UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO INTERVENORS' MOTION TO AMEND 'MOTION FOR ADMISSION OF CONTENTION NO. 5'

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's ("Board") Initial Scheduling Order ("ISO"),[1] the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer[2] to the "Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5,'" ("Intervenors' Motion") jointly filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively "Intervenors")[3] regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").[4]

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[1] Initial Scheduling Order at B.2.

[2] In an abundance of caution, because Contention 5 is not yet an admitted contention and because Intervenors' caption their request as a motion to amend their motion, the Staff treated the Intervenors' Motion as subject to the promptness deadline specified in 10 C.F.R. § 2.323(a), and not as subject to the new or amended contention deadline outlined in the ISO at B.2. *See* Order (Denying Motion for Leave to File a Motion for Reconsideration) at 5 ("All motions in this proceeding…are subject to the promptness deadline specified in 10 C.F.R. 2.323(a)…Answers to all… motions [other than summary disposition] must be filed within 10 days.") (Jan. 30, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12030A106).

[3] *See* Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5,' ("Intervenors' Motion") (Feb. 27, 2012) (ADAMS Accession No. ML12058A249).

[4] Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse (ADAMS Accession No. ML102450565) ("LRA").

As more fully set forth below, the Staff objects to Intervenors' Motion. First, Intervenors' Motion does not contain the certification required by 10 C.F.R. § 2.323(b) and the Board's ISO, and Intervenors' consultation was flawed. Second, Intervenors failed to establish that their late filing is justified by new and materially different information that was not previously available. Finally, Intervenors have not demonstrated that their proposed additional bases for Contention 5 meet the Commission's admissibility requirements. For all these reasons, Intervenors' Motion should be denied.

BACKGROUND

This proceeding concerns FENOC's August 27, 2010 application to renew its operating license for Davis-Besse for an additional twenty years from the current expiration date of April 22, 2017.[5] The "NRC Staff's Answer to Motion to Admit New Contention [5] Regarding the Safety Implications of Newly Discovered Shield Building Cracking," ("Staff's Answer to Contention 5")[6] discussed the procedural history for this proceeding through the filing of proposed new Contention 5,[7] so the Staff will not repeat it here.[8] The Staff's Answer to Contention 5 opposed the admission of Contention 5 as submitted, but recognized that a limited portion of Contention 5, as revised by the Staff, could be admitted by the Board.[9] On February 6, 2012, FENOC filed an answer opposing the admission of Contention 5.[10] On February 13,

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[5] LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

[6] *See* "NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking," (Feb. 6, 2012) ("Staff's Answer to Contention 5") (ADAMS Accession No. ML12037A200).

[7] *See* "Motion for Admission of Contention No. 5 on Shield Building Cracking," ("Intervenors' Motion to Admit Contention 5") (ADAMS Accession No. ML12010A172).

[8] Staff's Answer to Contention 5 at 2-3.

[9] *See, e.g.*, Staff's Answer to Contention 5 at 1-2.

[10] FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012) ("FENOC's Answer to Contention 5") (ADAMS Accession No. ML12037A245).

2012, Intervenors filed a combined Reply to the Staff's and FENOC's Answers to Contention 5[11] ("Intervenors' Reply"), which referenced the NRC's January 31, 2012 Integrated Inspection Report on Davis-Besse Nuclear Power Station ("NRC's January 31, 2012 Inspection Report").[12] On February 9, 2012, FENOC filed a motion requesting leave from the Board to file a short response to the Staff's Answer to Contention 5.[13] On February 13, 2012, the Board issued an order denying FENOC's motion for leave to respond to the Staff's Answer to Contention 5, and setting this matter for oral argument on the admissibility of Contention 5 at a time and place to be announced.[14] On February 23, 2012, FENOC filed a motion to strike portions of Intervenors' Reply.[15] On February 27, 2012, Intervenors filed an answer to FENOC's motion to strike,[16] and a motion to amend their motion for admission of Contention 5 based on a claim of new information.[17] On February 27, 2012, FENOC submitted a Shield Building Root Cause Report to the NRC, which included the results of the root cause evaluation and corrective actions,

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[11] *See* "Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5," (Feb. 13, 2012) ("Intervenors' Reply") (ADAMS Accession No. ML12044A361).

