

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of ) FIRSTENERGY NUCLEAR OPERATING ) COMPANY ) (Davis-Besse Nuclear Power Station, Unit 1) )	) Docket No. 50-346-LA ) ) June 28, 2013 ) )
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**FIRSTENERGY NUCLEAR OPERATING COMPANY’S MOTION TO STRIKE  
PORTIONS OF PETITIONERS’ REPLY**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.323(a), FirstEnergy Nuclear Operating Company (“FENOC”) files this motion to strike limited portions of “Petitioners’ Reply in Support of ‘Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request’” (“Reply”), dated June 21, 2013.<sup>1</sup> As discussed below, the Reply impermissibly includes new arguments and references not within the scope of the original Petition without satisfying the standards governing late filings set forth in 10 C.F.R. § 2.309(c). Accordingly, FENOC requests that the Atomic Safety and Licensing Board (“Board”) strike this new information from the record of this proceeding.<sup>2</sup>

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<sup>1</sup> As required by 10 C.F.R. § 2.323(b), counsel for FENOC certifies that FENOC has made a sincere effort to contact Petitioners and the NRC Staff and resolve the issues raised in this Motion, and that FENOC’s efforts to resolve the issues have been unsuccessful. Counsel for Petitioners stated that Petitioners oppose the Motion, but have no opposition to an additional opportunity to respond. Counsel for the NRC Staff stated that the Staff takes no position on the Motion, but reserves the right to file an answer to the Motion.

<sup>2</sup> Although this is the first motion to strike in this proceeding, the licensing board in the Davis-Besse license renewal proceeding has granted multiple motions to strike portions of replies filed by the same Petitioners impermissibly expanding the scope of their arguments. As one example, the licensing board granted FENOC’s motion to strike portions of Petitioners’ reply because they “impermissibly attempt to expand the scope of Contention 4 and attempt to add new bases and supporting material for the contention.” *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply), No. 50-346-LR, slip op. at 3 (Feb. 18, 2011) (unpublished).

Because the NRC regulations, 10 C.F.R. § 2.309(i)(3), prohibit FENOC from responding to the Reply, FENOC does not have a right to respond to the new arguments and references raised by Petitioners. Therefore, if the Board decides to consider the new arguments and references contained in the Reply, then FENOC requests an opportunity to respond to the new information in writing or during the oral argument.

## **II. BACKGROUND**

On May 20 and 29, 2013, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Ohio Sierra Club ("Petitioners") jointly filed and then non-timely supplemented their "Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request" ("Petition"). Petitioners submitted the Petition in response to a March 19, 2013 *Federal Register* notice<sup>3</sup> regarding FENOC's January 18, 2013 License Amendment Request ("LAR") seeking to amend four Technical Specifications (3.4.17, 3.7.18, 5.5.8, and 5.6.6) for the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse") to support plant operations following replacement of the steam generators, which is

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In a later reply, Petitioners attempted to include, for the first time, references to Davis-Besse in a contention that had been "incorporated by reference" from an unrelated plant and proceeding. The Board granted FENOC's and the NRC Staff's motions to strike on the grounds that "[i]ntervenors cannot mend their original contention by providing references [to the Davis-Besse License Renewal Application and Environmental Report] in their reply brief." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 NRC \_\_, slip op. at 11-12 (Nov. 23, 2011).

The licensing board again struck portions of a separate reply filed by Petitioners as "an attempt to expand the scope of proposed Contention 5" and for "putting forward baseless and irrelevant allegations of fraud." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Memorandum and Order (Granting in Part and Denying in Part Motion to Strike), No. 50-346-LR, slip op. at 4 (Oct. 11, 2012) (unpublished).

On that same day, the licensing board granted a fourth motion to strike. In reply to a motion for summary disposition, Petitioners filed a reply and statement of material facts outside the scope of the contention at issue. The Board struck the reply and statement of material facts in their entirety. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Memorandum and Order (Granting Motion to Strike), No. 50-346-LR, slip op. at 5 (Oct. 11, 2012) (unpublished).

In summary, the requirements related to the scope of replies should be strictly applied to Petitioners, who are experienced intervenors and represented by counsel, and who are certainly aware of the requirement to limit the scope of replies and not introduce new arguments.

