UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
FIRSTENERGY NUCLEAR OPERATING CO. Docket No. 50-346-LA
(Davis-Besse Nuclear Power Station, Unit 1)

NRC STAFF ANSWER TO THE BEYOND NUCLEAR,
CITIZENS ENVIRONMENT ALLIANCE OF SOUTHWESTERN ONTARIO,
DON'T WASTE MICHIGAN, AND OHIO SIERRA CLUB
JOINT REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE

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June 14, 2013
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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission ("NRC") staff ("Staff") hereby answers the request for a hearing and petition for leave to intervene ("Joint Petition") filed jointly on May 20, 2013 by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Ohio Sierra Club ("Joint Petitioners"), as supplemented on May 29, 2013.1

The Atomic Safety and Licensing Board ("Board") should deny the Joint Petition because (1) Joint Petitioners do not demonstrate standing to intervene (i.e., an injury-in-fact that is fairly traceable to the January 18, 2013 license amendment request, which is the subject matter of this proceeding2), and (2) the proffered contention does not satisfy the contention admissibility


2 Letter from Raymond A. Lieb, Vice President, Nuclear, FENOC, Davis-Bess Nuclear Power Station, Docket No. 50-346, License No. NPF-3, License Amendment Request for Proposed Revision of Technical Specification (TS) 3.4.17, "Steam Generator (SG) Tube Integrity"; 3.7.18, "Steam Generator Level"; TS 5.5.8, "Steam Generator (SG) Program"; and TS 5.6.6, "Steam Generator Tube Inspection
requirements of 10 C.F.R. § 2.309(f)(1)(iii) - (vi) because, *inter alia*, the proffered contention challenges the use of 10 C.F.R. § 50.59 by FirstEnergy Nuclear Operating Company (“FENOC”) to determine that the installation of replacement steam generators (“SGs”) at Davis-Besse Nuclear Power Station, Unit 1 (“DBNPS”) does not require prior NRC approval, a matter not within the scope of this proceeding.

**BACKGROUND**

This proceeding concerns FENOC’s January 18, 2013 license amendment request to revise four DBNPS technical specifications (“TS”) (*i.e.*, TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6) to support the operation of DBNPS following the planned installation of replacement SGs in April 2014.\(^3\) FENOC states that the proposed changes to TS 3.4.17, TS 5.5.8, and TS 5.6.6 would impose monitoring, inspection, repair, and reporting requirements to ensure that SG tube integrity is maintained consistent with the DBNPS accident analysis assumptions and regulatory requirements and that these revisions are necessary because of the differences in materials and analyses between the original and proposed replacement SGs.\(^4\) FENOC states that these changes are consistent with the guidance of Technical Specifications Task Force (“TSTF”) traveler TSTF-510, Revision 2, “Revision to Steam Generator Program Inspection

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(footnote continued . . .)


\(^3\) LAR at 1,4; 78 Fed. Reg. at 16,883. See also Davis-Besse Nuclear Power Station Unit 1 Technical Specifications, Appendix A to License No. NPF-3 (Apr. 22,1977) (ADAMS Accession No. ML053110490) (“DBNPS TS”).

\(^4\) LAR at 4.
Frequencies and Tube Sample Selection,” which was approved by the NRC on October 27, 2011. FENOC also states that the proposed changes to TS 3.7.18 would modify the SG water level restrictions because of the dimensional and design differences between the original and proposed replacement SGs, and will ensure that plant operation remains bounded by the existing values used in the main steam line break (“MSLB”) analyses of the DBNPS Updated Final Safety Analysis Report (“UFSAR”). According to FENOC, all of these TS changes are operational changes that (1) would not introduce any changes to the plant design or impact any other plant system or component and (2) would become effective only after the installation of the replacement SGs. FENOC indicates that the separate plant design change resulting from the removal of the original SGs and the installation of the replacement SGs is being pursued under 10 C.F.R. § 50.59 without the need for prior NRC approval.

On March 19, 2013, the Staff published in the Federal Register its proposed determination that the January 18, 2013 license amendment request to revise DBNPS

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5 Id.; TSTF-510, Revision 2, “Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection” (Mar. 1, 2011) (ADAMS Accession No. ML110610350) (“TSTF-510, Rev. 2”). TSTF Travelers are industry-sponsored changes to the Standard Technical Specifications (STS) developed by the NRC, which the NRC may approve and incorporate into the STS. Once approved, these changes may be used by licensees as model technical and regulatory bases for license amendment requests for TS changes. See http://www.nrc.gov/reactors/operating/licensing/techspecs/post-revision3-sts.html.


7 LAR at 4.

8 LAR at 1, 4, 10; 78 Fed. Reg. at 16,883.

9 See LAR at 4 (“Replacement of the SGs is being performed as a design modification in accordance with the provisions of 10 CFR 50.59 . . . NRC review and approval of the modification is not being requested herein.”).

