LBP-11-34

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

In the Matter of:	Docket No. 50-346-LR
FirstEnergy NUCLEAR OPERATING COMPANY	ASLBP No. 11-907-01-LR-BD01
(Davis-Besse Nuclear Power Station, Unit 1)	November 23, 2011

MEMORANDUM AND ORDER
(Denying Motion to Admit New Contention)

Before this Board is a motion to admit a proposed new contention submitted by Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, Intervenors).[1] This proposed new contention is based upon the near-term report of the task force (Near-Term Task Force Report)[2] that the U.S. Nuclear Regulatory Commission (NRC) created to investigate the implications for United States nuclear power plants of the events and accident at the Fukushima Dai-Ichi plant in Japan. The NRC Staff and FirstEnergy Nuclear Operating Company (FirstEnergy or Applicant) argue the

[1] Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) [hereinafter Motion to Admit]; Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 12, 2011) [hereinafter Proposed New Contention]; Proposed New Contention, Att., Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report [hereinafter Seabrook Attachment].

[2] Dr. Charles Miller et al., Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807) [hereinafter Near-Term Task Force Report].

motion to admit should be denied because, among other reasons, the proposed new contention does not challenge the application at issue in this proceeding,[3] i.e., FirstEnergy's license renewal application (LRA) for the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse).[4] The Board determines that the proposed new contention is not admissible because it does not satisfy multiple elements of 10 C.F.R. § 2.309(f)(1). In particular, it does not provide sufficient information to show that a genuine dispute exists with the Davis-Besse LRA, as required by 10 C.F.R. § 2.309(f)(1)(vi). Therefore we deny Intervenors' motion to admit.

I. Background

Previously, in LBP-11-13, this Board admitted Intervenors as parties in this proceeding and admitted, as limited and reworded, two contentions that challenge the analysis in FirstEnergy's environmental report (ER)[5] of (1) reasonable base load power alternatives and (2) severe accident mitigation alternatives (SAMA).[6] FirstEnergy's appeal of LBP-11-13 is pending before the Commission.[7]

Intervenors moved to admit the proposed new contention on August 11, 2011,[8] and

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[3] NRC Staff's Answer in Opposition to Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident at 2 (Sept. 6, 2011) [hereinafter NRC Staff Opposition]; FirstEnergy's Answer Opposing Joint Petitioners' Motion to Admit and Proposed Contention Regarding Fukushima Task Force Report at 2 (Sept. 6, 2011) [hereinafter FirstEnergy Opposition].

[4] License Renewal Application; Davis-Besse Nuclear Power Station (Aug. 2010) (ADAMS Accession Nos. ML102450567, ML102450563).

[5] Appendix E; Applicant's Environmental Report; Operating License Renewal Stage; Davis-Besse Nuclear Power Station at 7.2-7 (Aug. 2010).

[6] LBP-11-13, 73 NRC __, __ (slip op. at 64-65) (Apr. 26, 2011). The Board discusses the procedural history leading up to admission of these two contentions in LBP-11-13. See id. at __ (slip op. at 2-5).

[7] FirstEnergy's Notice of Appeal of LBP-11-13 (May 6, 2011).

[8] Motion to Admit at 1.

submitted the contention in a separate filing on August 12.[9] On September 6, 2011, FirstEnergy and the NRC Staff filed oppositions to Intervenors' motion to admit.[10] Intervenors filed a reply to the oppositions on September 13, 2011.[11]

FirstEnergy and the NRC Staff pointed out in their oppositions that although Intervenors' motion to admit purported to attach a rulemaking petition, no such petition was served on the parties.[12] Apparently, Intervenors had emailed a rulemaking petition, under caption for submission before the Board, to the Rulemaking.Comments@nrc.gov email address on August 11, 2011.[13] Intervenors served the rulemaking petition on the Board and the parties through the NRC's E-Filing System on September 15, 2011.[14] FirstEnergy filed an answer to the rulemaking petition on September 26, 2011.[15]

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[9] Proposed New Contention at 1.

