

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. Kastenber

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 Motion to Strike)

On July 26, 2012 FirstEnergy Nuclear Operating Company (“FENOC”) filed a Motion for Summary Disposition of Contention 4.¹ On September 14, 2012 the Nuclear Regulatory Commission Staff (“NRC Staff”) filed an answer and Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (collectively, “Intervenors”) filed a reply to the FENOC Motion for Summary Disposition.² On September 24, 2012 FENOC filed the instant motion to strike Intervenors’ Reply.³ Intervenors

¹ FENOC Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Term) (July 26, 2012) [hereinafter “FENOC Motion for Summary Disposition”].

² NRC Staff’s Answer to FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (Sept. 14, 2012) [hereinafter “NRC Staff Answer”]; Intervenors’ Reply in Opposition to ‘FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)’ (Sept. 14, 2012) [hereinafter “Intervenors’ Reply”].

³ FENOC’s Motion to Strike Intervenors’ Reply in Opposition to FENOC’s Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms) (Sept. 24, 2012) [hereinafter “FENOC’s Motion to Strike”].

filed an answer in opposition to the FENOC Motion to Strike on October 4, 2012.⁴ This Order addresses FENOC's Motion to Strike.

I. PROCEDURAL BACKGROUND

This underlying proceeding in this docket concerns FENOC's application to renew its operating license for the Davis-Besse Nuclear Power Station, Unit 1 for an additional twenty years.⁵ On December 27, 2010, Intervenors petitioned to intervene in this proceeding, setting forth a number of contentions including, Contention 4, challenging FENOC's analysis of severe accident mitigation alternatives or "SAMAs."⁶ SAMA analyses identify and assess possible plant changes – such as hardware modifications and improved training – that could cost-effectively reduce the radiological risk of a severe accident.⁷

On April 26, 2011, the Board rejected several of the Intervenors' arguments raised in Contention 4 based on the grounds that the arguments (1) fell outside of the scope of the licensing proceeding; (2) failed to raise a material issue; (3) lacked support by alleged facts or expert opinion; or (4) failed to show a genuine dispute.⁸ The Board narrowed Contention 4, finding Intervenors' challenges to the SAMA analysis source terms, decontamination costs, and plume dispersion modeling to be admissible elements of the Contention.⁹

⁴ Intervenors' Response in Opposition to FENOC's Motion to Strike Intervenors' Reply in Opposition to FENOC's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms) (Oct. 4, 2012) [hereinafter "Answer to FENOC's Motion to Strike"].

⁵ FENOC's License Renewal Application is available on the NRC's public website at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-lra.pdf>.

⁶ See 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) at 100.

⁷ Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 5 (2002).

⁸ LBP-11-13, 73 NRC 534, 565-77 (2011).

⁹ Id. at 577-86.

On May 6, 2011, FENOC appealed the admission of Contention 4.¹⁰ In an Order issued on March 27, 2012, the Commission reversed the Board's admissibility ruling as to Contention 4, in part, and dismissed two of three parts of the admitted Contention.¹¹

On July 26, 2012, FENOC filed a motion for summary disposition as to the sole remnant of Contention 4 – Intervenor's source term claims.¹² On September 14, 2012, the NRC Staff filed in support of FENOC's motion for summary disposition and the Intervenor's filed a reply in opposition to FENOC's motion for summary disposition.¹³ FENOC timely filed the instant Motion to Strike on September 24, 2012, arguing that the Intervenor's "reply in opposition" raised arguments outside the scope of Contention 4.¹⁴ The Intervenor's filed an answer opposing the motion to strike on October 4, 2012.¹⁵

II. LEGAL STANDARD

A motion to strike may be granted where a pleading or other submission contains information that is "irrelevant," or, in the context of summary disposition, portions of a filing or affidavit contain technical arguments based on questionable competence.¹⁶

A motion to strike is of limited value when it is lodged against a response to a motion for summary disposition. This is because a proponent of a motion for summary disposition bears

¹⁰ FENOC's Notice of Appeal of LBP-11-13 (May 6, 2011).

¹¹ CLI-12-08, 75 NRC __, __-__ (slip op. at 17-34) (Mar. 27, 2012).

¹² FENOC Motion for Summary Disposition at 20-21.

¹³ See NRC Staff Answer and Intervenor's Reply.

¹⁴ FENOC's Motion to Strike at 1.

¹⁵ See Answer to FENOC's Motion to Strike.

