May 16, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission

In the Matter of:	)	Docket No. 50-346
FirstEnergy Nuclear Operating Company	)	
Davis-Besse Nuclear Power Station, Unit 1	)	
Regarding the Renewal of Facility Operating License NPF-003 for a 20-Year Period	)	
	)	

JOINT INTERVENORS' BRIEF IN OPPOSITION TO FENOC'S NOTICE OF APPEAL AND BRIEF

I. INTRODUCTION

Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio, intervenors (hereafter "Joint Intervenors" or "Intervenors") in this license renewal proceeding, hereby respond in opposition to FirstEnergy's "Notice of Appeal" and "Brief in Support" (hereinafter "App. Br.") from the ASLB's April 26, 2011 Memorandum and Order ("LBP-11-13"), whereby the Board admitted two contentions related to FirstEnergy's license renewal application ("LRA") for the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse"): (1) a reformulated and consolidated version of Contentions 1, 2, and 3 regarding renewable energy alternatives; and (2) a revised and narrowed version of Contention 4 regarding severe accident mitigation alternatives ("SAMAs").

The Intervenors support the ASLB rulings on the contentions and submit that the

Commission's review of the Davis-Besse renewal application will be improved through the hearing of the contentions admitted by the ASLB panel. Accordingly, the Commission should uphold LBP-11-13.

II. BACKGROUND

FirstEnergy refuted Intervenors' original Petition with (1) a shaky challenge over the Petition's incontestably timely filing (the Petition and some exhibits were EIE'd before the midnight filing deadline); (2) a pointless inquiry respecting whether the founding articles of Don't Waste Michigan were sufficiently expansile to authorize intervention against relicensing of Davis-Besse, which is visible to the naked eye from Monroe, Michigan across 25 miles of Lake Erie (they are); and (3) a jejeune Google-mapping *divertissement* wherein FirstEnergy and the NRC Staff alleged that two Canadian intervenor representatives lived 300 feet outside a 50-mile radius of the centerpoint of the reactor building at Davis-Besse (an argument which the ASLB supposed was "approximately 1000 feet past the point from which frivolous arguments are measured"[1]). Now, FirstEnergy founders on the "clear error" and "abuse of discretion" requirements in its critique of the ASLB's reformulation and admission of two contentions. See, *Progress Energy Florida, Inc*. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, CLI-10-2, 71 NRC __ (Jan. 7, 2010) (slip op. at 1); *U.S. Department of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC ___ (Jun 30, 2009) (slip op. at 4)*; Crow Butte Resources, Inc*. (North Trend Expansion Area), CLI-09-12, 69 NRC ___ (Jun. 25, 2009) (slip op. at 8-9).

Having abandoned its initial meritless procedural arguments, FENOC now repairs to its

[1] LBP-11-13 p. 13 fn. 79.

similarly indefensible arguments of substance. A focal thrust of FENOC's disquisition is that to have admissible contentions, Intervenors must articulate evidence sufficient to withstand summary disposition from the get-go (untrue), and that since some of the contentions' supportive evidence appeared in other licensing proceedings, Intervenors have wrought some faint insult on the license renewal process and so should be denied a forum in this particular proceeding. But the ASLB has rejected FENOC's vulpine maneuvers, transcended all supposititious indignity, and properly accorded Intervenors standing to pursue its reformulations of the original contentions.

III. LEGAL CONSIDERATIONS

A. Contention pleading and content

The NRC's duty to consider new and significant information before making licensing decisions is nondiscretionary. *Calvert Cliff's Coordinating Commission v. AEC*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (federal agencies are held to a "strict standard of compliance" with NEPA's requirements). See also *Silva v. Romney*, 473 F.2d 287, 292 (1st Cir. 1973).

At this preliminary stage, Intervenors do not have to submit admissible evidence to support their contention, but only to "provide a brief explanation of the basis for the contention," 10 CFR 2.309(f)(1)(ii), and "a concise statement of the alleged facts or expert opinions which support the petitioners' position." 10 CFR 2.309(f)(1)(v). The rule ensures that "full adjudicatory hearings are triggered only by those able to offer minimal factual and legal foundation support of their contentions." *Duke Energy Corp*. (Oconee Stations Units 1, 2 and 3), 49 NRC 328, 334 (1999) (emphasis added). The Commission has posited that "an intervener need not … prove its case at the contention stage… The factual support necessary to show a genuine dispute

