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NUCLEAR REGULATORY COMMISSION

Title: FirstEnergy Nuclear Operating Company
Davis Besse Nuclear Power Station

Docket Number: 50-346-LA

ASLBP Number: 13-928-02-LA-BD01

Location: teleconference

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Pages 1-60

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: :

FIRSTENERGY NUCLEAR : Docket No. 50-346-LA

OPERATING COMPANY : ASLBP No. 13-928-02-LA-BD01

(Davis-Besse Nuclear :

Power Station, Unit 1):

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Wednesday, July 24, 2013

Teleconference

BEFORE:

- PAUL S. RYERSON, Chairman
- DR. MICHAEL F. KENNEDY, Administrative Judge
- NICHOLAS G. TRIKOUROS, Administrative Judge

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P R O C E E D I N G S

1:34 p.m.

1
2
3 JUDGE RYERSON: Okay. Let's go on the
4 record now. Welcome everyone. This is Judge Ryerson.
5 We're here on the matter of FirstEnergy Nuclear
6 Operating Company, Davis-Besse Nuclear Power Station,
7 Unit 1, and with me are the other members of this
8 particular board, Judge Kennedy and Judge Trikouros.

9 It will quickly become apparent that they
10 are the technically trained judges on the Board, and
11 that I am the legally trained judge.

12 We have a reporter online, so please try
13 to remember to identify yourselves before you speak,
14 and I also want to emphasize that we have made this
15 telephone call available in a non-speaking mode to
16 members of the public, and it's my understanding that
17 several people and possibly the media have taken
18 advantage of that.

19 So we will be, we will be heard by those
20 folks, and also a transcript will be available of this
21 argument within a few days. That said, let's take the
22 formal appearances. Who do we have for FirstEnergy?

23 MR. MATTHEWS: Good afternoon, Judge
24 Ryerson. This is Tim Matthews of Morgan, Lewis and
25 Bockius on behalf of FirstEnergy.

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1 JUDGE RYERSON: Okay, thank you, and for
2 the Petitioners, there are four Petitioners and all
3 represented by the same counsel; is that correct?

4 MR. LODGE: That is correct, Judge
5 Ryerson. Greetings to the Licensing Board. My name
6 is Terry Lodge, representing all the Petitioners.

7 I would like to indicate to the Board that
8 I, I'm not anticipating that this will be necessary,
9 but one of the people listening in on the non-speaking
10 lines is Arnie Gundersen, our expert, and there may,
11 from time to time, be some need for me to consult with
12 him. Thank you.

13 JUDGE RYERSON: Okay, thank you. And
14 finally for the NRC staff, who do we have today?

15 MS. YOUNG: Good afternoon, Judge Ryerson.
16 This is Mitzi Young. I'm with my co-counsel, Jeremy
17 Wachutka. Also listening in on the line are members
18 of the technical staff, Eva Brown, Jeremy Bowen,
19 Emmett Murphy, Gloria Kulesa and Ravi Grover.

20 JUDGE RYERSON: Okay, thank you Ms. Young,
21 and welcome to everyone again.

22 MR. MATTHEWS: Judge Ryerson?

23 JUDGE RYERSON: Yes.

24 MR. MATTHEWS: Judge Ryerson, this is Tim
25 Matthews again for FirstEnergy.

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1 JUDGE RYERSON: Yes.

2 MR. MATTHEWS: I wanted to further
3 clarify. With me here at counsel table are my
4 colleague, Stephen Burdick, also of Morgan Lewis, and
5 David Jenkins, senior counsel too of FirstEnergy.

6 Also with us are members of the
7 FirstEnergy project, Engineering and Licensing
8 Regulatory Affairs organization, principally among
9 them Henry Hegrat of the Licensing Regulatory Affairs
10 organization, and David Petro, the senior project
11 manager.

12 JUDGE RYERSON: Okay. Thank you Mr.
13 Matthews, and welcome to all of you. The purpose of
14 this call, the principal purpose anyway is set forth
15 in the Order that the Board issued on July 1.
16 Petitioners in this case have asked for a hearing on
17 a proposed license amendment that addresses four
18 technical specifications concerning a steam generator
19 at the Davis-Besse facility.

20 The Board has some questions concerning
21 the parties' standing and concerning the admissibility
22 of the one contention that the Petitioners have
23 proffered. We don't really need any formal
24 presentations by the parties. We've read all your
25 filings a number of times and we've talked about them

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1 amongst ourselves.

2 So the format I would like to use today is
3 to have individual members of the Board ask questions.
4 Usually, I think they will be directed to specific
5 parties. But we certainly want to give an opportunity
6 for other parties to respond if they wish to to the
7 same question.

8 Don't feel obliged to do that, because
9 sometimes the question will be really very specific to
10 a particular party. But we will try to remember to
11 invite comments from the other parties on any
12 question, and if we fail to do that, don't be shy.
13 Just speak up and ask for the opportunity to do that.

14 I would like to begin with just a few
15 questions of my own, and the first one is for Mr.
16 Lodge. Isn't the Petitioners sole contention here a
17 challenge to FirstEnergy's analysis under 10 C.F.R.
18 50.59?

19 MR. LODGE: No sir. It is a request that
20 the scope of the license amendment proceeding be
21 broadened to include all of the facts. We believe
22 that what has occurred here is that a very select
23 number of relatively narrow areas have been proffered
24 as being the license amendment, but in fact the actual
25 equipment to be replaced, the newly-installed steam

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1 generators, differ in very significant respects,
2 engineered respects from the original steam generator
3 design.

4 JUDGE RYERSON: Well, your contention as
5 drafted references one section of 10 C.F.R., I
6 believe, and I believe it references 10 C.F.R. 50.59
7 twice, and doesn't reference anything else. Am I
8 correct about that?

9 MR. LODGE: I would accept your
10 characterization of the numbers of times we may have
11 mentioned it in the petition, sure.

12 JUDGE RYERSON: Okay, and that's the
13 contention you put forward in front of us; correct?

14 MR. LODGE: Right.

15 JUDGE RYERSON: And your reply brief at
16 page 17, you say "Petitioners question the adequacy of
17 the 10 C.F.R. 50.59 analysis"; correct?

18 MR. LODGE: Yes.

19 JUDGE RYERSON: So I mean isn't the thrust
20 of your contention under 50.59?

21 MR. LODGE: Yes, and it is that the
22 analysis is incomplete.

23 JUDGE RYERSON: Okay. So your contention
24 is, in effect, that the 50.59 analysis is incomplete?

25 MR. LODGE: Correct.

1 JUDGE RYERSON: Okay. Still, that is, I
2 think, a challenge to the 50.59 analysis. You say
3 it's incomplete, and hasn't the Commission said that
4 your only remedy, then, is a petition under 10 C.F.R.
5 2.206, which is sent to a director of a division, and
6 not a hearing, not an adjudicatory hearing before the
7 Board such as this.

8 In other words, where do we get our
9 jurisdiction, in light of what the Commission has said
10 about that?

11 MR. LODGE: Well, 2.206 is, of course the
12 Board knows, is an enforcement petition. We're
13 looking for a determination of the scope of this
14 proceeding, which we believe that this Licensing Board
15 has the power to determine.

16 The problem is not exactly non-compliance
17 requiring enforcement; the problem is that the license
18 amendment request is incomplete.

19 JUDGE TRIKOUROS: Mr. Lodge, this is --
20 this is Judge Trikouros.

21 MR. LODGE: Yes.

22 JUDGE TRIKOUROS: Are you making a
23 connection between the 50.59 analysis and the license
24 amendment? Is that the thrust of your position, that
25 those two are connected in some manner?

