UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
		Docket No. 50-346-LR
First Energy Nuclear Operating Company	)	
(Davis-Besse Nuclear Power Station, Unit 1)		February 27, 2012
.	)	

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INTERVENORS' ANSWER TO FENOC 'MOTION TO STRIKE'

Now come Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario , Don't Waste Michigan, and the Green Party of Ohio (collectively, Intervenors), by and through counsel, and reply in opposition to FirstEnergy Nuclear Operating Company's ("FENOC's") "Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking." As Intervenors explain below, FENOC is using a motion to strike as a means of shutting down any opposition to the points raised in its Answer. FENOC further uses its strike motion as a subterfuge to make arguments in the nature of a surreply. The company abuses the procedural mechanism of a motion to strike; Intervenors have articulated reply arguments fairly calculated to meet those raised by FENOC.

A. Legal Standards

A motion to strike is the mechanism for seeking the removal of information from a pleading or other submission that is "irrelevant." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003). Nowhere in the Motion to Strike does FENOC address the relevance of Intervenors' arguments. The words "relevant,"

"relevance", "irrelevant" and "irrelevance" literally do not appear in the motion.

A reply may provide "legitimate amplification" to a proffered contention. *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 299-302 (2007). As illustrated below, amplification aptly describes Intervenors' reply arguments.

A party may not use the device of a motion to strike to categorically prohibit all new arguments. Although "principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant's or the NRC Staff's Answers," such a limitation:

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

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

Intervenors' reply to FENOC's answer is replete with new statements properly made within the scope of the initial shield building cracking contention. Intervenors' reply statements focus squarely on the issues and arguments raised by FENOC. FENOC's arguments are petty disagreements supplying no basis for the severe step of striking Intervenors' statements.

B. Intervenors' Direct Responses Are Legitimate Amplifications Which Respond Squarely to FENOC's Critiques

FENOC asserts ("Motion to Strike" at 4) that it objected to Intervenors' arguments concerning the generic determination for postulated accidents because, among other reasons, they had not requested a 10 C.F.R. §2.335 waiver. In direct response to this objection, the Intervenors advanced a single sentence: " Surely the shield building cracking at Davis-Besse, which is

distinguishable from the only other known crumbling shield building, at Crystal River in Florida, likely meets the 'unusual and compelling circumstances' standard of 10 C.F.R. §2.335." Intervenors' "Reply in Support" at 9-10. FENOC pillories Intervenors for a single sentence, which is reminiscent of the Humpty-Dumpty school of argument.[1]

FENOC continues on the same rail ("Motion to Strike" at 5) that "Intervenors now try to connect all of their earlier safety arguments to their environmental arguments. . . claim[ing] that they have provided 'fact-based suggestions,' and argue that there is a 'reasonably close causal relationship' with their safety arguments in the proposed Contention and analysis of the cracking must account for 'environmental factors occurring both before and after 2017." Intervenors are further accused *(id.)* of citing legal authorities on NEPA's "causal relationship" standard for the first time at the reply stage.

This is the "fact-based suggestions" argument made by Intervenors, which within its very terms responds fairly and directly to FENOC's answer:

> What FENOC insultingly calls Intervenors''environmental musings' are fact-based suggestions that serious reconsideration of LRA adequacy and management of the environmental and safety implications of Davis-Besse cracking must be found acceptable before the deteriorated carbonating concrete of the shield building can be deemed adequate for an additional score of years.

FENOC contrives to recast Intervenors' direct response into a forbidden new argument, and demands as compensation the exclusion of fully 5 pages of Intervenors' memorandum from

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[1] "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."
"The question is," said Alice, "whether you can make words mean so many different things."
"The question is," said Humpty Dumpty, "which is to be master . . . that's all."
Carroll, Lewis, Through the Looking-Glass (Raleigh, NC: Hayes Barton 6 Press, 1872), ISBN 1593772165, p. 72.

consideration. Objectively, Intervenors advanced a legitimate, amplified reply argument calculated to fairly meet FENOC's point. But at its essence, FENOC maintains that ***any*** argument raised in opposition to its Answer falls outside the scope of the original contention. That is illogical, self-serving, and departs from NRC principles.