need not be in affidavit or formal evidentiary form, or be of the quality necessary to withstand a summary disposition motion." *Matter of Georgia Institute of Technology*, 42 NRC 111 (1995). The requirement for showing of materiality is not intended to be overly burdensome; all that is needed is "a minimal showing that material facts are in dispute, indicating that a further inquiry is appropriate." *Id.*, citing *Gulf States Utilities Company*, (River Bend Station Unit 1), 40 NRC 43, 51(1994); Final Rule, "Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,171 (Aug. 11, 1989). Though the Commission be "unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions," *Duke Energy Corp.* (McGuire Nuclear Station, Units 1and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 8 (2002), where petitioners support a meritorious contention with diligent research, information, expert opinion and documents, the requirement for an adequate basis is more than satisfied.

B. Standard of review

The Commission must affirm Licensing Board rulings on the admissibility of contentions if the appellant "points to no error of law or abuse of discretion." *Dominion Nuclear Conn.,Inc.*, CLI-04-36, 60 NRC 631, 637, (2004), quoting *Private Fuel Storage, LLC*, (Independent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000). This standard is analogous to that utilized by courts of appeal reviewing trial court rulings on motions and is highly deferential. See *Engebretsen v.Fairchild Aircraft Corp.,* 21F. 3rd 721, 728 (6th Cir. 1994) ("We will find an abuse of discretion only when [we have] 'a definitive and firm conviction that the trial court committed a clear error of judgment,'" quoting *Logan v. Dayton Hudson Corp*., 865 F. 2nd 789,

790 (6th Cir. 1989)).

Thus, the standard of review of the Atomic Safety and Licensing Board is highly deferential; appellants must either show how the Licensing Board misinterpreted the law, or that the Licensing Board clearly abused its authority or committed a clear error of judgment.

Finally, the Commission's denial of review of a particular decision simply indicates that the appealing party "identified no 'clearly erroneous' factual finding or important legal error requiring Commission correction." *Hydro Res., Inc.*, LBP-06-1, 63 NRC 41, 59 n.15 (2006), *aff'd*, CLI-06-14, 63 NRC 510 (2006), (citing *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000) (quoting 10 C.F.R. § 2.786(b)(4), now §2.341(b)(4))).

IV. ISSUES AND ARGUMENT

It bears noting that the NRC Staff has ***not*** appealed LBP-11-13, despite having been assigned, as the federal actor for NEPA purposes, an enormous burden of compliance as a result of the ASLB's ruling. Perhaps this signals that the Staff will avoid the "losing proposition" of "blindly adopting the applicant's goals" and allow for the full consideration of alternatives required by NEPA. *Simmons v. Corps of Engineers*, 20 F.3d 664, 669 (7 Cir. 1997). NEPA requires the agency to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project" and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals." *Id.*

A. 'Cloned' contentions

FENOC complains that much of the content of the Joint Intervenors' contentions were copied from other license renewal proceedings. But the ASLB was not troubled with this.

FENOC calls the contentions proposed by Intervenors "essentially clones of contentions submitted in other proceedings," arguing that those other proceedings involved expert testimony in support of the analogous contentions. App. Br. Pp. 4-5. Remarkably, FENOC's demeaning terminology utterly ignores the expert declaration of Dr. Alvin Compaan, Ph.D. in physics and longtime professor at the University of Toledo, who brought his wealth of scientific experience in creating and validating photovoltaic technology to bear in his declaration which specifically addresses the Davis-Besse region of interest, predicting the coming enormous deployment of photovoltaic and wind production of electricity in the Great Lakes region. Dr. Compaan's conclusions are discussed by the ASLB at LPB-11-13 p. 27.

Even if Intervenors have "cloned" their contentions, the FENOC jeremiad that "cutting and pasting" from another proceeding may result in the Intervenors not fully understanding a contention, and thus risking a frivolous filing, is a bit alarmist. Indeed, the ASLB has somewhat validated Intervenors by its rulings in LBP-11-13, proving that the Intervenors were right to draw upon their experience from studying other license renewal application proceedings, and applying that cross-experience directly to the Davis-Besse LRA proceeding. In those earlier license renewal proceedings, other reactors' (such as at Seabrook, Indian Point, and Pilgrim) license renewal applications contained identical, or very similar, flaws regarding various renewable energy alternatives, as well as SAMA analyses, as are contained in FENOC's LRA and ER in this Davis-Besse license extension application proceeding. Joint Intervenors made sure to apply those lessons learned from earlier proceedings directly to relevant sections of FENOC's inadequate LRA and ER. And so far, though it has the power to sanction frivolous behavior by the parties, the ASLB has apparently noted no displays of contumacy by the Joint Intervenors, whereas the

Board has suggested that FirstEnergy came near to frivolous conduct in the manner of its opposition to the standing of Citizens Environment Awareness of Southwestern Ontario. LBP-11-13, p. 13, fn. 79.

