

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of )

FIRSTENERGY NUCLEAR OPERATING COMPANY )

(Davis-Besse Nuclear Power Station, Unit 1) )

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Docket No. 50-346-LR

April 16, 2012

**FENOC’S UNOPPOSED MOTION FOR LEAVE TO SUPPLEMENT ITS ANSWER TO  
THE PROPOSED SHIELD BUILDING CRACKING CONTENTION**

**I. INTRODUCTION**

On January 10, 2012, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (“Intervenors”) filed a motion with the Atomic Safety and Licensing Board (“Board”) to admit newly-proposed Contention 5 (“proposed Contention”) regarding Shield Building cracking.<sup>1</sup> Both FirstEnergy Nuclear Operating Company (“FENOC”) and the Nuclear Regulatory Commission (“NRC”) Staff timely filed Answers to the proposed Contention.<sup>2</sup>

On April 5, 2012, FENOC notified the Board that it had submitted revisions to the Davis-Besse License Renewal Application (“LRA”).<sup>3</sup> The LRA revisions included, among other things, a new aging management program (“AMP”) in Section B.2.43, “Shield Building Monitoring Program,” to “ensure that the intended functions of the Shield Building are

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<sup>1</sup> Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012) (“Proposed Contention”).

<sup>2</sup> NRC Staff’s Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking (Feb. 6, 2012) (“Staff Answer”); FENOC’s Answer Opposing Intervenors’ Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012) (“FENOC Answer”).

<sup>3</sup> Letter from T. Matthews, FENOC Counsel, to the Board, Notification of Filing Related to Proposed Shield Building Cracking Contention (Apr. 5, 2012) (“Board Notification”).

maintained during the period of extended operation.”<sup>4</sup> As explained below, this new AMP moots both (1) the proposed Contention’s challenges to whether FENOC addressed aging management of Shield Building cracking, and (2) the revised contention of omission set forth by the NRC Staff in its Answer.

Because the new AMP was not available at the time FENOC filed its Answer,<sup>5</sup> FENOC now moves for leave to file the following information and arguments as a timely supplement to the FENOC Answer in accordance with 10 C.F.R. § 2.323. This supplement is necessary to ensure that all material relevant information and arguments relative to admission of the proposed Contention are properly before the Board, and to prevent unnecessary litigation of the now-mooted issues.<sup>6</sup> For the reasons stated in its Answer, as supplemented below, FENOC respectfully requests that the Board reject Intervenors’ proposed Contention and the Staff’s revised contention.<sup>7</sup>

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<sup>4</sup> Enclosure L-12-028, Amendment No. 25 to the DBNPS License Renewal Application, at 10 (Apr. 5, 2012) (“Enclosure L-12-028”) (appended to “Attachment L-12-028” of the Board Notification’s Enclosure 1, Reply to Request for Additional Information for the Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application (TAC No. ME4640) and License Renewal Application Amendment No. 25 (Apr. 5, 2012) (“RAI Response”)).

<sup>5</sup> Indeed, the cause of the cracking phenomenon had not yet been identified. On February 29, 2012, FENOC provided the Board and the parties with the Root Cause Evaluation of the cracking. *See* Submittal of Shield Building Root Cause Evaluation (Feb 27, 2012) (“Root Cause Evaluation”) (submitted as an enclosure to Letter from T. Matthews, FENOC Counsel, to Board, Notification of Filing Related to Proposed Shield Building Cracking Contention (Feb. 29, 2012) (“Board Notification for Root Cause Evaluation”)).

<sup>6</sup> FENOC notes that the Board has scheduled oral argument for the proposed Contention on May 18, 2012. Notice and Order (Scheduling Oral Argument), at 3 (Mar. 28, 2012) (unpublished). While FENOC believes that the Board could rule on this Motion and dispose of the proposed Contention prior to oral argument, FENOC will be prepared to address the merits of this Motion at the oral argument. FENOC was compelled to file this Motion now, consistent with the Board’s Order of January 30, 2012, to ensure that its arguments on the effect of the new AMP are timely. *See generally* Order (Denying Motion for Leave to File a Motion for Reconsideration) (Jan. 30, 2012) (unpublished).

<sup>7</sup> Counsel for FENOC certifies under 10 C.F.R. § 2.323(b) and Initial Scheduling Order Section G.1 that it consulted with the other parties and has made a sincere attempt to resolve the issues raised in this Motion. Counsel for the NRC Staff indicated that the Staff does not oppose FENOC’s Motion. Similarly, counsel for Intervenors indicated that Intervenors do not oppose FENOC’s request to supplement its Answer and reserve the opportunity to file a reply.

