July 1, 2013

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-LA
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	
	)	

NRC STAFF MOTION TO STRIKE PORTIONS OF
JOINT PETITIONERS REPLY OR, IN THE ALTERNATIVE, FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), the U.S. Nuclear Regulatory Commission ("NRC") staff ("Staff") files this motion to strike portions of "Petitioners' Reply in Support of 'Petition to Intervene and for an Adjudicatory Public Hearing of [FirstEnergy Nuclear Operating Co. ("FENOC")] License Amendment Request,'" dated June 21, 2013 ("Reply")[1] by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Ohio Sierra Club ("Joint Petitioners") or, in the alternative, for leave to respond thereto.

The Reply impermissibly includes new arguments not within the scope of the original petition to intervene and does not satisfy the standards governing petitions filed after the deadline as set forth in 10 C.F.R. § 2.309(c). Accordingly, these new arguments either should be stricken or the Board should grant the Staff motion for leave to provide the responses included herein.

[1] Petitioners' Reply in Support of 'Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request' (Jun. 21, 2013) ("Reply").

BACKGROUND

This proceeding concerns FENOC's January 18, 2013 license amendment request to revise four Davis-Bess Nuclear Power Station, Unit 1 ("DBNPS") technical specifications ("TS") (*i.e*., TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6) to support the operation of DBNPS following the planned installation of replacement steam generators ("SGs") in April 2014.[2] FENOC indicates that the separate plant design change resulting from the removal of the original SGs and the installation of the replacement SGs is being pursued under 10 C.F.R. § 50.59 without the need for prior NRC approval.[3]

On March 19, 2013, the Staff published in the *Federal Register* its proposed determination that the January 18, 2013 license amendment request to revise DBNPS TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6 involves no significant hazards consideration[4] and provided an opportunity for a public hearing regarding these proposed TS changes.[5]

On May 20, 2013, Joint Petitioners timely filed a petition for leave to intervene in response to this *Federal Register* Notice ("Joint Petition").[6] Joint Petitioners claimed that they

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[2] Letter from Raymond A. Lieb, Vice President, Nuclear, FENOC, *Davis-Bess Nuclear Power Station, Docket No. 50-346, License No. NPF-3, License Amendment Request for Proposed Revision of Technical Specification (TS) 3.4.17, "Steam Generator (SG) Tube Integrity"; 3.7.18, "Steam Generator Level"; TS 5.5.8, "Steam Generator (SG) Program"; and TS 5.6.6, "Steam Generator Tube Inspection Report"* at 1, 4 (Jan. 18, 2013) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13018A350) ("LAR"); Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 78 Fed. Reg. 16,876, 16,877, 16,883 (Mar. 19, 2013). *See also* Davis-Besse Nuclear Power Station Unit 1 Technical Specifications, Appendix A to License No. NPF-3 (Apr. 22,1977) (ADAMS Accession No. ML053110490) ("DBNPS TS").

[3] *See* LAR at 4 ("Replacement of the SGs is being performed as a design modification in accordance with the provisions of 10 CFR 50.59 . . . NRC review and approval of the modification is not being requested herein.").

[4] 78 Fed. Reg. at 16,883-84.

[5] *Id*. at 16,877.

[6] Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request at 1 (May 20, 2013) ("Joint Petition").

had representational standing based primarily on the geographic proximity of various of their respective members[7] and proffered the following contention:

> Significant changes to the Replacement Once Through Steam Generator (ROTSG) modification project and to the reactor containment structures, all planned by FirstEnergy Nuclear Operating Company to be made to the Davis-Besse Nuclear Power Station, require that the steam generator replacement project be deemed an "experiment" according to 10 C.F.R. § 50.59, and that an adjudicatory public hearing be convened for independent analysis of the project, before it is implemented. Moreover, FENOC has applied after the fact for a technical specifications license amendment, which comprises an additional, automatic, trigger under 10 CFR § 50.59 and necessitates adjudication of the license amendment request.

Joint Petition at 12.

