

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

October 11, 2012

ORDER

(Granting in Part and Denying in Part Motion to Strike)

On January 10, 2012, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, "Intervenors") filed a proposed Contention 5 in this proceeding.¹ FirstEnergy Nuclear Operating Company (FENOC) and the Nuclear Regulatory Commission Staff (NRC Staff) filed answers on February 6, 2012.² Intervenors filed a combined reply on February 13, 2012.³ FENOC then filed a motion to strike portions of Intervenors' reply on February 23, 2012,⁴ to which Intervenors and the NRC Staff

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

² See FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012); NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking (Feb. 6, 2012).

³ Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5 (Feb. 13, 2012).

⁴ FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking (Feb. 23, 2012) [hereinafter "Motion to Strike"].

responded on February 27, 2012, and March 5, 2012, respectively.⁵ For the reasons discussed below, FENOC's motion to strike is granted in part and denied in part.

I. LEGAL STANDARD

A reply brief may not raise new arguments beyond the scope of a proposed contention in an effort to rectify inadequacies that existed in the motion to admit the new contention.⁶ However, a reply may "legitimately amplif [y]" arguments found within the motion to admit.⁷ A reply may also respond to any legal or logical arguments put forward by other parties in their answers.⁸

II. ANALYSIS AND RULING

FENOC contends that Intervenors have put forward in their reply a number of arguments that are outside the scope of the proposed new contention, and that Intervenors have made unsupported allegations against FENOC that are "contrary to the standards of practice for NRC adjudicatory proceedings."⁹ We grant the motion to strike in part and deny it in part.

First, FENOC argues that the Board should strike Section E of Intervenors' reply, which addresses postulated accidents.¹⁰ FENOC contends that while Intervenors raised "cursory" arguments regarding postulated accidents in their original contention, "Intervenors' Reply impermissibly provides new information and arguments in a blatant attempt to cure their earlier

⁵ Intervenors' Answer to FENOC 'Motion to Strike' (Feb. 27, 2012) [hereinafter "Intervenors' Answer"]; NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention on Shield Building Cracking (Mar. 5, 2012) [hereinafter "NRC Staff Answer"].

⁶ See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 152 (2006), rev'd in part on other grounds, CLI-07-16, 65 NRC 371 (2007).

⁷ See, e.g., Nuclear Management Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006).

⁸ See Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

⁹ Motion to Strike at 1.

¹⁰ Id. at 4-6.

deficiencies.”¹¹ Intervenors claim that their “reply statements focus squarely on the issues and arguments raised by FENOC” in FENOC’s answer.¹² While the NRC Staff has indicated its support for the motion,¹³ it does not seem to have put forward any arguments on this particular subject.

While FENOC is correct that Intervenors cite new legal authority and raise certain new arguments in their reply, we believe that these citations and arguments are fairly responsive to arguments proffered by FENOC in its answer. While a party may not raise new arguments in a reply that are outside the scope of the initial contention, it may “legitimately amplify” arguments presented in its initial contention in order to fairly respond to arguments raised in the answers.¹⁴ The arguments presented by Intervenors in Section E of its reply do not strike us as attempts to belatedly broaden the scope of the contention, but rather as efforts to fairly respond to FENOC’s answer. As such, FENOC’s February 23 Motion to Strike is denied insofar as it seeks to strike Section E of Intervenors’ reply.

Second, FENOC seeks to strike Section F of Intervenors’ reply regarding cumulative effects.¹⁵ FENOC argues that “Intervenors had not included any arguments whatsoever about the ‘cumulative effects’ of changes to the Shield Building in the proposed Contention,” and that “neither FENOC nor the NRC Staff raised cumulative effects issues in their respective answers.”¹⁶ The NRC Staff agrees, arguing that “Intervenors have not identified any portion of their original pleading as raising the issue of cumulative effects.”¹⁷ Intervenors again argue that their discussion of

¹¹ Id. at 4, 5.

¹² Intervenors’ Answer at 2.

¹³ See NRC Staff Answer at 1.

¹⁴ See, e.g., Nuclear Management Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 329 (2006).

¹⁵ Motion to Strike at 6-7.

¹⁶ Id. at 6.

¹⁷ NRC Staff Answer at 6.

cumulative effects in their reply “directly responded to FENOC’s argument” and should therefore not be stricken.¹⁸ We disagree.

Intervenors’ motion to admit proposed Contention 5 did not contain the phrase “cumulative effects.” The issue of cumulative effects, as FENOC asserts, is simply outside the scope of the proposed contention. Intervenors’ argument that its discussion of cumulative effects is a fair response to arguments put forward by FENOC is not convincing. The discussion of cumulative effects is not a “legitimate amplification,” but rather an attempt to expand the scope of proposed Contention 5. As such, FENOC’s motion is granted insofar as it seeks to strike Section F of Intervenors’ reply.

