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Congress of the United States
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Committees:
Government Reform
Education
and the
Workforce

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July 7, 2003

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United States Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: RESPONSE TO PROPOSED DIRECTOR'S DECISION DENYING PETITION PURSUANT TO 10 C.F.R. §2.206 REQUESTING THE NUCLEAR REGULATORY COMMISSION REVOKE FIRSTENERGY NUCLEAR OPERATING COMPANY'S LICENSE TO OPERATE THE DAVIS-BESSE NUCLEAR POWER STATION.

Re: License NPF-3, Docket #050-00346.

The NRC issued a proposed director's decision denying Congressman Dennis J. Kucinich's §2.206 petition requesting that the NRC revoke FirstEnergy's license to operate the Davis-Besse Nuclear Operating Station. The §2.206 petition asked the NRC to revoke FirstEnergy's license after it was discovered that accumulated boric acid had eaten a hole through the reactor lid. The corrosion occurred because FirstEnergy was violating NRC rules and regulations and its own operating license, and operating in contempt for public safety. The petition asserted, moreover, that FirstEnergy had fraudulently deceived the NRC into delaying an inspection for leaks in the CRDM nozzles, which were the very cause of the corrosion in the reactor lid. The supplement to the petition added further justifications for revoking the license. It further requested that the NRC wait until an OI investigation into FirstEnergy's fraudulent

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behavior was complete before issuing its decision on the petition and its decision on when to restart Davis-Besse.

The proposed director's decision explained that it will not await a completed investigation into the allegations of fraud. The proposed decision states that it is not necessary to await a completed investigation because it is "likely" that deceiving the NRC into delaying an inspection based on fraudulent information about the comprehensiveness and quality of past inspections would not justify revoking FirstEnergy's license.

Watchdogs who follow the NRC's regulation of the nuclear industry have predicted that the NRC will wait until Davis-Besse has re-opened before it releases its findings into FirstEnergy's fraud. They foresee that the NRC will do no more than levy a small civil fine, which will not be enough to deter future misconduct in FirstEnergy or other licensees. Although the proposed decision states that the NRC will not wait for a complete investigation to rule on the petition, petitioner is hopeful that the NRC will not follow the same course when making its decision to restart Davis-Besse.

The NRC justified its decision not to revoke FirstEnergy's operating license because it has continued oversight over the Davis-Besse plant through a Confirmatory Action Letter and the convened 0350 panel, because FirstEnergy has implemented programs to investigate and correct any problems at the Davis-Besse plant itself, and because FirstEnergy has not exhibited an inability or unwillingness to achieve compliance with the NRC's requirements.

The NRC requested that petitioner file comments on any portions that the petitioner believes involved errors or that have not been fully addressed. Petitioner believes that the proposed decision does not justify prematurely ruling on this petition before the OI completes its

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investigation. Nor does the proposed decision justify the NRC's refusal to hold FirstEnergy accountable for its past and present behavior by properly exercising its authority to revoke FirstEnergy's license to operate the Davis-Besse nuclear power station.

I. The final director's decision should not be issued until the OI investigation is complete.

The supplement to the 2.206 petition requested that the NRC wait until the OI investigation into FirstEnergy's fraudulent behavior is complete and findings are made before ruling on the petition. This request is made because a significant portion of the petition is dedicated to describing the events leading up to the discovery of the hole as publicly documented by the NRC, FirstEnergy and the press and showing how these public documents force the conclusion that FirstEnergy deliberately withheld and misstated information to the NRC.¹ The petition deserves a ruling based on complete information. The NRC should not justify its ruling based on a mere likelihood of an outcome, or on the fact that the allegations made in the petition are not yet supported by the NRC's own investigation. Yet, this is exactly what the NRC proposes to do.

The 2.206 petition stated that the NRC had the authority to revoke a license in "situations involving particularly poor licensee performance, or involving willfulness" and "situations when the licensee made a conscious decision to be in non-compliance in order to obtain an economic

¹ For further discussion on this subject please see Union of Concerned Scientists: Memorandum to Gregory A. White, U.S. Attorney for the Northern District of Ohio, Re: Legal and Factual Basis for Criminal Sanctions Against FirstEnergy Nuclear Operating Company for Material Misrepresentations to the U.S. Nuclear Regulatory Commission and Violations of NRC Regulations regarding the Davis-Besse Nuclear Power Plant, April 15, 2003 (explaining why several statements by FirstEnergy employees to the NRC fit the legal definition of fraud).

benefit.”² The proposed director’s decisions states that, while it did find that some information given to the NRC by FirstEnergy was inaccurate, it cannot yet determine whether this action was willful for the purposes of this petition, because “these reports did not make any findings regarding willfulness on the part of the licensee.”³ Thus, because the OI investigation is not complete, the proposed decision is able to evade the question of whether FirstEnergy’s license should be revoked due to its willful and fraudulent campaign to delay inspection of the Davis-Besse plant.