[10] NRC Staff Opposition at 1; FirstEnergy Opposition at 1.

[11] Intervenors' Reply Morandum [sic] to Staff and Applicant Oppositions to Admission of New Contention (Sept. 13, 2011) [hereinafter Reply]; id., Att., Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings [hereinafter Reply Memorandum].

[12] FirstEnergy Opposition at 19 n.85 (citing Seabrook Attachment at 4); NRC Staff Opposition at 3 (citing Seabrook Attachment at 4).

[13] Email from Terry Lodge, Counsel for Intervenors, to Rulemaking Comments, NRC (Aug. 11, 2011); id., Att., Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision.

[14] Notice and Certificate of Service of Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision at 1 (Sept. 15, 2011); id., Att., Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision [hereinafter Rulemaking Petition].

[15] FirstEnergy's Answer to Petition for Rulemaking and Request to Suspend (Sept. 26, 2011) [hereinafter FirstEnergy Answer to Rulemaking Petition].

Meanwhile, on September 9, 2011, the Commission issued CLI-11-05 in response to a series of emergency petitions filed in a number of adjudicatory, licensing, and rulemaking proceedings, including the proceeding before us.[16] As is relevant here, the Commission in CLI-11-05 denied requests to suspend this and other ongoing adjudicatory and licensing activities pending full consideration of the safety and environmental implications of the damage to the Fukushima Dai-Ichi Nuclear Power Station following the March 11, 2011 earthquake and tsunami.[17] Noting that Intervenors' reply addressed CLI-11-05, FirstEnergy moved for leave to file a surreply and simultaneously filed the surreply on September 20, 2011.[18]

FirstEnergy and the NRC Staff moved to strike portions of Intervenors' reply pleading on September 23, 2011 as outside the scope of the original pleading.[19] Intervenors filed an opposition to the motions to strike on October 6, 2011,[20] and filed a motion for leave to file their opposition nunc pro tunc, which was served and refiled on October 12.[21] On October 19,

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[16] Union Electric Company d/b/a Ameren Missouri (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, __ (slip op. at 3) (Sept. 9, 2011).

[17] Id.

[18] FirstEnergy's Unopposed Motion for Leave to File a Surreply to Intervenors' Reply to Applicant and NRC Staff Answers at 2-3 (Sept. 20, 2011) (quoting Reply at 2; Reply Memorandum at 1-4); FirstEnergy's Surreply to Intervenors' Reply to Applicant and NRC Staff Answers Opposing Admission of New Contention (Sept. 20, 2011).

[19] FirstEnergy's Motion to Strike Portions of Intervenors' Reply at 2 (Sept. 23, 2011) [hereinafter FirstEnergy Motion to Strike]; NRC Staff's Motion to Strike Portions of Intervenor[s'] Reply Memorandum to Staff and Applicant Oppositions to Admission of New Contention at 1 (Sept. 23, 2011); Corrected NRC Staff's Motion to Strike Portions of Intervenor[s'] Reply Memorandum to Staff and Applicant Oppositions to Admission of New Contention at 1 (Sept. 23, 2011) [hereinafter NRC Staff Corrected Motion to Strike].

[20] Intervenors' Opposition to FENOC and NRC Staff Motions to Strike Portions of Intervenors' Reply in Support of Admitting Contention Concerning Fukushima Dai-Ichi Accident at 1 (Oct. 6, 2011) [hereinafter Intervenors Opposition to Motions to Strike].

[21] Motion for Leave for Intervenors' Opposition to FENOC and NRC Staff Motions to Strike Portions of Intervenors' Reply in Support of Admitting Contention Concerning Fukushima Dai-Ichi Accident to be Deemed Filed Instanter at 1 (dated Oct. 7, 2011; served Oct. 12, 2011); Refiled Motion for Leave for Intervenors' Opposition to FENOC and NRC Staff Motions to Strike

(continued . . .)