Finally, FENOC contends that the Board should strike portions of the Intervenors’ reply raising accusations of fraudulent conduct against FENOC and the NRC Staff.¹⁹ FENOC argues that such allegations are “outside the bounds of appropriate conduct in an NRC adjudicatory proceeding.”²⁰ The NRC Staff agrees, arguing that Intervenors’ claims of fraud are “unsupported” and “meant to inflame rather than address any legitimate argument for contention admissibility.”²¹ We agree.

NRC Regulations provide that “parties and their representatives . . . are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law.”²² Intervenors’ actions in putting forward baseless and irrelevant allegations of fraud on the part of FENOC and the NRC Staff did not conform with this standard. As such, FENOC’s motion is granted insofar as it seeks to strike all allegations of fraudulent activity within Intervenors’ reply.

¹⁸ Intervenors’ Answer at 5.

¹⁹ See Motion to Strike at 7-10.

²⁰ Id. at 7.

²¹ NRC Staff Answer at 4.

²² 10 C.F.R. § 2.314(a).

We fully expect that the parties will conform their actions to this standard in all future activities before this Board, including the upcoming oral argument. At that argument, the Board will not entertain arguments beyond the scope of Contention 4 as it has been admitted and Contention 5 as it has been proposed and amended. The Board will not hesitate to exercise its powers to maintain decorum as necessary.²³ Unsupported allegations of fraudulent conduct will not be tolerated.

III. CONCLUSION

For the foregoing reasons, the FENOC February 23, 2012 motion to strike portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking is granted in part and denied in part as follows:

1. The motion is granted such that the entirety of Section F on pages 13 through 14 of Intervenors' reply is stricken from the record of this proceeding;
2. The motion is granted such that those portions of Section A that allege fraud, active concealment or mendacity took place are stricken from the record of this proceeding; and
3. The motion is denied insofar as it seeks to strike Section E of Intervenors' reply.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 11, 2012

²³ See id. § 2.314(c).

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
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(Davis-Besse Nuclear Power Station, Unit 1))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting in Part and Denying in Part Motion to Strike)** have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
Mail Stop O-7H4M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission.
Mail Stop T-3F23
Washington, DC 20555-0001

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Edward L. Williamson, Esq.
E-mail: edward.williamson@nrc.gov

William J. Froehlich, Chair
Administrative Judge
E-mail: william.froehlich@nrc.gov

Lloyd B. Subin, Esq.
E-mail: lloyd.subin@nrc.gov
Brian Harris, Esq.
E-mail: brian.harris@nrc.gov

Nicholas G. Trikouros
Administrative Judge
E-mail: nicholas.trikouros@nrc.gov

Catherine Kanatas, Esq.
E-mail: catherine.kanatas@nrc.gov
Brian P. Newell, Paralegal
E-mail: brian.newell@nrc.gov

William E. Kastenber
Administrative Judge
E-mail: wek1@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Matthew Flyntz, Law Clerk
E-mail: matthew.flyntz@nrc.gov
Onika Williams, Law Clerk
Email: onika.williams@nrc.gov

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

Davis-Besse Nuclear Power Station, Docket No. 50-346-LR
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Morgan, Lewis & Bockius
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
Stephen Burdick, Esq.
E-mail: sburdick@morganlewis.com
Kathryn M. Sutton, Esq.
E-mail: ksutton@morganlewis.com
Martin O'Neill, Esq.
E-mail: martin.oneill@morganlewis.com
Timothy Matthews, Esq.
E-mail: tmatthews@morganlewis.com
Jane Diecker, Esq.
E-mail: jdiecker@morganlewis.com
Mary Freeze, Legal Secretary
E-mail: mfreeze@morganlewis.com

Citizens Environmental Alliance (CEA)
of Southwestern Ontario
1950 Ottawa Street
Windsor, Ontario Canada N8Y 197

Green Party of Ohio
2626 Robinwood Avenue
Toledo, Ohio 43610

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

Terry J. Lodge, Counsel for CEA, Don't
Waste Michigan, and Green Party of Ohio
316 N. Michigan Street, Suite 520
Toledo, OH 43604-5627
E-mail: tjlodge50@yahoo.com

Beyond Nuclear
6930 Carroll Avenue Suite 400
Takoma Park, Md. 20912
Kevin Kamps
E-mail : kevin@beyondnuclear.org
Paul Gunter
E-mail : paul@beyondnuclear.org

[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of October 2012