

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Michael F. Kennedy
Nicholas G. Trikouros

In the Matter of

FIRSTENERGY NUCLEAR OPERATING
COMPANY

(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-346-LA

ASLBP No. 13-928-02-LA-BD01

August 12, 2013

MEMORANDUM AND ORDER

(Denying Petition for Intervention and Request for Hearing)

Before the Board is a petition¹ submitted in response to a notice of an opportunity for a public hearing regarding a license amendment request by FirstEnergy Nuclear Operating Co. (FirstEnergy).² FirstEnergy's request seeks to revise four technical specifications for the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse), located in Ottawa County, Ohio.³

Because petitioners have failed to submit an admissible contention in accordance with 10 C.F.R. § 2.309(f)(1), we deny their petition.

¹ Petition to Intervene and for an Adjudicatory Public Hearing of [FirstEnergy Nuclear Operating Company] FENOC License Amendment Request (May 20, 2013) [Petition].

² 78 Fed. Reg. 16,883 (Mar. 19, 2013).

³ See Letter from Raymond A. Lieb, Vice President, Nuclear, FirstEnergy, to Document Control Desk, NRC, License Amendment Request for Proposal Revision of Technical Specification (TS) 3.4.17, "Steam Generator (SG) Tube Integrity"; TS 3.7.18, "Steam Generator Level"; TS 5.5.8, "Steam Generator (SG) Program"; and TS 5.6.6, "Steam Generator Tube Inspection Report" (Jan. 18, 2013) (ADAMS Accession No. ML13018A350) [License Amendment Request (LAR)].

I. BACKGROUND

On January 18, 2013, FirstEnergy requested a license amendment, pursuant to 10 C.F.R. §§ 50.90–50.92, to revise four Davis-Besse technical specifications to support plant operations following the planned installation of replacement steam generators in April 2014.⁴ The revisions to the technical specifications, FirstEnergy asserts, would impose requirements that reflect the physical design characteristics and dimensions of the replacement steam generators.⁵ Separately, the actual replacement of the steam generators is currently being analyzed by FirstEnergy, without prior NRC review, pursuant to 10 C.F.R. § 50.59.⁶ FirstEnergy asserts that its Section 50.59 analysis is ongoing and will not necessarily require a license amendment.⁷

In response to the NRC’s notice of an opportunity for a hearing on FirstEnergy’s license amendment request regarding the Davis-Besse technical specifications, four organizations—Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Ohio Sierra Club (collectively Joint Petitioners)—petitioned for a hearing and asked to intervene.⁸ Both the NRC Staff and FirstEnergy oppose, each contending that Joint Petitioners have neither demonstrated standing nor proffered an admissible contention.⁹

⁴ 78 Fed. Reg. at 16,883.

⁵ Id.

⁶ Section 50.59(c) sets forth the circumstances under which a licensee may or may not make changes in a facility without obtaining a license amendment (a process that requires prior NRC review and approval).

⁷ LAR at 2.

⁸ Petition at 1.

⁹ See NRC Staff Answer to the Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and Ohio Sierra Club Joint Request for a Hearing and Petition for Leave to Intervene (June 14, 2013) [NRC Staff’s Answer]; [FirstEnergy’s] Answer Opposing Petition to Intervene and Request for Hearing Regarding Technical Specification License Amendment Request (June 14, 2013) [FirstEnergy’s Answer]. Joint Petitioners subsequently
(Continued)

II. ANALYSIS

To intervene as a party in an adjudicatory proceeding concerning a proposed license action, a petitioner must (1) establish it has standing; and (2) proffer at least one admissible contention.¹⁰ We first address the admissibility of Joint Petitioners' one proffered contention, and need go no further.

A. Contention

Joint Petitioners' proffered contention states:

Significant changes to the Replacement Once Through Steam Generator (ROTSG) modification project and to the reactor containment structures, all planned by FirstEnergy Nuclear Operating Company to be made to the Davis-Besse Nuclear Power Station, require that the steam generator replacement project be deemed an "experiment" according to 10 C.F.R. § 50.59, and that an adjudicatory public hearing be convened for independent analysis of the project, before it is implemented. Moreover, FENOC has applied after the fact for a technical specifications license amendment, which comprises an additional, automatic, trigger under 10 CFR § 50.59 and necessitates adjudication of the license amendment request.¹¹

The contention is not admissible for two fundamental reasons.