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1 MR. LODGE: Yes. The connection, if you
2 will, is that there's very little connection, that the
3 tech specs, the proposed technical specification
4 changes, sort of take you into and out of the steam
5 generators.

6 But they don't discuss or analyze, within
7 the license amendment, the major differences, critical
8 materials differences and engineer differences between
9 the original steam generators and the ones that are
10 proposed to be installed.

11 JUDGE TRIKOUROS: Well, let me ask you.
12 Why didn't you make that argument in your petition?

13 MR. LODGE: I believe we did.

14 JUDGE TRIKOUROS: I don't recall
15 specifically that you made that argument, that the
16 license amendment itself was incomplete or improper in
17 some manner.

18 MR. LODGE: Well, we made the argument
19 that it is, that the steam generators that are planned
20 to be used are experimental, because there has been no
21 disclosure nor apparent independent scrutiny completed
22 yet by the NRC staff of the engineered differences.

23 JUDGE TRIKOUROS: Well, I wonder if
24 somewhere along the line here you'd give us a cite to
25 where in your petition you specifically reference the

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1 license amendment request, and make a determination as
2 to it being incomplete or improperly done?

3 MR. LODGE: Sure. May I have a few
4 seconds here to see if I can find such a passage?

5 JUDGE TRIKOUROS: Yeah.

6 (Pause.)

7 JUDGE RYERSON: Mr. Lodge, this is Judge
8 Ryerson again. I wonder, it might perhaps be more
9 efficient to allow a little time at the end, if
10 there's something that you need to look up it's going
11 to take a while, or we can receive something.

12 (Simultaneous speaking.)

13 MR. LODGE: That would be fine.

14 JUDGE RYERSON: Pardon?

15 MR. LODGE: That would be fine.

16 JUDGE RYERSON: Okay, because in some ways
17 I think this relates to my next question, which is
18 again also for you, Mr. Lodge, and again, I think if
19 other parties feel they wish to jump in at this point
20 to respond to my first question, you may. But you
21 know, I don't, I thought it was primarily addressed to
22 Mr. Lodge, as is this one, and that's this.

23 The petition in this case, or that is the
24 Notice of Opportunity for Hearing in this case, to
25 which you purport to respond, addresses four proposed

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1 changes in technical specifications, and does your
2 petition really address those four changes at all?

3 You know, it seems your argument jumps
4 right into 50.59, which is the section you quote in
5 the contention. So how do you establish the
6 requirements for admissibility of a contention under
7 10 C.F.R. 2.309(f)(1), if you haven't spoken at all
8 about the actual specifications that gave rise to the
9 Notice of Opportunity for Hearing.

10 In particular, how do you demonstrate a
11 genuine dispute with the application, which is one of
12 the key requirements, when you haven't really
13 addressed that application at all?

14 MR. LODGE: Well first of all, it's our
15 understanding, upon a reading of the San Onofre
16 Licensing Board decision, that indeed, the only
17 opportunity is to raise concerns about the licensing
18 amendment, which we take to include concerns of scope
19 or experimental nature, within our Petition to
20 Intervene. So we've done that.

21 Secondly, I think that it is at least very
22 clearly implicit in the ground that we did raise, that
23 we're talking about an area of change, of physical
24 change that goes beyond, perhaps is connected to the
25 tech specs in some respect. But certainly it goes

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1 beyond the scope of the tech specs themselves.

2 JUDGE RYERSON: Yeah. But I guess the
3 question I have is doesn't that then back you into,
4 as you state in your contention, a challenge to the
5 50.59 analysis?

6 I mean in other words, I suppose
7 hypothetically, a Petitioner in your shoes could have
8 addressed the four technical specifications that are
9 being proposed to be changed, and attempted to explain
10 how those four specifications are related in some
11 fashion to the larger question of the replacement of
12 the steam generator.

13 But as I read your petition, you don't
14 seem to attempt to do that. You are responding, or
15 purporting to respond, to a Notice of Opportunity for
16 Hearing on four technical specification changes. As
17 far as I can see, you don't say anything about them.
18 I mean isn't that a problem under the standards for
19 contention admissibility?

20 MR. LODGE: We don't believe it is a
21 problem, as I said, based upon the San Onofre
22 Licensing Board's reasoning, which was this is your
23 one opportunity to raise whatever grounds you believe
24 to be appropriate for an intervention.

25 But moreover, what we did do was delineate

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1 the significant differences between the two
2 generations, if you will, of steam generators, and I
3 believe that that certainly establishes some sort of
4 issue of fact. We haven't seen much of a 50.59
5 analysis even of tech spec changes.

6 JUDGE RYERSON: Right.

7 MR. LODGE: A big problem here is the
8 comparative obscurity for proprietary nature of the
9 information related to the license amendment request,
10 and --

11 JUDGE RYERSON: I think that point is very
12 well taken, and some of my technical colleagues may
13 have some practical questions for you about the impact
14 of that.

15 But while we're on the subject of the San
16 Onofre decision, that, if I recall the facts, was a
17 very unusual case, in that the Commission received a
18 petition, part of which it sent to a Licensing Board,
19 to determine whether the, what is it called, a CAL,
20 Confirmatory Action Letter that the staff issued, was
21 a de facto license amendment that required a hearing.

22 But to the extent that that petition was
23 a challenge to a 50.59 analysis, it said it. The
24 Commission sent it to the appropriate office director
25 as a petition under 2.206.

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1 The Licensing Board itself, if I recall
2 the decision, went out of its way in analyzing the
3 question that the Commission had specifically asked it
4 to answer, went out of its way to clarify that the
5 Board was using the standards of 50.59 as guideposts
6 for that decision, but was not applying those
7 standards directly, and indeed went out of its way to
8 say that that would be prohibited. Am I misrecalling
9 that case?

10 MR. LODGE: I agree with your
11 clarification or your interpretation. But again,
12 we're not, we're not seeking enforcement.

13 We're seeking for essentially a
14 declaratory judgment type of finding from this Board,
15 the effect of which is to find that the license
16 amendment information provided by the applicant is not
17 sufficient for a determination of whether or not the
18 steam generator replacement project should be allowed
19 to go forward at this point.

20 JUDGE RYERSON: And where do we get
21 jurisdiction to decide that issue?

22 MR. LODGE: I don't mean to be
23 impertinent. I think that it is present in 50.59. We
24 provided -- at pages 14 and 15, we provided, of
25 course, and our expert's report, more detail. But we

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1 provide detail both the differences between the steam
2 generators across the two generations, and there are
3 many problems, because there's no analysis, no
4 discussion whatsoever that is, that addresses that
5 from the applicant.

6 JUDGE RYERSON: Okay. I think I
7 understand your argument. Let me turn, if I may;
8 again, if anyone else wants to contribute to this
9 immediate question, you're welcome to. But I'm happy
10 to move on to another question. This one's for the
11 NRC staff, and Ms. Young, will you be addressing this,
12 or one of your colleagues?

13 MS. YOUNG: My colleague.

14 JUDGE RYERSON: Okay. Well, this is then
15 for your colleague. If the 50-mile proximity
16 presumption does not apply in this case, which I think
17 was the staff's position, I assume the staff then
18 believes that standing could be established in other
19 ways.

20 In other words, it is presumably not the
21 practice of the Commission to issue a Notice of
22 Opportunity for Hearing, that no one would have
23 standing to respond to. That probably is not normally
24 the case.

25 So in the staff's view, could you tell me

1 what a proper petitioner would look like, and what
2 kind of showing would they have to make to have
3 standing to challenge these four proposed technical
4 specifications, separate and apart from the
5 replacement of the steam generator?

