UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company Davis-Besse Nuclear Power Station, Unit 1	)	June 21, 2013
Regarding the Proposed Amendment to Facility Operating License	)	

PETITIONERS' REPLY IN SUPPORT OF 'PETITION TO INTERVENE AND FOR AN ADJUDICATORY PUBLIC HEARING OF FENOC LICENSE AMENDMENT REQUEST'

Now come Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Ohio Sierra Club, hereafter referred to as the "Petitioners," and hereby respond to the "NRC Staff Answer to the Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and Ohio Sierra Club Joint Request for a Hearing and Petition for Leave to Intervene" (NRC Staff Answer) and "FirstEnergy Nuclear Operating Company's Answer Opposing Petition to Intervene and Request for Hearing Regarding Technical Specification License Amendment Request" (FirstEnergy or FENOC Answer). For reasons discussed herein, the Petition should be granted and the Petitioners accorded a merits hearing.

I. STANDING

FENOC and the NRC Staff predictably conflate the concept of standing to sue, improperly, with the merits of the Petition, returning a result of nonsuit. They also misread and misapply other commonly-understood standing principles, exaggerating the legally-required showing

which Petitioners must make.

A. Petitioners Stated Cognizable Facts And Concerns To Establish Proximity And Injury-in-Fact Standing

The Petitioners used a "form" declaration to assert their standing. Each individual declaration submitted contains these allegations:

> 3) FirstEnergy Nuclear Operating Corporation (FENOC) has applied for an amendment to the Davis-Besse operating license technical specifications related to replacement of a steam generator at the power plant, scheduled for 2014.
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> 4) I have safety and environmental concerns about the Davis-Besse plant's operations. I do not believe adequate information has been disclosed about the steam generator project. Also, lessons about the steam generator failures at the San Onofre plant have not been adequately explored or incorporated into the Davis-Besse plan. I believe the proposal may pose unacceptable risks to the environment and public health and my personal health and safety.

In their Petition to Intervene, the Petitioners allege several bases for their concerns about safety which give dimension to their assertions of standing:

> > The shield building at the plant will be subjected to an unprecedented fourth (4th) wall penetration to allow swapping the old generator components for the new. This raises the potential for additional aggravation of already-existing structural cracks identified in that building in 2011, and could conceivably cause failure of a critical safety component (the building itself or the steel containment structure inside it which houses the reactor). Petition at 4.
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> > The new steam generator equipment may fail, compromising safety margins for operation of the nuclear reactor. In short, without[1] the opportunity for a public hearing and independent assessment of the complete plans, Davis-Besse may operate unsafely and pose an undue and unacceptable risk to the environment, and jeopardize the health, safety and welfare of the Petitioners' members who live, recreate and conduct their business in the vicinity of the nuclear power plant. Petition at 4-5.
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> > Arnold Gundersen, a nuclear engineer who is Petitioners' expert, opined in his

[1] Use of "with" instead of "without" in this passage as it appears in the Petition was a typographical error.

written report filed with the Petition, listed nine (9) physical differences[2] between the 2013 steam generators and those installed when Davis-Besse was constructed, and opined that "Each and every one of these aforementioned changes is significant individually, and when taken together prove that the Replacement OTSG contains ***many experimental parameters, especially in comparison to the Original OTSG***." (Emphasis supplied). Expert Witness Report of Arnold Gundersen (Gundersen Report) at 5, incorporated by reference into Petition, but also quoted at Petition pp. 11-12.

> Gundersen concludes in his report that "the list of experimental changes identified by FENOC does not include the additional modifications applied by FENOC to cut into the Davis-Besse containment for the fourth time since it was constructed. To the best of Fairewinds' knowledge and belief, no other containment structure has been cut open more than twice, yet Davis-Besse's fourth containment perforation should have been identified by the 10 C.F.R. § 50.59 process as problematic and therefore requiring a license amendment review and application." Gundersen Report at 5-6, quoted in Petition at p. 15.

For purposes of assessing injury-in-fact or any other aspect of standing, a hearing petitioner's factual assertions, if uncontroverted, must be accepted. *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 82 (1993). The Atomic Safety and Licensing Board (ASLB) "must accept as true all material factual allegations of the petition, except to the extent [it] deem[s] them to be overly speculative." *Envirocare of Utah, Inc.* (By-product Material Waste Disposal License), LBP-92-8, 35 NRC 167, 173 (1992).

