

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of:)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company)	July 11, 2013
Davis-Besse Nuclear Power Station, Unit 1)	
)	
Regarding the Proposed Amendment to)	
Facility Operating License)	

**PETITIONERS’ REPLY IN OPPOSITION TO NRC STAFF
‘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 “NRC Staff Motion to Strike Portions of Joint Petitioners’ Reply Or, In the Alternative, for Leave to Reply” (Staff Motion to Strike). For reasons discussed herein, the Motion should be denied as to all objections raised by the NRC Staff. Petitioners deny that they raised by reply new standing arguments not within the scope of the original petition without demonstrating good cause for filing these arguments after the deadline.

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)). But 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. “[P]rinciples of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant’s or the NRC Staff’s Answers;” however, 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).

B. Responses to Specific Objections

1. Strike last paragraph p. 4 through end of Section I.A. on p. 6 of Petitioners’ Reply

The NRC Staff assert that Petitioners’ discussion of the one-tube-break standard in their Reply¹ attempts to “cure the insufficient traceability showing of the Joint Petition” and is raised impermissibly late. Staff Motion to Strike at pp. 6-7.

First, Petitioners deny that they failed to establish traceable harm in their initial Petition. The Gundersen Report which accompanied the Petition delineated significant unanalyzed changes in the engineering of the old vs. 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 to avoid safety implications from malfunctioning or malperforming generators. In the Gundersen Report, Petitioners’ expert pointed out that he had

¹Found at pp. 4-6 of “Petitioners’ Reply in support of ‘Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request.’”

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:

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). Gundersen Report p. 10.

In a portion of their Reply to which the Staff does not object, Petitioners observed (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.

The argument of Petitioners to which the Staff objects merely provides 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 expanded their argument on reply as a legitimate response to points made by FENOC and/or the NRC Staff in their respective Answers to the Petition.

2. Strike last two paragraphs on p. 8 of Reply re procedural damage

The Staff maintains (Motion to Strike p. 8) that Petitioners' allegation of injury to a purely legal interest is sufficient to support standing is outside "the scope of the original petition and is not accompanied by a demonstration of good cause for filing after the deadline."

Petitioners argued that the phraseology which recurs in the standing declarations signed by individual Petitioners, *i.e.*, that Petitioners "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" set the scope, factually speaking, for standing based on procedural harm. These averments are further supported within the Petition by a recitation of the untested, "experimental" nature of the new steam generators. Consequently, Petitioners urge, there must be much broader scrutiny of the license amendment request, extending beyond the narrow technical specification changes which FENOC enumerated as the limited basis for a license amendment.

It's clear on the very face of the Petition, Petitioners believe they have been procedurally damaged. Repeatedly throughout the Petition, they call for an extended investigation and an adjudicated hearing. They believe they will be procedurally damaged if they are denied a hearing which encompasses the broader scope of issues raised in the Petition.²

²From 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,

Petitioners “legitimately amplified” in their Reply their previous assertions that the license amendment process for Davis-Besse had not properly included lessons learned from the San Onofre steam generator engineering catastrophe into the analysis of the new generator design for Davis-Besse. Petitioners further “legitimately amplified” their previous, overt demands for a hearing made in their original Petition. *Cf. PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007) (reply may be used to provide “legitimate amplification” to a proffered contention).

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,

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).

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. 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).

Accordingly, this portion of the Reply should not be stricken.

3. Strike Sect. II.B. on pp. 15-16 exposing Staff's Reversal of Position

The NRC Staff took umbrage at Petitioners' mention of its 180-degree reversal of its position taken in the San Onofre litigation. Staff Motion to Strike pp. 9, 12.

In the San Onofre case, the Staff insisted (in "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)) that FOE's petition was not timely:

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.

Id. at 18-19. (Emphasis supplied). The NRC Staff acknowledged that the heart of FOE's claim was an allegation that the license amendment was "incomplete," but maintained 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, a deadline which FOE had missed.

Id. The NRC Staff even affirmed this position later, in the "NRC Staff's Answer to Request that the NRC Decide Petition to Intervene and Application to Stay Restart Decision," *See* ML

12299A513, p. 6 (October 25, 2012):

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). Petitioners' surprise, then, is understandable, when the NRC Staff for the very first time adopted the opposite stance in the instant license amendment case:

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.

"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," p. 15.

The NRC Staff has a unique role to play in licensing and license amendment proceedings. The Staff is obliged to lay all relevant materials before the Board to enable it to adequately dispose of the issues before it. *Consolidated Edison Co.* (Indian Point Nuclear Generating Units 1, 2 & 3), CLI-77-2, 5 NRC 13 (1977); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 n.18 (1983), *citing Indian Point, supra*, 5 NRC at 15. Moreover, the Staff is obligated to make every effort promptly to report newly-discovered important information or significant developments related to a proceeding to the presiding Licensing Board and the parties.