[12] Intervenors' Reply at 2-3 (*citing* Davis-Besse Nuclear Power Station Integrated Inspection Report 05000346/2011005 (Jan. 31, 2012) (ADAMS Accession No. ML12032A119).

[13] FENOC's Unopposed Motion for Leave to Respond to the NRC Staff's Answer to Proposed Contention 5 on Shield Building Cracking (Feb. 9, 2012) (ADAMS Accession No. ML12040A170).

[14] Order Denying Unopposed Motion for Leave to Respond to NRC Staff's Answer to Proposed Contention 5 and Setting Proposed Contention 5's Admissibility for Oral Argument (Feb. 13, 2012) (ADAMS Accession No.ML12044A306).

[15] *See* "FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking," (Feb. 23, 2012) (ADAMS Accession No. ML12054A755).

[16] *See* "Intervenors' Answer to FENOC's 'Motion to Strike,'" (Feb. 27, 2012) (ADAMS Accession No. ML12058A260).

[17] *See* Intervenors' Motion.

including long-term monitoring requirements.[18] On March 5, 2012, the Staff filed its Answer to FENOC's Motion to Strike.[19]

DISCUSSION

I. Legal Requirements for Amended Contentions

Intervenors' Motion attempts to add bases to their proposed Contention 5, which was submitted on January 10, 2012.[20] The Commission does not look with favor on new or amended contentions filed after the initial filing,[21] and does not allow new bases for a contention to be "introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2)."[22] This Board has likewise held that Intervenors must address the required criteria for late-filed or amended contentions in 10 C.F.R. § 2.309(c) and (f)(2) when attempting to add new bases and supporting material for a contention.[23] Additionally, late-filed contentions must meet the threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1).[24]

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[18] *See* Letter L-12-065 from Barry S. Allen to Cynthia D. Pederson, "Davis-Besse Nuclear Power Station, Unit 1 Docket Number NPF-3 Submittal of Shield Building Root Cause Evaluation," (Feb. 27, 2012) (ADAMS Accession No. ML120600056) (referencing CAL requirement). *See also* http://www.nrc.gov/reading-rm/doc-collections/news/2012/12-007.iii.pdf.

[19] *See* "NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking," (Mar. 5, 2012) (ADAMS Accession No. ML12065A341).

[20] *See* Intervenors' Motion at 1 ("To the allegations of fact submitted by Intervenors with their January 10, 2012 filing, they propose to add the following:…").

[21] *See Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004)(noting that Commission "does not look with favor on 'amended or new contentions filed after the initial filing.'").

[22] *Ameregen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009) (internal citations omitted).

[23] *See* Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (ADAMS Accession No. ML110490269).

[24] *Oyster Creek*, CLI-09-7, 69 NRC 235, 261 (2009).

Under 10 C.F.R. § 2.309(f)(2), an amended contention filed after the initial filing period may be admitted as a timely new contention only with leave of the Board upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[25]

Pursuant to the Board's ISO, "a motion and proposed new contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when the material information on which it is based first becomes available to the moving party through service, publication, or any other means. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c)."[26]

The Commission has made several points clear when discussing what constitutes new and materially different information for purposes of 10 C.F.R. § 2.309(f)(2). First, when a petitioner's motion makes little effort to meet the pleading requirements governing late-filed contentions, that in and of itself constitutes sufficient grounds for rejecting the petitioner's motion.[27] For example, the Commission has stated that a petitioner's failure to address the factors in 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c) is reason enough to reject the

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[25] 10 C.F.R. § 2.309(f)(2).