The Joint Intervenors never made a secret that they borrowed ideas and arguments from other proceedings. They explicitly acknowledged, and thanked, environmental colleagues for their groundbreaking work in those proceedings in their Petition and supporting filings: New England Coalition on Nuclear Pollution and Friends of the Coast for the groundbreaking work performed in the Seabrook LRA proceeding on SAMA analyses; Pilgrim Watch for its groundbreaking SAMA analysis in the Pilgrim LRA proceeding. The intimation behind FENOC's use of the phrase "cutting and pasting" to describe Contention Nos. 1 and 4 is that Intervenors have plagiarized others' ideas. That is not a legitimate claim, given Intervenors' overt acknowledgments and gratitude to earlier intervenors. Indeed, Beyond Nuclear, an Intervenor here, restated in this case a wind power contention which it prepared and filed as an organizational intervenor in the Seabrook LRA proceeding. All contentions filed in the Davis-Besse LRA proceeding were specifically tailored to the instant proceeding, and refer to FENOC's own LRA and ER, as well as FirstEnergy's region of interest.

B. 'Cobbled together' factual bases

FirstEnergy also grouses that the Joint Intervenors "have cobbled together - and the Board has relied upon - an internet blog, draft reports, generic analyses, and 'concept' papers, among others, in an attempt to demonstrate that there are reasonable energy or severe accident mitigation alternatives that must be considered under NEPA." *Id.* p. 5. FENOC claims the ASLB's "acceptance" of such information comprises reversible error. *Id.*

At bottom, the Commission does not require so extrusive a parade of proofs as First-Energy insists: "[A]n intervener need not … prove its case at the contention stage… The factual support necessary to show a genuine dispute need not be in affidavit or formal evidentiary form, or be the quality necessary to withstand a summary disposition motion." 54 Fed. Reg. 33,168, 33,171. Intervenors' burden is simply "a minimal showing that material facts are in dispute, indicating that a further inquiry is appropriate." *Id.*, citing *Gulf States Utilities Company*, *supra.*

Intervenors met, and exceeded, the "minimal showing" requirement in their Petition.

C. The 'Alternatives' Contention: Quibbling over words

Focusing on Intervenors' three alternative energy contentions, which call for more serious NEPA treatment to be accorded commercial wind-generated electricity, photovoltaic electricity and a combination of the two, FENOC quibbles with the ASLB's reformulation wording,[2] as though the mere choice of language by the Board and FENOC's confusion over its scope should disqualify admission of a contention on the subject at all. But an appeal will lie only from unfavorable action taken by the Licensing Board, not from wording of a decision with which a party disagrees but which has no operative effect. *Duke Power Co.* (Cherokee Nuclear Station, Units 1, 2 & 3), ALAB-482, 7 NRC 979, 980 (1978). Even the fact that a Board made an erroneous ruling is not sufficient to warrant appellate relief. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing *Cleveland Elec-*

[2] "[FENOC's ER] fails to adequately evaluate the full potential for renewable energy sources, specifically wind power in the form of interconnected wind farms and/or solar photovoltaic power, in combination with compressed air energy storage, to offset the loss of energy production from Davis-Besse, and to make the requested license renewal action unnecessary. The FENOC Environmental Report (§ 7.2) treats all of the alternatives to license renewal except for natural gas and coal plants as unreasonable and does not provide a substantial analysis of the potential for significant alternatives in the Region of Interest."

tric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 756 (1977); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-827, 23 NRC 9, 11 (1986) (appeals should focus on significant matters, not every colorable claim of error); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 143 (1986), *rev'd in part on other grounds*, CLI-87-12, 26 NRC 383 (1987). A party seeking appellate relief must demonstrate actual prejudice - that the Board's ruling had a substantial effect on the outcome of the proceeding. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984), citing *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983). See *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 278, 280 (1987) (intervenors failed to show any specific harm resulting from erroneous Licensing Board rulings).