First, in substance¹² and by its terms, the contention plainly challenges FirstEnergy's analysis of its proposed steam generator replacement under 10 C.F.R. § 50.59. Such a challenge is not cognizable in this proceeding. As the Commission has stated, "[a] member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition

submitted a reply (see Petitioners' Reply in Support of 'Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request' (June 21, 2013) [Reply]), which both the NRC Staff and FirstEnergy have moved to strike in part. See NRC Staff Motion to Strike Portions of Joint Petitioners Reply or, in the Alternative, for Leave to Reply (July 1, 2013) [NRC Staff's Motion to Strike]; [FirstEnergy's] Motion to Strike Portions of Petitioners' Reply (June 28, 2013) [FirstEnergy's Motion to Strike]. The Board heard oral argument by telephone on July 24, 2013.

¹⁰ 10 C.F.R. § 2.309(a).

¹¹ Petition at 12.

¹² Not only is 10 C.F.R. § 50.59 the only regulation cited in the contention itself and in Joint Petitioners' explanation of the bases for the contention, but collectively the petition and supporting expert witness report of Arnold Gundersen invoke Section 50.59 more than 50 times.

under 10 C.F.R. § 2.206.”¹³ Such a petition must be submitted to the Executive Director for Operations for consideration by the appropriate office director.¹⁴ Therefore, a challenge to FirstEnergy’s analysis under 10 C.F.R. § 50.59 of its proposed steam generator replacement is not the proper subject of an adjudicatory hearing, much less a hearing in a proceeding that concerns only a request to amend FirstEnergy’s license to modify four technical specifications.

The planned steam generator replacement project at Davis-Besse involves the physical changes to the plant that are required to remove the original steam generators and to install their replacements. It also involves the need to revise four technical specifications to support operation with the new steam generators. FirstEnergy is currently analyzing the physical changes under 10 C.F.R. § 50.59 and hopes to be able to accomplish these without obtaining a license amendment under 10 C.F.R. § 50.90.¹⁵ In contrast, the revisions to the Davis-Besse technical specifications that are necessary to allow Davis-Besse to operate safely with the replacement steam generators after they have been installed do require a license amendment,¹⁶ and are the subject of the license amendment request that gave rise to the hearing notice in this proceeding. It is those proposed changes to the technical specifications—and not the actual physical replacement of steam generators and associated Section 50.59 analysis—that are potentially subject to a hearing before this Board.

To be sure, separating consideration of four proposed changes in technical specifications from other aspects of FirstEnergy’s Section 50.59 analysis does raise certain

¹³ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994); see also S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC __, __ (slip op. at 3–4) (Nov. 8, 2012).

¹⁴ See 10 C.F.R. § 2.206.

¹⁵ LAR at 2.

¹⁶ See id. § 50.59(c)(1)(i).

issues regarding information availability.¹⁷ This Board has no authority to address such issues, however, because the Commission has prohibited Licensing Boards from hearing challenges to actions taken under 10 C.F.R. § 50.59.¹⁸

A recent decision of the Licensing Board in the San Onofre proceeding¹⁹ is not to the contrary. There, unlike in this case, the Commission directed the Licensing Board to address the question of whether a confirmatory action letter issued to the licensee by the NRC Staff constituted a de facto license amendment that would be subject to a hearing opportunity. In doing so, the San Onofre Board used the criteria of 10 C.F.R. § 50.59 as an analytical tool. But the Board clarified that it was not using the Section 50.59 criteria to “scrutiniz[e] the actual actions taken by [the licensee] under section 50.59.”²⁰ On the contrary, the Board recognized that “scrutinizing the actual actions taken by [a licensee] under section 50.59 . . . is prohibited.”²¹

¹⁷ Several such issues were raised during the argument on standing and contention admissibility that the Board conducted by telephone on July 24, 2013. The primary issue relates to FirstEnergy’s choice of which information to include in the license amendment request and which information to retain only in its nonpublic files as part of the Section 50.59 process. See Tr. at 7–8; see also Tr. at 24–25. FirstEnergy’s license amendment request provides very little information regarding the design changes and dimensions of the replacement steam generators, which form the basis of the requested technical specification changes (see Tr. 44–46) and the associated no significant hazards consideration evaluation. A potential intervenor responding to the hearing notice has very little information upon which to develop an informed contention because the design changes to the replacement steam generators are neither described nor referenced in the license amendment request. The NRC Staff indicated that it would issue requests for additional information to obtain the information needed to perform the Staff’s review (Tr. at 40–41), but potential intervenors have no such option. The same problem of information being unavailable exists with respect to filing a Section 2.206 petition challenging the adequacy of FirstEnergy’s Section 50.59 analysis (Tr. at 46–47).