6 MR. WACHUTKA: Yes, Your Honor. This is
7 Jeremy Wachutka from the NRC staff. You are correct
8 in saying that the proximity presumption does not
9 apply to license amendment requests, and therefore --

10 JUDGE RYERSON: I didn't say it didn't
11 apply. I said your position is it does not apply.

12 MR. WACHUTKA: Yes, Your Honor, that's our
13 position, based on case law and that the standard
14 would be is that the petitioner would have to show
15 that there is an obvious, there's either an obvious
16 chance for offsite release.

17 Or else they have to meet the
18 contemporaneous standing requirements, which involve
19 showing that there's an injury in fact, that there's
20 traceability, that there's redressability, and that
21 the injury in fact that they assert does fall within
22 the purview of the Atomic Energy Act, Your Honor.

23 JUDGE RYERSON: Yeah. No, that sounds
24 very familiar. That's the boilerplate description of
25 what they must show. I'm just trying to figure out,

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1 you know, who could possibly do that? How would they
2 do it? Can you give me a specific example of how
3 anybody would have standing to challenge four proposed
4 changes in the technical standards, without the
5 benefit of a proximity presumption?

6 What would their petition look like? Who
7 would the be?

8 MR. WACHUTKA: Yes, Your Honor. In this
9 case, the Joint Petitioners do have an expert, and
10 they had that expert analyze the differences between
11 the old steam generators and the proposed new steam
12 generators, and what they had to have done was to then
13 show how these differences would cause an actual
14 radiological offsite release. The problem is, is that
15 they did not show this, so there was no traceability.

16 JUDGE TRIKOUROS: Yeah. This is Judge
17 Trikouros, and you're referring to Mr. Gundersen,
18 regarding what you call an analysis of the differences
19 between the steam generators.

20 To my recollection, Mr. Gundersen found
21 that by reviewing a presentation that was made by the
22 applicant to the staff, and in fact Mr. Gundersen was
23 complaining, if you will, in his document, that he had
24 no information regarding the replacement steam
25 generators; isn't that correct?

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1 MR. WACHUTKA: That's correct, Your Honor.
2 But it's the staff's position that the 10 C.F.R. 2.206
3 process is the valid process by which all these
4 complaints that the Joint Petitioners have can be
5 given a hard look by the staff.

6 JUDGE TRIKOUROS: Well, perhaps you could
7 explain to me how that would work in this particular
8 case?

9 MR. WACHUTKA: Your Honor, what we would
10 recommend is that this petition be referred to the 10
11 C.F.R. 2.206 process, and then that would involve the
12 Joint Petitioners' expert not only explaining the
13 differences between the new and old steam generators,
14 but also explaining why they think that the tech spec
15 changes will make it so that these new steam
16 generators will not be operated safely.

17 JUDGE RYERSON: If I could just interrupt
18 for one second, Judge Trikouros. This is Judge
19 Ryerson again. This may be my last question, but you
20 spoke about referring the petition in front of us to
21 a director under 2.206. So maybe this question goes
22 finally to the applicant.

23 I believe it's the applicant's position,
24 in addition to other things, that a challenge under
25 50.59 is premature at this point, because the

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1 applicant, this FirstEnergy is still conducting a
2 50.59 analysis.

3 So if Mr. Matthews, would you favoring
4 referring this to a director under 2.206 at this
5 point, or should we, in your view, simply dismiss?

6 MR. MATTHEWS: Thank you, Judge Ryerson.
7 This is Tim Matthews on behalf of FENOC. As you
8 stated, we believe that at this point there is nothing
9 to refer under 2.206. But I would like the
10 opportunity to address the Board's question as it
11 relates to standing, if that would be appropriate.

12 JUDGE RYERSON: That's fine, thank you.

13 MR. MATTHEWS: With respect to proximity
14 standing, the Commission's jurisprudence describes
15 proximity standing not as an exception to the judicial
16 concepts of standing, but as a shorthand, a thumb
17 rule, where there's obvious potential for offsite
18 consequences.

19 It believes, it's essentially a reduction
20 in the burden of showing, not a production, making the
21 argument. But it doesn't mean that the Petitioner
22 needn't have some injury in fact. It's the Commission
23 acknowledging that there is an injury in fact, where
24 there is obvious potential for offsite consequences.

25 So the concepts continue to apply.

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1 Obviously in these limited tech spec proposed changes,
2 that potential does not exist. But it is possible
3 that a petitioner could demonstrate standing under the
4 contemporaneous judicial concepts of standing, by
5 arguing some injury in fact.

6 It would not be difficult, I think, in the
7 postulate to one of your earlier questions, Judge
8 Ryerson, I think a petitioner could take on one of the
9 technical specifications and say that the conclusions
10 are wrong for the following three reasons.

11 We have done our own analyses, for
12 example, with respect to the change in the volumetric
13 curve, and say that we believe for the following
14 reasons and with the expert analyses and showing their
15 calculations that they believe they're wrong, and
16 therefore there is the potential for offsite
17 consequences because of the accident that those curves
18 are intended to protect against.

19 So it is not some hypothetical that's
20 impossible for anyone to articulate. It's fairly easy
21 on the fly here. The Petitioner just chose not to do
22 it, for whatever reason, and --

23 JUDGE RYERSON: Yeah, okay. Thank you,
24 Mr. Matthews.

25 MR. MATTHEWS: So getting back to the

1 2.206 question, as the Commission did in CLI-1220, the
2 San Onofre decision the Petitioners don't cite, the
3 Board or the Commission did exactly as you said,
4 referred the opportunity for a hearing question not as
5 an opportunity for a hearing at all, but interpreted
6 as compliance with, I'm sorry, 10 C.F.R. 50.59.

7 Here, there is not really an opportunity
8 for the staff or anyone else to evaluate FENOC's
9 compliance with 50.59, as to the steam generator
10 replacement, because those evaluations are still
11 ongoing. So there's nothing to evaluate at this
12 point.

13 That question is far afield from the
14 *Federal Register* notice that brings us here today,
15 that is specific to the four technical specification
16 changes. Thank you.

17 JUDGE RYERSON: And I take it, I mean if
18 the 50.59 analysis is ongoing, there is at least a
19 theoretical possibility that FirstEnergy could
20 conclude that a license amendment was required for
21 some other reason, other than the tech specification
22 changes, although you don't anticipate that. Is that
23 your position, as I recall?

24 MR. MATTHEWS: That is our position --
25 this is Tim Matthews for FirstEnergy. That is

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1 correct, Judge Ryerson. That is our petition. We do
2 not anticipate that the screening or evaluation would
3 result in a need for an amendment. But until those
4 analyses are done, FirstEnergy has not reached that
5 conclusion, and it certainly understands the
6 seriousness with which it needs to conduct those
7 evaluations.

8 JUDGE RYERSON: Okay, thank you.

9 JUDGE KENNEDY: Mr. Matthews, this is
10 Judge Kennedy. Just a follow-up to a statement that
11 you had made about challenging the specific technical
12 specifications in this Notice of Hearing.

13 What would you envision would be the
14 information that the Petitioner would rely on, to
15 challenge any one of these specific technical
16 specifications?

17 MR. MATTHEWS: This is Tim Matthews on
18 behalf of FirstEnergy. Thank you, Judge Kennedy. I
19 have not gone out to try to analyze or try to
20 challenge First Energy's proposed technical
21 specification changes.

22 But I expect that with respect to the tech
23 spec traveler that addressed the technical
24 specifications or the revised tech spec changes, for
25 example, the reporting to the NRC or inspection

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1 frequency, that there are publicly available documents
2 in ADAMS that Petitioners could review.

3 But I think the expectation if Petitioners
4 intend to add something to the proceeding, that they
5 would bring their own analyses to it. Rather than
6 simply criticize what the applicant has done or the
7 quality of the staff's review, they would bring their
8 own information to the table.