The Staff is currently reviewing the January 18, 2013 license amendment request and has not reached any final determination regarding the proposed amendment or FENOC’s assertions.
TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6 involves no significant hazards consideration. The Federal Register notice provided an opportunity for any person whose interest may be affected by the issuance of the requested license amendment to file, by May 20, 2013, a request for a hearing and a petition for leave to intervene in accordance with 10 C.F.R. § 2.309. On May 20, 2013, Joint Petitioners timely filed the instant petition for leave to intervene with respect to the January 18, 2013 license amendment request, proffering a single contention and appending declarations of members of each organization, declarations of an officer of each organization, and a report of an expert witness. The contention proffered by Joint Petitioners states that:

Significant changes to the Replacement Once Through Steam Generator (ROTSG) modification project and to the reactor containment structures, all planned by FirstEnergy Nuclear Operating Company to be made to the Davis-Besse Nuclear Power Station, require that the steam generator replacement project be deemed an “experiment” according to 10 C.F.R. § 50.59, and that an adjudicatory public hearing be convened for independent analysis of the project, before it is implemented. Moreover, FENOC has applied after the fact for a technical specifications license amendment, which comprises an additional, automatic, trigger under 10 CFR § 50.59 and necessitates adjudication of the license amendment request.

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11 Id. at 16,877.

12 Joint Petition at 1, 12.

13 Organizational Declarations of Ohio Sierra Club, Don’t Waste Michigan, and Beyond Nuclear in Support of Petition to Intervene in FENOC License Amendment Request (May 20, 2013) (ADAMS Accession No. ML13141A244).

14 Id.

15 Expert Witness Report of Arnold Gundersen to Support the Petition for Leave to Intervene and Request for Hearing by Beyond Nuclear (Takoma Park, Md), Citizens Environment Alliance SW Ontario Canada, Don’t Waste Michigan (MI), and Sierra Club Ohio Chapter (OH) at 10 (May 20, 2013) (ADAMS Accession No. ML13141A243) ("Gundersen Report").
Joint Petition at 12.

On May 28, 2013, the Board was established to preside over this proceeding. On May 29, 2013, Joint Petitioners filed the declarations of two members of Citizens Environmental Alliance of Southwest Ontario (one a director), stating that the declarations were inadvertently omitted from the Joint Petition.

**DISCUSSION**

I. **Legal Standards for Intervention Petitions**

A. **Standing Requirements**

The Atomic Energy Act of 1954, as amended, (AEA) § 189a states that “[i]n any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding.” This requirement is reflected in 10 C.F.R. § 2.309(a), which provides that a presiding officer will grant a request for a hearing and petition for leave to intervene if he determines that the petitioner has standing according to 10 C.F.R. § 2.309(d) and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).

Standing to intervene in a proceeding is typically determined according to ‘contemporaneous judicial concepts of standing.”

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standing require that the petitioner provide a “sufficiently particularized”\textsuperscript{19} pleading of “(1) an actual or threatened, concrete and particularized injury [(injury-in-fact)], that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision.”\textsuperscript{20} The injury-in-fact pleading requirement cannot be satisfied by a “conjectural or hypothetical” injury or “an ingenious academic exercise in the conceivable.”\textsuperscript{21} Thus, “[a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency’s action.”\textsuperscript{22} Furthermore, injury-in-fact does not include a “generalized grievance shared in substantially equal measure by all or a large class of citizens—such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic interest as a ratepayer—that will not result in the distinct and palpable harm sufficient to support standing.”\textsuperscript{23}

Regarding standing in license amendment proceedings, the Commission has held that “a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with the challenged license amendment, not simply a general objection to the

\textsuperscript{19} Pebble Springs, CLI-76-27, 4 NRC at 614.

\textsuperscript{20} International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (citing Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001)). See also Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 103-04 (1998); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995).

\textsuperscript{21} Sequoyah Fuels Corp. & General Atomics, (Gore, Ok), CLI-94-12, 40 NRC 64, 72 (1994); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 566 (1992).


facility.” Similarly, the Commission has stated that, “[s]ince a license amendment involves a facility with ongoing operations, a petitioner's challenge must show that the amendment will cause a distinct new harm or threat apart from the activities already licensed. Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing.”

While the Commission has recognized a presumption of injury-in-fact for those individuals that reside within 50 miles of a facility in a construction permit, operating license, or license renewal proceeding, a petitioner in a license amendment proceeding cannot base standing solely on proximity unless “the proposed amendment quite obvious[ly] entails an increased potential for offsite consequences.” Instead, “[w]here there is no obvious potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her.” Finally, “[a] petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences.”

An organization may establish standing under 10 C.F.R. § 2.309(d) based on its own interests (i.e., a showing of harm to its organizational interest) or based on harm to the interests

24 Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999) (emphasis in original).