The NRC then states that any findings of willfulness “likely” would not provide a sufficient basis to revoke the Davis-Besse license.⁴ The NRC, by speaking within the terms of possibility and not dealing in facts, is avoiding the central assertion of this petition: the NRC must hold FirstEnergy accountable to the public for operating Davis-Besse in an unsafe manner in order to pursue greater profits and then deliberately lying to the NRC to delay an NRC mandated inspection. To state that it is “likely” that the NRC will not revoke FirstEnergy’s license for fraudulent conduct is to side-step the entire thrust of the petition.

To the extent that the NRC is relying on information from the OI investigation that has not been publicly released in making its decision, the NRC’s logic in this matter is fundamentally flawed. If the OI investigation is sufficiently mature to adequately inform the NRC’s decision,

² 63 F.R. 26630-03,26642. May 13, 1998. (The proposed director’s decision appears to insinuate that these are not the current NRC enforcement action rules. May 13, 1998, was the last time the NRC printed a comprehensive revised version of its enforcement action rules. Any later revised versions are not comprehensive and do not revise this section.)

³ See Proposed Director’s Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, pp.15

⁴ See Id. at pp. 15-16.

then it should be ready for public release – at least in synopsis form. Conversely, if the OI investigation is not mature enough for public release, then it is also not evolved sufficiently to inform the NRC’s decision-making process.

Detaching the results of the OI investigation from the NRC’s restart decision undermines the NRC oversight efforts and allows the NRC and FirstEnergy to avoid any public discussion of accountability for criminal behavior until it is too late to further delay the restart of Davis-Besse. NRC oversight, whether in the heightened form of the 0350 panel or in the routine form of the Reactor Oversight Process, relies primarily on information the licensee provides, with limited audits by NRC inspectors. The ongoing OI investigation challenges the truthfulness of the information FirstEnergy provides to the NRC. Thus, the OI investigation must be completed prior to restart in order for the NRC’s oversight process to function unimpeded by suspect information from FirstEnergy.

Delay, moreover, changes the circumstances under which penalties will be determined. If criminal and civil sanctions are determined soon after the criminal behavior occurred, the surrounding circumstances allow a more impartial and just decision: the plant is shut down, facts are fresh, memories are sharper, and government and industry have not deeply invested in the current administration of the plant. If the OI investigation findings continue to be delayed, penalties will be determined when the criminal behavior happened years ago: facts are stale, memories have dimmed, and the government and industry have deeply and irrevocably invested in the current management of the plant. Penalties will be determined in a context of shutting down a working nuclear plant, instead of merely using a different, more exacting, more complete

and more independent investigations of a closed plant. Delaying the investigation, and delaying the findings of that investigation, denies that justice will be served.

For these reasons, the director should not issue a final decision and the NRC should not allow Davis-Besse to restart until the OI investigation is complete.⁵

II. NRC must hold FirstEnergy accountable

This petition asked for the NRC to hold FirstEnergy accountable by revoking its operating license for (1) admittedly operating the plant in violation of NRC rules and regulations and its own operating license, (2) admittedly failing to observe safety standards necessary to protect health and to minimize danger to life or property and for (3) deliberately withholding information from the NRC and fraudulently misrepresenting plant conditions in order to operate the plant in an unsafe manner. The petition then went on to detail numerous instances of FirstEnergy continuing to behave in an unsafe manner following the discovery of the hole in the reactor lid, including (1) not properly training inspectors, (2) reports of retaliation for speaking out against management for putting expedience ahead of safety and being harassed for raising