The Petitioners reasoned, appropriately, that the NRC Staff's reversal of a significant legal policy position such as this, pertinent to two contemporaneous license amendment

litigations focused on the same subject, is something that would be brought to the Licensing Board's attention by the NRC's legal counsel, and conceded the Staff that opportunity. Surprisingly, NRC counsel did not avail itself of the chance to explain its critical change of heart to the ASLB, and so now should not be allowed to divert attention from its failure to address the Board candidly. Certainly the Staff cannot now be heard to argue that its own intentional change of position between the two litigations is a "new claim" that the Staff should have been given an "opportunity to rebut."

The scenario here is analogous to impeaching a key witness' testimony with evidence of a prior inconsistent statement. As with a prior inconsistent statement, the NRC Staff was given the chance to come clean and admit its inconsistent position in the San Onofre litigation. Because that opportunity was ignored, the Staff's credibility is harmed by a self-inflicted injury. And the Staff has the temerity to divert the Board's attention via the ruse of Petitioners' supposed departure from rigid procedural regularity. This absurd objection should be rejected.

4. Strike petitioners' prior participation in D-B license renewal at pp. 8-9

The Staff moves to strike Petitioners' reference to their prior participation 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 attainable by means of 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.

The fact of Petitioners' prior involvement 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)).

Petitioners' prior involvement in the still-pending Davis-Besse license renewal proceeding is not secret, is officially noticeable, and legitimately amplifies Petitioners' other qualifications to participate. This objection should be ignored.

5. Strike pp. 9-10 references to Petitioners' contribution to proceeding

If the Board is inclined against conferring standing on any other basis, it may still account for Petitioners' contribution to the license amendment proceeding, in particular, their expert's presentation by Arnold Gundersen. Gundersen, who is a nuclear engineer, testified substantively in the San Onofre regulatory disaster and cited many engineering concerns that require more exhaustive scrutiny of the replacement steam generators than may have taken place. As Petitioners have previously noted, FENOC 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 protection is a barrier to Petitioners' seeking to understand how FENOC fulfilled the "like-for-like" comparison necessitated by 10 C.F.R. § 50.59. So FENOC claims inordinate power to shield its decisions from public scrutiny. Despite disastrous results following the Southern California Edison misjudgments at San Onofre, the NRC Staff has nevertheless left it to FENOC to invoke this secrecy to limit the scope of public inquiry however it deems best.

Against this wall of secrecy, Petitioners have articulated a novel but substantial basis for hearing, by contending 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 and the new ones which FENOC hopes to install. See Gundersen Report, p.

5.³ Petitioners' argument in favor of discretionary intervention is "legitimate amplification" of their initial Petition, and offers an alternate ground of intervention in light of the Staff objections.

C. Conclusion

The Commission has long maintained that "the Commission's objectives are to provide a fair hearing process...and to produce an informed adjudicatory record that supports agency decision-making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment," and that "the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes...". Fed. Register, Vol. 63, No. 150 (August 5, 1998). Moreover, "Public participation through intervention is a positive factor in the licensing process and Intervenors perform a valuable function and are to be complimented and encouraged." *See, e.g., Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), ALAB- 256, 1 NRC 10, 18 n.9 (1975); *Consolidated Edison Co. of N.Y., Inc.* (Indian Point Nuclear Generating Unit 2), ALAB-243, 8 AEC 850, 853

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

(1974); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425 (1974); *Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222 (1974).

Joint Petitioners trust that the NRC means what it has said, and that the Petitioners here will be permitted to perform their indisputably “valuable function” of helping to ensure that the NRC will fulfill its “responsibilities for protecting public health and safety, the common defense and security, and the environment.”

WHEREFORE, Petitioners pray the ASLB deny the NRC Staff’s “Motion to Strike” in all its particulars.

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

Terry J. Lodge (OH #0029271)

316 N. Michigan St., Ste. 520

Toledo, OH 43604-5627

(419) 255-7552

Fax (419) 255-7552

Tjlodge50@yahoo.com

Counsel for Intervenors

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)	Docket No. 50-346-LA
FirstEnergy Nuclear Operating Company)	July 11, 2013
Davis-Besse Nuclear Power Station, Unit 1)	
Regarding the Proposed Amendment to)	
Facility Operating License)	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “PETITIONERS’ REPLY IN OPPOSITION TO NRC STAFF ‘MOTION TO STRIKE’” was deposited in the NRC’s Electronic Information Exchange this 11th day of July, 2013.

Executed in Accord with 10 C.F.R. § 2.304(d)
Terry J. Lodge (OH #0029271)
316 N. Michigan St., Ste. 520
Toledo, OH 43604-5627
(419) 255-7552
Fax (419) 255-7552
Tjlodge50@yahoo.com
Counsel for Intervenors