25 White Mesa, CLI-01-21, 54 NRC at 251 (citation and internal quotation marks omitted) (emphasis added).

26 Sequoyah Fuels, CLI-94-12, 40 NRC at 75, n.22 (1994).

27 Zion, CLI-99-04, 49 NRC at 191.


29 Zion, CLI-99-04, 49 NRC at 192.
of its members (i.e., representational standing). When an organization asserts representational standing, judicial concepts of standing require a showing that: (1) its member(s) would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit. Thus the organization must demonstrate, in part, “how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member.”

In summation, the Commission has held that “[t]he burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner. It should not be necessary to speculate about what a pleading is supposed to mean.”

B. Contention Admissibility Requirements

A proffered contention is admissible under 10 C.F.R. § 2.309(f)(1) only if it:

(i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . .;

(ii) Provide[s] a brief explanation of the basis for the contention;

(iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the


31 White Mesa, CLI-01-21, 54 NRC at 250; GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000).

32 Zion, CLI-99-04, 49 NRC at 194 (citation and internal quotation marks omitted).
issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .


The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements. Thus, the Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are “strict by design.” Furthermore, failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention and attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”

Finally, a contention is inadmissible if (1) it constitutes an attack on applicable statutory requirements; (2) it challenges the basic structure of the Commission’s regulatory


34 Id.


process or is an attack on the regulations; (3) it is nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be; (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or (5) it seeks to raise an issue which is not concrete or litigable.38

II. Joint Petitioners Do Not Demonstrate Standing to Intervene

There are two types of changes involved in the planned SG replacement at DBNPS. The first type is the physical change to the plant design resulting from removing the original SGs and installing replacement SGs. FENOC states that this change is currently being pursued without prior NRC approval under 10 C.F.R. § 50.59.39 The second type is the revisions to the DBNPS TS, which must be made so that the DBNPS may safely operate with the replacement SGs once they have been installed. This change is being pursued through the January 18, 2013 license amendment request because all changes to TS require prior NRC approval.40 It is this second type of change that is the subject of this proceeding. Joint Petitioners, however, improperly conflate these two types of changes and attempt to challenge the first type, the physical replacement of SGs and the associated 10 C.F.R. § 50.59 analysis, within the bounds of this license amendment proceeding. In doing so, Joint Petitioners attempt to identify a particularized injury-in-fact that is fairly traceable to the physical replacement of the SGs and the associated 10 C.F.R. § 50.59 analysis, instead of identifying a particularized injury-in-fact that is fairly traceable to the January 18, 2013 license amendment request, which is the subject matter of this proceeding. Thus, Joint Petitioners fail to demonstrate an injury-in-fact fairly traceable to the January 18, 2013 license amendment request such as a credible accident scenario with the


39 LAR at 4.

40 10 C.F.R. § 50.59(c)(1)(i).
potential for offsite radiological consequences that has a nexus to the operation of the replacement SGs under the proposed changes to the TS. In fact, Joint Petitioners do not address any of the FENOC assertions that the requested TS changes will ensure the safe operation of the replacement SGs. Consequently, Joint Petitioners do not demonstrate standing and the Joint Petition should be denied.

The individual organizations constituting Joint Petitioners attempt to establish standing by asserting the geographic proximity of one or more of their members to DBNPS, specifically that these members reside, work, or recreate within a 50-mile radius of DBNPS. Joint Petitioners also state that the interests of each of these member may be affected by the proceeding because they all “have safety and environmental concerns about [DBNPS’] operations,” “express[] the opinion that inadequate information has been disclosed about the steam generator project and further, that lessons about the steam generator failures at the San Onofre plant have not been adequately explored or incorporated into the DBNPS plan,” and “believe that the steam generator replacement proposal may pose unacceptable risks to the environment and public health and to their personal health and safety” from the “total mechanical failure[]” of the replacement SGs or the failure of the containment after being penetrated as part of the SG replacement process. Joint Petitioners analogize this alleged potential for a failure of the DBNPS replacement SGs or containment to the experiences at Crystal River and San Onofre, where a SG replacement preceded the permanent shutdown of those nuclear generating stations. Joint Petitioners allege that the injury resulting from those shutdowns was that “[r]atepayers were stuck with millions of dollars in payments for flawed

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41 Joint Petition at 5-8. It should be noted that, based on the provided addresses, none of the identified members reside closer than 23 miles from DBNPS.

42 Id. at 4-8.

43 Joint Petition at 17 (citing Gundersen Report).
Joint Petitioners extrapolate, without providing information as to how the circumstances of Crystal River or San Onofre are similar to those currently existing at DBNPS besides that they all involve SG replacements, that the same injury will occur at DBNPS.45

These assertions by the Joint Petitioners do not identify a particularized injury-in-fact; instead, they are a collection of “generalized grievance[s] shared in substantially equal measure by all or a large class of citizens—such as assertions of broad public interest in regulatory matters, or the administrative process, or the development of economical energy resources, or economic interest as a ratepayer—that will not result in the distinct and palpable harm sufficient to support standing.”46 Furthermore, if a SG replacement at DBNPS were to lead to the nuclear power station being permanently shutdown like Crystal River and San Onofre, it is unclear what radiological injury-in-fact could result from this speculative outcome. Since the Joint Petition does not demonstrate an injury-in-fact, Joint Petitioners have not established standing and the Joint Petition should be denied.