⁵ The letter accompanying the Draft Decision by John Zwolinski states that “the Davis-Besse plant is currently shut down, and will remain so, until the NRC is fully satisfied that there is reasonable assurance of adequate protection of the public health and safety and that all issues associated with management of the facility have been satisfactorily addressed.” All issues associated with management of the facility must include the issue of whether management committed fraud while lobbying the NRC to defer the inspection of the CRDM nozzles. The restart checklist referred to in the Proposed Director’s decision also lists issues that require resolution before the plant will be allowed to restart. These issues include the “adequacy of root cause determinations” and the “adequacy of organizational effectiveness and human performance.” These issues also must encompass a thorough and complete investigation into whether FirstEnergy committed fraud. The petitioner hopes that the NRC will keep the promise inherent in these statements by completing the OI investigation, disseminating the findings publicly, and acting on those findings before allowing the facility to restart.

safety concerns, (3) employee surveys finding that the “safety culture” at Davis-Besse is far from rehabilitated.

Since the time of the petition, further reports have surfaced bolstering the belief that the safety culture at Davis-Besse has not been repaired. A Safety Culture Evaluation report prepared by a consultant to FirstEnergy, stated:

Many personnel interviewed perceive that Senior Management has not acknowledged their accountability and responsibility for the reactor head event. These personnel expressed disappointment and frustration that this had not taken place. Staff point out that some of the managers directly involved in the event remain in the organization and have been reassigned to other sites and positions. The reassignments are perceived as indicating that the managers have not been held accountable by the organization.⁶

If Davis-Besse employees do not believe that FirstEnergy has sufficiently held its managers accountable, it is difficult to understand why the NRC believes FirstEnergy has done so.

The proposed director’s decision echoes one of FirstEnergy’s responses to the 2.206 petition and provides that FirstEnergy “stated that its corrective actions have included the replacement of several senior and mid-level managers who had been in positions of responsibility prior to February, 2002.”⁷ The proposed decision appears to offer this information as evidence of corrective actions that FirstEnergy has taken. The proposed decision, however, simply adopts FirstEnergy’s assertion with no analysis or discussion over whether these replacements are sufficient to address FirstEnergy’s lack of safety culture, or whether the managers replaced were even the ones who were directly involved in the reactor head event.

⁶ See Union of Concerned Scientists, NRC Office of Investigations Input to Davis-Besse Restart Decision, June 25, 2003, citing Safety Culture Evaluation Report, April 23, 2003.

⁷ Proposed Director’s Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, pp. 9-10.

FirstEnergy, moreover, has recently failed to catch a design flaw in a vital pair of emergency pumps at Davis-Besse, even though it states it is doing a comprehensive examination of its facilities. After the NRC pointed out the design flaw, FirstEnergy's first course was to do an analysis that attempted to justify not fixing the flaw.⁸ FirstEnergy asserted that it was not necessary to fix a flaw that could lead to the pumps being damaged, and thus unable to pump cooling water to stop a core meltdown because operators could use other pumps, not designed for that purpose nor designed to emergency standards, to prevent the core from melting. Sixteen months into the shut-down, the discovery of this problem caused the NRC to "press" FirstEnergy to do more analytical work.

These two recent examples are offered as further evidence that FirstEnergy still has not shown that it should escape culpability for its safety violations and fraudulent behavior through its current behavior, sixteen months after the hole was discovered and well over a year after coming under increased NRC oversight.

a. NRC's current oversight procedures

The proposed decision argues that the NRC's current oversight procedures are sufficient to protect the health and safety of the public and outlines the procedure it uses to inspect Davis-Besse. The proposed decision states that the NRC performs independent inspections and reviews samples of work performed by FirstEnergy staff. If the NRC finds discrepancies between its inspections and FirstEnergy inspections, or finds problems in the samples of work that it reviews,

⁸ See Funk, John, and Mangels, John, NRC reports Davis-Besse safety pump design flaw, Plain Dealer, June 25, 2003

it simply notifies FirstEnergy of these problems. Then, the NRC conducts follow-up reviews. If the follow-up reviews reveal that FirstEnergy still has not addressed the problem properly, the NRC may perform additional inspections.⁹ This is the extent of the oversight procedures discussed in the proposed director's decision. If problems are found, the NRC may, if it wishes, do additional inspections. At no point in the process described in the proposed decision does the NRC consider taking any further action.