Petitioners' expression of concern that the lessons learned from the steam generator controversy at San Onofre, which ultimately triggered the recent permanent shuttering of the plant, are being ignored in the Davis-Besse steam generator replacement plan. The reference to

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[2] A tenth (10^{th}) difference appears in the 2010 Environmental Report, Appendix E, http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-envir o.pdf:

"Each of the once-through steam generators is a vertically-mounted, straight-tube and shell counter-flow heat exchanger that converts heat from the reactor coolant system into steam to drive the turbine generators and produce electricity. ***The existing steam generators are each approximately 75 feet long, have a diameter of approximately 15 feet, and weigh approximately 590 tons. The replacement steam generators will be dimensionally equivalent to the original steam generators, but weigh only approximately 465 tons each."***

San Onofre bespeaks an engineering catastrophe that posed danger to Californians of a major radiation release. In his report in support of the Petition, Arnold Gundersen compared the bungled steam generator design change process at San Onofre with the similarly-trivialized analysis of design differences between the original and replacement generators at Davis-Besse. Gundersen stated in his expert report that 'In the detailed analysis of the [Southern California] Edison RSGs, Fairewinds identified 39 separate safety issues that failed to meet the NRC 50.59 criteria." He points out that it is literally "impossible" for FENOC to have incorporated any "lessons learned" in the replacement steam generators for Davis-Besse, "since the San Onofre RSGs failed in 2012, well after the D-B ROTSGs were already in fabrication. Quite simply, the Davis-Besse ROTSG could not have been modified to reflect any lessons learned from the technical failures at San Onofre Units 2 and 3." Gundersen report at 8.

The Atomic Safety and Licensing Board at San Onofre observed that

> Steam generator tubes serve critical safety functions. For example, they are an integral part of the reactor coolant pressure boundary and thus are essential for maintaining primary system pressure and coolant inventory. They also isolate the radioactive fission products in the primary coolant from the secondary system.

Southern California Edison Co, (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07 at 2 (May 13, 2013).

According to FENOC's license amendment request, ML 103018A350, the design basis accident release rate for Davis-Besse's steam generators assumes that only one tube can suffer an open-ended failure during a main steam line break accident and be adequately compensated for by system feedwater features. *Id.*, *see* "Evaluation of the Proposed Amendment" p. 40/49[3] (of

[3] "The steam generator tube rupture (SGTR) accident is the limiting design basis event for SG tubes and avoiding an SGTR is the basis for this Specification. The analysis of a SGTR event assumes a

.pdf). In these circumstances, high pressure radioactive water from the primary system enters the lower pressure steam cycle that is normally not radioactive. The tube failure provides a release path out of the containment into the non-radioactive spaces and into the environment.

When the Southern California Edison Company decided to avoid the 10 C.F.R. §50.59 licensing process at San Onofre, four replacement steam generators were fabricated. In January of 2012, a single tube in the Replacement Steam Generator on San Onofre Unit 3 failed and the unit was shut down. Resulting tests showed that design errors ignored by Edison's 10 C.F.R. §50.59 process caused at least eight tubes to thin to the point where they would have failed if a main steam line break accident occurred. Should this event have occurred, resulting water losses from the primary side to the secondary side would have exceeded the ability of emergency systems to provide adequate core cooling and a meltdown would have occurred. Reactor operators are not trained to address this scenario.

The experimental changes to the design of the tubes in the Davis-Besse replacement once through steam generators (ROTSG) could cause a similar cascading tube failure of more than one tube. In the event of multiple tube failures, accident releases from Davis-Besse can exceed engineered safety limits, and safety systems cannot provide adequate makeup water. Plant operators are not trained to mitigate this accident.

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bounding primary to secondary LEAKAGE rate equal to the operational LEAKAGE rate limits in LCO 3.4.13, "RCS Operational LEAKAGE," plus the LEAKAGE rate associated with with a double-ended rupture of a single tube. The accident analysis of a SGTR assumes the contaminated secondary fluid is released to the atmosphere via main steam safety valves.