FirstEnergy filed an opposition to Intervenors' motion for leave to file an opposition to the motions to strike.[22]

Intervenors moved for leave to supplement the basis of their proposed new contention on October 28, 2011.[23] The NRC Staff filed an opposition to that motion on November 7, 2011,[24] and FirstEnergy filed an opposition on November 18, 2011.[25]

II. Discussion and Analysis

A. Rulemaking Petition

Intervenors' rulemaking petition, filed under caption for submission before the Board, asks the Commission (1) to "rescind regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents and that preclude consideration of those issues in individual licensing proceedings" and (2) to suspend this proceeding while considering this petition and the proposed new contention that

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Portions of Intervenors' Reply in Support of Admitting Contention Concerning Fukushima Dai-Ichi Accident to be Deemed Filed Instanter at 1 (Oct. 12, 2011) [hereinafter Intervenors Refiled Motion for Leave to Oppose Motions to Strike]. Intervenors explain they filed the motion for leave to oppose the motions to strike in WordPerfect X4 format on October 7 and refiled in .pdf format on October 12 because there was "no acknowledgement nor notice . . . sent to counsel." Intervenors Refiled Motion for Leave to Oppose Motions to Strike at 1 n.1.

[22] FirstEnergy's Answer to Intervenors' Motion for Leave at 1 (Oct. 19, 2011) [hereinafter FirstEnergy Opposition to Intervenors Motion for Leave].

[23] Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report at 1 (Oct. 28, 2011) [hereinafter Motion to Supplement].

[24] NRC Staff's Answer to Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Nov. 7, 2011) [hereinafter NRC Opposition to Motion to Supplement].

[25] First Energy [sic] Nuclear Operating Company's Answer Opposing Intervenors' Motion for Leave to Supplement Basis of Contention Regarding Fukushima Task Force Report (Nov. 18, 2011) [hereinafter FirstEnergy Opposition to Motion to Supplement].

was separately filed before this Board.[26] FirstEnergy argues that the Board should summarily deny the petition because the Board has no jurisdiction to initiate a rulemaking proceeding and no responsibility to consider requests for suspension.[27] FirstEnergy points out further that the Commission has already directed the NRC Staff to examine the implications of the Fukushima Dai-Ichi accident for United States nuclear facilities and has denied a request to suspend this license renewal proceeding.[28]

Despite the petition's caption, the Board surmises that the requests for rulemaking and suspension were intended for the Commission's consideration because the discussion in the petition's body specifically directs these requests to the Commission.[29] The Commission responded to these requests in CLI-11-05.[30] The Commission stated that "petitioners have not shown that continuation of licensing proceedings, pending consideration of the rulemaking petition, would 'jeopardize the public health and safety, prove an obstacle to fair and efficient decision-making, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge' from [the agency's] continued evaluation of the events in Japan."[31] Accordingly, the Board need not address further the relief requested in the rulemaking petition.

B. Proposed New Contention

As stated above, Intervenors also moved to admit a proposed new contention that challenges the adequacy of the Davis-Besse ER "on the basis that it fails to address the extraordinary environmental and safety implications of the findings and recommendations raised

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[26] Rulemaking Petition at 1-2, 4.

[27] FirstEnergy Answer to Rulemaking Petition at 3 (citing 10 C.F.R. § 2.802).

[28] Id. at 3 (quoting Callaway, CLI-11-05, 74 NRC at __ (slip op. at 32, 41)).

[29] Rulemaking Petition at 1, 4.

[30] Callaway, CLI-11-05, 74 NRC at __ (slip op. at 41).