[26] ISO at B.1. Nontimely filings may only be entertained following a determination by the Board that a balancing of the eight factors in 10 C.F.R. § 2.309(c) weigh in favor of admission. Of all the eight factors, the first, good cause for failure to file on time, is given the most weight. This Board emphasized that if there was uncertainty in whether a new or amended contention was timely filed, the movant could file under both § 2.309(f)(2) and § 2.309(c). ISO at B.1. The Intervenors' Motion does not address the § 2.309(c) factors, and does not demonstrate good cause despite a failure to plead it.

[27] *Florida Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006).

motion.[28] Second, petitioners cannot just point to "documents merely summarizing earlier documents or compiling pre-existing, publicly available information into a single source…[as doing so]… do[es] not render 'new' the summarized or compiled information."[29] As the Commission noted in *Northern States Power Co*. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010), a "petitioner or intervenor [cannot] delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention. To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on "information … *not previously available*." (internal citations omitted).

Third, the Commission has made clear that alleged new and materially different information must support the proposed contention.[30] Thus, the Commission has noted that alleged new and materially different information must articulate a "reasonably apparent" foundation for the contention.[31] Fourth, simply rehashing old arguments is not enough to meet the materially different standard in 10 C.F.R. § 2.309(f)(2)(ii).[32] Instead, the Commission has stated that petitioners filing amended contentions must show how their arguments supporting the contention differ from old arguments.[33] Finally, the Commission considers information new

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[28] *Id.* (noting that petitioner did not address any of the factors in 10 C.F.R. § 2.309(f)(2) and did not address two of the factors in 10 C.F.R. § 2.309(c)).

[29] *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC __ (Mar. 10, 2011) (slip op. at 13).

[30] *See Prairie Island*, CLI-10-27, 72 NRC at 493-94 (noting that the SER petitioners cited to as having new and materially different information did not provide support for the contention and so did not contain new or materially different information).

[31] *Id.* at 495.

[32] *See Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 53 (2010).

[33] *Id*.

and materially different when the Staff is considering the information for the first time in responding to issues relevant to the contention.[34]

II. Admissibility of Intervenors' Proposed Revisions to New Contention 5

Intervenors' Motion proposes to add two items of allegedly new information to "the allegations of fact submitted by Intervenors with their January 10, 2012 filing,"[35] in which they moved for admission of Contention 5.[36] First, Intervenors allege that the NRC's January 31, 2012 Inspection Report showed that on October 31, 2011, FENOC discovered other areas of cracking including cracking "towards the top of the [shield building] wall, approximately between the 780 ft and 800 ft elevations."[37] Second, Intervenors allege that on or about February 8, 2012, they learned from a press release posted on Rep. Kucinich's website that "the cracking was not in 'architectural' or 'decorative' elements of the wall…but ran throughout the line of the main outer rebar [and that] the cracking is so extensive that the NRC required [FENOC] to assume, in its calculations of the strength of the wall, that the vertical outer rebar mat did not even exist."[38] Intervenors argue that the above information was not previously available,[39] and

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[34] *See Pa'ina Hawaii, LLC*, (Materials License Application), CLI-10-18, 72 NRC __ (July 9, 2010) (slip op. at 42-3).

[35] Intervenors' Motion at 1.

[36] Intervenors' Proposed Contention 5, submitted on January 10, 2012, stated: Interveners contend that FirstEnergy's recently-discovered, extensive cracking of unknown origin in the Davis-Besse shield building/secondary reactor radiological containment structure is an aging-related feature of the plant, the condition of which precludes safe operation of the atomic reactor beyond 2017 for any period of time, let alone the proposed 20-year license period. *Id*.

[37] *Id.* at 3 (citing page 48 of the NRC's January 31, 2012 Inspection Report). The Intervenors' Motion also includes more information from page 48 of the NRC's January 31, 2012 Inspection Report, which describes how FENOC entered this extent of condition issue for the shield building cracking into its corrective action program as CR 2011-04648, informed the NRC via the Resident Inspectors' office on site, and continued to investigate further to determine if any additional adverse conditions existed. *Id*.

