

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

)	
In the Matter of)	
)	Docket No. 50-346-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY)	
)	
(Davis-Besse Nuclear Power Station, Unit 1))	September 24, 2012
)	

**FENOC’S MOTION TO STRIKE INTERVENORS’ REPLY IN OPPOSITION TO
FIRSTENERGY’S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 4
(SAMA ANALYSIS – SOURCE TERMS)**

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.323(a) and 2.319, FirstEnergy Nuclear Operating Company (“FENOC”) files this Motion to Strike “Intervenors’ Reply in Opposition to ‘FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)’” (“Answer”) and the accompanying “Intervenors’ Statement of Material Facts in Opposition to ‘FirstEnergy’s Motion for Summary Disposition of Contention 4’” (“Statement of Material Facts”), both dated September 14, 2012.¹ As discussed below, the Answer and the Statement of Material Facts impermissibly include only new arguments and information far afield from the scope of Contention 4. The Commission has stated that it does “not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of

¹ Counsel for FENOC certifies under 10 C.F.R. § 2.323(b) and Section G.1 of the Board’s June 15, 2011 Initial Scheduling Order that it has made a sincere effort to contact other parties in the proceeding and resolve the issues raised in this Motion, and that these efforts to resolve the issues have been unsuccessful. Counsel for Intervenors stated that Intervenors oppose the Motion. Counsel for the NRC Staff stated that the Staff would not oppose the Motion for those issues that are outside the scope of the admitted Contention 4 and/or the bases of the Motion for Summary Disposition.

admitted contentions beyond their reasonably inferred bounds.”² Accordingly, FENOC requests that the Board strike Intervenors’ Answer and Statement of Material Facts in their entirety.³

II. BACKGROUND

On December 27, 2010, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (“Intervenors”) jointly filed a petition to intervene in this proceeding, submitting four environmental contentions related to the National Environmental Policy Act (“NEPA”) analysis in the Davis-Besse Nuclear Power Station, Unit 1 (“Davis-Besse”) Environmental Report (“ER”).⁴ The first three contentions concerned the adequacy of FENOC’s analysis of energy alternatives while the fourth contention challenged various aspects of FENOC’s severe accident mitigation alternatives (“SAMA”) analysis.⁵ On April 26, 2011, the Board issued a Memorandum and Order (LBP-11-13), finding that all four petitioners had demonstrated standing, and admitting an energy

² *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010).

³ A motion to strike is the appropriate vehicle for this request that the Board decline to consider Intervenors’ Answer because the information is irrelevant to the admitted contention. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2005) (concluding that a motion to strike “is an appropriate mechanism for seeking the removal of information from a pleading or other submission that is ‘irrelevant’”) (citing *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 514 (2001)); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Denying AmerGen’s Motion for Summary Disposition), slip op. at 5-6 (June 19, 2007) (unpublished) (granting in part a motion to strike portions of intervenors’ answer opposing summary disposition). *But see Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-3, 67 NRC 85, 97 (2008) (stating that in the context of a summary disposition motion, arguments that portions of an answer are outside the scope of an admitted contention should be framed in reply pleadings). If the Board disagrees with FENOC’s approach, FENOC requests that the Board treat this motion as a motion for leave to reply to Intervenors’ Answer and a reply to the Answer for the narrow purpose of explaining that Intervenors’ Answer raises issues beyond the scope of admitted Contention 4. 10 C.F.R. § 2.323(c) allows the presiding officer to grant leave to reply in compelling circumstances, “such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.” Here, FENOC could not reasonably have anticipated the arguments in Intervenors’ Answer because, as further discussed below, they do not address the arguments in FENOC’s Motion for Summary Disposition and are outside the scope of Contention 4 as admitted. Accordingly, there are compelling circumstances justifying a narrow reply under 10 C.F.R. § 2.323(c).

⁴ Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010) (“Petition” or “Pet.”) (Errata filed Jan. 5, 2011).

⁵ *See id.* at 99-151.

alternatives contention and the SAMA contention (as limited to three specific issues pled by Intervenors and designated as Contention 4).⁶

FENOC appealed LBP-11-13 pursuant to 10 C.F.R. § 2.311(d)(1), contending that the contentions did not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1).⁷ In a Memorandum and Order (CLI-12-08) issued on March 27, 2012, the Commission reversed the Board's admissibility rulings in part, dismissing Intervenors' consolidated energy alternatives contention in its entirety, and dismissing two of three parts of Contention 4.⁸ The remaining portion of Contention 4 relates solely to FENOC's use of the Modular Accident Analysis Program ("MAAP") computer code to determine plant-specific source terms and release fractions for use in its SAMA analysis.⁹

On July 16, 2012, FENOC submitted an amendment to its ER incorporating revisions to the Davis-Besse SAMA analysis that FENOC identified as necessary earlier this year.¹⁰ On the basis of the revised SAMA analysis, FENOC timely filed a Motion for Summary Disposition of Contention 4.¹¹ On September 14, 2012, the Staff filed an Answer in support of FENOC's

⁶ *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station)*, LBP-11-13, 73 NRC ___, slip op. at 64-65 (Apr. 26, 2011).

