October 31, 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 INTERVENORS' MOTION FOR RECONSIDERATION OF ASLB ORDER GRANTING FENOC'S MOTION TO STRIKE INTERVENORS' REPLY IN OPPOSITION TO FIRSTENERGY'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 4 (SAMA ANALYSIS – SOURCE TERMS)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Regulatory Commission ("NRC") Staff hereby files it answer to "Intervenors' Motion for Reconsideration of ASLB Order Granting FENOC's Motion to Strike Intervenors' Reply in Opposition to FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)" ("Intervenors' Motion") (Oct. 22, 2012) jointly filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively "Intervenors") regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application ("LRA") for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").[1]

As set forth below, the Atomic Safety and Licensing Board ("Board") should deny Intervenors' Motion. First, the Motion does not meet the high standards governing a Board's reconsideration of its own decisions because it does not show the compelling circumstances warranting reconsideration. Second, Intervenors failed to consult with the parties as required by

[1] Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse, Agencywide Documents Access and Management System ("ADAMS") Accession No. ML1024505650) ("LRA").

the Board's Initial Scheduling Order ("ISO") and 10 C.F.R. § 2.326(b). Therefore, the Intervenors' Motion should be denied.

BACKGROUND

This proceeding concerns FENOC's August 27, 2010 application to renew its operating license for Davis-Besse for an additional twenty years from the current expiration date of April 22, 2017.[2] On December 27, 2010, Intervenors petitioned to intervene and set forth a number of contentions, including Contention 4, which challenged FENOC's analysis of severe accident mitigation alternatives ("SAMAs").[3] Contention 4 was admitted by the Board, but only after being narrowed by the Board[4] and further narrowed by the Commission.[5] On July 26, 2012, FENOC filed a motion for summary disposition on the remainder of Contention 4.[6] Intervenors filed a reply in opposition.[7]

FENOC moved to strike Intervenors' reply.[8] On October 11, 2012, the Board struck the Intervenors' reply in its entirety on the grounds that it raised arguments "irrelevant" to FENOC's

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[2] LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

[3] 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, at 100 (Dec. 27, 2010) (ADAMS Accession No. ML103610406).

[4] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC 534, 577-86 (2011).

[5] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, __-__ (slip op. at 17-34) (Mar. 27, 2012).

[6] FENOC Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Term) (July 26, 2012) (ADAMS Accession No. ML12208A431) ("Motion for Summary Disposition").

[7] Intervenors' Reply in Opposition to 'FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)' (Sept. 14, 2012) (ADAMS Accession No. ML12258A777) ("Reply to FENOC's Motion for Summary Disposition").

[8] 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) (ADAMS Accession No. ML12268A376) ("Motion to Strike"). Intervenors opposed this motion. *See* 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) (ADAMS Accession No. ML12278A040) ("Answer Opposing FENOC's Motion to Strike").

motion for summary disposition and "entirely unrelated to and beyond the scope of Contention 4 as admitted by the Board and limited by the Commission."[9] On October 22, 2012, Intervenors filed the instant Motion, asking the Board to reconsider its decision to strike Intervenors' reply to FENOC's motion for summary disposition.[10]

DISCUSSION

I. Intervenors' Motion Does Not Meet the Reconsideration Standards

The regulations state that "[m]otions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid."[11]

A. Intervenors Do Not Demonstrate a Clear and Material Error

Intervenors' Motion should be denied because it fails to demonstrate a clear and material error in the Board's decision as required under 10 C.F.R. § 2.323(e). The Commission has held:

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[9] Order (Granting Motion To Strike), at 5 (Oct. 11, 2012) (ADAMS Accession No. ML12285A376) ("Order").

[10] The Intervenors emailed their Motion to all parties on October 22, 2012, and indicated that they were experiencing difficulties with the EIE system. Email from T. Lodge, Counsel for Intervenors, (Oct. 22, 2012, 11:54 EDT). In that email, Mr. Lodge indicated that he would contact the "Help Desk in the morning and try to properly file [Intervenors' Motion] in the EIS (sic) system on October 23." *Id.* Inexplicably, Intervenors waited an additional seven (7) days before filing a new motion, "Motion to File 'Intervenors' Motion for Reconsideration of ASLB Order Granting FENOC's Motion to Strike' *Nunc Pro Tunc*" ("*Nunc Pro Tunc* Motion") (Oct. 30, 2012). Intervenors again failed to consult or certify regarding the *Nunc Pro Tunc* Motion. Intervenors' *Nunc Pro Tunc* Motion also fails to indicate or provide any reason for the delay in filing Intervenors Motion on October 23, 2012, as indicted in their October 22, 2012 email. Although the Staff sees no reason to oppose Intervenors' *Nunc Pro Tunc* Motion, the cavalier attitude towards the Board's ISO and need to consult with the parties prior to filing motions continues a troubling trend in this proceeding.