[31] Callaway, CLI-11-05, 74 NRC at __ (slip op. at 39) (quoting Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)).

by the Nuclear Regulatory Commission's Fukushima Task Force" in its near-term report.[32] Intervenors argue that "admitting the new contention is necessary to ensure that the Nuclear Regulatory Commission . . . fulfills its nondiscretionary duty under the National Environmental Policy Act ('NEPA') to consider the new and significant information set forth in the [Near-Term] Task Force Report before it issues a Combined License ('COL') for Davis-Besse."[33]

One day later, Intervenors filed their proposed new contention "in support" of the motion to admit a new contention.[34] Intervenors' new contention consists of a two-sentence introductory paragraph[35] by their counsel and an attachment consisting of the contention that was filed in the Seabrook license renewal proceeding.[36] Intervenors propose to "incorporate by reference as though written herein the averments and arguments" made by the intervenors in the Seabrook license renewal proceeding.[37] As Intervenors have submitted the proposed new contention, it states:

> The ER for Seabrook license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.[38]

The NRC Staff and FirstEnergy oppose admission of the proposed new contention, arguing that Intervenors fall short of meeting the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) because the proposed new contention raises issues that are immaterial to

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[32] Motion to Admit at 1-2 (citing Near-Term Task Force Report).

[33] Id. at 2. We note that FirstEnergy has applied here for a license renewal, not a COL.

[34] Proposed New Contention at 1.

[35] Id. at 1.

[36] Seabrook Attachment.

[37] Proposed New Contention at 1.

[38] Seabrook Attachment at 5.

this proceeding and beyond its scope, fails to challenge the Davis-Besse LRA, and fails to supply an adequate factual basis.[39] FirstEnergy also argues that Intervenors' filings should be summarily dismissed because they are untimely and because Intervenors failed to consult the other parties before filing the motion.[40]

In their reply to the oppositions, Intervenors argue that the new contention is a contention of omission "challenging the completeness" of FirstEnergy's LRA and ER "in their entirety."[41] Intervenors fault FirstEnergy for not incorporating in the ER any lessons learned from the "new and significant information" revealed by the Near-Term Task Force Report.[42] Intervenors assert NEPA requires an applicant to update new and significant information in its ER and that the agency must include such new and significant information in its Draft Supplemental Environmental Impact Statement (DSEIS).[43] Intervenors conclude that this "is a significant omission that needs to be corrected to comply with NEPA" and that it is the "NRC's responsibility, not the Intervenors'."[44] Intervenors also attached and "incorporate[d] by reference" a reply memorandum that was filed in the Turkey Point, Vogtle, and Watts Bar cases.[45]

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[39] NRC Staff Opposition at 2; FirstEnergy Opposition at 16-17.

[40] FirstEnergy Opposition at 5, 9.

[41] Reply at 3.

[42] Id.

[43] Id. at 3-4.

[44] Id. at 5.

[45] Id. at 2. Intervenors state:

> The Reply Memorandum was prepared by the attorneys who represent the intervenors or petitioners in those cases: Diane Curran (counsel for the intervenor in the Diablo Canyon license renewal proceeding and Watts Bar operating license proceeding), Mindy Goldstein (counsel for some of the intervenors in the Vogtle and Vogtle Turkey Point [sic] COL proceedings), and (continued . . .)

1. Motion to Strike and Motion for Leave to File Opposition to Motion to Strike

FirstEnergy and the NRC Staff moved to strike portions of Intervenors' reply,[46] and Intervenors responded with an opposition to the motion to strike[47] and subsequently filed for leave to file that opposition.[48]

FirstEnergy opposes Intervenors' motion for leave to file their opposition to the motions to strike, pointing out that Intervenors' motion was filed three days late, on October 6, 2011.[49] The motions to strike were filed on September 23, 2011 and Intervenors' opposition was due 10 days later, i.e., October 3, pursuant to 10 C.F.R. § 2.323(c). Intervenors explain they filed late because their counsel "has been overwhelmed with work" and inadvertently confused federal court procedural rules with this agency's.[50] This excuse is wholly inadequate. The Commission has repeatedly stated that failure to read carefully NRC regulations does not constitute good cause for accepting late-filed petitions.[51] Nor do parties' other professional obligations relieve them of their obligations to meet regulatory deadlines.[52] Further, this Board has previously

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Jason Totoui (counsel for some of the intervenors in the Turkey Point COL proceeding).