[38] *Id.* at 2 (citing to Feb. 8, 2012 press release from Rep. Dennis Kucinich's website, *available at* http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=278784).

[39] *Id*. at 3 (claiming that the information about NRC requiring FENOC to assume certain calculations was not available until February 8, 2012 and that the information about the cracking in the top twenty feet of the shield building wall was not available until January 31, 2012).

is materially different than information previously available in that it "describe[s] new locations and types of structural damage caused by the cracking."[40] Intervenors assert that the alleged new information has been submitted in a timely fashion[41] and "falls within the scope of their initial, January 10, 2012 contention."[42]

As discussed in detail below, the Staff opposes Intervenors' Motion because Intervenors failed to certify that they made a sincere attempt to resolve the issues raised in their motion and their consultation was inadequate. Even assuming a proper certification and consultation, the Staff opposes Intervenors' Motion because the alleged new information cited is either (1) not accurate or (2) not information that was previously unavailable and materially different than information previously available. Therefore, the information is inadmissible and the Board should deny the Intervenors' Motion.

III. Intervenors' Motion Does Not Include the Required Certification and Intervenors' Consultation Was Inadequate

Intervenors' Motion contains no certification that Intervenors made a sincere attempt to resolve the issues raised by their Motion. Therefore, pursuant to the Commission's regulations and the Board's ISO, the Intervenors' Motion must be denied. Specifically, 10 C.F.R. § 2.323(b) provides that "[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." Likewise, the Board's ISO clearly

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[40] Intervenors' Motion at 3.

[41] *Id.* at 3-4 ("Finally, the informational disclosures are well within the 60-day window in which new allegations must be raised following discovery.").

[42] *Id.* at 4. *See also id*. (arguing in the alternative that an amended contention may include additional issues outside the scope of the contention as originally admitted).

states that "motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. 2.323(b) that a sincere attempt to resolve the issues has been made."[43]

Additionally, the Intervenors' "consultation" was flawed. Instead of making a sincere effort to resolve the issues raised in the motion, the Intervenors sent an email to the parties on a Sunday (just before 12 p.m. E.S.T.), and requested a response by 12 p.m. E.S.T. the next day.[44] This type of "consultation" is flawed as it does not allow the Staff adequate time to consult and attempt to address the issues raised by the Intervenors. For these reasons, the Staff reserved its right to oppose the Intervenors' Motion once it was filed.[45] The Intervenors' Motion makes no note of this response from Staff or of FENOC's response. Given these procedural deficiencies, the Intervenors' Motion should be denied.

IV. Intervenors' Motion Fails to Present New and Materially Different Information Regarding the Shield Building Cracking

Even assuming an adequate certification and consultation, the Intervenors' Motion should be denied because it does not show that (1) the information upon which Intervenors' amended Contention 5 is based was not previously available or (2) that such information is materially different than information previously available.[46] Therefore, Intervenors fail to meet the late-filed factors in 10 C.F.R. § 2.309(f)(2) and fail to plead any of the factors in § 2.309(c) or demonstrate good cause despite a failure to plead it.

As with their initially proposed Contention 5, Intervenors' Motion only asserts that amended Contention 5 is timely filed, and does not address the non-timely filing standards in

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[43] ISO at G.1.

[44] *See* Email from Terry Lodge to Timothy P. Matthews, Catherine Kanatas, Brian Harris, and Lloyd Subin, "Davis-Besse Contention 5 (proposed motion to amend/consultation)," (Feb. 26, 2012) (Attachment A).

[45] *See* Email from Brian Harris to Terry Lodge and Timothy P. Matthews, "RE: Davis-Besse Contention 5 (proposed motion to amend/consultation)," (Feb. 27, 2012) (Attachment B).