[11] 10 C.F.R. § 2.323(e). In its Statements of Consideration for the 2004 changes to the NRC's Rules of Practice, the Commission stated that it "intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier." Final Rule; Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

> Petitions for reconsideration should not be used merely to re-argue matters that the Commission already [has] considered but rejected. Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."[12]

Likewise, citing § 2.323(e), the Commission denied a reconsideration petition that "incorporate[d] by reference the legal arguments made in the previous motions . . . and otherwise provide[d] no new justification as to why these decisions deserve reconsideration."[13]

The Intervenors merely rehash arguments that the Board rejected in its Order granting FENOC's Motion to Strike. They do not provide even one new explanation as to why their Reply to FENOC's Motion for Summary Disposition is within the scope of Contention 4. For example, in their Answer Opposing FENOC's Motion to Strike, Intervenors challenged the MAAP code generated source terms based on the physical condition of the Davis-Besse shield building and containment:

> In ¶ 47 of its Statement of Material Facts, FENOC asserts the MAAP4 program has been benchmarked against Three Mile Island and other severe accident studies. Intervenors point out in opposition that the scenarios involving a fatally-cracked and compromised shield building and corroded containment shell do not appear to have been addressed.[14]

In the instant Motion, Intervenors make the same out of scope argument:

> In ¶ 47 of its Statement of Material Facts, FENOC asserts the MAAP4 program has been benchmarked against Three Mile Island and other severe accident studies. Intervenors pointed out in their opposition to summary disposition (and in their response to the Motion to Strike at p. 5) that the scenarios of a fatally-cracked and compromised shield building and corroded containment shell were not addressed in the course of that bench-marking.[15]

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[12] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003) (alterations in original) (internal quotation marks omitted).

[13] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC 245, 252 (2010).

[14] Answer Opposing FENOC's Motion to Strike at 5.

[15] Motion at 2.

This is but one example; each argument in the Intervenors' Motion shares a nearly word-for-word identity with prior unsuccessful arguments.

Moreover, the Board fully appreciated Intervenors' assertions "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."[16] However, the Board held that such arguments were not relevant to the narrow issues of the admitted contention:

> Contention 4, as limited by the Board and the Commission, challenges only the MAAP code generated source terms used by FENOC in performing its SAMA analysis. . . . 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.[17]

As the Board correctly concluded, arguments which at root rely on the physical condition of Davis-Besse's shield building and containment, even if couched in terms of a challenge to the MAAP code generated source terms, are far outside the scope of Contention 4. Intervenors cannot meet the high bar for reconsideration because they merely repeat out of scope arguments already rejected by the Board.

II. Intervenors' Failed to Consult or Include in Their Motion the Required Certification

Intervenors' Motion should also be denied because, as has often been Intervenors' practice in this proceeding, there was no consultation or certification in their Motion as required by the Commission's regulations and the Board's ISO.[18] Specifically, 10 C.F.R. § 2.323(b) provides that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other

[16] Order at 5.

[17] *Id.* at 6.

[18] *See, e.g.*, NRC Staff's Answer to Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5', at 8-9 (Mar. 8, 2012) (ADAMS Accession No. ML12068A095); NRC Staff's Answer to Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking), at 12-13 & n.57 (Jun. 29, 2012) (ADAMS Accession No. ML12181A013).

parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." Likewise, the Board's ISO clearly states that "motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. 2.323(b) that a sincere attempt to resolve the issues has been made."[19] Intervenors did not consult with the Staff by telephone, email, or any other means of communication in an attempt to resolve the issues raised by the Motion before filing, and the Motion does not contain the required certification. Because of these procedural defects, the Motion should be denied.[20]

CONCLUSION

For all of the reasons set forth above, the Board should deny Intervenors' Motion.

Respectfully submitted,

Signed (electronically) by
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[19] ISO at G.1.

[20] The Staff also notes that Intervenors have still failed to file this Motion via the Electronic Information Exchange as required by 10 C.F.R. § 2.302(a).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that "NRC STAFF'S ANSWER TO INTERVENORS' MOTION FOR RECONSIDERATION OF ASLB ORDER GRANTING FENOC'S MOTION TO STRIKE INTERVENORS' REPLY IN OPPOSITION TO FIRSTENERGY'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 4 (SAMA ANALYSIS – SOURCE TERMS)", in the above-captioned proceeding have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 31st day of October, 2012.

Signed (electronically) by
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Date of Signature: October 31, 2012