions of Intervenors’ Reply for the Proposed Contention 5 on Shield Building Cracking (Mar. 5, 2012).

November 6, 2012,³⁹ as necessary. Oral argument will be held in the Common Pleas Courtroom of the Lucas County Courthouse, 700 Adams Street, in Toledo, Ohio. Argument will commence at 9:00 a.m. each day and will conclude no later than 4:30 p.m.

V. Order of Presentation for Oral Argument

FENOC's July 26, 2012 Motion for Summary Disposition will be heard first. The Board will inquire whether or not the filing of the July 16, 2012 Environmental Report Severe Accident Mitigation Alternatives Analysis and License Renewal Application Amendment No. 29, entitle FENOC to summary disposition as a matter of law. Summary disposition is only appropriate when the record shows there is no genuine dispute on a material issue of fact.⁴⁰

We will then hear argument on the admissibility of Contention 5, as proposed by Intervenors. The Board will ask questions to determine whether or not the proposed contention meets the standards set forth in 10 C.F.R. § 2.309(f)(1) and whether the filing of the Shield Building Aging Management Plan (AMP) filed by FENOC on April 5, 2012 renders Contention 5 moot.

The order in which the parties address each of the motions listed above will comport with their respective burdens. Therefore, FENOC will open and close on its Motion for Summary Disposition and the Intervenors will open and close on their motion to admit Contention 5. For each motion we will hear short opening statements, limited to ten minutes each, from the Intervenors, FENOC, and the NRC Staff. Second, we will hear oral argument on the legal merits of each motion. The parties will respond to specific questions from the Board. Third, we will hear closing statements, limited to five minutes each, from each of the parties.

³⁹ We recognize that November 6 is Election Day. We encourage those who will have to travel out-of-town to attend this oral argument to vote early if their jurisdiction permits or to request an absentee ballot.

⁴⁰ 10 C.F.R. § 2.710(d)(2).

VI. Preparation for Oral Argument

In formulating their opening and closing statements and in responding to the Board's questions, participants should keep in mind that the Board will have read their pleadings. Participants should focus on the critical points in controversy, as those issues have emerged in the pleadings. The main purpose of the oral argument is to allow the Board to clarify its understanding of legal and factual points to assist it in deciding the issues presented by the pleadings. Thus, the participants should expect that their oral argument will be devoted primarily to responding to questions from the Board. The Board will endeavor to issue a supplement to this Notice and Order prior to the oral argument with specific questions and areas of inquiry.

Given that the sole purpose of this proceeding is to evaluate whether the motion for summary disposition of Contention 4 should be granted and whether proposed Contention 5 should be admitted, oral argument will only be heard from the duly authorized representatives or counsel for the Intervenors, FENOC, and the NRC Staff who have entered an appearance pursuant to 10 C.F.R. § 2.314(b). In addition, the Board will not allow the presentation of any new evidence. The purpose of this oral argument is to allow the Board to seek clarification on the pleadings as they currently exist, not to allow the parties to submit new arguments or evidence.

No witnesses, other representatives of the parties, or members of the public will be heard at this time. However, members of the public and representatives of the media are welcome to attend and observe this proceeding. This is an adjudicatory proceeding and the Board intends to conduct an orderly oral argument, focused solely on the topics now pending before the Board. Signs, banners, posters, and displays are prohibited in accordance with NRC policy.⁴¹

VII. Security at the Courthouse for Oral Argument

All interested persons should arrive at least fifteen minutes early so as to allow sufficient time to pass through any security screening. All individuals, upon entering the Courthouse, are

⁴¹ See Procedures for Providing Security Support for NRC Public Meetings/Hearings, 66 Fed. Reg. 31,719 (June 12, 2001).

subject to security screening. All persons must pass through a magnetometer and all purses, briefcases, packages, and other items must be x-rayed. If someone has an item which is not illegal but which is not permitted in the building, the item will be held at the screening station. A claim check will be issued, with the item to be retrieved upon departure from the Courthouse. If the item being brought into the Courthouse is illegal (e.g., drugs, a weapon), the person is subject to arrest. Individuals are not permitted to bring cell phones into the Courthouse unless he/she is an attorney, a public safety officer, a juror, a Courthouse employee, or has been pre-authorized by the Court Deputies Department.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 20, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **NOTICE AND ORDER (Scheduling Oral Argument)** have been served upon the following persons by Electronic Information Exchange.

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Docket No. 50-346-LR

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

Dated at Rockville, Maryland
this 20th day of September 2012