The analysis for design basis accidents and transients other than a SGTR assume the SG tubes retain their structural integrity *(i.e.*, they are assumend not to rupture). In these analyses, the steam discharge to the atmosphere is based on the total primary to secondary LEAKAGE from all SGs of 1 gallon per minute. DOSE EQUIVALENT I-131 is assumed to be equivalent to 1% filed fuel in the accident analysis. The does consequences of these events are within the limits of GDC 19 (Ref. 2), 10 CFR 100 (Ref. 3) or the NRC approved licensing basis (*e.g.*, a small fraction of these limits)."

Hence, contrary to the assertions of the NRC Staff (Answer at 12) and FENOC (Answer at 14) in the event of steam generator failure, there is "obvious potential for radiological harm at a particular distance frequented by a petitioner."[4] *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005). "A petitioner may base its standing upon a showing that his or her residence, or that of its members, is 'within the geographical zone that might be affected by an accidental release of fission products.'" *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 371 n.6 (1973);" *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (1979). Distances of as much as 50 miles have been held to fall within this zone. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

B. Staff and FENOC Conflation Confusion

Both the NRC Staff and FirstEnergy have blurred concepts of Petitioners' legal standing with the merits of the Petition. This is apparent in tenuous arguments advanced by both.[5] The ultimate result is to elevate the requirement of standing to the expectation, at the outset of a proceeding, of proof beyond a reasonable doubt that petitioners will prevail on the merits after trial. In evaluating Petitioners' claims here, care must be taken to avoid "the familiar trap of

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[4] Including, surely, those Petitioners whom, as the NRC Staff helpfully clarified, reside 23 miles or so from Davis-Besse, see NRC Staff Answer at 13 fn. 41.

[5] For example, see NRC Staff answer at 14: "Furthermore, if a SG replacement at DBNPS were to lead to the nuclear power station being permanently shutdown like Crystal River and San Onofre, it is unclear what radiological injury-in-fact could result from this speculative outcome."

Also, *see* FENOC Answer at 16-17: "Moreover, Petitioners' general concerns about the safety of Davis-Besse due to the new steam generators, Shield Building penetrations, or their other arguments do not support the causation prong of standing, because these concerns are not 'traceable to the proposed action,' which relates to amending four Davis-Besse Technical Specifications to account for material and dimension changes in the new steam generators.As a result, these issues are outside the scope of the LAR and cannot be used as a basis for standing in this proceeding.

confusing the standing determination with the assessment of petitioner's case on the merits." *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 82 (1993), *citing City of Los Angeles v. Nat'l Highway Traffic Safety Admin*., 912 F.2d 478, 495 (D.C. Cir. 1990), *cert. denied*, 117 L.Ed. 2d 460 (1992); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 68 (1994), *aff'd*, CLI-94-12, 40 NRC 64 (1994); *Sequoyah Fuels Corp.* (Gore, Oklahoma, Site Decommissioning), CLI-01-02, 53 NRC 2, 15 (2001).

While the Staff and FENOC would no doubt prefer to consign the Petition to the tender mercies of the Red Queen in Alice in Wonderland,[6] Petitioners expect the ASLB to avoid conflation of standing and merits.

C. An Alleged Injury To A Purely Legal Interest Is Sufficient To Support Standing

In the individual standing declarations, the declarants "do not believe adequate information has been disclosed about the steam generator project" and that "lessons about the steam generator failures at the San Onofre plant have not been adequately explored or incorporated into the Davis-Besse plan." These averments are supported within the petition by a recitation[7] of the

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[6] http://www.literature.org/authors/carroll-lewis/alices-adventures-inwonderland/chapter-12.html:

"'Let the jury consider their verdict,' the King said, for about the twentieth time that day.
`No, no!' said the Queen. `Sentence first - verdict afterwards.'
`Stuff and nonsense!' said Alice loudly. `The idea of having the sentence first!'"