On May 22, 2013, the Acting Secretary of the Commission referred this "joint petition to intervene regarding the proposed Davis-Besse license amendment" published in the "March 19, 2013, Federal Register Notice (78 Fed. Reg. 16876)" to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel.[8] On May 28, 2013, the Atomic Safety and Licensing Board ("Board") was established to preside over the proceeding on FENOC's January 18, 2013 license amendment request.[9] On June 14, 2013, both the Staff[10] and FENOC[11] opposed the Joint

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[7] *Id*. at 1-5.

[8] Memorandum Referring Davis-Besse Nuclear Power Station, Unit 1 Petition to Intervene and for an Adjudicatory Hearing of FENOC License Amendment Request Docket No. 50-346-LA to the Atomic Safety and Licensing Board (May 22, 2013).

[9] Establishment of Atomic Safety and Licensing Board (May 28, 2013); FirstEnergy Nuclear Operating Company, Establishment of Atomic Safety and Licensing Board, 78 Fed. Reg. 33,449 (Jun. 4, 2013).

[10] 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 (Jun. 14, 2013).

[11] FirstEnergy Nuclear Operating Company's Answer Opposing Petition to Intervene and Request for Hearing Regarding Technical Specification License Amendment Request (Jun. 14, 2013).

Petition, arguing that Joint Petitioners had not demonstrated standing or proffered an admissible contention.

On June 21, 2013, Joint Petitioners filed the instant reply, presenting, as discussed below, new arguments not within the scope of the original petition without demonstrating good cause for filing these arguments after the May 20, 2013, deadline for the petition.

DISCUSSION

I. Legal Standards

Under the Commission's rules, a petitioner may file a reply to any answer filed in response to its petition to intervene.[12] The scope of that reply, however, is not unlimited.[13] As explained by the Commission,

> [i]t 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 . . . unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c) . . . .[14]

This limited reply scope prevents petitioners from initially filing vague, unsupported, and generalized allegations only to "us[e] reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate [the

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[12] 10 C.F.R. § 2.309(i)(2).

[13] *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009) (*quoting Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("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."); *Entergy Nuclear Operations, Inc*. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 261-62 (2008) (stating that a petitioner cannot claim standing based on vague assertions and then attempt to repair this pleading defect by filing authorization affidavits with replies); *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) ("LES") ("[Commission] rules do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions.").

[14] *Palisades*, CLI-06-17, 63 NRC at 732.

Commission's] rules governing timely filing, contention amendment, and submission of late-filed contentions"[15] and would "unfairly deprive other participants of an opportunity to rebut the new claims."[16] This prohibition also applies to attempts to later repair vague standing assertions.[17] Thus, it is a "cornerstone" of the Commission's continuing efforts to "avoid unnecessary delays and increase the efficiency of NRC adjudication" to require that petitioners provide sufficient alleged factual or legal bases to support their intervention "and to do so at the outset" of a proceeding.[18] Therefore, petitioners may not remediate a pleading deficiency by "presenting entirely new arguments in the reply briefs" unless they meet the late-filing requirements of 10 C.F.R. § 2.309(c); otherwise, there "simply would be no end to NRC licensing proceedings."[19] According to 10 C.F.R. § 2.309(c), intervention petitions filed after the deadline

> will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
>
> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

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[15] *LES*, CLI-04-35, 60 NRC at 622-23; *see also Palisades*, CLI-08-19, 68 NRC at 261-62.

[16] *Palisades*, CLI-06-17, 63 NRC at 732.

[17] *See Palisades*, CLI-08-19, 68 NRC at 261-62 (stating that a petitioner cannot claim standing based on vague assertions and then attempt to repair this pleading defect by filing authorization affidavits with replies).

[18] *LES*, CLI-04-35, 60 NRC at 622-23.

[19] *Louisiana Energy Services, LP* (National Enrichment Facility), CLI-04-32, 60 NRC 223, 224 (2004) (internal quotation marks omitted).