⁷ *See* FirstEnergy's Notice of Appeal of LBP-11-13 (May 6, 2011); FirstEnergy's Brief in Support of the Appeal of LBP-11-13 (May 6, 2011).

⁸ *FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station)*, CLI-12-08, 75 NRC ___, slip op. at 5-34 (Mar. 27, 2012).

⁹ *Id.* at 20-21.

¹⁰ *See* Letter from John C. Dominy, Director, Site Maintenance, FirstEnergy, to Document Control Desk, NRC, "Correction of Errors in the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application (TAC No. ME4613) Environmental Report Severe Accident Mitigation Alternatives Analysis, and License Renewal Application Amendment No. 29" (July 16, 2012) (submitted as Attachment 5 to FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (July 26, 2012) ("FENOC's Motion for Summary Disposition")).

¹¹ *See* FENOC's Motion for Summary Disposition at 1-2.

Motion for Summary Disposition,¹² and Intervenors filed their Answer and Statement of Material Facts in opposition to FENOC's Motion for Summary Disposition.

III. THE BOARD SHOULD STRIKE INTERVENORS' ANSWER AND STATEMENT OF MATERIAL FACTS BECAUSE THEY IMPERMISSIBLY RAISE ARGUMENTS OUTSIDE THE SCOPE OF THE ADMITTED CONTENTION

Intervenors' Answer and Statement of Material Facts consist solely of new arguments related to Shield Building cracking and containment vessel corrosion. As such, the arguments and supporting information in the Answer and Statement of Material Facts on those topics fall well outside the scope of Contention 4 as admitted by the Board. Therefore, Intervenors' Answer and Statement of Material Facts should be stricken in their entirety.¹³

Cracking and corrosion were not within the scope of the original contention. At the time Contention 4 was pled and admitted, the Shield Building laminar cracking phenomenon had not yet been discovered. Intervenors became aware of the Shield Building cracking many months ago. Intervenors have proposed Contention 5—and now five supplements to the proposed contention—all related to this phenomena. In no instance have Intervenors sought to modify or supplement Contention 4. Specifically, Contention 4 asserts that FENOC's analysis has minimized the potential amount of radioactive material released in a severe accident by using MAAP-generated source terms that "are smaller for key radionuclides than the release fractions specified in NRC guidance."¹⁴ Intervenors pled three principal bases in support of the currently admitted portion of Contention 4:

¹² NRC Staff's Answer to FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (Sept. 14, 2012).

¹³ A licensing board has the authority to strike improper arguments. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary "to take appropriate action to control the prehearing . . . process"). The Board already has stricken information and arguments provided by Intervenors in this proceeding. *See* Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) (unpublished).

¹⁴ Pet. at 108.

1. The MAAP code “has not been validated by the NRC.”¹⁵
2. The radionuclide release fractions generated by MAAP “are consistently smaller for key radionuclides than the release fractions specified in NUREG-1465”¹⁶ and result in “anomalously low” accident consequences.¹⁷
3. The MAAP code generates lower release fractions than those derived and used by NRC in other severe accident studies.¹⁸

These three bases define the scope of admitted Contention 4.¹⁹

FENOC’s Motion for Summary Disposition addresses each of these bases and demonstrates that no genuine issue of material fact exists regarding FENOC’s use of the MAAP code to develop source term information for use in the Davis-Besse SAMA analysis.²⁰ Instead of responding to the arguments in FENOC’s Motion for Summary Disposition, Intervenor’s Answer and Statement of Material Facts improperly raise two new arguments and supporting information outside the scope of admitted Contention 4. Specifically, Intervenor for the first time challenge: (1) FENOC’s SAMA analysis does not take into account the Davis-Besse Shield Building cracking phenomena; and (2) FENOC’s SAMA analysis does not reference apparent corrosion of the Davis-Besse inner steel containment vessel.²¹

¹⁵ *Id.*; *Davis-Besse*, CLI-12-08, slip op. at 20.

¹⁶ Pet. at 108, 112, 114; *Davis-Besse*, CLI-12-08, slip op. at 20.

¹⁷ Pet. at 112, 114; *Davis-Besse*, CLI-12-08, slip op. at 20.

¹⁸ Pet. at 113; *Davis-Besse*, CLI-12-08, slip op. at 20.

¹⁹ *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-15, 71 NRC 479, 482 (2010) (“[U]nder longstanding NRC practice, if a question arises over the scope of an admitted contention, the Board or Commission will refer back to the bases set forth in support of the contention.”); *Pilgrim*, CLI-10-11, 71 NRC at 309 (2010) (“The reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”) (emphasis in original) (citing *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert denied*, 502 U.S. 899 (1991)).