The NRC's rules and regulations specifically give it the power to modify, suspend, or revoke a license, and to assess civil penalties.¹⁰ Nowhere in this procedure does the NRC even contemplate taking such steps. The procedure described in the proposed director's decision appears to be hypothetical response to what actions the NRC will take, depending on FirstEnergy's responsiveness. Even when NRC speculates that FirstEnergy is non-responsive to "significant differences between NRC inspections and licensee reviews" after FirstEnergy has been notified of a deficiency, the utmost response the NRC contemplates is "additional independent inspections."¹¹

The NRC's reluctance to use the authorities Congress granted it, after a licensee has: allowed a hole to be eaten through a reactor head, given incomplete and fraudulent information to the NRC, and then, as the NRC speculates in its description of the oversight process, does not sufficiently correct problems the NRC finds in spot inspections and reviews, is of grave concern.

⁹ See Proposed Director's Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, p. 7.

¹⁰ See 63 F.R. 26630-03, 26641, May 13, 1998; 10 C.F.R. §50.100.

¹¹ Proposed Director's Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, p 7.

If the question this petition asks is, at what point will the NRC consider revoking an operating license, the NRC's response, as illustrated in this proposed decision, is – never. If the NRC never contemplates going further in its enforcement powers than “additional inspections” in a hypothetical context where the licensee does not respond to the NRC's concerns, then the next question to be answered is whether the NRC has “consciously and expressly adopted a general policy of non-enforcement that is so extreme as to amount to an abdication of its statutory responsibilities.”¹²

b. FirstEnergy's inspections of Davis-Besse

The proposed director's decision refers often to the reviews and inspections that FirstEnergy is conducting in the Davis-Besse plant, and its reliance on FirstEnergy to do a thorough and complete job of those inspections and repairs. The 2.206 petition and supplement has repeatedly questioned the trust that the NRC has placed in FirstEnergy to review itself.¹³ The 2.206 petition states, “FirstEnergy has cut corners and the NRC has caught them doing so numerous times. The question must arise, then, how many corners has FirstEnergy cut that the NRC has not discovered?”¹⁴ The supplement adds, “As FirstEnergy itself has identified, a major cause of this corrosion was a focus on production established by management, and a culture of placing a “less than an adequate” focus on nuclear safety. This leads to the question of

¹² See *Safe Energy Coalition of Michigan v. Nuclear Regulatory Commission*, 866 F.2d 1473 (D.C. Cir. 1989)

¹³ Petitioner has not, however, requested that the NRC disallow credit for any work FirstEnergy has already conducted. The repair work that FirstEnergy has performed to date at Davis-Besse can form a foundation for the relicensing process. If there are gaps or deficiencies in this work, a relicensing procedure, rather than spot inspections, is the better regulatory vehicle to find and fix them.

¹⁴ Congressman Dennis J. Kucinich's 2.206 petition, February 3, 2003, p.25

what else may have been overlooked by the plant during the years that FirstEnergy admits to a less than adequate safety focus.”¹⁵

The proposed director’s decision does not answer this question. It merely puts forth its procedures for limited independent inspections and spot-checking FirstEnergy’s work. How can the public trust FirstEnergy to police itself when it had failed to do so adequately for the many years leading up to the discovery of the hole in the reactor lid? How can the public trust the NRC’s oversight of FirstEnergy’s inspection and procedure process when the NRC contemplates doing no more than “additional inspections” no matter how unresponsive FirstEnergy is to their demands?

Petitioner understands that the NRC does have the power to keep Davis-Besse from re-opening until the NRC is satisfied that there is adequate protection of the public health and safety. Petitioner also understands that it is in FirstEnergy’s financial interest to open the plant as soon as it is able. This would appear to make it within FirstEnergy’s interest to comply with all NRC directives as quickly as possible.

Logically, however, it does not necessarily give FirstEnergy an incentive to disclose all problems it finds to the NRC. Nor does it give FirstEnergy an incentive to find all latent problems within the plant. If employees of FirstEnergy believed that it was more likely than not that the NRC would not find a problem during its spot inspections and reviews, it may make financial sense for FirstEnergy to hide the problem from the NRC, or to never find it in the first place. If the NRC finds the problem, FirstEnergy would only have to expend the same resources it would have had to expend if it had disclosed the problem to the NRC. According to the

inspection policy the NRC has outlined here, it will face no more consequence than a mere notification from the NRC of the deficiency so that FirstEnergy can take action to improve its evaluation process. If the NRC does not find the problem, then FirstEnergy can save the time and money it would have had to expend to fix the problem. Under the current enforcement scheme, FirstEnergy's financial incentive is to do the minimum to comply with the NRC's requirements, because it suffers no financial penalty if it is caught doing sub-par inspections or overlooking design and safety flaws.