The Joint Petition should also be denied because Joint Petitioners do not identify how any harm could be fairly traceable to the January 18, 2013 license amendment request. It is Joint Petitioners’ burden to show a “specific and plausible means of how the challenged action may harm [them]” unless there is “obvious potential for radiological harm at a particular distance frequented by a petitioner.”47 Joint Petitioners neither show that the proposed TS changes

44 Id.

45 Id. Nor should Joint Petitioners rely on the unique board decision of Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC ___ (May 13, 2013) (slip op.) for generically establishing their standing. That decision did not actually address the issue of standing.


involve an obvious potential for offsite radiological harm at any particular distance, nor do they show specific and plausible means of how the TS changes may harm them. Instead, Joint Petitioners provide “[c]onclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue.”\textsuperscript{48} Although Joint Petitioners acknowledge that the instant hearing opportunity is provided because of the January 18, 2013 license amendment request,\textsuperscript{49} they do not address how the proposed TS changes could cause them injury. They generally allege that it is because of the proposed TS changes that DBNPS will be allowed to operate with replacement SGs or containment that may fail.\textsuperscript{50} However, while Joint Petitioners claim that the replacement SGs are “new” and “untested”\textsuperscript{51} with “at least nine unreviewed technical specification changes”\textsuperscript{52} and that the process of installing these replacement SGs will require penetrating the containment for a fourth time,\textsuperscript{53} they do not explain how these statements demonstrate that the changes to TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6 will allow operation of the replacement SGs that will cause safety problems and result in offsite consequences. On the contrary, the only information provided regarding the consequences of the TS changes is FENOC’s statement that the January 18, 2013 TS changes are specifically tailored so as to ensure the safe operation of the replacement SGs following their installation, taking into account the differences between the design and the materials used.

\textsuperscript{48} White Mesa, CLI-01-21, 54 NRC at 251 (citation and internal quotation marks omitted).

\textsuperscript{49} Joint Petition at 8-9.

\textsuperscript{50} \textit{Id.} at 4-5, 12.

\textsuperscript{51} \textit{Id.} at 4 (\textit{citing} Gundersen Report).

\textsuperscript{52} Gundersen Report at 10.

\textsuperscript{53} \textit{Id.} at 15.
in the original and the replacement SGs.\footnote{LAR at 4 ("TSs 3.4.17, 5.5.8, and 5.6.6 . . . ensure SG tube integrity is maintained consistent with DBNPS accident analysis assumptions and regulatory requirements. . . . TS 3.7.18 . . . ensure[s] that plant operation remains bounded by the values used in the Main Steam Line Break (MSLB) analyses presented in the DBNPS Updated Safety Analysis Report (UFSAR).")} Therefore, although this Board “must accept as true all material factual allegations of the petition, except to the extent [it] deem[s] them to be overly speculative,”\footnote{Envirocare, LBP-92-8, 35 NRC at 173.} Joint Petitioners do not present any factual allegations that the January 18, 2013 TS changes will not ensure safe operation of the replacement SGs, despite the alleged differences between the original and the replacement SGs identified by Joint Petitioners’ expert. Thus, Joint Petitioners do not demonstrate that there is a harm fairly traceable to the challenged action giving rise to this proceeding and, therefore, the Joint Petition should be denied for lack of standing.

III. Joint Petitioners Do Not Proffer an Admissible Contention

Joint Petitioners’ proffered contention essentially alleges (1) that, but-for its improper 10 C.F.R. § 50.59 analysis, FENOC would have determined that a license amendment request was required for its planned installation of replacement SGs at DBNPS and, therefore, that there should be a hearing opportunity regarding the planned installation of which Joint Petitioners may avail themselves and (2) that because there is a license amendment request to revise TS related to the subsequent operation of the replacement SGs that FENOC plans to install, there should also be a hearing opportunity regarding the installation of these SGs itself of which, again, Joint Petitioners may avail themselves.\footnote{Joint Petition at 12. Nor should Joint Petitioners rely on the unique board decision of Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC ___ (May 13, 2013) (slip op.) for generically establishing an admissible contention. That decision did not actually address the issue of contention admissibility.} This proffered contention regarding the installation of replacement SGs at DBNPS is not cognizable in this proceeding because it is outside the scope of the hearing opportunity provided by the January 18, 2013 license
amendment request in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and because it does not
facially satisfy the other contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v),
and (vi).


