

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of:)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company)	July 8, 2013
Davis-Besse Nuclear Power Station, Unit 1)	
)	
Regarding the Proposed Amendment to)	
Facility Operating License)	

PETITIONERS’ REPLY IN OPPOSITION TO FENOC
‘MOTION TO STRIKE’

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 “First Energy Nuclear Operating Company’s Motion to Strike Portions of Petitioners’ Reply” (FENOC Motion to Strike). For reasons discussed herein, the Motion should be granted in one narrow respect and denied as to all other objections raised by FENOC.

A. Permissible Scope Of Reply Arguments; ‘Legitimate Amplification’

Replies should be “narrowly focused on the legal or logical arguments presented in the [answers] on a request for hearing/petition to intervene.” *South Carolina Elec. and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI 10-01, 71 NRC 1, 7 (Jan. 27, 2010) (quoting “Final Rule, Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). A reply may provide “legitimate amplification” to a proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007).

A party may not use the device of a motion to strike to categorically prohibit all new

arguments. Although “principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant’s or the NRC Staff’s Answers,” such a limitation:

. . . [F]alls well short of prohibiting a petitioner from raising all new arguments.
As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments.

(Emphasis supplied). *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p. 43 of .pdf) (July 6, 2011).

Although the Commission does “not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds,” *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010), the Response did not go outside those boundaries. As illustrated below, Petitioners remained well in-bounds in their reply, amplifying facts stated in their initial Petition for Leave to Intervene. In its Answer to the initial Petition, it appears that FENOC, with its seasoned lawyers and platoons of supportive experts, somehow misplaced its abilities to draw inferences and identify nuance. Given the broad denials contained in FENOC’s Answer to the original Petition, it fell to Petitioners to amplify hitherto obvious facts asserted in support of their assertions of standing and to further fill in the gaps which FENOC oddly was not able to bridge.

B. Responses to Specific Objections

1. Page 3, Footnote 2 of Petitioners’ Response

Upon review, Petitioners concede the introduction of a dramatic difference in weight between the old and new steam generators is a new fact, and because it was not listed along with the nine (9) other major engineering differences between the 1977 version of steam generator and

the 2014 edition, Petitioners will not oppose the reference's being stricken.

2. Pages 4-5 of Petitioners' Response Addressing Design Basis Accident Potential

FENOC asserted in its "Answer Opposing Petition to Intervene" (p. 10) that "The Commission has explained that '[a] petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences.'" Petitioners believed that they had, indeed, substantiated via their Petition and the Gundersen Report which accompanied it that there were significant unanalyzed engineered changes between old and new steam generators which, in light of the steam generator engineering disaster at San Onofre, should prompt significantly greater regulatory scrutiny of the Davis-Besse plan, lest there be safety implications from malfunctioning or malperforming generators.

First, in the Gundersen Report which is part of the original Petition, the expert for Petitioners, Arnold Gundersen, pointed out that he had identified dozens of features at San Onofre which carried safety implications, and that he then had noticed at least 9 "triggering" aspects of the Davis-Besse steam generator replacement that could have safety implications:

In the analysis detailed of the Edison RSGs, Fairewinds identified 39 separate safety issues that failed to meet the NRC 50.59 criteria. Any one of those 39 separate safety issues should have triggered the license amendment review process by which the NRC would have been notified of the proposed significant design and fabrication changes.

Now it appears that FENOC is also attempting to skirt the 10 C.F.R. § 50.59 processes on its Davis-Besse ROTSG project. . . .

In its previous reports, Fairewinds identified at least 39 *unreviewed* modifications to the original steam generators at San Onofre. Now Fairewinds' preliminary review of the D-B ROTSG shows that FENOC made *at least nine unreviewed technical specification changes to the Systems, Structures and Components (SSC)*. These major design changes are not *like-for-like* and clearly show that FENOC should have applied for a license amendment review of the D-B ROTSG under 10 C.F.R. § 50.59.

(Emphasis in original).

Second, Petitioners observed in an non-objected-to portion of their Response (pp 3-4) that:

The reference to 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.

FENOC objects to the further explanation offered by Petitioners a paragraph later. That explanation, however, merely paints in additional details as to how safety could be compromised absent a hearing and prolonged investigation of the steam generator replacement plan at Davis-Besse. Petitioners’ response was “within the scope of the initial contention and directly flow[s] from and [is] focused on the issues and arguments raised in the Answers,” per *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01 at 41 (p.43 of .pdf) (July 6, 2011). The Board should conclude that Petitioners fairly responded to points made by FENOC in its Answer.

