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)	)	February 23, 2012

FENOC'S MOTION TO STRIKE PORTIONS OF INTERVENORS' REPLY FOR THE PROPOSED CONTENTION 5 ON SHIELD BUILDING CRACKING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), FirstEnergy Nuclear Operating Company ("FENOC") files this Motion to strike limited portions of "Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5" ("Reply"), dated February 13, 2012.[1] As discussed below, the Reply impermissibly includes new arguments not within the scope of the original proposed Contention 5 regarding Shield Building cracking ("proposed Contention") without satisfying the standards governing late-filed contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). Additionally, Intervenors make unsupported allegations against FENOC and the Nuclear Regulatory Commission ("NRC") Staff that are contrary to the standards of practice for NRC adjudicatory proceedings. Accordingly, these arguments should be stricken.

II. BACKGROUND

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

[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 the 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 authorized FENOC to state that the Staff does not oppose the Motion.

the Atomic Safety and Licensing Board ("Board") to admit a proposed Contention regarding Shield Building cracking.[2] Both FENOC and the NRC Staff filed Answers to the proposed Contention on February 6, 2012.[3] Intervenors filed their Reply on February 13, 2012.[4] As discussed in Section IV below, Intervenors' Reply contains new arguments not included in their proposed Contention.

III. LEGAL STANDARD

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties' answers. A reply may not be used as a vehicle to introduce for the first time new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention.[5] As the Commission has stated:

> It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).[6]

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

3 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) ("FENOC Answer").

4 Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5 (Feb. 13, 2012) ("Reply").

5 *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC __, slip op. at 10 (Dec. 22, 2011) (stating that the Commission has "long held that a reply may not contain new information that was not raised in either the petition or answers"); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and finding that petitioners impermissibly "expand[ed] their arguments" by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63 (refusing to consider references to various documents identified in a petitioner's reply that were not included in the original petition), *aff'd*, CLI-06-17, 63 NRC 727 (2006).

6 *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

The Commission's prohibition on new arguments in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently and consistent with basic principles of fairness. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount."[7] It has further stated:

> NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.[8]

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a petitioner to amend or supplement its pleadings in reply to the applicant's or NRC Staff's answers would run afoul of the Commission's clear directives:

> Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.[9]

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner's reply,[10] principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the applicant's or NRC Staff's answer. "Allowing new claims in a

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7 *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) ("LES").

8 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (internal quotation marks omitted), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

9 *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotation marks and citation omitted).

10 *See* 10 C.F.R. § 2.309(h)(3); *see also* Initial Scheduling Order § B.2.

reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."[11] Thus, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."[12] Any improper arguments should be stricken.[13]

IV. BASES FOR MOTION TO STRIKE

As detailed below, Intervenors' Reply contains new and inappropriate arguments that should be stricken.

A. The Board Should Strike Reply Section E Regarding Postulated Accidents

In the proposed Contention, Intervenors made only cursory arguments regarding postulated accidents. The entirety of Intervenors' arguments regarding generic determinations for postulated accidents were stated as:

> Despite the "small" significance assigned to Category 1 "Postulated Accidents" at 10 C.F.R. Part 51, Subpart A, Appendix B, Intervenors contend that the rather unique cracking phenomenon at Davis-Besse suggests that this generic finding is inapplicable in this instance. Similarly, the potential for severe accidents might be implicated were the cracking to be accepted without any repair or other mitigation, such as replacement of the entire shield building.[14]

The FENOC Answer objected to these arguments in the proposed Contention for multiple reasons. First, Intervenors' arguments regarding the Category 1 determination for design basis accidents advance an improper challenge to NRC regulations and fall outside the scope of this proceeding, because Intervenors have not submitted a waiver request, have not submitted the

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[11] *Palisades*, CLI-06-17, 63 NRC at 732.

[12] *LES*, CLI-04-25, 60 NRC at 225; *see also* Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

[13] A licensing board has the authority to strike individual arguments and attachments. *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] Proposed Contention at 6.

required affidavit, have not demonstrated "unusual and compelling circumstances," and cannot satisfy the *Millstone* test.[15] Similarly, Intervenors' arguments regarding the Commission's generic finding for severe accidents present an improper challenge to the NRC's regulations and fall outside the scope of this proceeding because Intervenors provided no basis for disturbing this generic finding regarding severe accidents, and have proffered no waiver petition pertaining to such a challenge.[16] Finally, Intervenors' environmental arguments fail to identify a genuine dispute with the Davis-Besse Environmental Report and lack adequate factual support.[17]