9 So I don't have the short answer to your
10 question as to any particular tech spec what
11 information is available that might challenge it,
12 because we believe that the tech spec themselves are
13 more than adequately supported.

14 JUDGE KENNEDY: I understand, Mr.
15 Matthews. This is Judge Kennedy again. I guess I was
16 trying to look at it more generically, and focusing in
17 on the content of the license amendment request, and
18 trying to see what you believed information was
19 available within that license amendment request, that
20 could support a specific challenge, that would lead to
21 causation of harm to a member of the public.

22 I think that's really, it was more of a
23 generic question, not one specific, that says here's
24 how we pieced the puzzle together, but where would I
25 start? We know the four technical specification

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1 changes, but what's lacking is how you would raise a
2 challenge that could either lead to standing, or to an
3 admissible contention, and what information is
4 available to the Petitioner at this stage.

5 MR. MATTHEWS: This is Tim Matthews on
6 behalf of FirstEnergy. Thank you, Judge Kennedy.
7 First of all, I don't agree with Petitioners'
8 assertion that the Commission imposes some incredibly
9 high evidentiary burden, in order to establish a
10 contention.

11 There is some showing required. I agree
12 with that, and we have argued it and continue to argue
13 it. But it is not some super-high standard. I'm
14 challenged to address your question generically, as it
15 relates to specific Davis-Besse steam generator
16 technical specification changes.

17 The January 18th submittal includes a
18 fairly detailed description in Section 2.0 of the
19 proposed changes, a technical evaluation of them, and
20 a no significant hazards consideration.

21 I think there is sufficient information on
22 there, in there, such that a knowledgeable petitioner,
23 someone who actually had some information to bring to
24 the table, some independent knowledge, this together
25 with information available, for example, in the public

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1 document room or available through experience at other
2 projects, could bring challenges to them.

3 That's not necessarily they wouldn't be
4 able to present the evidence to prevail at a hearing
5 at the end of the day, after an evidentiary hearing.
6 But I think they could present sufficient evidence to
7 present an admissible contention.

8 JUDGE KENNEDY: Mr. Matthews, this is
9 Judge Kennedy again. Just for argument's sake, and I
10 don't know if you've looked; I certainly haven't
11 looked, and I certainly don't know if the Petitioners
12 have looked.

13 But it sounds like you're telling us there
14 could be sufficient information within the public
15 domain that would allow them to understand what this
16 steam generator replacement project looks like.

17 They have noted the PowerPoint
18 presentation, but have indicated they found little
19 more than that. Is it your sense that there's more
20 information about there and they just didn't look hard
21 enough?

22 MR. MATTHEWS: This is Tim Matthews on
23 behalf of First Energy. Thank you, Judge Kennedy. I
24 point out that this discussion, it's somewhat
25 academic, because the challenge the Petitioners have

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1 don't address any of the tech spec, don't even attempt
2 to address the tech spec changes.

3 In fact, they argue that we should be
4 changing the tech specs and don't recognize that in
5 fact we have proposed changes to the tech specs. But
6 as to your specific point, the industry has been
7 changing steam generators for over a decade.

8 The OE that -- under 50.59, the OE, and
9 because of that there are inspection reports. You
10 know, the staff, every time there's a steam generator
11 change, including the announced inspection of Davis-
12 Besse, every time there's a steam generator change
13 under 50.59, the staff performs an inspection, and
14 there's an inspection report of that 50.59 analysis.

15 That doesn't mean that Intervenors have or
16 potential petitioners have the 50.59 analysis itself,
17 or have the underlying calculations or reference
18 documents. But they do have a toehold, and I do
19 believe that in a decade, more than a decade of
20 generators being changed under this process, that
21 there is information available.

22 As to the once-through steam generators,
23 Davis-Besse is certainly not the first. The OE that,
24 the operator experience that Petitioners point to, as
25 Judge Trikouros noted, that FirstEnergy described to

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1 the staff in that PowerPoint presentation, those were
2 all there.

3 There's information about those other
4 steam generator replacements, the very similar type
5 steam generators that, you know, for the design that
6 Davis-Besse is using to replace. So I don't accept
7 that there is no information out there. I have not
8 done the search to prove what information may or may
9 not be available.

10 But frankly, that's not FirstEnergy's
11 burden, and I don't see that Intervenors have even
12 tried or Petitioners have even tried in this case.

13 MR. LODGE: This is Terry Lodge. I would
14 like to respond to some of these things at some point,
15 and if now is acceptable, I'd like to proceed.

16 JUDGE RYERSON: Yes. This would be a good
17 time, Mr. Lodge.

18 MR. LODGE: Thank you very much. First of
19 all, I'd like to note that the FSAR is being charged.
20 The FSAR, the final safety analysis report is updated.
21 It's being changed, and it set the bounding
22 characteristics for steam generators. The one-tube
23 failure mode is certainly that.

24 Secondly, we're just learning today that
25 FirstEnergy hasn't even completed its 50.59 analysis.

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1 Therefore, this entire proceeding is premature. I
2 think I believe that this matter should be tabled
3 awaiting some final analysis. We are also aware, of
4 course, that the staff has not completed its 50.59
5 analysis.

6 The problem is is that we're looking at a
7 scenario where FirstEnergy gets to select the agenda.
8 FirstEnergy determines what the scope of their license
9 amendment request will be, based upon information that
10 is not available to the public.

11 I'm a little surprised that FirstEnergy
12 can't conclusively describe to this panel the paucity
13 of information that's available. We have produced an
14 expert's report that indicates that he could find
15 virtually nothing, and is relying upon a slide show
16 and very little other information that is in the ADAMS
17 inventory.

18 There's no longer a public documents room
19 per se. We have conducted a bona fide search,
20 produced an extensive report from one of the best-
21 recognized experts on nuclear engineering in the
22 world, and I'd further like to point out that perhaps
23 we have a decade of steam generator replacement
24 experience to review, and our review, as expressed in
25 Mr. Gundersen's report, is that the last three

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1 generator replacement projects have been fiascos, if
2 not economic disasters.

3 What we have attempted to do here is bring
4 to the attention of the NRC a serious enforcement gap,
5 a series of problems that have contributed to industry
6 failures, closures of operating reactors forever, and
7 it's absurd that we're arguing over whether or not
8 there's zero possibility, based on tech spec changes,
9 of any accident; therefore, there's no standing.

10 This is, the Calvert Cliffs decision is
11 one wherein the Commission held that you cannot argue
12 that there's no possible negative consequences;
13 therefore, no one could possibly have standing. We
14 are bringing information in advance of regulatory
15 errors and gaps and fiascos.

16 I'm hopeful that the Licensing Board will
17 understand things in that spirit. The significance of
18 the essentially the concealment, if you will, of the
19 application information is very serious, because if
20 the public is going to be the only regulator, we don't
21 have access to information to bring to the attention
22 of the NRC the precise problems with the steam
23 generators. Thank you.

24 JUDGE RYERSON: Thank you, Mr. Lodge.

25 MR. WACHUTKA: Your Honor, this is the NRC

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1 staff, Jeremy Wachutka. We would like to note that if
2 it is the Joint Petitioners' aim to bring this issue
3 to our attention, bringing a petition under 10 C.F.R.
4 2.206 would completely accomplish that goal, and we
5 would take a hard look at this process.

6 MR. MATTHEWS: This is Tim Matthews on
7 behalf of First Energy. Judge Ryerson, if I might.

8 JUDGE RYERSON: Yes.

9 MR. MATTHEWS: I think my colleague at the
10 bar may have misspoken, because our brief notes that
11 the 50.59s for the steam generator replacements have
12 not yet been completed. But regardless, the
13 suggestion that a contention be held in abeyance is
14 completely contrary to Commission precedent, and would
15 not be appropriate.