3. Pages 7-8 of Petitioners’ Response That Procedural Damage Confers Standing

Petitioners cited in their Response wording which appears repeatedly in the submitted standing declarations signed by individual Petitioners. Specifically, the declarants each state they “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 of the 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 narrow technical specification changes which FENOC considers to be the basis for a license amendment.

Of course the Petitioners believe they have been procedurally damaged; repeatedly throughout their petition, they call for an extended investigation and an adjudicated hearing!¹

Petitioners repeatedly call for rigorous procedural scrutiny of the proposed replacement project.

¹From Petition (emphases added where italicized), p. 1: “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 move to intervene in this proceeding and *to request a public hearing*.”

From Petition, p. 5: “In short, *without 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.”

From Petition, p. 12 (wording of proposed 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.”

From Petition, p. 12 (Petitioners’ expert) “concludes that FENOC has likely deliberately avoided characterization of the project as *one which necessitates an adjudicatory hearing*.”

From Petition, pp. 15-16: “Pointing to the May 13, 2013 San Onofre ASLB ruling, engineer Gundersen asserts that ‘10 C.F.R. § 50.59 requires a formal license renewal application when a license amendment change is required as a result of such a modification,’ *Id.* at 6, because ‘If a licensee is unable to operate a reactor in strict accordance with its license, it must seek authorization from the NRC for a license amendment (10 C.F.R. §§ 50.59, 50.90 to 50.92), *which is a process that triggers a right to request an adjudicatory hearing by persons whose interests may be affected by the proceeding.*’ *Id.*, quoting *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, p. 18 (May 13, 2013).”

From Petition, pp. 19-20: “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).

They express a legal interest in the proper application of regulations and in particular, of use of the Atomic Energy Act hearing right. *Petitioners are alleging that they will be procedurally harmed if they are not granted a hearing on the steam generator replacement plan.*

Unfortunately, FENOC seems to have thoroughly missed the cited parts of the Petition for Leave to Intervene, and so misunderstands that the entire thrust of this License Amendment proceeding is to cure ongoing procedural damage to Petitioners' interests. A petitioner derives standing by alleging that a proposed license amendment would deprive it of the right to notice and opportunity for hearing provided by § 189a 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 "legitimately amplified" in their Response their previous overt, unmistakable demands for a hearing made in their original Petition. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007) (reply may provide "legitimate amplification" to a proffered contention). Accordingly, this portion of their Response may not be stricken.

4. Pages 8-9 of Petition Concerning Prior Participation in D-B License Renewal

FENOC moves to strike Petitioners' reference to the participation by most of them in the pending license renewal proceeding for Davis-Besse. The simple fact of their prior involvement

as litigants is a cumulative and indisputable point which is easily learned by the Atomic Safety and Licensing Board's taking of official notice.

Under 10 C.F.R. § 2.337(f) (formerly § 2.743(i)), official notice may be taken of any fact of which U.S. federal courts may take judicial notice. Additionally, licensing boards may take official notice of any scientific or technical fact within the knowledge of the NRC as an expert body. Pursuant to 10 C.F.R. § 2.337(f), the Commission may take official notice of publicly available documents filed in the docket of such matters as:

- > a statement in a letter from the AEC's General Manager that future releases of radioactivity from a particular reactor would not exceed the lowest limit established for all reactors at the same site. *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-74-25, 7 AEC 711, 733 (1974);

- > Commission records, letters from applicants and materials on file in the Public Document Room to establish the facts with regard to the Ginna fuel problem as that problem related to an appeal in another case. *Consol. Edison Co. of N.Y.* (Indian Point, Unit 2), ALAB-75, 5 AEC 309, 310 (1972);

- > portions of a hearing record in another Commission proceeding involving the same parties and a similar facility design. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), LBP-74-5, 7 AEC 82, 92 (1974);

- > a statement, set forth in a pleading filed by a party in another Commission proceeding, of AEC responses to interrogatories propounded in a court case to which the agency was a party. *Catawba*, LBP-74-5, 7 AEC at 96.

Petitioners note that the fact of the prior involvement of most of their representative

organizations and some individuals in the Davis-Besse license renewal is not subject to dispute. 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)).

5. Pages 9-10 of Petition Respecting Petitioners' Contribution To Proceeding

The arguments made by Petitioners on this score - that if the Board is inclined against conferring standing on any other basis, it should take into account Petitioners' contribution to the license amendment proceeding in the form of their presentation from one of the public experts who testified in the San Onofre regulatory disaster - are "legitimate amplification" of their initial Petition. Petitioners conditionally conceded that if their standing assertions are defective, as argued by FENOC in its Answer, there remains the option of discretionary intervention.