The "harm" claimed by FENOC is that it must rely on a fair, plain reading of the reformulated contention to determine how to improve the SEIS. This is not cognizable "harm" and cannot - and should not - be redressed via FENOC's appeal.

D. Wind and Solar alternatives are not 'remote and speculative'

FirstEnergy further finds its procedural back up against the substantive future by arguing the sheer impossibility of wind and photovoltaic expansion in its region of interest by 2017, an especially fatuous quarrel, since the Fukushima nuclear power disaster in Japan has prompted its government to announce an historic abandonment of new nuclear electrical generation. Fukushima has triggered similar governmental responses in Germany and other countries. The global economy is about to ramp up to solar and wind in unprecedented fashion, and FENOC rhet-

orically argues speciousness to avoid having to perform a comprehensive delineation of how bad things are becoming for the nuclear option in it Environmental Report.

FENOC repeatedly blurs the distinction between contention admissibility with summary disposition. Applicant's discussion of the capacity of the Norton CAES (compressed air storage) project is clearly an argument on the merits of the Intervenors' argument, which is not an appropriate discourse at this juncture. The declaration testimony of Intervenors' expert, Dr. Compaan, suggests that the CAES and/or other existing storage systems (such as the pumped reservoir facility near Ludington, Michigan can supply the necessary supplement to wind and solar to make them a viable baseload supply. Whether this claim is accurate remains to be adjudicated, but the fact that it is "reasonable" is proven by decades of inclusion of these devices in the current grid.

Contrary to FENOC's dreary prediction - which argues contention inadmissibility as though all the proofs for summary disposition truculence must be arrayed at the starting gate (App. Br. pp. 9-14) - the NRC has previously addressed the contents of an adequate discussion of solar and wind alternatives to a new nuclear plant. In *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (COLA for Calvert Cliffs Unit 3), LBP-10-24, Docket No. 52-016-COL (December 28, 2010), the ASLB discussed the bias of a DEIS that omitted serious consideration of wind and solar:

> Intervenors maintain that the comparison in the DEIS between a new nuclear power plant and the combined alternative violates NEPA because it is inaccurate and incomplete. They have identified information indicating that the NRC Staff might have significantly underestimated the potential contribution of wind power and solar power to the combined alternative. If Intervenors are correct, then the DEIS's comparison of alternatives might well be incomplete or inaccurate because, by underestimating the contribution of power sources that produce little or no air emissions, it overestimates the

> air emissions the combined alternative would produce. The estimated level of air emissions influenced the DEIS's comparison of the combined alternative to the construction of a new nuclear power plant.

Id. pp. 48-49. Respecting the NRC staff's duty upon identification of serious factual errors or omissions in the NEPA document, the Board declared:

> If Intervenors' contention is upheld on the merits, they will have shown that the DEIS violates NEPA even if they have not shown precisely how the DEIS should be revised or what ultimate conclusion it should reach. Federal courts have held that ***inaccurate, incomplete, or misleading information in an EIS concerning the comparison of alternatives is itself sufficient to render the EIS unlawful and to compel its revision***.[Emphasis supplied]. As the court of appeals explained in *Animal Defense Council v. Hodel*,
>
> > The Council alleges that the EIS was so filled with misinformation and incorrect cost figures that the Bureau must revise its EIS to adequately provide the public with an informed comparison of alternatives. Where the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide 'a reasonable, good faith, and objective presentation of the subjects required by NEPA.' *Johnston v. Davis*, 698 F.2d 1088, 1095 (10th Cir. 1983) (revision of EIS necessary where use of artificially low discount rate resulted in unreasonable comparison of alternatives to proposed project); *see also National Wildlife Federation v. Andrus,* 440 F.Supp. 1245, 1254 (D.D.C. 1977) (EIS deficient where several alternatives were not treated in the EIS and the EIS did not set forth reasons why these alternatives were rejected).
>
> Thus, ***if the DEIS's analysis of the combined alternative significantly underestimates the potential contribution of wind and solar power, as Intervenors maintain, then the EIS fails in one of its essential functions - to provide the public and the decision maker with accurate information comparing the proposed action and its alternatives - and, as such, it cannot support an agency decision to issue the license***. (Emphasis supplied)

Id. p. 50.