In order to contend that Intervenors blindsided FENOC with "new" NEPA arguments, FENOC manipulated the context of Intervenors' "causal relationship" comment (from Intervenors' "Reply in Support" at pp. 10-11):

> FENOC's profound insincerity on this point is most apparent in its Answer at 35-36, where it summarizes factual arguments of Intervenors which, to FENOC, are 'neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application.' But there is a reasonably close causal relationship between the Davis-Besse relicensing and the need for adequate structural integrity of the shield building in the 2017-2037 time period, and analysis of that relationship must account for actual and anticipated physical changes and exterior environmental factors occurring both before and after 2017. Those changes include whatever repairs might be contemplated in the coming months and years, the planned reopening of the shield building in 2014 for steam generator replacement, and perhaps other foreseeable physical changes to, and repairs of, the structure.

Here, again, Intervenors directly and fairly met an argument of FENOC's. But FENOC, unhappy with Intervenors' response, resorted to the procedural strike, not to exclude irrelevant argument, but merely to silence opposition and to use the opportunity to posit surreptitious surrebuttal.

Reality, inconveniently for FENOC, poses the documented prospect of at least one guaranteed shield building intrusion in the pre-2017 period. Intervenors suggest that the steam generator replacement cut of 2014 could have implications for the shield building structural soundness and integrity during the 2017-2037 period. Changes in the shield building's protective features as a result of cracking, coupled with necessary future cuts through the walls, might be profound, might lead to additional cracking, and should be considered (even if ultimately

dismissed as insignificant problems) under NEPA. The scheduled steam generator replacement in 2014[2] and the potential for more as-yet unanticipated cuts into the shield building during the 2014-2017 period[3] both were mentioned in the original Motion. To suggest that repeated future cuts into the shield building preceding the 2017-2037 period might have implications for the building's continued adequacy under NEPA is not a surprise attack, but legitimately follows upon the fact that cracking was first discovered during the October 2011 cut through the shield building.

Indeed, FENOC invited the very argument it now seeks to strike. At pp. 35-36 of its Answer, FENOC iterates seven (7) "complaints" of the Intervenors. which FENOC maintains are not germane to age-related degradation nor to the 2017-2037 license extension period:

> These issues either do not relate to age-related degradation or they do not relate to the period of extended operation that is requested by FENOC in the Davis-Besse LRA, and therefore, are part of the Davis-Besse CLB. Additionally, *even if they were to relate to age-related degradation, Intervenors do not identify a sufficient linkage between their arguments and the Davis-Besse period of extended operation*.

(Emphasis supplied). FENOC Answer at 36. Intervenors responded to this passage by pointing out what they believe to be the sufficient linkage: that NEPA requires cumulative effects analysis and that the Supreme Court has set the standards for determining the causal relationship that must exist in order to invoke NEPA. Again, Intervenors directly responded to FENOC's argument and were pilloried for it. FENOC's aim is to completely disable any chance for a reply argument. Having the last word is utterly important to Humpty-Dumpty.

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[2]The 2014 steam generator replacement is referenced 6 times in Intervenors' Motion (at 11, 12, 13, 22 and 53), and is disclosed in detail in FENOC's Environmental Report at 3.2-1 through 3.2-4.

[3]Intervenors' Motion at 12, 13.

Perhaps FENOC completely overlooked pp. 3-6 of Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking, a section entitled "Implications Of The Shield Building's Cracking Phenomena Must Be Analyzed Within the Supplemental Environmental Impact Statement." There, Intervenors contend that the cracking problems at Davis-Besse must be analyzed within the SEIS for the plant. Analysis within an SEIS means analysis based on the obligations and standards articulated in the NEPA statute and its respective general and agency regulations. NEPA obligations and written standards require cumulative effects analysis when, as here, it would be appropriate.

Intervenors have consistently advanced their belief, beginning with the original cracking motion filing, that the concept of "age-related degradation" includes consideration of cumulative effects of the prospective cut(s) through the shield building walls before 2017, and that future cuts, followed by additional possible cuts occurring during the 2017-2037 period, must be anticipated and analyzed within the SEIS for their cumulative contribution (or lack thereof). FENOC shrugs off this part of the contention via *ipse dixit*, citing no authority to rebut the given that changes in stress loading in the massively heavy shield building as a result of the temporary removal of large spans of concrete and rebar might be one plausible explanation for the cracking.