The regulations at 10 C.F.R. § 50.59 provide a screening process that allows licensees
to determine for themselves which changes to their facility and procedures as described in the
UFSAR, or which tests or experiments not described in the UFSAR, may be conducted without
prior NRC approval.57 A licensee that does not properly perform a 10 C.F.R. § 50.59 analysis
and makes a change requiring prior NRC approval without a license amendment request would
be in violation of NRC regulations and thus subject to enforcement action.58 As explained
below, binding Commission precedent holds that challenges to a licensee’s 10 C.F.R. § 50.59
analyses are outside the scope of the actions listed in AEA § 189a and may only be brought as
requests for enforcement under 10 C.F.R. § 2.206.

57 NEI 96-07, Revision 1, directs licensees on how to perform a 10 C.F.R. § 50.59 analysis. NEI
96-07, Revision 1, Guidelines for 10 CFR 50.59 Implementation (Nov. 2000) (ADAMS Accession No.
ML003771157). The guidance of NEI 96-07 has been approved by the NRC as a method acceptable for

58 See 10 C.F.R. § 50.100.

There is no requirement to individually submit 10 C.F.R. § 50.59 analyses to the NRC although
they are maintained onsite available for inspection. Additionally, licensees “shall update periodically . . .
the [FSAR] . . . [which] shall include the effects of . . . all safety analyses and evaluations performed by
the . . . licensee . . . in support of conclusions that changes did not require a license amendment in
accordance with § 50.59(c)(2) . . . .” 10 C.F.R. § 50.71(e).

Furthermore, just because the NRC is not immediately scrutinizing any potential FENOC 10
C.F.R. § 50.59 analyses regarding the installation of replacement SGs at DBNPS does not mean that the
NRC has relinquished oversight of this planned installation. To the contrary, the NRC has already
scheduled SG replacement inspections at DBNPS in accordance with NRC inspection procedures 50001.
See Letter from James L. Cameron, NRC, to Barry Allen, Site Vice President, FENOC, Mid-Cycle
Assessment Letter for Davis-Besse Nuclear Power Station (Sep. 4, 2012) (ADAMS Accession No.
ML12248A343); NRC Inspection Manual, Inspection Procedure 50001, Steam Generator Replacement
Inspection (Nov. 2011) (ADAMS Accession No. ML11206B197).
In Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95 (1994) ("Yankee"), the petitioner sought an adjudicatory hearing regarding the licensee’s plans to decommission and dismantle the Yankee Nuclear Power Station. The Commission held that, “the only 'right' to an opportunity for a hearing under AEA section 189[a] exists for those actions that are identified in section 189[a]” and since the petitioner “has not identified any action or proposed action taken to this date in connection with the decommissioning and dismantling of Yankee [Nuclear Power Station] that constitutes an action identified in section 189a of the AEA for which an opportunity for a hearing is required” the petitioner cannot be granted a hearing. Additionally, even though the Yankee licensee was conducting the challenged decommissioning and dismantling activities pursuant to its 10 C.F.R. § 50.59 analysis finding that prior NRC approval through a license amendment request was not required, this use of 10 C.F.R. § 50.59 did not “implicate the hearing rights afforded by section 189a.” Thus, the petitioner had no right to a hearing under AEA § 189a and the licensee’s conduct of activities without prior NRC approval pursuant to 10 C.F.R. § 50.59 did not create such a right. According to the Commission, the petitioner’s only recourse would be to challenge the licensee’s 10 C.F.R. § 50.59 analysis itself; however, in so doing, “[a] member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.”

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60 Id. at 101 (citing Florida Power & Light v. Lorion, 470 U.S. 729, 739 (1985)).

61 Id. at 101-102.

62 Id.

63 Id. at 101 n.7 (emphasis added).
The Commission recently affirmed its holding that a 10 C.F.R. § 50.59 analysis can only be challenged via a 10 C.F.R. § 2.206 petition in *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC __ (Nov. 8, 2012) (slip op.) ("*San Onofre, CLI-12-20*"). In *San Onofre, CLI-12-20*, as in the instant case, the petitioner argued that there should be a hearing opportunity regarding the licensee’s allegedly improper analysis under 10 C.F.R. § 50.59 finding that a planned installation of replacement SGs would not require prior NRC approval through a license amendment request.64 In making this argument, the petitioner conceded that past Commission precedent held that such challenges to 10 C.F.R. § 50.59 analyses could only be construed as requests for enforcement relief under 10 C.F.R. § 2.206, but argued that the 10 C.F.R. § 2.206 process was not a “viable alternative” for obtaining relief and thus that this precedent should be overturned.65 The Commission disagreed, stating that:

> The 2.206 process provides stakeholders a forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted. We may then review the NRC Staff's findings on our own motion. If [the petitioner] prevails on its 2.206 argument that [the licensee] needed a license amendment to replace the [facility] steam generators, then it may be able to obtain the adjudicatory hearing it seeks. Section 189a of the [AEA] grants an opportunity for a hearing on (among other things) license amendments . . . . We therefore deny [the petitioner’s] request and refer this portion of [the] petition to the EDO for consideration as a petition under 10 C.F.R. § 2.206.