[46] *See* 10 C.F.R. § 2.309(f)(2), ISO at B.1, and Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (ADAMS Accession No. ML110490269). *See also* 10 C.F.R. § 2.309(c).

10 C.F.R. § 2.309(c).[47] Intervenors assert that amended Contention 5 is based on "new information which they believe to be relevant to the contention,"[48] and which has been timely submitted.[49] However, the Intervenors' Motion does not demonstrate that the alleged new information meets the requirements of the ISO or the Commission's regulations regarding amended contentions, and should therefore be denied. Moreover, the Intervenors' Motion does not address the factors in 10 C.F.R. § 2.309(c). Both the Commission and this Board have clearly stated that intervenors must address the required criteria in 10 C.F.R. § 2.309(c) when attempting to add new bases and supporting material for a contention.[50]

A. NRC's January 31, 2012 Inspection Report Was Cited in Intervenors' Reply and Does Not Contain New and Materially Different Information

Intervenors claim that the NRC's January 31, 2012 Inspection Report contains new information regarding the locations and types of structural damage caused by the cracking "compared to the information hitherto known."[51] Specifically, Intervenors note that on page 48 of the NRC's January 31, 2012 Inspection Report, the Staff discusses how the licensee identified additional cracking in the shield building on October 31, 2011, "approximately between the 780 ft and 800 ft elevations."[52]

However, neither the NRC's January 31, 2012 Inspection Report nor the information cited from page 48 of that report is new information. In fact, the Intervenors' Reply references

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[47] Intervenors' Motion at 5. As discussed above, the failure to address 10 C.F.R. § 2.309(c) is sufficient grounds for dismissing a motion to amend a contention. *Florida Power & Light Co.*, CLI-06-21, 64 NRC 30, 33 (2006).

[48] Intervenors' Motion at 1.

[49] *Id*. at 5.

[50] *See Florida Power & Light Co.*, CLI-06-21, 64 NRC at 33; Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011)(ADAMS Accession No. ML110490269).

[51] Intervenors' Motion at 3.

[52] *Id*. (*citing* NRC's January 31, 2012 Inspection Report at p. 48).

the exact same section of the NRC's January 31, 2012 Inspection Report.[53] Further, the Intervenors' Reply notes that FENOC mentioned this discovery at a January 5, 2012 public meeting,[54] and that Rep. Kucinich's December 7, 2011 public disclosures discussed these cracks.[55] Moreover, the Intervenors' Motion to Admit Contention 5 and the Staff's Answer to Contention 5 both discuss these cracks, as well as assumptions that the cracks extended the full 225-foot height of the building.[56] Therefore, the cracking described on page 48 of the NRC's January 31, 2012 Inspection Report is not new information and is merely redundant of information already before the Board. Additionally, the Intervenors have not demonstrated how the NRC's January 31, 2012 Inspection Report's discussion of the cracking in the top 20 feet of the shield building provides information that is materially different from information already cited by the parties previously.[57] Thus, the Intervenors' Motion fails to meet the requirements for amending contentions outlined in the ISO and the Commission's regulations and should be denied.

B. Rep. Kucinich's February 8, 2012 Press Release Does Not Contain New and Materially Different Information Regarding the Shield Building Cracking.

Intervenors also argue that Rep. Kucinich's February 8, 2012 press release revealed new information that the cracking in the shield building was so extensive that the NRC required

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[53] Intervenors' Reply at 2-3 (quoting from page 48 for the claim that it shows that FENOC discovered this cracking on October 31, 2011).

[54] *Id*. at 3.

[55] *Id*.

[56] *See* Intervenors' Motion to Admit Contention 5 at 8, 33, 35, 36, 37; Staff's Answer to Contention 5 at 13, 16.

[57] To the extent that Intervenors are citing to the NRC's January 31, 2012 Inspection Report as a whole, they have still failed to show any materially different information. The Commission has clearly stated that Intervenors cannot just point to "documents merely summarizing earlier documents or compiling pre-existing, publicly available information into a single source" to meet the standard for new and materially different information. *Vermont Yankee*, CLI-11-02, 73 NRC __ (slip op. at 13).

