

For the Nuclear Regulatory Commission.

**Ledyard B. Marsh,**

Director, Division of Licensing Project  
Management, Office of Nuclear Reactor  
Regulation.

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## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-346; License No. NPF-03]

### FirstEnergy Nuclear Operating Company; Notice of Issuance of Director's Decision Under 10 CFR 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has issued a Director's Decision with regard to a letter dated February 3, 2003, filed by Congressman Dennis Kucinich, Representative for the 10th Congressional District of the State of Ohio in the United States House of Representatives, hereinafter referred to as the "petitioner." The petition was supplemented on March 27, 2003. The petition concerns the operation of the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse), located in Ottawa County, Ohio.

The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC) immediately revoke the FirstEnergy Nuclear Operating Company's (FENOC's or the licensee's) license to operate the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse), located in Ottawa County, Ohio. As an alternative, the Petitioner asked the NRC to reexamine its denial of a previous 2.206 petition, submitted by the Toledo Coalition for Safe Energy *et al.*, that requested the NRC issue an order to the licensee requiring a verification by an independent party for issues related to the reactor vessel head damage at Davis-Besse.

The basis for the request was that FENOC "has operated outside the parameters of their operating license for several years, has violated numerous federal laws, rules and regulations, and has hidden information from the NRC and lied to the NRC to justify the continuing operation of the Davis-Besse Nuclear Power Station." The Petitioner supported his request by citing various publicly available documents and information related to reactor pressure vessel head damage discovered at Davis-Besse in March 2002. The documents describe noncompliance with the Davis-Besse operating license and violations of NRC regulations. The documents include NRC inspection reports, newspaper articles, and reports

published by the Union of Concerned scientists.

By an acknowledgment letter dated February 10, 2003, the NRC staff formally notified the Petitioner that the letter dated February 3, 2003, met the criteria for review under 10 CFR 2.206, and that the NRC staff would act on the request within a reasonable time. The acknowledgment letter further stated that the Davis-Besse facility was shut down, and would remain so, until the NRC is satisfied that there is reasonable assurance of adequate protection of the public health and safety and that issues associated with management of the facility and potential wrongdoing have been satisfactorily addressed. The NRC staff also informed the Petitioner in the acknowledgment letter that the issues raised in the petition were being referred to NRR for appropriate action.

On March 27, 2003, the Petitioner submitted supplemental information to support the petition. The licensee responded to the Petition on February 27, 2003, and to the supplement on April 11, 2003. These responses were considered by the staff in its evaluation of the petition. Copies of the licensee's responses are publicly available in the NRC's Agencywide Documents Access and Management System (ADAMS).

The NRC sent a copy of the proposed Director's Decision to the Petitioner and to licensee for comment on June 6, 2003. The Petitioner and FENOC both responded with comments on July 7, 2003. The comments and the NRC staff's response to them are included with the Director's Decision.

The Director of the Office of Nuclear Reactor Regulation has determined that the request to revoke the Davis-Besse operating license and the alternative request for the NRC to reexamine its denial of a previous 2.206 petition, submitted by the Toledo Coalition for Safe Energy *et al.*, that requested the NRC issue an order to the licensee requiring a verification by an independent party for issues related to the reactor vessel head damage at Davis-Besse, both be denied. The reasons for these decisions are explained in the Director's Decision pursuant to 10 CFR 2.206 DD-03-03, the complete text of which is available in ADAMS, or are available for inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records are accessible from the ADAMS Public Electronic Reading Room on the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who

encounter problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff at 1-800-397-4209 or 301-415-4737, or by e-mail to [pdr@nrc.gov](mailto:pdr@nrc.gov).

The NRC staff has carefully considered the Petitioner's arguments regarding why FENOC's operating license for the Davis-Besse Nuclear Power Station should be revoked, as well as the alternative request for verification by independent party. The NRC staff shares the Petitioner's concerns about verifying the adequacy of plant operator performance and ensuring that future operation of the plant is conducted safely and in compliance with NRC requirements. The licensee has established, and is implementing, a Return-to-Service Plan that comprehensively addresses human factors, programmatic, and equipment issues along with the specific corrosion of the reactor vessel head. This includes evaluating, testing, or inspecting plant safety-related systems to ensure that they are able to perform their design-basis functions as defined in the plant's technical specifications and Updated Final Safety Analysis Report. Additionally, the NRC's has implemented enhanced oversight of the Davis-Besse facility that included the creation of an oversight panel to provide the required oversight during the plant shutdown, any future restart, and following restart until a determination is made that the plant is ready for return to the NRC's normal Reactor Oversight Process. The NRC's inspection activities go beyond ensuring that the direct causes of the damage to the reactor vessel head are properly identified and corrected. The NRC's activities also look broadly at safety-related plant systems and programs to ensure that the physical condition of the plant is adequate and the licensee's operations, maintenance, and engineering organizations are prepared to operate the plant safely if it is permitted to restart. Thus the NRC believes that the FENOC Return-to-Service Plan, as monitored by the NRC Davis-Besse Oversight Panel, provides an appropriate opportunity for FENOC to demonstrate or achieve compliance with NRC requirements, and that these activities will provide results that adequately address the Petitioner's stated safety concerns.