[7] From Petition at 4-5: "This proposed amendment calls for installation of new, untested steam generator equipment. The shield building at the plant will be subjected to an unprecedented fourth (4th) wall penetration to allow swapping the old generator components for the new. This raises the potential for additional aggravation of already-existing structural cracks identified in that building in 2011, and could conceivably cause failure of a critical safety component (the building itself or the steel containment structure inside it which houses the reactor). The new steam generator equipment may fail, compromising safety margins for operation of the nuclear reactor. In short, with*out* the opportunity for a public hearing and independent assessment of the complete plans, Davis-Besse may operate unsafely and pose an undue

untested nature of the new steam generators and concerns that the unprecedented fourth (4th) penetration of the shield building - which is degraded by widespread cracking - require more comprehensive scrutiny, beyond technical specification changes which are the narrow rationale FENOC considers to be the sole basis for a license amendment. These are calls for rigorous procedural scrutiny of the proposed replacement project. They are expressions of a legal interest in the proper application of regulations and in particular, of use of the Atomic Energy Act hearing right.

An alleged injury to a purely legal interest is sufficient to support standing. Thus, a petitioner derived standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189.a. of the AEA. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990). Standing may be based upon the alleged loss of a procedural right, as long as the procedure at issue is designed to protect against a threatened concrete injury, and the loss of rights to notice, opportunity for a hearing and opportunity for judicial review constitute a discrete injury. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 93-94 (1993).

Petitioners have, then, demonstrated standing to enforce their legal interest in the project.

D. Prior Participation In Proceedings Involving The Same Facility Vitiates Need For New Proofs Of Standing

Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, and Don't Waste Michigan, of the putative intervening organizations, and Michael Keegan of the individ-

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and unacceptable risk to the environment, and jeopardize the health, safety and welfare of the Petitioners' members who live, recreate and conduct their business in the vicinity of the nuclear power plant."

ually-designated intervenor representatives, all were accorded standing in the Davis-Besse Nuclear Power Station license renewal proceeding. That proceeding remains on the Commission's active docket.

The conferring of standing on these parties should occur without any further scrutiny. If an intervenor has established standing in a prior proceeding involving the same facility, there is no need for the intervenor to establish standing in a later proceeding. *U.S. Army* (Jefferson Proving Ground), LBP-04-01, 59 NRC 27, 29 (2004). Under certain circumstances, even if a current proceeding is separate from an earlier proceeding, the Commission may refuse to apply its rules of procedure in an overly formalistic manner by requiring that petitioners participating in the earlier proceeding must again identify their interests to participate in the current proceeding. *Georgia Inst. of Tech*. (Georgia Tech Research Reactor), LBP-95-14, 42 NRC 5, 7 (1995) (*citing Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2) LBP-91-33, 34 NRC 138 (1991)).

E. The Board Should Consider The Contribution Petitioners May Make To The Proceeding

Even if the Board believes that Petitioners have not made their case for any other form of standing, it should take into account Petitioners' contribution to the license amendment proceeding already, in the form of a report from one of the same public experts who was involved in the litigation over the San Onofre steam generator controversy, and grant leave to Petitioners to intervene on that basis.

Where a petitioner does not satisfy the judicial standards for standing, intervention could still be allowed as a matter of discretion. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983); *Sacramento Mun. Util. Dist*.

(Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 358 (1993). Licensing Boards may, as a matter of discretion, grant intervention in domestic licensing cases to petitioners who are not entitled to intervene as of right under judicial standing doctrines but who may, nevertheless, make some contribution to the proceeding. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610 (1976).

Moreover, taking into account the previous contributions that most of the petitioning organizations have made during more than three (3) years of activity in the Davis-Besse license renewal proceeding, the cognizable legal injury alleged, and the assertions respecting injury-in-fact, the ASLB may justifiably grant Petitioners the status of intervenors to ensure that the public's interest in a transparent license amendment process is respected.

II. REPLY AS TO SCOPE AND ENFORCEMENT OBJECTIONS

The NRC Staff and FENOC both complain that the Petition raises issues beyond the scope of the license amendment request, and that Petitioners seek, in effect, an enforcement action, for which the only available remedy is a 10 C.F.R. §2.206 petition. See NRC Staff Answer at 15; FENOC Answer at 22.