<sup>3</sup> Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 78 Fed. Reg. 16,876, 16,876 (Mar. 19, 2013).

scheduled to be completed in April 2014. The Petition and its one “Proposed Contention” argue that FENOC must obtain additional license amendments with associated public hearings before implementation of the Davis-Besse replacement steam generator project.

In response, FENOC and the NRC Staff timely filed Answers on June 14, 2013 opposing the Petition for failing to demonstrate standing and for failing to submit an admissible contention.<sup>4</sup> On June 21, 2013, Petitioners filed their Reply to FENOC’s and the NRC Staff’s Answers. As discussed in Section IV below, Petitioners’ Reply contains new arguments and references not contained in their Petition and that do not appropriately respond to FENOC’s and the NRC Staff’s Answers.

### **III. LEGAL STANDARDS**

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention. As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).<sup>5</sup>

The Commission’s prohibition on new arguments in replies is rooted in the Commission’s interest in conducting adjudicatory hearings efficiently and on basic principles of fairness. The Commission has recognized that “[a]s we face an increasing adjudicatory

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<sup>4</sup> FirstEnergy Nuclear Operating Company’s Answer Opposing Petition to Intervene and Request for Hearing Regarding Technical Specification License Amendment Request (June 14, 2013); 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 (June 14, 2013).

<sup>5</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citation omitted).

docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.”<sup>6</sup> It has further stated:

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.<sup>7</sup>

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a petitioner to amend or supplement its pleadings in reply to the applicant’s or NRC Staff’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.<sup>8</sup>

These principles apply no less to arguments regarding standing. In *Palisades*, for example, the Commission rejected an attempt to cure standing deficiencies in the reply, stating:

[I]t “is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details offered for the first time in a petition for reconsideration.” The same rationale strikes us as equally applicable to authorization affidavits filed with replies, as here.<sup>9</sup>

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<sup>6</sup> *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“LES”).

<sup>7</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (internal quotation marks and citations omitted), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 225.

<sup>8</sup> *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

<sup>9</sup> *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261-62 (2008) (quoting *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527-28 (2007)).

Moreover, because NRC regulations do not allow the applicant or the NRC Staff to respond to a petitioner’s reply,<sup>10</sup> fundamental principles of fairness mandate that a petitioner restrict its reply brief to only those issues raised in the applicant’s or NRC Staff’s answer. “Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims.”<sup>11</sup> Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”<sup>12</sup> Any improper arguments should be stricken.<sup>13</sup>

#### **IV. BASES FOR MOTION TO STRIKE**

As detailed in the following table, Petitioners’ Reply contains new arguments and references that should be stricken.

<b>Location of New Information in Petitioners’ Reply</b>	<b>Description of New Information and Basis for Striking It</b>
<p><u>Section I.A, “Petitioners Stated Cognizable Facts And Concerns To Establish Proximity And Injury-in-Fact Standing”</u></p> <ul style="list-style-type: none"> <li>• On page 3, strike footnote 2.</li> </ul>	<p>This footnote refers to a new change between the original and replacement steam generators. It also provides a new reference to the Davis-Besse license renewal Environmental Report. Petitioners did not identify either this change or this reference in their Petition, and neither FENOC nor the NRC Staff raised them in their Answers.</p>

<sup>10</sup> See 10 C.F.R. § 2.309(i)(3).

<sup>11</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>12</sup> *LES*, CLI-04-25, 60 NRC at 225; see also *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

<sup>13</sup> A licensing board has the authority to strike individual arguments and exhibits. See, e.g., 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”). See also *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 376-77, 399-400, 407, 429 (2008) (granting the applicant’s motion to strike portions of petitioners’ reply that contained new arguments and factual allegations in an attempt to cure deficiencies in the petition to intervene).