This is merely offered as a hypothetical economic analysis of FirstEnergy's financial incentives under the program the NRC describes in the proposed director's decision. Three reported incidents, however, appear to bolster the application of this analysis: FirstEnergy's failure to adequately train inspectors who were to oversee the integrity of the reactor before start up, FirstEnergy's refusal to test the reactor coolant pumps for known gasket leaks, and FirstEnergy's failure to find the design basis problem in its emergency pumps. It was only after the NRC, or a whistleblower, pointed out these failures that FirstEnergy made an effort to correct them.

c. Willingness to comply with NRC regulations.

The proposed director's decision places emphasis on the fact that Davis-Besse is different from other licensees who have had their licenses revoked in the past because the NRC has not observed that FirstEnergy is unwilling to achieve compliance with NRC regulations. How can the NRC decide whether a licensee is unwilling to comply with its rule if it will not enforce

¹⁵ Supplement to Congressman Dennis J. Kucinich's 2.206 petition, March 27, 2003, p.2

them? In this case, petitioner has explained why FirstEnergy has a financial incentive to hide problems discovered during its inspections of Davis-Besse, or to fail to perform thorough and exhaustive inspections. If those problems are discovered, then the NRC simply informs FirstEnergy of them and allows FirstEnergy to address them itself. Thus, any non-compliance is never addressed as such.

The petition has pointed out several areas in which FirstEnergy has been non-compliant with the NRC since the discovery of the hole in the reactor head. For example: (1) FirstEnergy's failure to train the inspectors properly, (2) FirstEnergy's failure to test the reactor pumps for known gasket leaks, (3) FirstEnergy's failure to find the design basis problem with the emergency pumps, (4) FirstEnergy's failure to properly hold its management accountable for the circumstances that led to the hole in the reactor head, (5) FirstEnergy's failure to address management's fraudulent and deceitful delivery of information to the NRC, and (6) numerous reports of FirstEnergy retaliating against employees who raise safety concerns. The NRC, apparently, has chosen not to label FirstEnergy's behavior as non-compliant.

d. Shifting the burden

The 2.206 petition stated that after FirstEnergy's license is revoked, if FirstEnergy wished to continue operating the Davis-Besse plant, it should re-apply for a new operating license. The process of applying for a new license would place the burden of proof squarely on FirstEnergy to show that the facility complies with all regulations and guidelines, instead of leaving the burden where it is now, on the NRC, to show that FirstEnergy is non-compliant. It

would, moreover, force Davis-Besse to undergo the exhaustive and meticulous inspections, tests and inquiries necessary to obtain a new operating license.

The proposed director's decision answers this assertion by stating that "Petitioner is arguing that the Davis-Besse operating license should be revoked in order to force the licensee to demonstrate compliance with NRC requirements because the NRC is unable to prove that the licensee isn't in compliance."¹⁶ The proposed director's decision misunderstands the petitioner's argument. The petitioner has laid out many ample reasons for the NRC to revoke FirstEnergy's license under the NRC's rules and regulations. Indeed, the bulk of the petition is addressed to explaining the factual basis for FirstEnergy's violation of these rules and regulations. The petition explains that (1) FirstEnergy allowed a hole to eat through the reactor head by failing to perform adequate inspections for many years; (2) FirstEnergy ignored numerous warning signs of corrosion and leaks that would have led to the discovery of the hole earlier, and (3) a review of publicly available documents forces the conclusion that FirstEnergy lied to and hid information from the NRC in order to continue operating the plant beyond a deadline for an NRC mandated inspection. The petition then goes on to explain that FirstEnergy's behavior since the discovery of the hole does not support any conclusion that FirstEnergy has sufficiently rehabilitated itself. The NRC's rules and regulations unquestioningly support revoking a license under these circumstances.¹⁷ The NRC enforcement guidelines, in fact, state specifically that the

¹⁶ Proposed Director's Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, p 18.