FENOC to make certain assumptions in its calculations on the shield building wall's strength.[58] Intervenors note that neither the NRC nor FENOC have independently released any information indicating that the NRC imposed these requirements on FENOC.[59] However, as discussed below, this allegedly new information is not new and materially different and is not accurate. For both of these reasons, it is inadmissible.

1. The February 8, 2012 Press Release Does Not Reveal New and Materially Different Information Regarding the Shield Building Cracking

Intervenors argue that Rep. Kucinich's February 8, 2012 press release provides new and materially different information concerning the extent of the shield building cracking.[60] Specifically, Intervenors now appear to argue that it was not until February 8, 2012, that they were aware that the cracking was not in only the "architectural" or decorative" elements of the shield building wall.[61] But in their January 10, 2012 Motion to Admit Contention 5, Intervenors stated that they were made aware of this fact on January 5, 2012.[62] In fact, the February 8, 2012 press release explains that this information was discussed at the January 5, 2012 public meeting.[63] Moreover, the February 8, 2012 press release points out that the "very first photo

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[58] Specifically, Intervenors argue that the NRC required FENOC to assume that the vertical outer rebar mat did not exist in its calculations of the strength of the wall. Intervenors' Motion at 2.

[59] *Id*. at 4.

[60] *Id*. at 3.

[61] *Id*. at 2, 3.

[62] *See* Motion to Admit Contention 5 at 8. As discussed in the Staff's Answer to Contention 5, it is clear based on the Intervenors' Motion to Admit Contention 5, as well as articles published and the Staff's disclosures, that the Intervenors recognized as early as November 1, 2011, that the shield building cracks were structural and not contained to the architectural flutes. *See* Staff's Answer to Contention 5 at 10-12.

[63] *See* Intervenors' Motion at 2 (citing Feb. 8, 2012 press release which states that "When FirstEnergy made its presentation at the January 5[, 2012] public hearing, its Site Vice-President, Mr. Barry Allen, admitted…that the cracking was located along the line of the main outer rebar.").

released by the NRC" showed "that the cracking was in the area of the main outer rebar."[64] Therefore, the February, 8, 2012 press release does not provide new information regarding the shield building cracking, and should not be admitted to amend Contention 5. Intervenors have an "iron-clad obligation to examine the publicly available documentary material … with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention."[65]

Even assuming the February 8, 2012 press release contained some new information, the Intervenors have not demonstrated how any new information in the February 8, 2012 press release is materially different from previously available information. As discussed in the Staff's Answer to Contention 5, the Intervenors were aware as early as November 1, 2011, that there was structural cracking in the shield building.[66] Intervenors' Motion does not indicate how any structural cracking discussed in the February 8, 2012 press release is materially different than the cracking previously identified. Instead, Intervenors only make the bare assertion that the information is materially different because it "describe[s] new locations and types of structural damage caused by the cracking compared to the information hitherto known."[67] But as discussed above, the locations and types of cracking discussed in the February 8, 2012 press release were known about and discussed in public meetings and publicly available documents well before February 8, 2012. Therefore, the Intervenors' Motion fails to meet the requirements for amending a contention outlined in the ISO and the Commission's regulations.

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[64] Intervenors' Motion at 2 (*citing* Feb. 8, 2012 press release). The photo is publicly available on NRC's website at: http://www.flickr.com/photos/nrcgov/6727592193/in/set-72157629000911615/.

[65] *Prairie Island*, CLI-10-27, 72 NRC 483 (2010).

[66] Staff's Answer to Contention 5 at 10-12. Even if Intervenors argue that they were not aware of this information on November 1, 2011, they state that they were aware of it as of January 5, 2012. Motion to Admit Contention 5 at 8.

[67] Intervenors' Motion at 3.