Clearly, the Commission does "not allow distinctly new complaints to be added at will as litigation progresses," *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010). But Petitioners' argument on this score was framed to meet the arguments of FENOC against Petitioners' claims that they have standing as of right.

6. Pages 17-18 of the Petition Concerning Genuine Dispute

The objection raised by FENOC on this part of Petitioners' Response is perplexing. FENOC seeks to strike the entirety of the argument (all of Section III of the Response). In addition, FENOC contrives to argue that (Motion to Strike p. 7) that "Petitioners make a new

argument in their Reply that the scope of the January 18, 2013 LAR is incorrect and the LAR is incomplete.”

While Petitioners did not use the magic word, “incomplete,”² they surely did raise in the original Petition and Gundersen Report FENOC’s lack of public accounting and transparency respecting the license amendment process. The magical word Petitioners used was “inadequate.”

At p. 10 of their original Petition, the Petitioners summarized the core of their case this way:

Petitioners detail below their position that the analysis provided the NRC by FENOC is inadequate; that there is some possibility that significant hazards associated with the steam generator replacement project have not been adequately identified, considered or disclosed; and that the standards of 10 CFR 50.92(c) have not been satisfied.

They further contended at length that the steam generator replacement plan is “experimental” and fails to account for, discuss and resolve at least 9 engineered differences between the original once-through generators, installed circa 1976 or 1977, and the new, redesigned versions which FENOC hopes to place inside the cracked shield building in 2014. See Gundersen Report, p. 5.³

²Magical only by FENOC’s expectations .

³Specifically, 10 C.F.R. § 50.59 requires that any licensee performing an experiment at a licensed nuclear power plant must apply for a license amendment and include the requisite public review. FENOC itself had acknowledged that the ROTSG design had significant modifications in comparison to the original OTSG. More specifically, slides 10 through 13 identify the following significant, experimental modifications to the original OTSG design:

1. The tube inspection lane was removed.
2. An additional tube support plate was added.
3. 150 additional tubes were added.
4. The tube alloy was changed.
5. The tube-to-tube sheet junction was modified extensively.
6. The overall design of the steam generator support structure was changed from a cylindrical skirt to a pedestal cone.
7. The thickness of the pressure retaining walls of the ROTSG is two inches thinner than the pressure retaining wall in the Original Once Through Steam Generator.
8. The 180-degree elbow design will be extensively modified.
9. The alloy of the hot leg nozzles was also changed.

Each and every one of these aforementioned changes is significant individually, and when taken

What is at issue here is FENOC's ironclad insistence that once *it* has decided which of 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 the challenge of those few changes. The position of Petitioners is 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 and disclosed by FENOC.

FENOC's smokescreen that somehow Petitioners are raising a new contention and arguing that it is one of omission are diversionary. The genuine dispute here is over the *scope* of the license amendment proposal. FENOC cannot be allowed to dictate to the adjudicatory panel what that should be.

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). The scope appears to include the systems involved in the license amendment application, *see also Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-88, 16 NRC 1335, 1342 (1982).

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 private analysis which is not available to the public, and the related decision-making by FENOC, have been undertaken. "Standard Technical

together prove that the Replacement OTSG contains many experimental parameters, especially in comparison to the Original OTSG.

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.⁴

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 nonpublic decision *not* to seek a technical specification amendment. And thus these assertions fall 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 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.

As to the request to strike the entirety of Petitioners’ response on the “genuine dispute” point, that should be denied. Petitioners’ reply argument was “narrowly focused on the legal or logical arguments presented in the [answers] on a request for hearing/petition to intervene.” *South Carolina Elec. and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI 10-

⁴Found at <http://www.nrc.gov/reactors/operating/licensing/techspecs.html>

01, 71 NRC 1, 7 (Jan. 27, 2010). Petitioners provided “legitimate amplification” to their proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). Although “principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant’s or the NRC Staff’s Answers,” such a limitation:

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Accordingly, Section III of Petitioners’ Response should not be stricken, but instead, must be duly considered by the Licensing Board in rendering a determination on the Petition.

WHEREFORE, Petitioners pray the ASLB deny FENOC’s “Motion to Strike” except as to the sole point conceded by them.

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

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* * * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "PETITIONERS' REPLY IN OPPOSITION TO FENOC 'MOTION TO STRIKE'" was deposited in the NRC's Electronic Information Exchange this 8th day of July, 2013.

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