16 The idea that FirstEnergy is somewhat
17 setting the agenda about what the public does or
18 doesn't have access to challenge is completely crazy.
19 The Commission decided exactly that when it issued
20 50.59 and when it reevaluated 50.59 in 1999, while
21 steam generator replacements were already being
22 conducted.

23 The Commission has decided that licensees
24 can replace or can make changes, including to major
25 RCS reactor coolant system components, provided they

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1 meet those criteria specifically described in 50.59.
2 So the Commission has decided that.

3 As Judge Ryerson, you noted in the
4 beginning, Petitioners' beef seems to be with 50.59.
5 It's unclear to us whether their intention is really
6 a facial challenge to 50.59.

7 That's inappropriate for the Board, but
8 would it be appropriate for petition to rulemaking, or
9 if they're challenging FirstEnergy's implementation of
10 50.59, which is not yet complete and therefore would
11 be inappropriate for a 2.206 petition at this point,
12 a referral.

13 But I point out that Intervenors have the
14 possibility, the ability on their own. They have
15 experienced counsel, national anti-nuclear groups, a
16 purported expert in NRC regulation. They know how to
17 file a petition for rulemaking. They know how to file
18 a petition for 2.206.

19 They've just decided not to do it.
20 There's no concealment here. FirstEnergy decided to
21 replace the steam generators. It decided on a design
22 that would fit within the existing safety analysis of
23 the plant, not to go out and reanalyze the safety of
24 the plant, at a cost of who knows what cost to go out
25 and reanalyze an entire plant.

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1 So it's not surprising that the generator
2 that fits the design analysis is likely to fit the
3 50.59 screening criteria, and therefore, as an
4 ancillary consideration, doesn't become subject to a
5 license amendment.

6 But there's no concealment here, and it's
7 completely inappropriate to be suggesting that
8 FirstEnergy is hiding anything or disenfranchising
9 anyone.

10 JUDGE RYERSON: Okay. Thank you, Mr.
11 Matthews. I think we understand your position on
12 that. I will agree. You are correct that your briefs
13 did state your position, and that's the basis on which
14 I think I summarized it a few minutes ago, that the
15 50.59 analysis is ongoing, and I'm sure Mr. Lodge's
16 statement to the contrary was not intentional.

17 Let's see if we have some more specific
18 questions from the technical judges.

19 JUDGE KENNEDY: This is Judge Kennedy, and
20 I think -- let me try to work my way through this
21 question. This is, it sort of speaks to both the
22 50.59 process and the technical, the tech spec changes
23 that are at issue here.

24 I'm going to refer to page 11 of the
25 petition, just to ground us in some phrases. But it

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1 states on page 11 of the petition that 50.59 states
2 that a licensee need not request a license amendment
3 pursuant to 50.90, if a change to the technical
4 specifications incorporated in the license is not
5 required.

6 Now I guess I'd like to start with the
7 applicant, and maybe that's Mr. Matthews. Could you
8 help us by providing the basis behind why a technical
9 specification change is not required when analyzing
10 the overall steam generator replacement activities?

11 I mean I recognize there are technical
12 specification changes being requested here, but it
13 appears to me that we have a set of modification
14 activities that are being conducted under 50.59, and
15 FirstEnergy has called out some technical
16 specification changes would be required to implement
17 that modification.

18 So it would appear to me that, and I guess
19 that's what I'm asking for, is confirmation that what
20 has happened is the modification activity has been
21 separated from the implementation activity, and if
22 that is true, what is the basis for that approach?

23 MR. MATTHEWS: Thank you, Judge Kennedy.
24 This is Tim Matthews on behalf of FirstEnergy. The
25 meeting slides that Petitioners refer to and provide

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1 the ADAMS citation for from March 20th, 2013,
2 describes the steam generator replacement project
3 generally, and in it includes, at page 30, three-zero,
4 a list of design changes to the facility, that are
5 broken into engineering change packages, which is
6 typical in the industry, that those engineering change
7 packages address discrete evolutions or changes.

8 Each of those -- I'm sorry. Each of those
9 engineering change packages has a 50.59 evaluation or
10 review, a screening for 50.59, associated with it.
11 But with respect to the steam generator changes that
12 Petitioners cite or Mr. Gundersen cites in
13 Petitioners' repeat, those changes to the steam
14 generators, and they are incremental changes to the
15 steam generator. This is not a wholesale light piece
16 of paper, redesign of a steam generator.

17 These are once-through steam generators
18 that fit the same design functions as the existing
19 Davis-Besse steam generators. It is a design being
20 provided, being manufactured by B&W Canada, and there
21 are incremental changes to the current Davis-Besse
22 steam generators, such as improvements in materials to
23 go to less corrosion-resistant or more corrosion-
24 resistant materials, such as alloy 690, to go with a
25 stronger shell material, to provide more tubes to

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1 address spacing in the support plates between the
2 tubes.

3 So incremental changes, not some radical
4 new design of a steam generator. But all of those
5 changes are considered, each of those changes are
6 considered individually, and they are considered
7 cumulatively as is required under 50.59, in the
8 analysis associated -- or they will be associated with
9 engineering change package, the first one listed.
10 It's 100474.

11 So each of those changes is considered
12 individually and collectively, and I'll stop. I think
13 that was your question.

14 JUDGE KENNEDY: I guess that's part of my,
15 I think that's part of what I'm looking for. So there
16 are a series of engineering design package changes
17 that were independently and separately analyzed, and
18 one that collectively analyzed the change packages.
19 That's what I heard. Could you, is that --

20 MR. MATTHEWS: I'm checking with my
21 experts here, Judge Kennedy. Give me one moment.

22 JUDGE KENNEDY: Understand.

23 MR. WACHUTKA: And Your Honor, the NRC
24 staff would like to note that this process that's
25 being described here has been done for steam generator

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1 replacements since 1989, and that includes
2 approximately 50 replaced steam generators.

3 JUDGE KENNEDY: Thank you.

4 MR. MATTHEWS: Judge Kennedy, this is Tim
5 Matthews on behalf of FirstEnergy. Each of the
6 changes to the replacement once-through steam
7 generator are considered in the 50.59 review
8 associated with engineering change package 10.0474,
9 the one listed at page 30.

10 It is in the context of that engineering
11 change package that each of those design changes is
12 evaluated individually and collectively, to see if
13 there are cross-impacts associated with them.

14 JUDGE KENNEDY: What I guess --

15 [Telephonic Interference - 93 seconds.]

16 MR. MATTHEWS: --expectation that the
17 result of that would be that there would not be a
18 50.59 change, a license amendment associated with the
19 replacement steam generators.

20 That was not the purpose of it, but that
21 is one of the ancillary things that fall out when you
22 try to remain within the existing design analysis.

23 In answer to your specific question, as
24 the design matured, it was about, I'm told, a year to
25 a year and a half ago, that the Davis-Besse staff

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1 understood well enough that technical specification
2 changes were going to be needed.

3 Certainly, the improved technical
4 specifications and the tech spec traveler, they have
5 dates on them and they tell us the frequency would be
6 appropriate for this type of generator, and the
7 frequency with which the staff wants reports.

8 But with respect to the volumetric, the
9 change in the volumetric limitation, it requires some
10 development, some maturity of the steam generator
11 design, to have some expectation as to what the as-
12 built steam generator is going to look like.

13 JUDGE KENNEDY: To put it in my words,
14 this is Judge Kennedy, as you started this
15 modification project, no type of specification change
16 was anticipated. As the project evolved and a better
17 understanding of the as-built parameters came into
18 being, you saw the need for technical specification
19 changes at a later date?