Thereafter, in *NextEra Energy Seabrook LLC* (Seabrook Station, Unit 1), LBP-11-02, ASLBP No. 10-906-02-LR-BD01 (February 15, 2011), the ASLB addressed the "remote and speculative" canard. The Seabrook Board found, as to a contention urging NEPA consideration

of offshore wind power, that the utility and NRC Staff "conflate[d] the merits of the contention with the adequacy of its pleading," *id.* p. 23, and that "whether an interconnected system of offshore wind farms constitutes a 'reasonable' alternative is the very issue on which the . . . petitioners seek a hearing. When a contention alleges the need for further study of an alternative, from an environmental perspective, 'such reasonableness determinations are the merits, and should only be decided after the contention is admitted.'" *Id*. To be entitled to a hearing, the *NextEra* Board held, "petitioners need not demonstrate that they will necessarily prevail, but only that there is at least some minimal factual support for their position." *Id.* The ASLB in *NextEra* accepted that the petitioners had made the required minimal factual showing that commercial wind power "is a feasible alternative at the present time" and was not "remote and speculative," and that the obligation is "to consider alternatives as they exist and are likely to exist" [citation omitted]. *Id.* p. 25. That Board further opined that "we are not persuaded that, as a matter of law, an integrated system of offshore wind farms could not constitute a single, discrete source for baseload energy," and that it "seems to pose, at a minimum, a disputed question of fact." *Id*. p. 25.

Here, FirstEnergy seeks to make of the contention admission stage a substitute "trial by affidavit" in order to avoid the substantive consequences of having to definitively identify the soon-burgeoning direct competition of wind and solar with nuclear, *i.e.*, to admit, in the NEPA document, the positive prognosis for wind and photo-voltaic power, as opposed to incipiently anemic atomic energy. What is increasingly "remote and speculative" are not these incremental alternative power sources, but instead, how long nuclear utilities can hold back the *tsunami* of change that will forever dispel the "baseload" central-site power station anachronism.

"The existence of a viable, but unexamined alternative renders an environmental impact statement inadequate." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992). Agencies must "study. . . significant alternatives suggested by other agencies or the public. . . ." *DuBois v. U.S. Dept. of Agric*., 102 F.3d 1273, 1286 (1st Cir. 1996), *cert. denied*, 117 S.Ct. 1567 (1997). Even an alternative which would only partially satisfy the need and purpose of the proposed project must be considered by the agency if it is "reasonable," *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, (2nd Cir. 1975), because it might convince the decision-maker to meet part of the goal with less impact, *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990).

E. Davis-Besse-specific SAMA

FENOC claims that Joint Intervenors' Contention No. 4, which challenges FENOC's Severe Accident Mitigation Alternatives ("SAMA") analysis, is based entirely on non-specific references to technical documents. However, a plain reading of the Joint Intervenors' Petition reveals that the Intervenors explained each document's relevance, and connected their claims to specific portions of FENOC's LRA and ER. FENOC's arguments have been turned aside, and instead of appealing the admitted SAMA contention, a discovery opportunity should now be extended to the parties and FENOC's remedy should be confined to summary disposition. FENOC persistently makes new arguments that it could have and should have already made to the ASLB, or, worse, simply repeats arguments that it already did make. Nowhere has FENOC raised examples of egregious error or abuse of discretion by the ASLB sufficient to merit Commission intervention.

The basic assumptions of the SAMA in terms of costs in the case of a severe accident

have to be reexamined in light of the Fukushima accident, and will be, in the form of the NRC's formal "lessons learned" process. Early indications certainly show that the Intervenors have correctly asserted that the SAMA cost assumptions made by FENOC were, in fact, "dramatically minimized." Additional data on these assumptions are being generated every day, and will be available as adjudication approaches.

V. CONCLUSION

It is germane to these proceedings that the claims of entities such as FENOC should be tested by the evolving realities injected into the proceedings by Intervenors, using studies, media accounts, blogs, draft reports, generic analyses, "concept" papers and other sources. Intervention and litigation of contentions from the public assures a higher-quality outcome than would otherwise be possible were FENOC and the NRC Staff left to their own devices. So far in this license renewal case, the ASLB has enforced the distinction between articulation of admissible contentions, and the adjudication of them. No clear error nor abuse of discretion has been shown by the ASLB in rendering LBP-11-13. That ruling should be allowed to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing "JOINT INTERVENORS' BRIEF IN OPPOSITION TO FENOC'S NOTICE OF APPEAL AND BRIEF" was sent by me to the following persons via electronic deposit filing with the Commission's EIE system this 16th day of May, 2011:

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