A. At Issue Is FENOC's Purposeful Limitation Of The Scope Of The License Amendment Request

Central to this litigation is the question of whether FENOC should have sole discretion to decide the scope of the license amendment request (a view acquiesced in by the NRC Staff). Petitioners submit that such unbridled discretion does not exist and that the supine posture of the NRC on this issue has contributed to recent disastrous results in steam generator replacements.

The argument goes as follows. "There is no requirement to individually submit 10 C.F.R.

§ 50.59 analyses to the NRC, although they are maintained onsite available for inspection." NRC Staff Answer at 15, fn. 58. Additionally, licensees "shall update periodically . . . the [FSAR] . . . [which] shall include the effects of . . . all safety analyses and evaluations performed by the . . . licensee . . . in support of conclusions that changes did not require a license amendment in accordance with § 50.59(c)(2) . . . ." 10 C.F.R. § 50.71(e). *Id.* "Furthermore, just because the NRC is not immediately scrutinizing any potential FENOC 10 C.F.R. § 50.59 analyses regarding the installation of replacement SGs at DBNPS does not mean that the NRC has relinquished oversight of this planned installation. To the contrary, the NRC has already scheduled SG replacement inspections at DBNPS in accordance with NRC inspection procedures 50001." *Id.* Finally, according to the NRC Staff and FENOC views, the public notice dictates with finality the scope - *i.e.*, the sole topics which may be addressed - of the hearing opportunity. FENOC Answer 20.

The FENOC-NRC Staff position, then, is that the utility company is allowed to maintain, secreted away from public scrutiny, the methodology and reasoning by which it concluded that major design changes of the replacement steam generators did not contradict the "fit-form-function" licensing parameters of the original Davis-Besse license. This protected, unregulated zone also is impermeable to any outsider seeking to understand how FENOC fulfilled the "like-for-like" comparison necessitated by 10 C.F.R. § 50.59. Thus FENOC is allowed to restrict its decisions from public scrutiny. Despite disastrous results following the hide-and-seek Southern California Edison misjudgments at San Onofre, the NRC Staff has nevertheless left it to FENOC to invoke at its option whatever limitation upon the scope of public inquiry it deems best for the hearing.

B. The AEA And Commission Interpretation Require A Hearing On The Petition Because Petitioners' Issues Fall Within The Scope Of The Hearing Notice

There is no regulation that compels either disclosure or nondisclosure of the license amendment analysis to the public. There is no regulation which authorizes the utility company to dictate the scope of the license amendment proceeding and constrain it, at its whim. Unless the public has a right to seek a hearing, only the licensee would know the basis and reasoning supporting its characterization of the replacement steam generator as a like-for-like replacement satisfying the requirements of Section 50.59. The result in the San Onofre case exposes the fallacy of this view, as well as the public health and safety risks such a policy creates.

Section 182a of the Atomic Energy Act addresses what must be included in a reactor operating license. Such licenses must include "technical specifications," including "the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization . . . of special nuclear material . . . will provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). Further, the Commission is empowered to issue an order amending any license it deems necessary to "effectuate the provisions of [the AEA]" (42 U.S.C. § 2233) to "promote the common defense and security or to protect health or to minimize danger to life or property." *Id.* § 2201; *see also id.* § 2237. Finally, section 189a of the AEA states that "[i]n any proceeding under [the AEA], for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A).

Consistently with the statutes, the Commission advises ASLBs that "the scope of any

hearing should include the proposed license amendments, and any health, safety or environmental issues ***fairly raised by them.***" (Emphasis supplied). *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981); *see also Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-88, 16 NRC 1335, 1342 (1982) (holding that it is not "appropriate to permit an intervenor to question the original design of the reactor or the systems not directly involved in [the license amendment] application").