Id. at 2 n.1.

[46] FirstEnergy Motion to Strike; NRC Staff Corrected Motion to Strike.

[47] Intervenors Opposition to Motions to Strike.

[48] Intervenors Refiled Motion for Leave to Oppose Motions to Strike.

[49] FirstEnergy Opposition to Intervenors Motion for Leave at 2.

[50] Intervenors Refiled Motion for Leave to Oppose Motions to Strike at 1-2.

[51] See, e.g., Florida Power & Light Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-06-21, 64 NRC 30, 33 (2006).

[52] See Tennessee Valley Authority (Bellefonte Nuclear Plants, Units 1 and 2), CLI-10-26, 73 NRC __, __ (slip op. at 3) (Sept. 29, 2010) (". . . Petitioners' argument that their counsel was busy on other legal matters disregards our longstanding policy that 'the fact that a party may
(continued . . .)

cautioned Intervenors "to prepare their pleadings well in advance of any deadlines."[53] Because Intervenors have not shown good cause for filing their opposition to the motions to strike three days late, their motion for leave to file that opposition is denied.

FirstEnergy and the NRC Staff move to strike portions of Intervenors' reply, arguing those portions contain new arguments beyond the scope of the original pleading.[54] The NRC Staff states that the reply "simply seeks to substitute [the] original contention with a contention that at least purports to address FirstEnergy's LRA and ER."[55] For example, because Intervenor's original contention never mentions FirstEnergy's LRA, ER, or SAMA analysis, FirstEnergy and the NRC Staff object to the claims in the reply about the adequacy of the SAMA analysis and about the results of keyword searching the LRA and ER.[56] Because the original contention does not provide any Davis-Besse specific arguments, FirstEnergy and the NRC Staff object also to information in the reply about the possibility of earthquakes, floods, seiches on Lake Erie, or other events that could result in a long-term station blackout at Davis-Besse.[57] FirstEnergy and the NRC Staff provide tables in which they identify the portions of the reply that they claim go beyond the scope of the original contention.[58]

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have . . . other obligations . . . does not relieve that party of its hearing obligations.'" (quoting Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981))).

[53] LBP-11-13, 73 NRC at __ (slip op. at 8).

[54] FirstEnergy Motion to Strike at 2; NRC Staff Corrected Motion to Strike at 1.

[55] NRC Staff Corrected Motion to Strike at 6.

[56] FirstEnergy Motion to Strike at 5-6 (citing Reply at 4-7); NRC Staff Corrected Motion to Strike at 7 (citing Reply at 4).

[57] FirstEnergy Motion to Strike at 6 (citing Reply at 5-6); NRC Staff Corrected Motion to Strike at 5, 7 (citing Reply at 5-6).

[58] FirstEnergy Motion to Strike at 7-8; NRC Staff Corrected Motion to Strike at 4-6.

The proper scope of a reply brief is limited to the scope of the arguments set forth in the original motion or petition.[59] The reply must "focus narrowly on the legal or factual arguments first presented in the original [motion or] petition or raised in the answers to it."[60] A reply cannot be used to present entirely new facts or arguments in an attempt to "reinvigorate thinly supported contentions."[61] If a contention as originally pled did not satisfy 10 C.F.R. § 2.309(f)(1), a reply cannot remediate the deficiency by introducing, for the first time, references to a genuine dispute with the license application at issue.[62]

Intervenors' original contention, which consists of a two-sentence introductory paragraph seeking to "incorporate by reference" an attached contention that was filed in an unrelated proceeding,[63] lacked any reference to the Davis-Besse LRA or ER. Intervenors cannot mend their original contention by providing those references in their reply brief. Because the regulations do not allow other parties an automatic right to respond to reply briefs,[64] Intervenors' "wholesale substitution of Seabrook and NextEra for Davis-Besse and FirstEnergy" in their reply brief, in the words of the NRC Staff, "fundamentally undermines the fairness of the proceeding for all the parties."[65]

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[59] See Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[60] Id.