¹⁶ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003).

the burden of proof even if the motion for summary disposition is unopposed and no reply is filed.¹⁷

III. ANALYSIS AND RULING

FENOC argues that Intervenors' Reply and Statement of Material Facts in Opposition to FENOC's Motion for Summary Judgment impermissibly consists of new arguments related to shield building cracking and containment vessel corrosion.¹⁸ FENOC contends that the new arguments presented in Intervenors' Reply and Statement of Material Facts are not within the scope of admitted Contention 4¹⁹ and improperly raise two new arguments: (1) FENOC's SAMA analysis does not take into account the Davis-Besse shield building cracking issue; and (2) FENOC's SAMA analysis does not reference apparent corrosion of the Davis-Besse inner steel containment vessel.²⁰ FENOC asserts that Intervenors' new arguments improperly attempt to expand the scope of Contention 4 without first seeking leave from the Board to admit a new, or amend an existing, contention; thus, Intervenors' Reply and Statement of Material Facts should be stricken.²¹

¹⁷ The Appeals Board quoting from Moore's Federal Practice, "Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required." Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977).

The Appeals Board also quoted from the Supreme Court, who in turn was quoting from the Federal Rules Advisory Committee: "the Committee stated that '[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*'" Id. (emphasis in original).

¹⁸ FENOC's Motion to Strike at 3-4.

¹⁹ Id. at 4.

²⁰ Id. at 5 (citing Reply to FENOC's Motion for Summary Disposition at 1-2).

²¹ FENOC's Motion to Strike at 7.

Intervenors contend in their Answer to FENOC's Motion to Strike that the arguments raised in their Reply to FENOC's Motion for Summary Disposition are within the scope of Contention 4 because Intervenors' opposition arguments pertain to "scenarios involving a fatally-cracked and compromised shield building and corroded containment shell" – elements not addressed in FENOC's SAMA analysis.²² Thus, Intervenors assert that their opposition arguments are relevant to the source terms used in FENOC's SAMA analysis because the source terms do not account for a cracked shield building or a corroded steel containment.²³ In addition, Intervenors acknowledge that they did not formally file a motion to amend Contention 4 to include their cracking and steel containment objections, but contend that FENOC should not have been surprised by Intervenors' Reply to FENOC's Motion for Summary Disposition because Intervenors commented that the structural problems in the shield building and steel containment shell would affect FENOC's SAMA analysis in their initial and supplemental filings related to Contention 5 (the proposed shield building cracking Contention currently pending before this Board).²⁴

The Board finds that Intervenors' Reply and Statement of Material Facts are outside the scope of Contention 4 and should be stricken in their entirety. Intervenors' Reply and Statement of Material Facts are not only irrelevant to FENOC's Motion for Summary Disposition of Contention 4, but are entirely unrelated to and beyond the scope of Contention 4 as admitted by the Board and limited by the Commission. NRC regulations "do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted

²² Answer to FENOC's Motion to Strike at 5.

²³ See id. at 6.

²⁴ Id. at 7 (citing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (January 10, 2012) at 26).

contentions beyond their reasonably inferred bounds.”²⁵ Intervenors contend that their cracking and steel containment objections fall within the “reasonably inferred bounds” of Contention 4.²⁶ We disagree. Contention 4, as limited by this Board and the Commission, challenges only the MAAP code generated source terms used by FENOC in performing its SAMA analysis. While Intervenors’ concerns regarding the Davis-Besse containment may well have some relation to FENOC’s SAMA analysis, the scope of Contention 4 does not encompass any and all arguments Intervenors have relating to SAMAs. Contention 4 is a very narrow contention, and it is beyond reason to suggest that Intervenors’ arguments regarding the Davis-Besse shield building and containment are within its scope.

Intervenors could have presented these arguments in a motion to amend Contention 4 or a motion to admit a new contention, but they did not.²⁷ Thus, the Board grants FENOC’s Motion and strikes Intervenors’ Reply to FENOC’s Motion for Summary Disposition.

IV. CONCLUSION

For the foregoing reasons, FENOC’s September 24, 2012 Motion to Strike Intervenors’ Reply in Opposition to FENOC’s Motion for Summary Disposition of Contention 4 is GRANTED; Intervenors’ September 14, 2012 Reply in Opposition to FENOC’s Motion for Summary Disposition of Contention 4 is stricken in its entirety. We note, however, that FENOC continues to bear the burden of demonstrating that summary disposition should be granted,²⁸ and we will

²⁵ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010).

²⁶ Answer to FENOC’s Motion to Strike at 4.

²⁷ See 10 C.F.R. § 2.309(f)(2).

²⁸ See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754 (1977) (“[T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.”) (quoting 6 James Moore, Moore’s Federal Practice ¶ 56.22 (2d ed. 1966)).

proceed with oral argument on the motion for summary disposition on November 5 and November 6 as planned.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 11, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)

CERTIFICATE OF SERVICE

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

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

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