

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	Docket No. 50-346-LR
)	
(Davis-Besse Nuclear Power Station, Unit 1))	February 9, 2012
)	

**FENOC’S UNOPPOSED MOTION FOR LEAVE TO RESPOND TO THE NRC STAFF’S
ANSWER TO PROPOSED CONTENTION 5 ON SHIELD BUILDING CRACKING**

On January 10, 2012, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (“Intervenors”) filed a Motion with the Atomic Safety and Licensing Board (“Board”) to admit newly-proposed Contention 5 (“proposed Contention”) regarding Shield Building cracking.¹ Both FirstEnergy Nuclear Operating Company (“FENOC”) and the Nuclear Regulatory Commission (“NRC”) Staff filed Answers to the proposed Contention on February 6, 2012.²

The Staff agreed with FENOC that the proposed Contention was not timely filed under 10 C.F.R. § 2.309(f)(2) and the Initial Scheduling Order. Unlike FENOC, however, the Staff concluded that, although not specifically pled by the Intervenors, the factors for non-timely contentions under 10 C.F.R. § 2.309(c) supported timeliness of a revised contention with new wording supplied by the Staff.³ Because the Staff Answer advances arguments not pled by Intervenors themselves, and more importantly, because the Staff Answer supplies revised contention language that FENOC will not otherwise have an opportunity to address in the record,

¹ Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012).

² NRC Staff’s Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking (Feb. 6, 2012) (“Staff Answer”); FENOC’s Answer Opposing Intervenors’ Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012).

³ Staff Answer at 9-16.

FENOC moves for leave from the Board to file a Response to the Staff Answer in accordance with 10 C.F.R. § 2.323. The other parties do not oppose FENOC's request.⁴

Pursuant to the Board's Initial Scheduling Order Section B, FENOC has no automatic right to file a brief in response to another party's Answer. However, the new arguments and modified contention language supplied for the first time in the Staff Answer give rise to exactly the type of "compelling circumstances" contemplated by 10 C.F.R. § 2.323(c) because FENOC could not have reasonably anticipated the arguments made by the Staff.⁵ As the non-moving party with respect to Intervenor's proposed Contention, FENOC respectfully requests an opportunity to address on the record the Staff's arguments against FENOC's interests. FENOC could not reasonably have anticipated the Staff's suggestion of revised contention language, or other new arguments, because FENOC and the Staff filed their Answers on the same day. Accordingly, FENOC requests a limited-scope opportunity to respond to the new arguments and suggested revised contention language.

For these reasons, FENOC requests that the Board grant this motion and allow FENOC until Friday, February 17 to file a short Response to the Staff Answer. In the alternative, should the Board not grant this motion, FENOC requests that the Board hold oral argument on the proposed Contention, which would provide FENOC an opportunity to address on the record its concerns related to the new arguments and revised contention language first advanced in the Staff Answer.

⁴ Counsel for FENOC certifies under 10 C.F.R. § 2.323(b) and Initial Scheduling Order Section G.1 that it consulted with the other Parties regarding this request. Counsel for the NRC Staff indicated that the Staff does not oppose FENOC's request to file a responsive brief. Counsel for Intervenor similarly indicated that Intervenor would not oppose FENOC's request, provided FENOC does not oppose an opportunity for Intervenor to file a rebuttal pleading; FENOC does not oppose.

⁵ If the Board does not consider this Motion appropriate under 10 C.F.R. § 2.323(c), then FENOC requests the Board consider it as a general motion under 10 C.F.R. § 2.323(a).

Respectfully submitted,

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

Signed (electronically) by Timothy P. Matthews

Timothy P. Matthews

Kathryn M. Sutton

Stephen J. Burdick

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, N.W.

Washington, DC 20004

Phone: 202-739-5527

E-mail: tmatthews@morganlewis.com

David W. Jenkins

Senior Corporate Counsel

FirstEnergy Service Company

Mailstop: A-GO-15

76 South Main Street

Akron, OH 44308

Phone: 330-384-5037

E-mail: djenkins@firstenergycorp.com

COUNSEL FOR FENOC

Dated in Washington, D.C.
this 9th day of February 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

FIRSTENERGY NUCLEAR OPERATING COMPANY)

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

Docket No. 50-346-LR

February 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FENOC’s Unopposed Motion for Leave to Respond to the NRC Staff’s Answer to Proposed Contention 5 on Shield Building Cracking” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

Administrative Judge
William J. Froehlich, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wjfl@nrc.gov

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: nicholas.trikouros@nrc.gov

Administrative Judge
Dr. William E. Kastenber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wek1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Brian G. Harris
Megan Wright
Emily L. Monteith
Catherine E. Kanatas
E-mail: Brian.Harris@nrc.gov;
Megan.Wright@nrc.gov;
Emily.Monteith@nrc.gov;
Catherine.Kanatas@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Michael Keegan
Don't Waste Michigan
811 Harrison Street
Monroe, MI 48161
E-mail: mkeeganj@comcast.net

Kevin Kamps
Paul Gunter
Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
E-mail: kevin@beyondnuclear.org;
paul@beyondnuclear.org

Terry J. Lodge
316 N. Michigan St., Ste. 520
Toledo, OH 43604
E-mail: tjlodge50@yahoo.com

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: 202-739-5059
E-mail: sburdick@morganlewis.com

COUNSEL FOR FENOC