[61] Louisiana Energy Services (National Enrichment Facility), CLI-04-32, 60 NRC 223, 224 (2004).

[62] Cf. Palisades, CLI-06-17, 63 NRC at 732 ("While a petitioner need not introduce at the contention phase every document on which it will rely in a hearing, if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.").

[63] Proposed New Contention at 1.

[64] See 10 C.F.R. §§ 2.309(h)(3), 2.323(c).

[65] NRC Staff Corrected Motion to Strike at 7 (citation omitted).

Therefore, for all the reasons above, the Board grants FirstEnergy and the NRC Staff's motions to strike.

2. Ruling on Motion to Admit Proposed New Contention

We conclude that Intervenors' motion and proposed new contention are hopelessly flawed, as they fail to meet the requirements of NRC regulations. First, the motion must be denied for failure to satisfy the requirements of 10 C.F.R. § 2.323(b) as well as the Initial Scheduling Order in this case. Section 2.323(b) reads, in pertinent part:

> A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.[66]

This regulatory requirement was stressed by this Board in our Initial Scheduling Order, where we stated that "motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. § 2.323(b)."[67]

As noted by FirstEnergy, Intervenors "made no attempt to contact FirstEnergy or its counsel and resolve the issues raised in the Motion and New Contention."[68] Indeed, Intervenors' motion to admit a new contention does not contain the certification required by Section 2.323(b). The motion can therefore be rejected on this ground alone.

Next, the proposed new contention is inadmissible because Intervenors have not satisfied the requirements of 10 C.F.R. § 2.309(f)(1), which provides, in pertinent part:

> For each contention, the request or petition must:
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

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[66] 10 C.F.R. § 2.323(b).

[67] Initial Scheduling Order (June 15, 2011) at 18 (unpublished).

[68] FirstEnergy Opposition at 5.

> (iv) 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;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing . . . ; [and]
> (vi) . . . [Demonstrate] 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 . . . or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . .[69]

The proposed new contention as presented in this case falls far, far short of these pleading standards. The proposed new contention does not demonstrate that the issue raised is within the scope of the proceeding as required by paragraph (iii) nor that it is material to the findings the NRC must make to support the license renewal as required by paragraph (iv) because Intervenors do not show any connection between the Near-Term Task Force Report analysis and the Davis-Besse application.

Intervenors have merely slapped a two-sentence introduction onto a pleading filed in an unrelated license renewal proceeding. Although this pleading strategy is not necessarily fatal, it is insufficient in this case for us to admit this contention. The Atomic Safety and Licensing Appeal Board[70] has held that "[a] contention cannot be automatically discarded by a hearing board simply because it repeats a contention advanced in a different proceeding."[71] However,

> a carry-over contention must be subjected to especially careful scrutiny by the board at the prehearing stage. The board must satisfy itself not only that the

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[69] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[70] While the Atomic Safety and Licensing Appeal Panel is no longer in existence, the decisions of its Appeals Boards continue to be binding on us to the degree they concern a regulation or regulatory matter that has not been revised or otherwise materially altered. See Sequoyah Fuels Corporation (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 n.2 (1994).

[71] Duquesne Light Company (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 246 (1973).

> contention applies to the facility at bar but, as well, that there has been sufficient foundation assigned for it to warrant its further exploration.[72]

Intervenors have made no effort to demonstrate how the contention applies to the Davis-Besse facility. Indeed, the proposed new contention makes no reference to the Davis-Besse license renewal application or environmental report. Rather, it challenges the Seabrook ER and apparently the Seabrook DSEIS.[73] Similarly, the affidavit attached to the motion[74] makes no reference to the Davis-Besse LRA or ER.