Rather than address the validity of these arguments, Intervenors' Reply impermissibly provides new information and arguments in a blatant attempt to cure their earlier deficiencies.[18] For example, Intervenors claim for the first time that the Shield Building cracking satisfies the "unusual and compelling circumstances" standard in 10 C.F.R. § 2.335.[19] Additionally, Intervenors now try to connect all of their earlier safety arguments to their environmental arguments.[20] In this regard, Intervenors claim 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."[21] Similarly, for the first time in their Reply, Intervenors cite legal authorities regarding the National Environmental Policy Act's ("NEPA's") "causal relationship" standard.[22]

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15 FENOC Answer at 25-28.

16 *Id.* at 28-30.

17 *Id.* at 30-32.

18 *See* Reply at 9-13.

19 *Id.* at 9-10.

20 *See id.* at 10-13.

21 *Id.* at 10.

22 *Id.* at 11-13.

The arguments and information in Reply Section E identified above are entirely new and impermissibly expand Intervenors' original environmental arguments in the proposed Contention. For these reasons, the Board should strike Reply Section E in its entirety.

B. The Board Should Strike Reply Section F Regarding Cumulative Effects

In Reply Section F, Intervenors for the first time argue that NEPA requires FENOC to consider the "cumulative effects" of changes to the Shield Building.[23] Intervenors had not included any arguments whatsoever about the "cumulative effects" of changes to the Shield Building in the proposed Contention. Additionally, neither FENOC nor the NRC Staff raised cumulative effects issues in their respective Answers.

In Reply Section F, Intervenors also for the first time impermissibly attempt to link their earlier safety arguments to a new environmental concern. Specifically, Intervenors now state that NEPA requires a cumulative effects analysis of "the planned 2014 cut into the shield building mentioned by the Intervenors, seismic activity in the vicinity of Davis-Besse, or physical changes brought on by the very repairs aimed at rectifying the cracking."[24] To the limited extent that these topics were mentioned at all in the proposed Contention, they were not connected in any manner to the Intervenors' new environmental arguments.[25] For example, Intervenors' earlier reference to the 2014 maintenance in the proposed Contention related to "risks" of new stresses causing additional cracking in the Shield Building and weak spots in the containment or Shield Building causing a "safety-significant issue" or undermining the "safety

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23 *Id.* at 13-14.

24 *Id.* at 13.

25 *See* Proposed Contention at 11-13, 21-22, 55-57. It is not clear what Intervenors are referring to as "physical changes brought on by the very repairs aimed at rectifying the cracking," but this appears to be a new topic in the Reply and should be stricken. Reply at 13.

function."[26] Similarly, Intervenors alleged that seismic activities could affect aging of the Shield Building.[27]

Intervenors did not raise cumulative effects or these safety issues in the context of NEPA environmental arguments in the proposed Contention. For these reasons, the Board should strike Reply Section F in its entirety.

C. The Board Should Strike Arguments in Reply Section A Regarding Alleged Fraud

At the risk of dignifying Intervenors' baseless allegations regarding fraudulent conduct by FirstEnergy, because the allegations risk misleading the public if unaddressed, the Company feels compelled to respond. These baseless unsupported allegations are well outside the bounds of appropriate conduct in an NRC adjudicatory proceeding and should be stricken.

Intervenors allege that FENOC engaged in "*active concealment* of the true nature of the cracking problem throughout the months of October through December 2011 by *pretending* that only the 'decorative' and 'architectural' features of the shield building were showing concrete fissures."[28] Intervenors' own documents demonstrate the falsity of this allegation. Intervenors reference and discuss an October 31, 2011 investor letter that stated that "[FENOC's] investigation also identified other [cracking] indications. Included among them were sub-surface hairline cracks in two localized areas of the Shield Building similar to those found in the architectural elements."[29] The Company's public statement clearly identified cracking outside of the architectural features of the Shield Building. Intervenors assume an impossible omniscience on the part of FENOC personnel, suggesting they should have described information even before it became known. Intervenors have identified no requirement for disclosure that FENOC failed

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[26] Proposed Contention at 11-13, 21-22, 55-56.

[27] *See id.* at 57.

[28] Reply at 2 (emphasis added).

[29] FENOC Answer, attach. 1, at 1.

to satisfy. Intervenors confuse what they would like to know with FENOC's appropriate communications with the NRC and other stakeholders.