¹⁸ Similarly, insofar as the Petition could possibly be read as a challenge to the NRC Staff’s proposed no significant hazards consideration determination under 10 C.F.R. § 50.92(c), this Board lacks jurisdiction to adjudicate that claim as well. See 10 C.F.R. § 50.58(b)(6) (“No petition or other request for review of or hearing on the staff’s significant hazards determination will be entertained by the Commission.”).

¹⁹ See S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC __, __ (slip. op.) (May 13, 2013).

²⁰ Id. at 23.

²¹ Id.

Thus, the San Onofre Board did not question the inability of licensing boards to hear challenges to Section 50.59 determinations, but rather confirmed it.

Second, although an admissible contention must satisfy all the requirements of 10 C.F.R. § 2.309(f)(1), Joint Petitioners' proffered contention satisfies virtually none. The contention fails even to mention, much less to grapple with, the four proposed changes in technical specifications that are the subject of the hearing notice to which Joint Petitioners purport to respond.

Contrary to 10 C.F.R. § 2.309(f)(1)(vi), which requires that an admissible contention "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," the proffered contention provides no reference to any specific portion of the license amendment request that petitioners dispute. Indeed, the contention makes no specific reference whatsoever to FirstEnergy's January 18, 2013 license amendment request. Contrary to 10 C.F.R. § 2.309(f)(1)(iii), the proffered contention is outside the scope of this proceeding, as it challenges the entire steam generator replacement project, rather than any aspect of the proposed changes to four technical specifications identified in the license amendment request. Contrary to 10 C.F.R. § 2.309(f)(1)(iv), the contention raises no issues that are material to any findings the NRC must make to approve the license amendment request, as it does not focus at all on the technical specifications that are the subject of that request. And, contrary to 10 C.F.R. § 2.309(f)(1)(v), the proposed contention—which is primarily based on the fact that steam generator replacements in other reactors have experienced problems—is not adequately supported. Even if a challenge to FirstEnergy's 10 C.F.R. § 50.59 analysis of its replacement steam generator project were cognizable in this proceeding, Joint Petitioners offer only speculation regarding the alleged inadequacies of that analysis.

B. Standing

In their initial submission, Joint Petitioners claimed standing on the basis of the standing of their individual members and, in turn, premised the standing of their members primarily upon their residing within 50 miles of Davis-Besse.²² In response, FirstEnergy and the NRC Staff challenged the applicability of a 50-mile proximity presumption to establish standing in a case such as this.²³ In their reply, Joint Petitioners then elaborated upon other possible grounds for standing,²⁴ which prompted motions to strike their expanded arguments.²⁵

We need not resolve these disputes. Because it is clear that Joint Petitioners have not proffered an admissible contention, and their petition must be denied for this reason, the Board does not rule on Joint Petitioners' standing.

III. ORDER

For the foregoing reasons:

- A. Joint Petitioners' petition to intervene and for an adjudicatory public hearing is denied.
- B. FirstEnergy's motion to strike portions of Joint Petitioners' reply is denied as moot.
- C. The NRC Staff's motion to strike portions of Joint Petitioners' reply or, in the alternative, for leave to reply is denied as moot.

The proceeding before this Board is therefore terminated. In accordance with 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within

²² See Petition at 2–8.

²³ See FirstEnergy's Answer at 13–17; NRC Staff's Answer at 10–14.

²⁴ See Reply at 1–10.

²⁵ See generally NRC Staff's Motion to Strike; FirstEnergy's Motion to Strike.

twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

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Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

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ADMINISTRATIVE JUDGE

Rockville, Maryland
August 12, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Petition for Intervention and Request for Hearing)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of August, 2013