FENOC persists in requiring Intervenors to prove their contention - and beyond a reasonable doubt, at that - at the threshold motion filing; but in truth, the factual support required is "a minimal showing that material facts are in dispute." All that is needed at this juncture is "alleged facts," and the factual support need not be of the quality necessary to withstand a summary disposition motion. *First Energy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01, LBP-11-13 at 17 (April 26, 2011) (slip op.).

C. Misrepresentations by FENOC and NRC Staff

Even as it inveighs against Intervenors' accusations of fraud in the Motion to Strike, FENOC perpetrates the fraud anew. Brandishing its October 31, 2011 disclosure to shareholders that there are "sub-surface hairline cracks in two localized areas of the Shield Building similar to those found in the architectural elements," FENOC pouts that Intervenors require "impossible omniscience on the part of FENOC personnel, suggesting they should have described information even before it became known." Motion to Strike at 7. Omniscience isn't what Intervenors were seeking; they wanted honesty, for FENOC to describe known knowns.

FENOC proceeds immediately from that point in its Motion to castigate Intervenors for use of the term "fraud" to describe FENOC's suspect partial disclosures, and non-disclosures, concerning the cracking. In the course of that castigation, FirstEnergy entirely omitted to mention key evidence cited by Intervenors in their "Reply in Support of Contention No. 5." Intervenors pointed out that the October 31 advisory did not divulge all information which FirstEnergy knew on October 31, and cited as proof a January 31, 2012 NRC inspection report, ML12032A119,[4] which states that FENOC also discovered cracking high up on the shield building:

> On October 31, 2011, the licensee identified additional indications of concrete cracking during IR testing towards the top of the SB wall, approximately between the 780 ft and 800 ft elevations. This area of indications was yet another one different from the laminar cracking initially identified adjacent to the RRVCH opening. The licensee entered this extent-of-condition issue for the SB cracking into their CAP as CR 2011-04648, informed the NRC via the Resident Inspectors' Office on site, and continued to investigate further to determine if any additional adverse conditions existed.

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[4]http://adamswebsearch2.nrc.gov/webSearch2/doccontent.jsp?doc={99E65968-3B8D-471D-B9B9-65CDA18AE0CC}.

P. 48 of report (p. 52 of .pdf). FENOC did not publicly mention this discovery until January 5, 2012. It took Congressman Kucinich's December 7, 2011 information release for the public to learn that "'impact response mapping' had revealed similar cracks in 'various areas of the top 20 feet of the building' that were not flute shoulders,"[5] and that this cracking "seems to be 'more extensive on the south side of the building.'" The NRC revealed "laminar cracking" that is "circumferential to the entire outer rebar map"[6] and told Congressman Kucinich that it was "assuming for purposes of evaluation that the flute shoulders have laminar cracking 'all the way up and down' the concrete wall."[7]

Intervenors demonstrated that FENOC did not tell the public or its investors everything it knew about the cracking on October 31, 2011, nor in the weeks following, including that the NRC had instructed FENOC, after the discovery of cracking within 20 feet of the summit of the shield building on October 31, to consider that cracking may be present on its entire 225-foot height.

FENOC also stated in its disclosure statement on October 31 that it anticipated returning Davis-Besse to service within 30 days. But throughout October and well into November 2011, the NRC reassured the public that there would be no restart until the root cause of the cracking had been isolated, there was a grasp of how extensive the cracking was, and there was emplacement of a corrective action plan and establishment of a monitoring system. The restart happened in early December 2011, before any of these steps had been implemented.

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[5]http://kucinich.house.gov/UploadedFiles/Factual_Analysis_of_FirstEnergy_Statements.pdf

[6]*Id.*

[7]*Id.*

Congressman Kucinich on February 8, 2012 posted a press release at his official website entitled "Why Won't FirstEnergy Tell the Truth About Davis-Besse?"[8] In it, he reveals that "the cracking is so extensive that the NRC required FirstEnergy to assume, in its calculations of the strength of the wall, that the vertical outer rebar mat did not even exist." Kucinich further stated that FirstEnergy's vice-president, Barry Allen's, insistence on January 5, 2012 that FirstEnergy had revealed all new information as it was discovered was not true, because "even as late as December 29, 2011, the NRC was still repeating this misleading description from FirstEnergy - 'Cracking has been identified primarily in the architectural regions. . . .'"