¹⁷ See 63 F.R. 26630-03, May 13, 1998 ("In any event, in serious cases where the licensee's actions in not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness, the Commission may exercise its authority to issue orders modifying, suspending, or revoking the license.") See also 10 C.F.R. §50.100 ("A license or construction permit may be revoked, suspended, or modified, in whole or in part, for any material false statement in the application for license or in the supplemental or other statement of fact required

commission may revoke a license “in serious cases where the licensee’s actions in not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness.”¹⁸

Because of FirstEnergy’s past actions, NRC should not trust FirstEnergy to inspect itself. The NRC should use the enforcement power that it undeniably has to revoke FirstEnergy’s operating license. In pointing out that a license revocation would shift the burden of proof to FirstEnergy, the 2.206 petition simply asserts the advantage of this path over the avenue the NRC has chosen to take. Shifting the burden of proof to FirstEnergy to show that it complies with all NRC rules, regulations and guidelines would block the financial incentive to hide plant defects from the NRC, and solve the inherent conflict in allowing FirstEnergy to inspect and police itself. It would, moreover, help to restore public trust and confidence in the operation of Davis-Besse.

The petition never argues that shifting the burden is a reason unto itself for revoking an operating license. This would be a nonsensical argument considering the great quantity of significant reasons the NRC has before it to revoke FirstEnergy’s license

of the applicant; or because of conditions revealed by the application for license or statement of fact or any report, record, inspection, or other means, which would warrant the Commission to refuse to grant a license on an original application (other than those relating to Secs. 50.51, 50.42(a), and 50.43(b) of this part); or for failure to construct or operate a facility in accordance with the terms of the construction permit or license, provided that failure to make timely completion of the proposed construction or alteration of a facility under a construction permit shall be governed by the provisions of Sec. 50.55(b); or for violation of, or failure to observe, any of the terms and provisions of the act, regulations, license, permit, or order of the Commission.”). See also 42 U.S.C. 2236.

e. NRC should address all events at Davis-Besse cumulatively, rather than in isolation.

The 2.206 petition relied on publicly available information to request that the NRC revoke FirstEnergy's operating license. Public information provides ample evidence that FirstEnergy: violated NRC rules and regulations and its own operating license, failed to observe safety standards necessary to protect health and to minimize danger to life or property, and deliberately withheld information and fraudulently misrepresented plant conditions in order to operate the plant in an unsafe manner. The petitioner is aware that the NRC reviews petitions for whether they have "already been the subject of NRC staff review and evaluation either on that facility. . . for which a resolution has been achieved, the issues have been resolved and the resolution is applicable to the facility in question."¹⁹ This criteria is often reduced by the NRC to a review for "new information." In fact, the proposed director's decision used the shorthand criteria of "new information" to justify not directly addressing any of the factual information in the petition.²⁰

Because no resolution has been achieved, petitioner meets the criteria outlined in the NRC handbook. The NRC has still not completed its OI investigation into whether FirstEnergy deliberately lied to and hid information from the NRC in its lobbying effort to extend the operation of the plant beyond the NRC's deadline. The NRC, moreover, has not sufficiently

¹⁸ See 63 F.R. 26630-03, May 13, 1998.

¹⁹ See Volume 8 Licensee Oversight Programs, Review Process for 10 C.F.R. 2.206 petitions, Handbook 8.11, Part III. Criteria for Petition Evaluation.

²⁰ See Proposed Director's Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, p.12 "The NRC staff reviewed the supporting information used by the petitioner to determine if it contained any new allegations; nothing new was found. Since the specific supporting information used in the main petition was already known to the NRC, and is already addressed by other NRC inspection or investigation activities, the following discussion . . . will address each of the general arguments summarized above rather than the specific supporting information."

addressed in a cumulative and complete fashion, all of the issues presented by FirstEnergy in its behavior before, during and after the discovery of the hole in the nuclear reactor.

Each issue that the proposed director's decision chooses to address, it addresses in a piecemeal and isolated fashion, without taking into account the entire history of FirstEnergy's behavior at the Davis-Besse plant. In the supplement, petitioner raised concerns that the current oversight procedures will not adequately address or discover latent problems at Davis-Besse, including problems with the (1) electrical systems and cable trays, (2) the safety systems matching the design basis of the plant, (3) the reactor coolant pumps, (4) leak containment, and (5) continuing safety culture problems. These were offered as support for why the current oversight procedures are not adequate, and why the NRC should use the authority it undoubtedly has, to revoke FirstEnergy's license so Davis-Besse can be more completely, comprehensively and independently inspected. This goes to a central issue in the petition and supplement that the public does not and cannot, in light of its history, trust FirstEnergy to inspect the plant itself.