*San Onofre, CLI-12-20*, slip op. at 3-4.

Therefore, Commission precedent is clear that a challenge to a 10 C.F.R. § 50.59 analysis, like that raised by Joint Petitioners’ proffered contention, is not subject to an AEA § 189a hearing opportunity; rather, such arguments must be submitted to the 10 C.F.R. § 2.206

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64 *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC __, __ (Nov. 8, 2012) (slip op. at 1).

65 *Id.* at 3.
process and if this process determines that a license amendment is required, and when such a license amendment request is submitted by the licensee, only then may the petitioner be granted an AEA § 189a hearing opportunity.

Despite Commission precedent, Joint Petitioners argue that a recent board decision in the San Onofre proceeding ("San Onofre, LBP-13-07")\(^6\) allows them, instead of filing a 10 C.F.R. § 2.206 petition, to request that a licensing board scrutinize the DBNPS SG replacement activities currently being pursued under 10 C.F.R. § 50.59 without prior NRC approval. However, the holding in San Onofre, LBP-13-07, is neither applicable to the instant proceeding nor is it precedent on which this Board should rely. San Onofre, LBP-13-07, involved a licensee replacing the original SGs at San Onofre Nuclear Generating Station with new SGs manufactured by Mitsubishi Heavy Industries.\(^6\) The licensee’s 10 C.F.R. § 50.59 analysis in support of this replacement determined that prior NRC approval through a license amendment request was not required.\(^6\) However, shortly after the replacement, the licensee discovered that various replacement SG tubes had experienced unexpected wear.\(^6\) To address this unexpected wear, the licensee submitted to the NRC a plan describing actions that it committed to take before operating the SGs again.\(^6\) Through the issuance of a Confirmatory Action Letter ("CAL"), the NRC confirmed these licensee commitments and communicated that future operation of the nuclear station would require prior NRC authorization.\(^6\)

\(^{66}\) Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-13-07, 77 NRC ___ (May 13, 2013) (slip op.).

\(^{67}\) Id. at 3.

\(^{68}\) Id. at 4.

\(^{69}\) Id. at 4-6.

\(^{70}\) Id. at 6.

\(^{71}\) Id. at 6-7.
The Commission delegated to the San Onofre, LBP-13-07, licensing board the question of whether “the Confirmatory Action Letter issued to SCE [from the NRC] constitutes a de facto license amendment that would be subject to a hearing opportunity under [AEA] Section 189a.”\(^\text{72}\) Subsequently, the San Onofre, LBP-13-07, licensing board found that the commitments made in the CAL between the licensee and the NRC represented a “CAL process” and that there could be an opportunity for a hearing if any aspect of this “CAL process” constituted a de facto license amendment.\(^\text{73}\) To determine whether any aspect of “CAL process” constituted a de facto license amendment, the board, without prior precedent, used the criteria of 10 C.F.R. § 50.59 as an analytical tool.\(^\text{74}\) However, in so doing, the board made clear that it was not using the criteria of 10 C.F.R. § 50.59 to “scrutiniz[e] the actual actions taken by [the licensee] under section 50.59.”\(^\text{75}\) Ultimately, the board held that, in light of the criteria of 10 C.F.R. § 50.59, various aspects of the CAL process between the licensee and the NRC did constitute a de facto license amendment\(^\text{76}\) and, thus, implicated an AEA § 189a hearing opportunity.\(^\text{77}\)

Joint Petitioners’ reliance on San Onofre, LBP-13-07, is misplaced because that proceeding’s factual and legal issues are not applicable to the instant proceeding. The San Onofre, LBP-13-07, proceeding considered whether the “CAL process” between the licensee and the NRC constituted a de facto license amendment and thus gave rise to a hearing opportunity.\(^\text{78}\) However, in the instant proceeding, there has been no “CAL process” involving

\(^{72}\) San Onofre, CLI-12-20, 76 NRC at ___ (slip op. at 5).

\(^{73}\) San Onofre, LBP-13-07, 77 NRC at ___ (slip op. at 10).

\(^{74}\) Id. at 24.

\(^{75}\) Id. at 23-24.

\(^{76}\) Id. at 24-25.

\(^{77}\) Id. at 38.