Petitioners submit that the issues raised in their pleadings fall fairly within the scope of the hearing notice, because the technical specifications for the plant comprise the parameters - *i.e.*, the outer limits - within which all of the nonpublic analysis and decision-making by FENOC have been undertaken. "Standard Technical Specifications (STS) are published for each of the five reactor types as a NUREG-series publication. Plants are required to operate within these specifications." NRC website statement.[8]

Thus Arnold Gundersen's assertions (Report at 4) that "The lack of a license application on file with the NRC also implies that Davis-Besse made the determination that the 'fit-form-function' of the replacement steam generators fell within the licensing parameters of the original Davis-Besse license" challenges an undeniable, implicit nonpublic decision ***not*** to seek a technical specification amendment and thus falls within the scope. His conclusion (Report at 5) that "Moreover, the data reviewed shows that FENOC should have applied for a license amendment with the requisite public review six years ago when the ROTSG was originally designed, ordered, and purchased" similarly implicates and challenges decisions that fall within the parameters of Davis-Besse's technical specifications. Gundersen's point (Report at 6) that "A

[8] Found at http://www.nrc.gov/reactors/operating/licensing/techspecs.html

review of the FENOC PowerPoint presentation submitted to the NRC contains an extensive list of changes to the D-B Technical Specifications that clearly identifies the necessity for complete technical review by the NRC via the formal 10 C.F.R. § 50.59 license amendment processes" has been greeted with opposition by the NRC Staff, instead of the objective warning it is. In several significant ways, Gundersen has signaled that the license amendment proceeding, while a desirable development,, covers an incomplete array of changes in specifications.

What FENOC and the NRC Staff are suggesting is that once the die is cast and a limited array of technical specifications is deemed to be affected by the steam generator project, the "scope" of any subsequent proceeding is limited to a challenge of those few changes. Petitioners counter that the notice of hearing opened the window for a public hearing to be sought based, among other grounds, upon the point that an insufficient array of technical specifications changes has been identified by FENOC. The Staff admits that it has not effectively decided the merits of the technical specifications modifications,[9] so how can it foreclose the potential that FENOC has unduly limited the range of its engineering review and performed an incomplete analysis of the nature and technical implications of the multitude of differences between the original steam generators and the 2014 replacements?

Under the circumstances, the Licensing Board may not delegate its obligation to decide controversial issues to the Staff. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), ALAB-298, 2 NRC 730, 737 (1975); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), LBP-84-2, 19 NRC 36, 210 (1984), *rev'd on other grounds*, ALAB-

[9] At Staff Answer p. 3 fn. 9, the NRC Staff states: "The Staff is currently reviewing the January 18, 2013 license amendment request and has not reached any final determination regarding the proposed amendment or FENOC's assertions."

793, 20 NRC 1591, 1627 (1984), citing *Perry*, ALAB-298, 2 NRC at 737.

Strikingly, the position assumed by the NRC Staff in the instant matter directly contradicts its position in the San Onofre case. In the "NRC Staff's Answer to Petition to Intervene and Request for Hearing by Friends of the Earth on the Restart of the San Onofre Reactors," ML12195A330 (July 20, 2012), the NRC Staff took this position:

> ***FOE also does not meet the timely filing requirements of 10 C.F.R § 2.309(b) because the heart of FOE's claim appears to be that the June 27, 2008, license amendment was incomplete. But the time for FOE to bring forward this concern would have been within sixty days of the Federal Register notice published on September 23, 2008.*** No individual or individuals submitted a hearing request. The Staff subsequently issued the requested amendments on July 14, 2009. ***Thus a hearing on the adequacy of the June 27, 2008 request is no longer available to FOE.*** FOE's challenge to the previous action must take the form of a petition under 10 C.F.R. § 2.206.

Id. at 18-19. (Emphasis supplied). In the San Onofre case, the Staff acknowledged that the heart of FOE's claim was an allegation that the license amendment was "incomplete." Incomplete analysis of the changes requiring a formal license amendment is similarly the crux of Petitioners' allegations in the instant matter. In the San Onofre litigation, the Staff concurred that the proper time in which to raise averments of incompleteness would have been within 60 days of September 23, 2008, the date of the Federal Register notice, but FOE missed that deadline. *Id.*

The NRC Staff affirmed this position in a later filing in the San Onofre case. In the "NRC Staff's Answer to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision," ML 12299A513, p. 6 (October 25, 2012), the Staff explained to the Commission:

> FOE's claim that there was no license amendment related to the SONGS steam generator replacement is not accurate. As discussed in Staff's Answer to FOE's Petition to Intervene, ***there was a license amendment associated with the SONGS steam generator replacement, and along with it, an opportunity to request a hearing***.