2. The NRC Did Not Require FENOC to Make Particular Assumptions in its Calculations

Intervenors also claim that the February 8, 2012 press release provided "new" information that the NRC required FENOC to make particular assumptions in its calculations.[68] However, this claim is not accurate.[69] The NRC did not require FENOC to make particular assumptions in its calculations on the strength of the shield building wall.[70] Instead, FENOC developed calculations and the NRC Staff reviewed them. Moreover, FENOC's calculations did not assume that the shield building's entire vertical outer rebar mat was removed.[71] Instead, based on extensive field investigations, FENOC conservatively considered between 50 to 100 percent of outside hoop and vertical rebars in the top 20 feet of shield building near spring line, in the 16 flute shoulders, and around two main steam line penetrations to be ineffective.[72] Therefore, this information is not accurate and should not be admitted to amend Contention 5.

C. Intervenors Have Not Shown that the Additional Bases Proposed to Amend Contention 5 Meet the Commission's Admissibility Requirements

Even assuming that Intervenors' Motion demonstrated that the information cited was new and materially different than previously available information, the motion should still be denied because Intervenors have not demonstrated that the additional bases proposed to amend Contention 5 meet the threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1). As discussed above, the Intervenors must satisfy the usual substantive

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[68] Intervenors' Motion at 2.

[69] The Intervenors are correct that neither the NRC nor FENOC has made a statement about the NRC imposing requirements on FENOC's calculations. *See* Intervenors' Motion at 4. But this is because making such a statement would be inaccurate. *See* Affidavit of Abdul Sheikh ("Sheikh Aff.") at ¶ 5 (Attachment C).

[70] Sheikh Aff. at ¶ 5.

[71] *See* Intervenors' Motion at 2 (claiming that the NRC required FENOC to assume that the vertical outer rebar mat did not even exist).

[72] *See* Sheikh Aff. at ¶ 6.

requirements for admissibility of contentions in addition to the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii) when filing an amended contention arising out of new information.[73]

Intervenors' Motion does not demonstrate how these additional bases meet 10 C.F.R. § 2.309(f)(1). Instead, Intervenors merely claim that the information presented "shows that material facts of the application for the license extension are in dispute…[and they] have met the threshold requirements to be accorded leave to amend their proposed Contention 5."[74] These types of unsupported assertions do not meet the Commission's admissibility standards.[75] But because the additional bases for Contention 5 proffered in Intervenors' Motion do not meet the Commission's requirements, the Intervenors' Motion should be dismissed.

For all the reasons outlined above, the additional bases proffered by Intervenors are inadmissible.

CONCLUSION

For the reasons set forth above, the Board should deny Intervenors' Motion.

Respectfully submitted,

Signed (electronically) by

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[73] *See Oyster Creek*, CLI-09-7, 69 NRC at 261 (holding that even if late-filed contention criteria are satisfied, proposed contentions must still meet threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1)). *See also Pacific Gas and Electric Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008).

[74] Intervenors' Motion at 5.

[75] *Oyster Creek*, CLI-00-6, 51 NRC 193, 208 (2000). The Staff continues to support admission of a limited portion of Contention 5, as revised by the Staff. However, the Staff is currently reviewing FENOC's root cause report.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO INTERVENORS' MOTION TO AMEND 'MOTION FOR ADMISSION OF CONTENTION NO. 5;'" Attachment A: "Email from Terry Lodge to Timothy P. Matthews, Catherine Kanatas, Brian Harris, and Lloyd Subin, "Davis-Besse Contention 5 (proposed motion to amend/consultation)," dated Feb. 26, 2012; Attachment B: "Email from Brian Harris to Terry Lodge and Timothy P. Matthews, "RE: Davis-Besse Contention 5 (proposed motion to amend/consultation)," dated Feb. 27, 2012; and Attachment C: Affidavit of Abdul Sheikh dated March 8, 2012, in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 8th day of March, 2012.

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