\(^{78}\) Id. at 24.
licensee commitments to take follow-up actions that have been formally accepted by the NRC. Additionally, the U.S. Court of Appeals for the First Circuit has held, and the San Onofre, LBP-13-07, board recognized that, “it is the substance of the NRC action that determines entitlement to a section 189a hearing”\(^8^0\) however, in the instant proceeding there has been no “NRC action,” related to the actual installation of replacement SGs at DBNPS that Joint Petitioners seek to litigate. Furthermore, the San Onofre, LBP-13-07, board explicitly stated that its decision could not be applied to litigating 10 C.F.R. § 50.59 issues because, “scrutinizing the actual actions taken by [a licensee] under section 50.59 . . . is prohibited.”\(^8^1\) The board also noted that the issue in San Onofre was “not a challenge to [the licensee’s] previous actions taken under section 50.59.”\(^8^2\) Finally, the controversy at issue in the San Onofre, LBP-13-07, proceeding is fundamentally different than the controversy at issue in the instant proceeding. In San Onofre, LBP-13-07, the Commission had delegated to the board the specific question of whether a CAL between the licensee and the NRC constituted a de facto license amendment and, thus, gave rise to a hearing opportunity.\(^8^3\) In the instant proceeding, however, Joint Petitioners are attempting to use a noticed hearing opportunity on an actual license amendment request (i.e., the January 18, 2013 TS license amendment request) to argue that a separate licensee activity (i.e., the installation of replacement SGs without prior NRC approval pursuant to 10 C.F.R. § 50.59) constitutes a de facto license amendment that should give rise to its own hearing opportunity. Because of the factual and legal differences between San Onofre, LBP-13-07,

\(^79\) Id. at 1.

\(^8^0\) Citizens Awareness Network, Inc. v. NRC, 59 F.3d 284, 295 (1st Cir. 1995); LBP-13-07 at 14 (emphasis added).

\(^8^1\) San Onofre, LBP-13-07, 77 NRC at ___ (slip op. at 23-24).

\(^8^2\) Id. (emphasis added).

\(^8^3\) San Onofre, CLI-12-20, 76 NRC at ___ (slip op. at 5).
07, and the instant proceeding, Joint Petitioners’ attempt to use the holding of San Onofre, LBP-13-07, to justify challenging FENOC’s 10 C.F.R. § 50.59 analysis in the instant proceeding is not persuasive.

In addition to being factually and legally distinct from the instant proceeding, San Onofre LBP-13-07, should also not be used as precedent in this proceeding because it is a board, not a Commission, decision and, by its own terms, its holding is narrow. San Onofre, LBP-13-07, does not overturn the binding Commission precedent of Yankee and San Onofre, CLI-12-20, which hold that 10 C.F.R. § 50.59 analyses can only be challenged through 10 C.F.R. § 2.206 petitions. This is because unreviewed board rulings such as San Onofre, LBP-13-07, “do not constitute precedent or binding law” whereas Commission rulings do. Also, San Onofre, LBP-13-07, itself repeatedly states that its holding is “highly fact-specific” and “exceptionally unusual”, thus, the factual and legal differences between San Onofre, LBP-13-07, a proceeding initiated by Commission-delegation to investigate the possibility of a CAL constituting a de facto license amendment, and the instant proceeding regarding a specific license amendment request, make the determinations of San Onofre, LBP-13-07, inapplicable here. Finally, the circumstances underpinning the San Onofre, LBP-13-07, decision have been mooted by the San Onofre licensee’s recent announcement that it has permanently ceased power operations at San Onofre Nuclear Generating Station, effective June 7, 2013, instead of pursuing the Confirmatory Action Letter process that San Onofre, LBP-13-07, had found to constitute a de facto license amendment. Under established NRC practice, unreviewed board

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\[\text{84} \text{ Yankee, CLI-94-3, 39 NRC at 101 n.7; San Onofre, CLI-12-20, 76 NRC at __ (slip op. at 3-5).}\]

\[\text{85} \text{ Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998).}\]

\[\text{86} \text{ San Onofre, LBP-13-07, 77 NRC at __ (slip op. at 16).}\]
judgments are typically vacated when their appellate review becomes unavailable because of mootness. Thus, this potentially moot decision should not be relied upon in this proceeding.

Because the proffered contention at bottom seeks litigation concerning FENOC’s 10 C.F.R. § 50.59 analysis regarding the installation of replacement SGs at DBNPS, binding Commission precedent requires that it be denied as outside the scope of this proceeding and that Joint Petitioners be required to pursue the 10 C.F.R. § 2.206 process for relief. Thus, the proffered contention does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

B. The Proffered Contention Does Not Satisfy 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi)

Because of the incongruence between the subject matter of this proceeding (i.e., the January 18, 2013 license amendment request for TS changes to support the operation of the replacement SGs) and the Joint Petitioners’ proffered contention (i.e., that there should be a hearing regarding the alleged FENOC determination under 10 C.F.R. § 50.59 that the installation of the replacement SGs can proceed without prior NRC approval), the proffered

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(footnote continued . . .)


contention also does not satisfy the “strict by design”\(^{89}\) contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi). Since failure to comply with any one of these requirements is grounds for the dismissal of a contention,\(^{90}\) the Joint Petition should be denied.