II. Motion to Strike Portions of the Reply

A. New Standing Arguments

In the Joint Petition, Joint Petitioners argued that they had standing based on the geographic proximity of one or more of their members to DBNPS, specifically that these members reside, work, or recreate within a 50-mile radius of DBNPS.[20] Joint Petitioners also stated that the interests of each of these members may be affected by the proceeding because they all "have safety and environmental concerns about [DBNPS'] operations," "express[] the opinion that inadequate information has been disclosed about the steam generator project and further, that lessons about the steam generator failures at the San Onofre plant have not been adequately explored or incorporated into the DBNPS plan," and "believe that the steam generator replacement proposal may pose unacceptable risks to the environment and public health and to their personal health and safety" from the "total mechanical failure[]" of the replacement SGs or the failure of the containment after being penetrated as part of the SG replacement process.[21]

In the Reply, Joint Petitioners include four new standing arguments not within the scope of the original petition without demonstrating good cause for filing these arguments after the deadline. First, Joint Petitioners, for the first time, attempt to provide arguments for their previously vague, unsupported, and generalized allegation that a mechanical failure of the replacement SGs would harm the health and safety of the public.[22] Joint Petitioners attempt to cure the insufficient traceability showing[23] of the Joint Petition by stating that "[a]ccording to

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[20] Joint Petition at 5-8.

[21] *Id*. at 4-8.

[22] Reply at 4-6.

[23] Standing requires a showing of "(1) an actual or threatened, concrete and particularized injury [(injury-in-fact)], that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision."

FENOC's license amendment request, . . . 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," and that "experimental changes to the design of the tubes in the Davis-Besse replacement [SGs] could cause a . . . cascading tube failure of more than one tube" which could result in "accident releases" beyond the design basis accident release rate.[24] However, this new argument is untimely pled without reference to the requirements of 10 C.F.R. § 2.309(c) for filing after the deadline. As a previous participant before the Atomic Safety and Licensing Board,[25] Joint Petitioners should be aware of their "ironclad obligation to review the [license amendment request] thoroughly and to base their challenges on its *contents*."[26] However, Joint Petitioners substantively discuss the contents of FENOC's January 18, 2013, license amendment request for the first time in the Reply.[27] The Board should not now consider this late attempt to demonstrate standing by curing deficiencies in the originally insufficient Joint Petition, because to do so would "effectively bypass and eviscerate [the Commission's] rules governing timely filing, contention amendment, and submission of late-filed contentions"[28] and

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(footnote continued . . .)

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (*citing Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001)).

[24] Reply at 4-5.

[25] *Id*. at 8-9, 10.

[26] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 312 (Mar. 8, 2012) (emphasis added).

[27] The Joint Petition quoted the content of the license amendment request, Joint Petition at 8-9, but only now do the Joint Petitioners attempt to tie the content of this license amendment request to their proffered contention.

[28] *LES*, CLI-04-35, 60 NRC at 622-23; *see also Palisades*, CLI-08-19, 68 NRC at 261-62.

would "unfairly deprive other participants of an opportunity to rebut the new claims."[29] Therefore, the Reply text starting with the last paragraph on page 4 through to the end of Section I.A. on page 6 should be stricken.

Second, Joint Petitioners newly allege as an injury-in-fact that FENOC's plan to install replacement SGs without "rigorous procedural scrutiny of the . . . project," harms the Joint Petitioners' "legal interest in the proper application of regulations and in particular, of use of the Atomic Energy Act hearing right."[30] Joint Petitioners argue that such "[a]n alleged injury to a purely legal interest is sufficient to support standing."[31] This injury-in-fact argument is not within the scope of the original petition and is not accompanied by a demonstration of good cause for filing after the deadline. Therefore, the last two paragraphs of Section I.C. on page 8 of the Reply should be stricken.

Third, Joint Petitioners newly argue that "prior participation in proceedings involving the same facility vitiates [the] need for new proofs of standing" and that, since Joint Petitioners were granted standing in the DBNPS license renewal proceeding, they should automatically be granted standing in this license amendment proceeding "without any further scrutiny."[32] This argument could have been made in the Joint Petition, particularly since it relies upon Joint Petitioners' standing in an ongoing proceeding.[33] This argument is not within the scope of the original petition and is not accompanied by a demonstration of good cause for filing after the deadline. Thus, Section I.D. of the Reply should be stricken.