Location of New Information in Petitioners' Reply	Description of New Information and Basis for Striking It
<p><u>Section I.A, "Petitioners Stated Cognizable Facts And Concerns To Establish Proximity And Injury-in-Fact Standing"</u></p> <ul style="list-style-type: none"> <li>On pages 4-5, strike the text <u>beginning</u> "According to FENOC's license amendment request" on page 4 through the sentence <u>ending</u> "are not trained to mitigate this accident." on page 5.</li> </ul>	<p>Petitioners identify new information from the January 18, 2013 LAR and advance new theories related to steam line ruptures, steam generator tube ruptures, and cascading tube failures not previously made. Petitioners included no cites to the LAR in the Petition, much less reference to this specific information, and did not make these arguments regarding steam line ruptures, steam generator tube ruptures, and cascading tube failures. Neither FENOC nor the NRC Staff raised this information or these arguments in their Answers.</p>
<p><u>Section I.C, "An Alleged Injury To A Purely Legal Interest Is Sufficient To Support Standing"</u></p> <ul style="list-style-type: none"> <li>On pages 7-8, strike Section I.C in its entirety.</li> </ul>	<p>Petitioners make an entirely new argument in their Reply that an alleged injury to a legal interest is sufficient to support standing. In the Petition, Petitioners supported their claim for standing with alleged injuries to tangible interests based on proximity to the Davis-Besse site. In addressing the "injury" requirement of standing, Petitioners note "tangible and particular harm to the health and well-being" of Petitioners' members.<sup>14</sup> Petitioners did not claim standing based on a legal interest. Neither FENOC nor the NRC Staff raised this issue in their Answers.</p>
<p><u>Section I.D, "Prior Participation In Proceedings Involving The Same Facility Vitiates Need For New Proofs Of Standing"</u></p> <ul style="list-style-type: none"> <li>On pages 8-9, strike Section I.D in its entirety.</li> </ul>	<p>Petitioners make the new argument in their Reply that their participation in the Davis-Besse license renewal proceeding should establish standing in this proceeding. This argument does not appear anywhere in the Petition. Neither FENOC nor the NRC Staff raised this issue in their Answers.</p>
<p><u>Section I.E, "The Board Should Consider The Contribution Petitioners May Make To The Proceeding"</u></p> <ul style="list-style-type: none"> <li>On pages 9-10, strike Section I.E in its entirety.</li> </ul>	<p>Petitioners make a new argument for the first time in their Reply that they should be granted discretionary intervention. This argument does not appear in the Petition. Neither FENOC nor the NRC Staff raised this issue in their Answers.</p>

<sup>14</sup> Petition at 4.

Location of New Information in Petitioners' Reply	Description of New Information and Basis for Striking It
<p data-bbox="186 256 678 319"><u>Section III, "The Contention Raises a Genuine Dispute of Fact and Law"</u></p> <ul data-bbox="186 361 743 436" style="list-style-type: none"> <li>On pages 17-18, strike Section III in its entirety.</li> </ul>	<p data-bbox="824 256 1404 747">Petitioners make a new argument in their Reply that the scope of the January 18, 2013 LAR is incorrect and the LAR is incomplete. They appear to be claiming that they have proposed a contention of omission. This argument does not appear in the Petition, and the single Proposed Contention is not a contention of omission. While both FENOC and the NRC Staff argue that certain arguments raised by Petitioners are outside the scope of this proceeding, Petitioners do not challenge that argument. Instead, they raise this new argument and attempt to re-characterize their Proposed Contention.</p>

The Board should strike these new arguments and references that Petitioners present for the first time in their Reply. These portions of Petitioners' Reply fail to "focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."<sup>15</sup> Instead, these portions of the Reply impermissibly attempt to take another bite at the apple by expanding the scope of their argument for standing and their Proposed Contention without addressing the criteria for late filings in 10 C.F.R. § 2.309(c). Petitioners cannot now try to salvage their deficient initial Petition with entirely new information and arguments that are not "narrowly focused" on the legal or factual arguments presented in the FENOC and NRC Staff Answers,<sup>16</sup> and to which FENOC and the NRC Staff have no opportunity to respond. Accordingly, the new arguments and references identified above should be stricken.

<sup>15</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>16</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

V. **CONCLUSION**

For the foregoing reasons, the Board should strike the new arguments and references impermissibly provided in Petitioners' Reply.

Respectfully submitted,

*Executed in Accord with 10 C.F.R. § 2.304(d)*

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Dated in Washington, D.C.  
this 28th day of June 2013



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	
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FIRSTENERGY NUCLEAR OPERATING	)	Docket No. 50-346-LA
COMPANY	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	June 28, 2013
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, a copy of “FirstEnergy Nuclear Operating Company’s Motion to Strike Portions of Petitioners’ Reply” was filed through the E-Filing system.

*Signed (electronically) by Stephen J. Burdick*

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