Id. at 6. (Emphasis supplied). But now, in the Davis-Besse case, under very similar circumstances, the Staff stands fast in its insistence that

> A licensee that does not properly perform a 10 C.F.R. § 50.59 analysis and makes a change requiring prior NRC approval without a license amendment request would be in violation of NRC regulations and thus subject to enforcement action. . . . [B]inding Commission precedent holds that challenges to a licensee's 10 C.F.R. § 50.59 analyses are outside the scope of the actions listed in AEA § 189a and may only be brought as requests for enforcement under 10 C.F.R. § 2.206.

So the Staff was right before it was wrong.

C. 10 C.F.R. § 2.206 Is A Meaningless Tail-Chase

The assertions by NRC Staff and FENOC that Petitioners must file for regulatory enforcement under 10 C.F.R. § 2.206 is disingenuous. A petitioner is not entitled to an adjudicatory hearing under § 2.206, which, as NRC regulations and precedent make clear, is a petition to the NRC to take *enforcement* action. Holding an adjudicatory hearing is critical from a due process and public participation standpoint, as it is the mechanism through which information about the changes the licensee made to the facility is tested and provided to the public.

Further, a § 2.206 petition is in fact not a viable alternative for obtaining substantive relief. In the San Onofre litigation, the ASLB determined that the number of instances in which the Staff granted a § 2.206 petition in whole was 2 out of 387, or one-half of one percent.[10]

As Friends of the Earth argued there, "it is clear that the vast majority of § 2.206 petitions suffer a quiet death before the Staff. Thus, the refrain in the NRC Staff's Answer to FOE's Petition – that 'the correct course of action is to file a petition under 10 C.F.R. § 2.206' – is, in

[10] *Southern California Edison Company* (San Onofre Nuclear Generating Station), Docket Nos. 50-361, 50-362 (Licensing Board Memorandum and Order Directing Staff to Amend Filing on 10 C.F.R. § 2.206) (June 19, 2012) at 2.

reality, a proposal to consign Petitioner's concerns to eternal regulatory purgatory." FOE Reply, ML12195A330, p. 12. Filing a § 2.206 petition is not a viable alternative.

III. THE CONTENTION RAISES A GENUINE DISPUTE OF FACT AND LAW

Contrary to FENOC's insistence (Answer at 18), the proposed Contention does, indeed, "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," as required by 10 C.F.R. § 2.309(f)(1)(vi). There is a genuine dispute on the legality of the restricted scope of the license amendment and a factual dispute as to the completeness of FENOC's license amendment analysis. Restriction of the litigation to numerical changes in technical specifications in four areas related to the steam generator replacement project is specious and does not comport with customary regulatory practice.

A failure to demonstrate the existence of a genuine dispute on a material issue of fact is a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of applicant's documents or that provide supporting reasons that tend to show that there is some specified omission from applicant's documents. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 515, 521 & n.12 (1990), citing 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). Petitioners question the adequacy of the 10 C.F.R. 50.59 analysis, and claim that there are specific omissions from FENOC's license amendment request.

The factual support necessary to show that a genuine dispute exists need not be as strong as that necessary to withstand a summary disposition motion. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51

(1994) (citing "Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989), *quoting Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980).

A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984).

IV. CONCLUSION

It is not enough that there is a nominal hearing opportunity, calculated to be void of most controversy. FENOC and the NRC Staff have eviscerated the substantive mechanism of the Atomic Energy Act, hearings on the merits which afford access to the public to participate in the regulation of inherently dangerous technologies. A hearing is of no value to the public interest if it has been censored or restricted. The Licensing Board should reject the arguments raised by FENOC and the NRC Staff, and set this matter for hearing of the issues raised by Petitioners in their May 20, 2013 filing.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company Davis-Besse Nuclear Power Station, Unit 1	)	June 21, 2013
Regarding the Proposed Amendment to Facility Operating License	)	

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "PETITIONERS' REPLY IN SUPPORT OF 'PETITION TO INTERVENE AND FOR AN ADJUDICATORY PUBLIC HEARING OF FENOC LICENSE AMENDMENT REQUEST'"was deposited in the NRC's Electronic Information Exchange this 21st day of June, 2013.

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