While perhaps FENOC has not committed actionable fraud because no one from the public can show economic loss from its misleading statements and omissions to speak, the elements of common law fraud are (1) a material misrepresentation; (2) the defendant knew the statement was false or made the statement with reckless disregard for the truth; (3) the defendant intended for the plaintiff to rely upon the statement; and (4) the plaintiff relied upon the statement (5) to his detriment. *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 762 (5th Cir. 2002), citing *DeSantis v. Wackenhut Corp.,* 793 S.W.2d 670, 688 (Tex.1990).

Intervenors' purpose in raising the aspect of fraud in FENOC disclosures is to show that FENOC cannot be heard to rely on its misleading concealments and omissions to answer as authority for the objection that Intervenors missed the 60-day filing window for the cracking contention. If the fraudulent conduct of the defendant caused the injured party to remain ignorant of the violation, without any fault or lack of due diligence, the limitations period does not begin to run until the fraud is discovered. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874); *Hobson v.*

[8]http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=278784

Wilson, 737 F.2d 1, 34 (D.C. Cir. 1984). The application of equitable principles is warranted when a defendant fraudulently conceals its actions, misleading a plaintiff respecting the plaintiff's cause of action. See *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir.1981); *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir.1988); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975). Where a petitioner relied to its detriment on Staff's representations that no action would be immediately taken on licensee's application for renewal, elementary fairness requires that the action of the Staff could be asserted as an estoppel on the issue of timeliness of petition to intervene, and the petition must be considered even after the license has been issued. *Armed Forces Radiobiology Research Inst*. (Cobalt-60 Storage Facility), LBP-82-24, 15 NRC 652, 658 (1982), rev'd on other grounds, ALAB-682, 16 NRC 150 (1982). Intervenors properly asserted the argument in their "Reply in Support of Contention No. 5" that FENOC and the NRC Staff are equitably estopped from claiming untimeliness of filing based in any way on their statements in October and November 2011 that the cracking phenomenon was minor and more limited than in truth it actually was; that it was, besides, being addressed and that there would be no decision on reactor restart absent a root cause analysis.

D. Conclusion

Intervenors have shown that throughout their Reply, their new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the FENOC and NRC Staff Answers - *i.e.*, their reply arguments meet the standard enunciated by the Board in *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), *supra* at 41 (p. 43 of .pdf) ("As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and

arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments").

There are serious negative implications for Intervenors' due process rights if they are not accorded a degree of flexibility in shaping their reply arguments. The D.C. Circuit has interpreted §189(a) of the Atomic Energy Act [42 U.S.C. §2239(a)] substantively, holding that "once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester." *Union of Concerned Scientists v. United States Nuclear Regulatory Com'n,* 735 F.2d 1437, 1443 (D.C. Cir. 1984). The First Circuit has warned that the NRC's Part 2 rules "may approach the outer bounds of what is permissible under the [Administrative Procedure Act]." *Citizens Awareness Network, Inc. v. NRC,* 391 F.3d 338, 355 (1st Cir. 2004). Intervenors articulated relevant reply arguments; if those arguments are barred, Intervenors will have been denied due process.

Intervenors submit this final proposition: the use of motions to strike by the NRC Staff and corporate applicants for NRC licenses has given rise to a new sector of satellite litigation, whereby suspect, trivial, bad faith or purely obstructionist objections by well-resourced parties are used to waste the resources of intervenors and threaten to frustrate the economic litigation which was the purported aim of the revisions to 10 C.F.R. Part 2. Intervenors suggest that the ASLB should ignore motions to strike because they require the Board to read the disputed material anyway, in order to declare whether these arguments are "proper" or "improper", and should be stricken. Instead of wasting time on induced self-censorship, the ASLB should, instead, proceed directly to a merits decision, reading all arguments and accepting or rejecting them *seriatim*. The ASLB is presumably capable of discerning a just course through the

licensing universe without having to detour through clusters of satellites.

WHEREFORE, Intervenors pray the Licensing Board deny FENOC's "Motion to Strike."

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CERTIFICATE OF SERVICE OF
INTERVENORS' ANSWER TO FENOC 'MOTION TO STRIKE'

We hereby certify that a copy of the "INTERVENORS' ANSWER TO FENOC 'MOTION TO STRIKE'" was sent by us to the following persons via electronic deposit filing with the Commission's EIE system on the 27th day of February, 2012:

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