Intervenors further state:

> By controlling the nature and implications of information disclosed, FENOC may have averted a major disinvestment crisis, but the utility cannot similarly employ its *mendacity* to accuse Intervenors of missing the 60-day filing window.
>
> 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. 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).
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> FENOC and the NRC Staff are equitably estopped from benefitting from their repetitions in October and November 2011 that the cracking phenomenon was being regulatorily handled and no decision on reactor restart would happen in the absence of a root cause analysis - which as of this writing has yet to be provided the [sic] NRC by FENOC. Additionally, FENOC is equitably estopped from claiming the 60-day window had closed, because of its own *incomplete public information disclosures*.[30]

In summary, rather than contest the merits of FENOC's arguments regarding the untimeliness of their proposed Contention, Intervenors instead make unsupported accusations against FENOC and the NRC Staff, including that FENOC actively concealed information,

[30] Reply at 4-5 (emphasis added).

FENOC is mendacious, FENOC and the Staff engaged in fraudulent conduct and fraudulently concealed their actions, and FENOC made incomplete investor disclosures. Unsupported attacks on the character and integrity of parties inappropriately degrade the stature of NRC adjudicatory proceedings and should not be tolerated. The standards of practice for NRC adjudicatory proceedings are provided in 10 C.F.R. § 2.314(a), which states that "parties and their representatives in proceedings subject to this subpart are expected to conduct themselves with honor, dignity, and decorum as they should before a court of law."

The Commission upholds the dignity of adjudicatory proceedings and has very little patience for unsupported accusations or offensive and belittling remarks in pleadings. A few examples are illustrative:

- In *Millstone*, the Commission rejected a similar unsupported claim of "fraud, deceit and cover-up" that was presented in a motion by an intervenor in the proceeding.[31] The Commission concluded that the allegation was "frivolous" and it saw "no reason to consider the dispute anything other than a difference of opinion."[32]

- In *TRUMP-S*, the Commission rejected derogatory comments directed at the Staff, concluding that it was "intemperate, even disrespectful, rhetoric" and is "wholly inappropriate in legal pleadings."[33]

- In *Point Beach*, a licensing board chastised a party "for impugning [another party's] reputation without submitting proof."[34] The board stated that they have a "responsibility to see that parties not be subject to unsubstantiated charges in our proceedings."[35]

- In *Indian Point*, a licensing board censured and demanded an apology from an intervenor's representative for directly insulting the licensing board.[36] The licensing board later barred that representative from participating in the proceeding entirely, stating that "it would be impossible for the Board to meet its responsibility 'to control the

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31 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 36 (2006).

32 *Id.* at 36-37.

33 *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-17, 42 NRC 229, 232 n.1 (1995).

34 *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-5A, 15 NRC 216, 223 (1982).

35 *Id.* at 224.

36 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Censure of Sherwood Martinelli), at 2-3 (Dec. 3, 2007) (unpublished), *aff'd*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-07-28, 66 NRC 275 (2007).

> prehearing and hearing process . . . maintain order' and 'conduct a fair and impartial hearing according to the law' without holding all participants to the level of courtesy and decorum required by the Commission's Regulations."[37] The Commission upheld the board's actions, stating that the Board's response was "reasonable" given the conduct.[38]

Intervenors' unsupported allegations of active concealment, mendacity, and fraud are inappropriate for this proceeding and fail to satisfy NRC standards of practice. Intervenors' disagreement with FENOC's and the Staff's arguments cannot justify the serious allegations made by Intervenors. For these reasons, FENOC requests that the Board strike the statements identified above and the arguments resting upon them. This includes the portion of Reply Section A beginning on page 2 with "But the dogma must be rejected," and continuing through the end of Section A.

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[37] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Barring Sherwood Martinelli from Further Participation in this Proceeding), at 4-5 (Dec. 13, 2007) (unpublished) (quoting 10 C.F.R. § 2.319).

[38] *Indian Point*, CLI-07-28, 66 NRC at 275-76 (citing 10 C.F.R. § 2.314(c) (Reprimand, censure or suspension from the proceeding)).

V. CONCLUSION

For the foregoing reasons, the Board should strike the new arguments impermissibly provided in Intervenors' Reply for the proposed Contention. FENOC respectfully requests the Board to strike: (1) Reply Section E in its entirety; (2) Reply Section F in its entirety; and (3) the portion of Reply Section A beginning on page 2 with "But the dogma must be rejected," and continuing through the end of Section A.

Respectfully submitted,

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

Signed (electronically) by Timothy P. Matthews

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Dated in Washington, D.C.
this 23rd day of February 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking" was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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