It appears that Intervenors would have this Board dig through the Davis-Besse LRA and ER to determine how the Seabrook contention relates specifically to the Davis-Besse facility. However, as the Commission has stated, "it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by [intervenors]."[75] Therefore, because Intervenors' proposed new contention does not refer to FirstEnergy's ER or the NRC Staff's DSEIS for Davis-Besse (which is currently projected to be released in January 2012),[76] it is inadmissible. After "careful scrutiny," we conclude that Intervenors have provided us with no information to "warrant [the contention's] further exploration."[77]

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[72] Id.

[73] While Intervenors rely entirely on the Seabrook contention, it is worth noting that the Board in the Seabrook proceeding concluded that this contention was inadmissible. See NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-28, 74 NRC __, __ (slip op. at 4) (Oct. 19, 2011).

[74] Motion to Admit, Att., Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011).

[75] USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006).

[76] Letter from Brian G. Harris, Counsel for NRC Staff, to Administrative Judges William J. Froehlich, Nicholas G. Trikouros, and Dr. William E. Kastenberg, Atomic Safety and Licensing Board Panel (Nov. 1, 2011) at 1.

[77] Beaver Valley, ALAB-109, 6 AEC at 246.

In addition, Intervenors cite no case law or Commission regulation that requires an applicant to update its ER.[78] Further, nothing in NEPA, which applies to "agencies of the Federal Government," can be read to require an applicant to update its environmental report.[79]

However, Intervenors are correct when they state that the NRC Staff must include new and significant information in the DSEIS.[80] NRC regulations also explicitly allow for petitioners to amend their contentions or file new contentions if the DSEIS "differ[s] significantly from the data or conclusions in the applicant's documents."[81] As noted by another Licensing Board, this provides "a remedy [for Intervenors] to the extent they believe the Staff's draft or final EIS fails to account for new and significant information arising from the Fukushima Dai-Ichi events."[82]

For the reasons stated above, the Board denies the motion to admit the proposed new contention.

C. Motion to Supplement Basis

In their motion to supplement the basis of their contention,[83] Intervenors requested this

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[78] As the Licensing Board in the Turkey Point proceeding stated:

> [T]he NRC Staff, pursuant to its obligation to prepare an adequate EIS, is empowered to issue requests for additional information relevant to an applicant's ER (see 10 C.F.R. § 51.41), and an applicant may update an ER if relevant new and significant information becomes available. The salient point, however, is that an applicant is under no regulatory or statutory obligation to effect such an update.

Florida Power & Light Company (Turkey Point Units 6 and 7), LBP-11-33, 74 NRC __, __ (slip op. at 7 n.9) (Nov. 21, 2011) (some citations omitted).

[79] See 42 U.S.C. § 4332; accord Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC __, __ (slip op. at 12) (Nov. 18, 2011).

[80] See 10 C.F.R. § 51.72(a).

[81] See 10 C.F.R. § 2.309(f)(2).

[82] Turkey Point, LBP-11-33, 74 NRC at __ n.12 (slip op. at 7 n.12).

[83] This motion was accompanied by the required Section 2.323(b) consultation certification.

Board "to consider the recent issuance of a directive by [the Commission] to the NRC Staff, which requires Staff to 'strive to complete and implement the lessons learned from the Fukushima accident within five years – by 2016.'"[84] Intervenors argue that by publishing the Commission Directive, "the Commission makes clear that it believes the lessons learned from the Fukushima accident have safety and environmental significance."[85] NRC Staff and FirstEnergy argue that the motion is inadequate because it does not provide sufficient information to make the underlying contention admissible.[86] NRC Staff argues further that the motion is procedurally defective for failing to discuss the requirements for late, new, or amended filings.[87]