The proposed director's decision looks at each of these issues in a vacuum, and concludes at the end of its discussion that each isolated issue "does not provide a sufficient basis to revoke the Davis-Besse operating license."²¹ The proposed director's decision's approach to separating out issues for isolated assessment also leads it to make the non-sensical argument that the NRC cannot alter the burden of proof merely because it wants to, as addressed above. The issues are not meant to be addressed as isolated and individually sufficient reasons to revoke FirstEnergy's license, but to provide a narrative of a company whose pursuit of profit at the expense of safety

²¹ Proposed Director's Decision under 10 C.F.R. 2.206, In the Matter of FirstEnergy Nuclear Operating Company, Docket No. 50346, License No. NPF-3, pp. 25, 27, 33, 37,40.

ignored corrosion eating through a reactor lid at the same time that the company was lobbying the NRC to delay inspections. A company moreover, that has not yet proven, through publicly available information, that they have corrected their misplaced priorities, and that has not yet been held accountable for this grave breach of public trust.

The petition asks the NRC to revoke FirstEnergy's license because no other enforcement action adequately addresses the long-standing and continuing problems at the Davis-Besse plant, and FirstEnergy's deliberately fraudulent behavior. The NRC's response to Davis-Besse has not done enough to re-establish public trust in the operation of the Davis-Besse plant, and has done much to diminish trust in the NRC's oversight of the nuclear industry.

The Inspector General, in its investigation of the NRC's decision to allow Davis-Besse to continue to operate past its deadline for inspections, found that the NRC was "driven in large part by a desire to lessen the financial impact on [FirstEnergy]."²² The IG also found that the NRC "appears to have established an unreasonably high burden of requiring absolute proof of a safety problem, versus lack of reasonable assurance of maintaining public health and safety, before it will act to shut down a power plant."²³ Instead of accepting this report and using it to improve the NRC's procedures and policies, the former chair of the NRC wrote a letter to the Inspector General disputing the findings and refusing to accept any responsibility for allowing Davis-Besse to operate past an inspection deadline even though the NRC was virtually certain that there were potentially dangerous cracks and leaks in the CRDM nozzles.²⁴

²² See Office of the Inspector General, NRC's Regulation of Davis-Besse regarding Damage to the Reactor Vessel Head (Case No. 02-03S). December 30, 2002, pp. 23-24, finding #1.

²³ See Id., finding #3.

Petitioner is concerned that the NRC is similarly responding to the corrosion of Davis-Besse's nuclear reactor lid, the incomplete and fraudulent information FirstEnergy provided to NRC, and the continuing safety culture problems at Davis-Besse by being overly concerned with FirstEnergy's financial well-being, and FirstEnergy's stake in Davis-Besse, instead of acting in the best interests of the health and safety of the citizens it was created to protect.

The NRC, moreover, seems more concerned with requiring absolute proof before acting. There is more than adequate proof in publicly available documents that FirstEnergy deliberately deceived the NRC, and yet the NRC refuses to act on this information, and has not yet completed an investigation, more than sixteen months later, that would provide the findings the NRC states that it needs to act. There is also more than adequate proof that FirstEnergy is showing an unwillingness or inability to comply with NRC requirements, but that the NRC chooses not to define it as such.

III. Conclusion

The proposed director's decision avoids the central issue of the 2.206 petition by denying the petition before the OI has completed its investigation into the fraudulent behavior at Davis-Besse. The proposed decision is based on likelihood and possibility in the absence of findings of fact the NRC states that it needs to adequately analyze the merits of the 2.206 petition.

Petitioner, therefore, requests that the director wait until this investigation is complete before issuing a final decision.

²⁴ See Memorandum to: Hubert T. Bell, Inspector General, From: Richard Meserve, Report on NRC's regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head (Case No. 02-03S), January 8, 2003.

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The proposed director's decision also does not adequately explain why the NRC has chosen not to hold FirstEnergy accountable for its violations of NRC rules and regulations and violation of federal law. Well over a year after the discovery of the hole in the reactor lid, safety culture problems and technical troubles are continuing to surface. Congress has granted the NRC the authority to regulate the industry so that the pursuit of private profit does not trump public safety, to exact penalties when rules are broken and fraud is committed, and to keep and gain public trust in the nuclear industry. In issuing this proposed decision, it appears that the NRC is unwilling to use its authority to do so.

Sincerely,

Dennis J. Kucinich
Member of Congress

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