10 C.F.R. § 2.309(f)(1)(iv) requires that a contention demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding. The action involved in this proceeding is the January 18, 2013 license amendment request regarding TS changes to support operation of the replacement SGs following their installation at DBNPS. In determining whether an amendment to a license will be issued, the Staff is guided by the considerations which govern the issuance of initial licenses.\(^{91}\) These considerations include whether the action will be protective of the health and safety of the public.\(^{92}\) However, the proffered contention seeks a hearing on a separate action; specifically, whether FENOC properly performed a 10 C.F.R. § 50.59 analysis in support of the actual installation of the replacement SGs.\(^{93}\) Whether the replacement SGs could be installed without prior NRC approval is not material to the Staff determination of whether the replacement SGs themselves can be operated safely under the TS changes requested by the January 18, 2013 license amendment request because this safety determination can be made through a review of the design of the replacement SGs alone. Therefore, the proffered contention does not satisfy 10 C.F.R. § 2.309(f)(1)(iv) and should be denied.

\(^{89}\) Millstone, CLI-01-24, 54 NRC at 358.

\(^{90}\) Private Fuel Storage, CLI-99-10, 49 NRC at 325.

\(^{91}\) 10 C.F.R. § 50.92(a).

\(^{92}\) AEA § 103.

\(^{93}\) Joint Petition at 12.
10 C.F.R. § 2.309(f)(1)(v) requires that a contention provide a concise statement of the alleged facts or expert opinions which support the petitioner’s position on the issue and on which the petitioner intends to rely “at hearing.” Contrary to this requirement, Joint Petitioners merely cite problems at other facilities without showing a nexus to the January 18, 2013 license amendment request\(^94\) and provide an expert’s opinion to support the argument that, because of FENOC’s allegedly improper 10 C.F.R. § 50.59 analysis, there should be a hearing opportunity regarding the 10 C.F.R. § 50.59 analysis.\(^95\) Joint Petitioners do not provide “with particularity”\(^96\) any alleged facts or expert opinions that pertain to the adequacy of the January 18, 2013 license amendment request and that would be relied upon at this requested hearing. It is clear that Joint Petitioners want some sort of a hearing, but it is unclear what this hearing would involve beyond Joint Petitioners’ generalized assertions regarding the speculated failure of the replacement SGs or the containment. Since a petitioner must allege “concrete issues”\(^97\) rather than rely on “[m]ere ‘notice pleading,’”\(^98\) the proffered contention should be denied for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).

10 C.F.R. § 2.309(f)(1)(vi) requires that a contention provide sufficient information to show that a genuine dispute exists with the licensee on a “material issue of law or fact,” including specific references to portions of the application at issue. Joint Petitioners acknowledge that the FENOC no significant hazards consideration discussion asserts that “the technical specifications amendment will not increase the chances of a steam generator tube

\(^94\) Id. at 16-17.

\(^95\) Gundersen Report.

\(^96\) 10 C.F.R. § 2.309(f)(1).


\(^98\) Oyster Creek, CLI-06-24, 64 NRC at 119.
rupture in the proposed 2014 swapout of the originally-installed 1970's steam generator components,” that “the chances of a main steam line break will not increase as a result of installation of the new equipment, nor is there a possibility of a new or different kind of accident from any accident previously evaluated,” and that “[t]he new steam generators would not affect any existing margin of safety”;99 however, Joint Petitioners do not provide the “supporting reasons,” as required by 10 C.F.R. § 2.309(f)(1)(vi), for their dispute with any of these FENOC assertions of material facts. Instead of disputing the material FENOC assertions that the requested TS changes will ensure safe operation of the replacement SGs, Joint Petitioners dispute the non-material issue of whether FENOC properly performed a 10 C.F.R. § 50.59 analysis regarding the installation of the replacement SGs.100 Since this proffered contention does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) and since the Commission “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing,”101 the Joint Petition should be denied.

99 Joint Petition at 9.
100 Id. at 12.
CONCLUSION

Joint Petitioners lack standing because they do not demonstrate a cognizable injury-in-fact that is fairly traceable to the January 18, 2013 license amendment request giving rise to this proceeding. Joint Petitioners’ proffered contention is inadmissible because it is a challenge to a 10 C.F.R. § 50.59 analysis which is outside the scope of the January 18, 2013 license amendment request in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and because it does not satisfy the other contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi). Therefore, the Joint Petition should be denied.

Respectfully submitted,
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Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
this 14th day of June, 2013
CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing NRC STAFF ANSWER TO THE BEYOND NUCLEAR, CITIZENS ENVIRONMENT ALLIANCE OF SOUTHWESTERN ONTARIO, DON’T WASTE MICHIGAN, AND OHIO SIERRA CLUB JOINT REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE dated June 14, 2013 have been served upon the Electronic Information Exchange, the NRC’s E-Filing System, in the above captioned proceeding, this 14th day of June, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 14th day of June, 2013