Intervenors' motion is only two pages and does not tell us how exactly this supposed belief of the Commission strengthens Intervenors' contention. We must presume, given the title Intervenors have given this motion, that Intervenors are claiming that this new information bolsters the basis for the contention. However, as noted above, "provid[ing] a brief explanation of the basis for the contention"[88] is but one of the six requirements for establishing that a contention is admissible.[89] The motion to supplement does not explain how it cures any of the defects noted above, where we most notably concluded that Intervenors failed to show that a

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[84] Motion to Supplement at 1 (quoting SRM/SECY-11-0124, Memorandum from R.W. Borchardt, Executive Director for Operations, to Annette L. Vietti-Cook, Secretary, re: Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011)).

[85] Id. at 2.

[86] NRC Opposition to Motion to Supplement at 5-8, FirstEnergy Opposition to Motion to Supplement at 4-7.

[87] NRC Opposition to Motion to Supplement at 4.

[88] 10 C.F.R. § 2.309(f)(1)(ii).

[89] We note also that the basis requirement is relatively straightforward. As one Board has noted: "Rarely should this require more than a sentence or two." U.S. Dept. of Energy (High-Level Waste Repository), LBP-08-10, 67 NRC 450, 455 (2008).

genuine dispute existed between the parties, as required by 10 C.F.R. § 2.309(f)(1)(vi). In other words, we identified grounds for dismissing the contention that were totally separate from the "basis" requirement, and as such, supplementing the basis alone cannot cure the failures that we addressed.[90]

Intervenors also claim that the Commission Directive undermines the decision of another Licensing Board that recently found a similar contention inadmissible because it was premature.[91] While NRC Staff does not appear to address this issue, FirstEnergy argues that the Commission Directive does *not* undermine that Board's decision.[92] Intervenors do not make clear how the Commission Directive undermines that decision, or how such undermining bears on the Davis-Besse proceeding now before us. Indeed, while that Board found the contention inadmissible because it was premature, we conclude that the contention before us is inadmissible for the different reasons explained above. Even if the Commission Directive *did* undermine the Bell Bend Board's decision (a proposition on which we make no comment), it would not undermine our decision, as we have made no ruling on the issue of prematurity.

Although we grant the motion to supplement, it does not render the proposed new contention admissible.

III. Order

For the reasons stated above:

A. The Board will not consider the rulemaking petitions filed August 11, 2011 or September 15, 2011.

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[90] NRC Staff also discusses the requirements under 10 C.F.R. § 2.309(c)(1) for nontimely contentions and under 10 C.F.R. § 2.309(f)(2) for new and amended contentions. NRC Opposition to Motion to Supplement at 4. We need not reach this issue because we find that the contention, even as amended by the motion to supplement, would not be admissible.

[91] Motion to Supplement at 2 (citing PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), LBP-11-27, 74 NRC __, __ (slip op. at 13-14) (Oct. 18, 2011)).

[92] FirstEnergy Opposition to Motion to Supplement at 8-10.

B. Intervenors' August 11, 2011 motion to admit a proposed new contention is denied.

C. NRC Staff's September 23, 2011 motion to strike is granted.

D. FirstEnergy's September 23, 2011 motion to strike is granted.

E. Intervenors' October 12, 2011 motion for leave to oppose the motions to strike nunc pro tunc is denied.

F. Intervenors' October 28, 2011 motion to supplement is granted.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[93]

/RA/

_____
William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. William E. Kastenberg
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 23, 2011

[93] A copy of this Memorandum and Order was sent this date by the NRC's E-Filing System to: (1) the pro se representative for Beyond Nuclear; (2) counsel for Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio; (3) counsel for FirstEnergy; and (4) counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FIRST ENERGY NUCLEAR OPERATING COMPANY	)	Docket No. 50-346-LR
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **MEMORANDUM AND ORDER (Denying Motion to Admit New Contention) (LBP-11-34),** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
This 23rd day of November 2011