²⁰ See FENOC’s Motion for Summary Disposition at 15-35.

²¹ See Answer at 1-2.

Not only do Intervenor fail to contradict the arguments in FENOC’s Motion for Summary Disposition, Intervenor appear to agree with FENOC’s arguments.²² In their Answer and Statement of Material Facts, Intervenor completely abandon their prior arguments related to Contention 4 in lieu of new arguments related to Shield Building cracking and containment vessel corrosion, concluding that they have presented the following “genuine issue of material fact”:

[T]he SAMA for Davis-Besse may not be considered complete or must be supplemented and recalculated to recognize the fact of proven, and suspected, degradation of the shield building concrete, and corrosion of the containment vessel which shelters the reactor.²³

Indeed, Intervenor’s entire Answer and Statement of Material Facts either directly address the two new arguments regarding Shield Building cracking and steel containment vessel corrosion, or attempt to support these two new arguments.

Consistent with NRC case law, information provided in support of an intervenor’s response to a dispositive motion may not be considered if the information is outside the scope of the admitted contention.²⁴ The Commission has stated that it does “not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.”²⁵

²² See *id.* at 14 (“The Motion for Summary Disposition consists largely of hollow platitudes about SAMA contents and source term usages with which Intervenor don’t much necessarily disagree . . .”).

²³ *Id.* at 24.

²⁴ See, e.g., *Pilgrim*, CLI-10-11, 71 NRC at 309; see also *Vogtle*, LBP-08-3, 67 NRC at 97.

²⁵ *Pilgrim*, CLI-10-11, 71 NRC at 309. Additionally, raising new arguments in Intervenor’s Answer and Statement of Material Facts is akin to including information in a reply brief that was not raised in an initial pleading, which the Commission has ruled is impermissible. *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (“Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.”); *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (upholding the Board’s refusal to consider arguments presented for the first time in reply briefs, because “the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments”).

Recently, in the Pilgrim license renewal proceeding, for example, the applicant moved to strike part of the intervenors' answer to the applicant's motion for summary disposition of an admitted SAMA contention, because it raised new issues related to off-site "economic costs" due to health effects that were beyond the scope of the admitted contention.²⁶ The licensing board agreed, concluding that this information fell outside the scope of the admitted contention and was "simply not reasonably inferable" as part of earlier arguments.²⁷ On appeal, the Commission concluded that the Board properly rejected these new arguments "because they are not fairly encompassed" by the admitted contention.²⁸ The Commission explained that it has "long stressed that 'NRC adjudicatory proceedings would prove endless if parties were free . . . to introduce entirely new claims which they either originally opted not to make or which simply did not occur to them at the outset.'"²⁹

Intervenors' attempt here to raise new arguments regarding Shield Building cracking and steel containment vessel corrosion lands far outside of the scope of admitted Contention 4, and similarly should be rejected. Intervenors improperly attempt to expand the scope of Contention 4 without first seeking leave from the Board to admit a new, or amend an existing, contention, and to circumvent entirely the applicable timeliness and contention admissibility requirements.³⁰ Thus, Intervenors' Answer and Statement of Material Facts should be stricken.³¹

²⁶ See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-07-13, 66 NRC 131, 145-48 (2007), *remanded on other grounds*, *Pilgrim*, CLI-10-11, 71 NRC at 298, 301-08.

²⁷ See *Pilgrim*, LBP-07-13, 66 NRC at 148.

²⁸ *Pilgrim*, CLI-10-11, 71 NRC at 310; see *Pilgrim*, CLI-10-15, 71 NRC at 481, 483.

²⁹ *Pilgrim*, CLI-10-11, 71 NRC at 311.

³⁰ If Intervenors wanted to file a new contention or amend Contention 4, then they should have done so timely and separate from their Answer to FENOC's Motion for Summary Disposition of Contention 4. In fact, Intervenors already have raised issues related to the Shield Building cracking and FENOC's SAMA analysis as part of the ongoing litigation of proposed Contention 5, entirely separate from Contention 4. See, e.g., Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking), at 27, 32 (Aug. 16, 2012). Additionally, a new contention or an amendment to another contention based on the information raised in Intervenors' Answer would be untimely at this point, because the

IV. CONCLUSION

For the foregoing reasons, the Board should strike Intervenors' Answer and Statement of Material Facts in their entirety.

Respectfully submitted,

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

Signed (electronically) by Timothy P. Matthews

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COUNSEL FOR FENOC

Dated in Washington, D.C.
this 24th day of September 2012

underlying information has been available more than 60 days. *See* Initial Scheduling Order, at 12 (June 15, 2011).

³¹ The new arguments and information should be stricken, as discussed in this Motion. However, if the Board disagrees, then FENOC requests that the Board grant leave for FENOC to respond to the new arguments and information raised by Intervenors for the first time in their Answer.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FENOC’s Motion to Strike Intervenors’ Reply in Opposition to ‘FirstEnergy’s Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)’” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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