20 MR. MATTHEWS: I'd say not exactly, Judge
21 Kennedy. With respect to the administrative technical
22 specification change. There are four tech spec
23 changes FirstEnergy has proposed. Three are largely
24 administrative. One goes to the volumetric changes
25 associated with the new generators.

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1 With respect to those administrative ones,
2 FirstEnergy understood that it would, prior to
3 implementation, it would need to propose changes.
4 Prior to startup from the change out, it would need to
5 make these changes. The volumetric one required a
6 little more information upon which to base it.

7 JUDGE KENNEDY: Okay, I understand.

8 JUDGE TRIKOUROS: This is Joe Trikouros.
9 I'd like to ask a question of the staff, to get their
10 perspective of this, along the same lines that we've
11 been discussing up to now.

12 This started out as a steam generator
13 replacement project, one project. Along the way, you
14 know, all the details started to develop, all these
15 engineering design work packages were put together,
16 etcetera, etcetera, tech specs were identified that
17 had to be changed, etcetera.

18 But in terms of the license amendment
19 requirements for this one modification of the plant,
20 it was decided to separate the modification
21 engineering design change packages, let's say,
22 separate from the tech spec changes, and so a license
23 amendment request was put together and submitted to
24 the staff.

25 The information that stayed back in the

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1 50.59 phase and the information that was included in
2 the tech spec change seems rather arbitrary. Are
3 there any, and let me be specific. The license
4 amendment request states that, I think this is on page
5 3 of 11, but it shows up elsewhere.

6 It talks about physical design
7 characteristics and dimensions of the once-through
8 steam generator, that hinges a lot on those, that
9 statement. Yet there's nowhere in this license
10 amendment request does it actually identify what those
11 changes are.

12 So a decision was actually made to exclude
13 that information from the license amendment request.
14 Now I'm assuming the staff will not be able to review
15 the license amendment request without that
16 information. So it's just not clear to me what the
17 staff's position is on this, and I'll use the term
18 "bifurcation" of the 50.59 process for part of a
19 modification, and then the license amendment request
20 for another part.

21 Is this established policy with respect to
22 the application of 50.59 to such a modification that
23 requires tech spec changes?

24 MR. WACHUTKA: Your Honor, this is the NRC
25 staff. What we would say is that first of all, as we

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1 stated previously, is that this two-step process has
2 been the way that steam generator replacements have
3 been conducted since 1989, and that we have now is in
4 the license amendment request is sufficient
5 information for docketing of the license amendment
6 request.

7 We have not yet completed our review of
8 these proposed tech spec changes. But if we see that
9 we need more information in order to make that
10 determination, that's when we would issue a request
11 for additional information.

12 Basically, we see this as there's two
13 different spheres here. There's the licensing realm
14 and there's the inspection and enforcement realm.
15 Licensing is where we deal with these tech spec
16 changes for the subsequent operation of the steam
17 generators, and in inspection and enforcement domain,
18 we actually have inspections scheduled for the steam
19 generator replacement process, and these inspections
20 are going to look at the engineering evaluations that
21 were made prior to the installation.

22 They're going to look at the plans for the
23 installation. They're going to observe the
24 installation as it happens, make sure there's
25 sufficient radiation protection, and then there is

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1 also 10 C.F.R. requirements for leak testing the
2 containment, when the containment is sealed after the
3 installation, and all that's going to be inspected as
4 well. So that's how we divide up these issues, Your
5 Honor.

6 MR. MATTHEWS: Judge Trikouros, this is
7 Tim Matthews on behalf of FirstEnergy, if I might
8 respond.

9 JUDGE TRIKOUROS: Sure.

10 MR. MATTHEWS: The suggestion that somehow
11 the breakup or the division is arbitrary or worse,
12 nefarious, is completely contrary to the facts. If
13 you look at page 30 of the presentation that
14 Petitioners cite to, it lists a number of engineering
15 change packages, but they are not fine segmentation of
16 the project.

17 They are logical, natural separations,
18 such as the hall route for replacing the steam
19 generator is one package. But all of these issues
20 that Petitioners cite to are all contained within the
21 same engineering change package. I mis-cited the
22 number before. It's wrong in our presentation. It
23 should be 12-0474.

24 But all of those engineering changes, the
25 generators themselves, are included in the same

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1 engineering change package. That's not a requirement,
2 but it made sense to FirstEnergy to do it that way.
3 There's a separate one for steam generator storage
4 facilities.

5 So there are logical breakpoints
6 associated with these that are consistent with the way
7 FirstEnergy does business, consistent with its
8 procedures, and consistent with the way the industry
9 has done business, as Mr. Wachutka has articulated.

10 This is not some unique breakdown of work
11 that FirstEnergy has implemented for this particular
12 project. This is the routine way that licensees,
13 responsible licensees, operating consistent with their
14 procedures and the NRC regulations, conduct business.

15 But as to the specific points of why were
16 the tech specs excluded from the 50.59 analysis, it's
17 because -- I'm sorry tech spec changes are not part of
18 the 50.59 analysis. A tech spec change requires a
19 license amendment, period. Tech spec changes don't
20 have the ability to screen out. Licensees do not have
21 the ability to change their tech specs on their own.

22 The Commission has decided that if the
23 licensee wants to propose a change to its tech spec,
24 the Commission must approve it, and that is why First
25 Energy submitted a tech spec change, I'm sorry a

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1 license amendment to change the tech specs.

2 It doesn't make sense to go in and also
3 ask the staff for approval to make a change that the
4 licensee has the authority to change on its own.

5 JUDGE TRIKOUROS: I understand. I
6 certainly agree with that. However, doesn't it seem
7 odd that we're here discussing as a primary reference
8 for this modification a presentation that was made to
9 the NRC, that was discovered by Mr. Gundersen during
10 the course of his deliberations?

11 MR. MATTHEWS: This is Tim Matthews on
12 behalf. Petitioners' characterization is somewhat
13 misleading, Judge Trikouros. The presentation that
14 FirstEnergy made on March the 20th to the staff, the
15 day after the *Federal Register* notice associated with
16 the tech spec changes, was publicly noticed. It was
17 a public meeting.

18 Petitioners were present at the meeting.
19 Their representative was there. FirstEnergy discussed
20 this information publicly. It's a presentation that's
21 available in ADAMS. It wasn't some creative search
22 that Mr. Gundersen undertook to find this. It's
23 publicly available information. FENOC handed it out.

24 JUDGE TRIKOUROS: I understand. I
25 understand, Mr. Matthews. But the license amendment

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1 request does not reference any, that I could find, not
2 a single location where one would find an answer to
3 the simple question what changes were made to the
4 steam generator. But --

5 MR. MATTHEWS: The license amendment
6 request does not, because that's not the subject of
7 the license amendment request.

8 JUDGE TRIKOUROS: Oh, it absolutely is --

9 MR. MATTHEWS: The license amendment
10 request is what's the inspection frequency, reporting
11 it to the NRC, other administrative changes associated
12 with the tech spec traveler, and the change to the
13 volumetric curve, specifically to remain within the
14 current mass energy requirements of the accident
15 analysis.

16 It's not -- this is not some change to the
17 tech specs. It's keeping the same volume of water and
18 energy in the secondary side. It's maintaining the
19 status quo.

20 JUDGE KENNEDY: This is Judge Kennedy.
21 Just following up on that, we certainly agree with you
22 on the three administrative changes, and that, you
23 know, I think that's easily sorted through. But this
24 volumetric change, I mean there's no data other than
25 an assertion that it's the same to support that

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1 determination, with the license amendment package.

2 MR. MATTHEWS: This is Tim Matthews on
3 behalf of FirstEnergy. Thank you, Judge Kennedy. I
4 guess I understand the concern that you and Judge
5 Trikouros are articulating, and it's an interesting
6 point, but it's not one that Petitioners themselves
7 asserted that brings us here today.