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[29] *Palisades*, CLI-06-17, 63 NRC at 732.

[30] Reply at 8.

[31] *Id*.

[32] *Id*. at 8-9.

[33] *Id*.

Fourth, Joint Petitioners newly argue that they should be granted discretionary intervention.[34] This argument was neither in the Joint Petition nor is it accompanied by a demonstration of good cause for filing after the deadline. Therefore, Section I.E. of the Reply should be stricken.

B. New Contention Admissibility Arguments

Joint Petitioners' proffered contention essentially alleges (1) that, but-for its improper 10 C.F.R. § 50.59 analysis, FENOC would have determined that a license amendment request is required for its planned installation of replacement SGs at DBNPS and, therefore, that there should be a hearing opportunity regarding the planned installation and (2) that because there is a license amendment request to revise TS related to the subsequent operation of the replacement SGs, there should also be a hearing opportunity regarding the installation of these SGs.[35]

In the Reply, Joint Petitioners quote Staff pleadings in the *San Onofre* proceeding to newly argue that the Staff has previously suggested that 10 C.F.R. § 50.59 analyses may be challenged as part of the hearing opportunity for separate TS changes.[36] In so doing, Joint Petitioners "unfairly deprive other participants [(*e.g.*, the Staff)] of an opportunity to rebut the new claims."[37] Since this argument was neither in the Joint Petition nor is it accompanied by a demonstration of good cause for filing after the deadline, the Reply text starting with the first paragraph on page 15 through to the end of Section II.B. on page 16 should be stricken.

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[34] *Id*. at 9-10.

[35] *See* Joint Petition at 12.

[36] Reply at 15-16.

[37] *Palisades*, CLI-06-17, 63 NRC at 732.

III. Motion for Leave to Respond to Portions of the Reply

In the alternative, pursuant to 10 C.F.R. § 2.323(a), the Staff moves for leave to file the following response to the Reply's new arguments that are not within the scope of the original petition and are not accompanied by a demonstration of good cause for filing after the deadline.

A. New Standing Arguments

Joint Petitioners' new traceability showing[38] is insufficient to support standing in this proceeding. The Acting Secretary of the Commission referred to the Board a petition "regarding the proposed Davis-Besse license amendment" published in the "March 19, 2013, Federal Register Notice (78 Fed. Reg. 16876)."[39] According to the March 19, 2013 *Federal Register* Notice, this license amendment has to do with the revision of four TS to support the operation of replacement SGs after their installation.[40] However, Joint Petitioners' new argument does not trace a harm to how the replacement SGs will be operated according to these revised TS. Instead, Joint Petitioners trace a harm to the speculated existence of a defect in the proposed replacement SGs caused in some unexplained manner by the design differences between the replacement SGs and the original SGs.[41] Since Joint Petitioners do not demonstrate that an alleged harm is traceable to the subject of this proceeding, they fail to demonstrate standing.

Joint Petitioners' new injury-in-fact showing[42] is also insufficient to support standing in this proceeding because a generalized grievance, such as an assertion of a public interest in regulatory matters, without a showing of a distinct and palpable harm is not a cognizable injury-

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[38] *See* Reply at 4-6.

[39] Memorandum Referring Davis-Besse Nuclear Power Station, Unit 1 Petition to Intervene and for an Adjudicatory Hearing of FENOC License Amendment Request Docket No. 50-346-LA to the Atomic Safety and Licensing Board (May 22, 2013).

[40] 78 Fed. Reg. at 16,883-84.

[41] Reply at 4-6.