With regard to the specific punitive action of revoking the Davis-Besse operating license sought by the Petitioner, the NRC staff finds that there is insufficient basis to take the requested action. While serious violations did occur at the Davis-Besse facility, the violations in and of themselves do not

warrant revocation of the license. The Davis-Besse facility is currently shut down, and will remain so until the NRC is satisfied that there is reasonable assurance of adequate protection of the public health and safety and that restart issues associated with management of the facility and potential wrongdoing have been satisfactorily addressed. In its oversight of the licensee's corrective actions for the identified violations, the NRC has not observed an inability or unwillingness on the part of FENOC to achieve compliance with NRC regulations, the Davis-Besse operating license, or the Davis-Besse design and licensing bases.

A copy of the Director's Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206 of the Commission's regulations. As provided for by this regulation, the Director's Decision will constitute the final action of the Commission 25 days after the date of the decision, unless the Commission, on its own motion, institutes a review of the Director's Decision in that time.

Dated at Rockville, Maryland, this 12th day of September, 2003.

For the Nuclear Regulatory Commission.

**Brian W. Sheron,**

*Acting Director, Office of Nuclear Reactor Regulation.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48486; File No. SR-Amex-2003-74]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the American Stock Exchange LLC Relating to the Listing and Trading of Contingent Principal Protection Notes Linked to the Performance of the Standard & Poor's 500 Stock Index

September 11, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 13, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have

been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade under Section 107A of the Amex Company Guide ("Company Guide") notes linked to the performance of the Standard & Poor's 500 Index ("S&P 500" or "Index").

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

Under Section 107A of the Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.<sup>3</sup> The Amex proposes to list for trading under Section 107A of the Company Guide notes, the performance of which is linked to the Index ("Contingent Principal Protected Notes" or "Notes").<sup>4</sup> The Exchange represents that the Index value will be disseminated at least once every fifteen seconds throughout the trading day.<sup>5</sup> The Index is determined, calculated and

maintained solely by S&P.<sup>6</sup> The Notes will provide for an uncapped participation in the positive performance of the Index during their term while also reducing the risk exposure to the principal investment amount as long as the Index does not at any time decline to a pre-established level to be determined at the time of issuance ("Contingent Level").<sup>7</sup> This Contingent Level will be a pre-determined percentage decline from the level of the Index at the close of the market on the date the Notes are priced for initial sale to the public ("Initial Level"). A decline of the Index to the Contingent Level is referred to as a "Contingent Event." If there is a Contingent Event, at any time during the term of the Notes, then at maturity, the holder's principal investment of \$1,000 will be reduced to the Contingent Level, even if the Index later rises.<sup>8</sup>

The Contingent Principal Protection Notes will initially conform to the listing guidelines under Section 107A,<sup>9</sup> and continued listing guidelines under Sections 1001-1003,<sup>10</sup> of the Company

<sup>6</sup> Amex represents that the Index is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The Index is a capitalization-weighted index reflecting the total market value of 500 widely held component stocks relative to a particular base period. The Index is computed by dividing the total market value of the 500 stocks by an Index divisor. The Index Divisor keeps the Index comparable over time to its base period of 1941-1943 and is the reference point for all maintenance adjustments. The securities included in the Index are listed on the Amex, New York Stock Exchange, Inc. ("NYSE") or traded through Nasdaq Stock Market, Inc. ("Nasdaq"). The Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks.

<sup>7</sup> The issuer represents to Amex that the intended Contingent Level will be a decline in the Initial Level of between 55 to 60%. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex and Florence Harmon, Senior Special Counsel, Division, Commission, dated September 11, 2003.

<sup>8</sup> *Id.*

<sup>9</sup> Pursuant to Section 107A of the Company Guide, the initial listing standards for the Notes will require: (1) A market value of at least \$4 million; and (2) a term of at least one year. Because the Notes will be issued in \$1,000 denominations, the minimum public distribution requirement of one million units and the minimum holder requirement of 400 holders do not apply. In addition, the listing guidelines provide that the issuer has assets in excess of \$100 million, stockholder's equity of at least \$10 million, and pre-tax income of at least \$750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in Section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) Assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (2) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

<sup>10</sup> The Exchange's continued listing guidelines are set forth in Sections 1001 through 1003 of Part

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR-Amex-89-29).

<sup>4</sup> Credit Suisse First Boston (USA), Inc. ("CSFB") and Standard & Poor's Corporation ("S&P") have entered into a non-exclusive license agreement providing for the use of the Index by CSFB and certain affiliates and subsidiaries in connection with certain securities including these Notes. S&P is not responsible and will not participate in the issuance and creation of the Notes.

<sup>5</sup> Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex and Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission, dated September 11, 2003.