8 Petitioners didn't even reference the four
9 proposed tech spec changes. Rather, they referenced
10 the slide presentation, where FirstEnergy said they
11 were going to need to do tech spec changes. In fact,
12 the petition seems to think that we hadn't submitted
13 the tech spec changes at all.

14 So they are not challenging the tech spec
15 changes, and it's not based on some lack of
16 information, other than perhaps not reading the slide
17 presentation itself, or reading the petition itself,
18 because the petition says "FirstEnergy is proposing
19 changes to these four tech specs," and providing a
20 basis for it.

21 JUDGE TRIKOUROS: Fine. We understand.
22 I'd like to just ask the staff. This is Judge
23 Trikouros. I'd like to just ask the staff at this
24 point, how would an intervenor file a 2.206 petition
25 on a 50.59 analysis if the 50.59 information is not

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1 available to them to review?

2 MR. WACHUTKA: Yes. Your Honor, this is
3 the NRC staff. Let me confer for one moment with
4 technical staff.

5 (Pause.)

6 MR. WACHUTKA: Your Honor, this is the NRC
7 staff. Basically, what we would say is that this,
8 what the Intervenors may be articulating here is just
9 an argument with the 50.59 rule itself. But this is
10 exactly what the 50.59 rule allows, is that the NRC
11 staff cannot pre-approve every change to a power
12 plant, and so that's why 50.59 exists.

13 There are documents that the staff
14 releases or that are publicly available, such as the
15 50.71(e) change report, that is put out by licensees
16 every two years, to discuss how the 50.59 changes have
17 affected the FSAR. Using this information would have
18 to be the way that a member of the public would raise
19 a 10 C.F.R. 2.206.

20 JUDGE RYERSON: This is Judge Ryerson, and
21 I have a question for Mr. Matthews that's prompted by
22 this. I take it if the Petitioners were at least
23 within say 30 days from today, to file a 2.206
24 petition, you would not question its timeliness, since
25 you say it would be premature as of today; is that

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1 correct?

2 MR. MATTHEWS: This is Tim Matthews on
3 behalf of FirstEnergy. Judge Ryerson, I guess I'm a
4 little confused. Petitioners can file a 2.206
5 petition --

6 JUDGE RYERSON: I'm sorry, I'm sorry. I
7 meant to say you would not assert that it was late,
8 untimely. I misspoke, given you think it's premature
9 today.

10 MR. MATTHEWS: If they filed -- if they
11 filed, I'm sorry, a 2.206 petition today?

12 JUDGE RYERSON: Say within 30 days of
13 today, you would not argue that it was out of time,
14 because your position is that you are still conducting
15 your 50.59 petition? In other words, you wouldn't say
16 --

17 MR. MATTHEWS: 2.206. Correct, a 2.206.
18 First I just --

19 (Simultaneous speaking.)

20 JUDGE RYERSON: --at the same time.

21 MR. MATTHEWS: Thank you, Judge Ryerson.
22 Tim Matthews on behalf of FirstEnergy. I just first
23 note that a 2.206 petition is not filed before the
24 Board. It's filed with the staff.

25 JUDGE RYERSON: Correct.

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1 MR. MATTHEWS: And to my knowledge, I am
2 not aware of a timeliness requirement with respect to
3 a 2.206 petition. So if they wanted to challenge it
4 30 days from now, 30 years from now, they can file a
5 petition. They could have filed one before. Instead
6 of filing this proposed contention, they could have
7 filed a 2.206 petition.

8 My only point was that until there is
9 actually a 50.59 review, there really isn't anything
10 to say that FirstEnergy hasn't complied with 50.59.
11 But even then, I understand the information access
12 questions that have been articulated here, and while
13 I understand those are issues that some interested
14 members of the public may have, they are not the
15 issues before us here today.

16 JUDGE RYERSON: Okay, yeah. Just to be
17 clear, since I was not clear in my question initially,
18 it is FirstEnergy's position that a 2.206 petition
19 would be premature today, because you haven't
20 completed your two point, your 50.59 analysis.

21 But you are actually going beyond what I
22 was suggesting would be your position. You're not
23 aware of any timeliness requirement on a 2.206
24 petition, and certainly in the immediate future, you
25 would not be contending, I take it then, that a 2.206

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1 petition in front of the proper director would not be
2 timely? That would not be your -- would not be
3 untimely. That would not be your position?

4 MR. MATTHEWS: The only caveat or
5 clarification I would make perhaps on my hyperbole of
6 30 years is a 2.206 petition is a request for
7 enforcement, and the NRC recognizes a five year
8 statute of limitations. So I'm not sure that the
9 staff would want to exercise its resources,
10 enforcement resources five years out.

11 But yes, provided the petition was filed
12 in the appropriate forum to the appropriate director,
13 as distinguished from the Board, FirstEnergy would not
14 have a reason to assert a timeliness issue with
15 respect to the 2.206 petition.

16 JUDGE RYERSON: Okay. Thank you, Mr.
17 Matthews.

18 MR. LODGE: This is Terry Lodge. I would
19 respond on behalf of the Petitioners to several points
20 that have been under discussion here.

21 JUDGE RYERSON: This is Judge Ryerson.
22 Please do.

23 MR. LODGE: Thank you, sir. Number one,
24 2.206 petitions are a black hole. That was an
25 argument that was made in the San Onofre proceeding,

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1 and somewhat well received by the Licensing Board
2 there. Some of the statistics --

3 JUDGE RYERSON: If I may interrupt you, I
4 believe it was pretty firmly rejected by the
5 Commission in its decision in that case, was it not?

6 MR. LODGE: Well, yes sir. But there were
7 statistics that were introduced by Friends of the
8 Earth, indicating that perhaps 2 out of 400 2.206
9 petitions in documented history have ever been granted
10 in any cognizable respect.

11 Secondly, so 2.206 is simply a procedural
12 derailment. The problem is is the 50.59 review
13 conducted by FirstEnergy is not going to be a public
14 domain document. We the public are not going to have
15 anything by way of timely access to something which is
16 never going to be in ADAMS.

17 Which brings me to the point that what you
18 are listening to is FirstEnergy's essentially
19 admitting that they have decided not to go with the
20 one for one replacement; that the tech specs are not
21 related to their 50.59 review; and that they have
22 effectively in secret, based upon non-public
23 information, adjudicated, based on whatever 50.59
24 analysis they have done to date, that the new
25 generator with verifiably very significant

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1 distinctions from the old ones, somehow will fill the
2 form, fit, function requirement and that they are
3 replacement, one for one replacement of the earlier
4 generation of steam generators.

5 Which of course is not true. It's not
6 correct. We are, I repeat, what the public is
7 attempting to do here is to bring to the attention of
8 the NRC that there's a half billion dollar project
9 that's under consideration. There have been, in the
10 last six months, major, major significant regulatory
11 lapses.

12 To put it kindly, there have been three
13 disasters, and we think that there should be very,
14 very serious consideration given to the adjudication,
15 not the derailment by means of a 2.206 referral.

16 JUDGE RYERSON: Thank you, Mr. Lodge. I
17 know some of my colleagues actually may share your
18 concerns about 2.206. But ultimately, as I'm sure
19 you're aware, we take our direction from the
20 Commission, which has pretty clearly stated that, in
21 the Commission's view, 2.206 petitions are a viable
22 option. I think we have to assume that. Judge
23 Trikouros.

24 JUDGE TRIKOUROS: This is Judge Trikouros.
25 Mr. Lodge, I have a question for you. You keep

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1 referring to the word "experiment" in your pleadings.
2 I'd like to understand why you believe that a once-
3 through steam generator replacement would be deemed an
4 experiment.