[42] *See Id*. at 8.

in-fact. *See Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 174 (1992) (stating that an injury-in-fact does not include "generalized grievance[s] shared in substantially equal measure by all or a large class of citizens—such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic interest as a ratepayer—that will not result in the distinct and palpable harm sufficient to support standing."). Joint Petitioners assert such a non-cognizable generalized grievance without showing that it will cause them a distinct and palpable harm when they state that they should be granted a hearing because the replacement of SGs at DBNPS "require[s] more comprehensive scrutiny, beyond technical specification changes" and because Joint Petitioners have a "legal interest in the proper application of regulations and in particular, of use of the Atomic Energy Act hearing right." However, Joint Petitioners do not explain how they are harmed by not being granted a hearing regarding FENOC's 10 C.F.R. § 50.59 analysis regarding the installation of replacement SGs when no such hearing right is provided for by the Atomic Energy Act. Since Joint Petitioners do not demonstrate an injury-in-fact, they fail to demonstrate standing.

Finally, Joint Petitioners' new discretionary intervention argument[43] is also not cognizable to support standing in this proceeding because, under 10 C.F.R. § 2.309(e), the presiding officer may consider a request for discretionary intervention only when "at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held." Such circumstances do not exist in this proceeding and, therefore, discretionary intervention cannot be granted.

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[43] *See id*. at 9-10.

B. New Contention Admissibility Arguments

Joint Petitioners now claim that the Staff's October 25, 2012 statement in *San Onofre* that, "there was a license amendment associated with the [San Onofre] steam generator replacement, and along with it, an opportunity to request a hearing"[44] supports their argument that hearings on SG TS license amendment requests may include arguments regarding a licensee's 10 C.F.R. § 50.59 analyses. However, Joint Petitioners read these words out of context of the Staff positions taken in that proceeding. Joint Petitioners do not consider the subsequent Staff statements that the license amendment associated with the San Onofre SG replacement involved only "requested changes to technical specifications" while other "aspects of the [San Onofre] steam generator replacement were done through the § 50.59 process."[45] With respect to aspects or activities done using the 10 C.F.R. § 50.59 process, the Staff stated that "individuals with concerns about licensee actions taken pursuant to 10 C.F.R. § 50.59, which allows a licensee to take an action without the need for any NRC approval, must challenge the action by means of a § 2.206 petition."[46] Therefore, Joint Petitioners' new argument that the Staff has previously taken the position that 10 C.F.R. § 50.59 analyses in support of SG replacements may be challenged in TS license amendment requests is without merit.

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[44] *Id*. at 15; NRC Staff's Response to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision at 6 (Oct. 25, 2012) (ADAMS Accession No. ML12299A513).

[45] NRC Staff's Response to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision at 6 (Oct. 25, 2012) (ADAMS Accession No. ML12299A513).

[46] 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 at 12 (Jul. 13, 2012) (ADAMS Accession No. ML12195A330). *See also* NRC Staff's Response to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision at 2 n.5 (Oct. 25, 2012) (ADAMS Accession No. ML12299A513).

CONCLUSION

The four new standing arguments and one new contention admissibility argument discussed above should be stricken from the Reply because of the well-established Commission practice that requires replies to focus narrowly on the legal or factual arguments first presented in the original petition unless the criteria of 10 C.F.R. § 2.309(c) for filing after the deadline are satisfied. If the Board denies that motion, alternatively, the Board should grant the Staff leave to reply and consider the Staff responses to the Reply included herein.

As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Mr. Terry Lodge, counsel for Joint Petitioners, to resolve the issues raised in these motions. Joint Petitioners oppose the motion to strike but stated that they do not oppose an additional opportunity to respond to the Reply. Counsel for FENOC authorized the Staff to state that FENOC does not oppose the motions.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
this 1st day of July, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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FIRSTENERGY NUCLEAR OPERATING CO.	)	Docket No. 50-346-LA
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(Davis-Besse Nuclear Power Station, Unit 1)	)	
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF MOTION TO STRIKE PORTIONS OF JOINT PETITIONERS REPLY OR, IN THE ALTERNATIVE, FOR LEAVE TO REPLY dated July 1, 2013 have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 1st day of July, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 1st day of July, 2013