5 MR. LODGE: This is a custom design. The
6 steam generators that are proposed to be installed at
7 Davis-Besse have been installed nowhere else, and we
8 believe that when you get into questions of metals, of
9 replacement of some of the support structures with
10 additional tubes, one of the points that was objected
11 to by FirstEnergy was that we raised the observation
12 that the old generators weighed 590 tons and that the
13 new ones would weigh 465 tons.

14 There are very, very significant engineer
15 changes that is an experiment underway. This is an
16 experiment that is ongoing.

17 JUDGE TRIKOUROS: And how would the fact
18 -- let's assume, for the sake of the argument, that it
19 were an experiment. How would that change the
20 situation? There would still be a 50.59 analysis
21 performed by the applicant; correct?

22 MR. LODGE: Yes sir, there would. We
23 would hope that in the spirit of transparency, that it
24 would be made public. But in any event, how it would
25 change is is that the public would have the

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1 opportunity to have its experts address, scrutinize
2 the changes in the analysis and the engineering.

3 We are seeking discovery. We are seeking
4 the opportunity to conduct cross-examination of
5 witnesses. We're talking about adjudicating this
6 matter.

7 JUDGE TRIKOUROS: I understand. But my
8 question is whether it be a change, test or
9 experiment, it would still be a 50.59 analysis, along
10 the lines of what's being done now?

11 MR. LODGE: Yes sir.

12 JUDGE TRIKOUROS: Is that not correct?

13 MR. LODGE: Yes, except that the 50.59
14 analysis would actually address the differences in the
15 steam generators, instead of assuming or -- we don't
16 understand the basis for the determination, the
17 implicit determination, that the steam generators
18 fulfill the form function requirement. We're looking
19 to understand what that basis might be.

20 JUDGE TRIKOUROS: I understand what you're
21 looking for, but the mechanism for that to happen
22 doesn't exist, in terms of your having open access to
23 all of this information. It's all being done under
24 50.59.

25 Let me ask the applicant. Would you see

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1 a difference in any of this if you would determine
2 this was an experiment rather than a change?

3 MR. MATTHEWS: This is Tim Matthews on
4 behalf of the applicant. Thank you, Judge Trikouros.
5 One of the problems we have is we don't know what
6 definition Mr. Gundersen or Petitioners are using for
7 the inflammatory word "experiment." But the bottom
8 line is no. The answer is 50.59 applies to changes,
9 tests or experiments.

10 The industry and the NRC guidance does
11 provide definition with respect to test or experiment,
12 and it's generally using the existing component or
13 equipment beyond the reference bounds or design of
14 that SSC, or inconsistent with the analyses or
15 descriptions in the FSAR.

16 That's consistent with the staff's, the
17 guidance the staff has accepted in, for performing
18 50.59 evaluations in NEI 9607, and Reg Guide, one
19 moment, 1.187 of November 2000. But your point is
20 exactly correct.

21 At the end, whether it's a, characterized
22 as a change or as an experiment is a distinction
23 without a difference. It's the same criteria that
24 apply in 50.59.

25 JUDGE TRIKOUROS: All right. Well, thank

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1 you very much. Because the use of that word, well the
2 excessive use of that word was rather confusing to me.

3 MR. LODGE: Judge Trikouros, this is Terry
4 Lodge. I'd just like to point out that the word
5 "experiment" appears and is discussed repeatedly in
6 50.59, and we believe that the requirements, I'm
7 trying to divine down through the alphabet soup of
8 vowels and numbers what subsection we're looking at.
9 It's under A, and so we believe very definitely --

10 "Subsection (a)(6). Tests or experiments
11 not described in the final safety analysis report is
12 updated in any activity where a structure, system or
13 component is utilized or controlled in a manner which
14 is either (1) outside the reference boundary of the
15 design bases, as described in the FSAR, or (2)
16 inconsistent with the analyses or descriptions in the
17 FSAR."

18 We believe that it, that this proposal is
19 experimental for those reasons.

20 MR. WACHUTKA: Your Honor, this is the NRC
21 staff. We believe that this whole argument here just
22 validates our position, that this is not a claim under
23 Section 189(a) of the Atomic Energy Act. This is a
24 50.59 argument.

25 They're using the language exactly from

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1 50.59, and so to determine whether the applicant
2 properly assessed if this was an experiment or not,
3 this should be done -- this should be brought up by
4 Intervenors under 10 C.F.R. 2.206.

5 MR. MATTHEWS: This is Tim Matthews on
6 behalf of the applicant. I agree with Mr. Wachutka's
7 conclusion, but I'd just like to make clear for the
8 Board and for anyone listening, that there is no
9 ambiguity about what FENOC is doing here, and whether
10 it's a change or an experiment.

11 The definitions are provided in 50.59, as
12 I paraphrased the definition of an experiment. But it
13 clearly falls within the definition of a change, a
14 modification or addition to or removal from the
15 facility or procedures that affects the design
16 function.

17 We're talking about changes to a
18 component, the steam generators, and changes to the
19 design of those components. Those changes are
20 incremental changes to an existing steam generator
21 design.

22 They are changes to tube materials. These
23 are not new or experimental materials. Alloy 690's
24 been around for a good, long time. A relatively small
25 addition in the number of tubes, an additional divider

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1 plate, a stronger shell.

2 These are not somehow out on the edge.
3 But that's not even the test. The suggestion of
4 experiment is using your existing facility or
5 operation your existing facility in some way that's
6 beyond the bounds of your FSAR. There's nothing at
7 all, in anything Petitioners have cited, that suggests
8 FirstEnergy is contemplating such a thing. It's just
9 completely irresponsible.

10 JUDGE RYERSON: All right. Thank you, Mr.
11 Matthews. This is Judge Ryerson again. I believe
12 that concludes the Board's questions. This has been
13 very helpful. We appreciate the responses of all the
14 parties. I think it leads to a better decision by the
15 Board when we have this kind of discussion.

16 It's probably gone on a little longer than
17 we expected, and that probably indicates it has been
18 helpful. The Board will now consider your briefs
19 again. We have read them. I will consider the
20 arguments today. We should have the transcripts in a
21 few days, and we'll look at those as well.

22 My expectation is we will have a written
23 decision issued during August. I doubt at this stage
24 of the case if there's anything else we need to talk
25 about. But while we have everyone on the line, is

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1 there anything else we should discuss? Judge Kennedy,
2 anything?

3 JUDGE KENNEDY: No sir.

4 JUDGE RYERSON: Judge Trikouros?

5 JUDGE TRIKOUROS: No.

6 JUDGE RYERSON: FirstEnergy, anything else
7 we should discuss right now?

8 MR. MATTHEWS: This is Tim Matthews on
9 behalf of FirstEnergy. Judge Ryerson, did you want
10 any follow-up or discussion on the motions to strike?

11 JUDGE RYERSON: No, thank you.

12 MR. MATTHEWS: FirstEnergy has nothing
13 further. Than you, Your Honor.

14 JUDGE RYERSON: And Mr. Lodge, anything
15 further?

16 MR. LODGE: Just a question, Your Honor.
17 Will the transcripts be posted to ADAMS or otherwise
18 made available to the parties please?

19 JUDGE RYERSON: They should be posted on
20 -- I think they will be sent to the parties
21 electronically by SECY. They will be served by SECY
22 when they come in, and I think they usually come in
23 within three business days, if not sooner.

24 MR. LODGE: Okay, thank you.

25 JUDGE RYERSON: Okay, and anything from

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1 the NRC staff at this point?

2 MR. WACHUTKA: Your Honor, the NRC staff
3 has nothing further.

4 JUDGE RYERSON: Very good. Well again,
5 thank you all, and we stand adjourned.

6 (Whereupon, at 2:54 p.m., the hearing was
7 concluded.)

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