## II. BACKGROUND

As noted above, Intervenor filed the proposed Contention on January 10, 2012. The proposed Contention states:

***Contention 5: Cracked Shield Building/Secondary Reactor Radiological Containment Structure***

Intervenor contends 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.<sup>8</sup>

Both FENOC and the Staff filed answers to the proposed Contention on February 6, 2012. The FENOC Answer demonstrates that the proposed Contention is untimely and does not satisfy the contention admissibility requirements, and therefore should be rejected in its entirety.<sup>9</sup> The Staff Answer also concludes that much of the proposed Contention is inadmissible, but does not object to admission of a limited portion of the proposed Contention, stating: "To the extent Contention 5 identifies FENOC's failure to describe how the Structures AMP will account for the shield building cracks during the period of extended operation, Contention 5 is an admissible contention of omission."<sup>10</sup> Intervenor filed a Reply on February 13, 2012.<sup>11</sup> The parties subsequently filed pleadings related to FENOC's motion to strike portions of the Reply<sup>12</sup> and Intervenor's motion to amend the proposed Contention.<sup>13</sup>

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<sup>8</sup> Proposed Contention at 10-11.

<sup>9</sup> See FENOC Answer at 1-3.

<sup>10</sup> Staff Answer at 1-2, 16.

<sup>11</sup> Intervenor's Combined Reply in Support of Motion for Admission of Contention No. 5 (Feb. 13, 2012).

<sup>12</sup> FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking (Feb. 23, 2012); Intervenor's Answer to FENOC 'Motion to Strike' (Feb. 27, 2012); NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking (Mar. 5, 2012).

<sup>13</sup> Intervenor's Motion to Amend 'Motion for Admission of Contention No. 5' (Feb. 27, 2012); FENOC's Answer Opposing Intervenor's Motion to Amend Proposed Contention 5 on Shield Building Cracking (Mar. 8,

In the interim, on February 29, 2012, FENOC filed a Notification with the Board explaining that it had submitted the Root Cause Evaluation for Shield Building cracking to the NRC on February 27, 2012.<sup>14</sup> The Root Cause Evaluation concludes that the direct cause for the cracking “is the integrated affect of moisture content, wind speed, temperature, and duration from the blizzard of 1978,” and the root cause “was due to the design specification for construction of the shield building (C-038) that did not specify application of an exterior sealant from moisture.”<sup>15</sup> Of note, the Root Cause Evaluation concludes that “[t]here was no evidence of typical concrete time-dependent aging failure modes.”<sup>16</sup>

On April 5, 2012, FENOC filed the Board Notification informing the Board of FENOC’s response to Request for Additional Information (“RAI”) B.2.39-13, related to Shield Building cracking.<sup>17</sup> The RAI Response explains that, even though the Root Cause Evaluation did not identify any new aging effects, “a new plant-specific aging management program titled ‘Shield Building Monitoring Program’ is provided to periodically inspect the structure to confirm that there are no changes in the nature of the identified laminar cracks.”<sup>18</sup> The new AMP is provided in LRA Section B.2.43, which includes a description of the elements of the AMP.<sup>19</sup> The AMP concludes: “Implementation of the Shield Building Monitoring Program will provide reasonable assurance that the existing environmental conditions will not cause aging effects that could result

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2012); NRC Staff’s Answer to Intervenor’s Motion to Amend ‘Motion for Admission of Contention No. 5’ (Mar. 8, 2012).

<sup>14</sup> See Board Notification for Root Cause Evaluation.

<sup>15</sup> Root Cause Evaluation at 59.

<sup>16</sup> *Id.* at 6. The RAI Response explains that “evaluation of the recent Shield Building operating experience did not identify any new aging effects.” Attachment L-12-028 at 5.

<sup>17</sup> RAI Response at 1.

<sup>18</sup> Attachment L-12-028 at 5.

<sup>19</sup> Enclosure L-12-028 at 10-15.

in a loss of component intended function.”<sup>20</sup> Submission of this AMP gives rise to this timely Motion to Supplement the FENOC Answer.

### III. LEGAL STANDARDS

The Commission has stated that there is “a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.”<sup>21</sup> “Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot.”<sup>22</sup> In this regard, the Commission has held: “[W]here a contention is ‘superseded by the subsequent issuance of licensing-related documents’—whether a draft EIS or an applicant’s response to a request for additional information—the contention *must* be disposed of or modified.”<sup>23</sup>

Based on this established legal precedent, the Commission made clear that “resolution of the mooted contention requires no more than a finding by the presiding officer that the matter has become moot.”<sup>24</sup> Importantly, for purposes of the instant Motion, the Commission has held that this “may be accomplished as part of the contention admission phase of the proceeding.”<sup>25</sup> Similarly, licensing boards have rejected *proposed* contentions as moot based on the submission of information by the applicant *before* the licensing board ruled on the admissibility of the

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<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

<sup>22</sup> *Id.* at 383; *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (2006) (holding that “where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention ‘is moot’”) (citing *McGuire*, CLI-02-28, 56 NRC at 383).

<sup>23</sup> *McGuire*, CLI-02-28, 56 NRC at 382 (emphasis added) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1050 (1983)).

<sup>24</sup> *USEC*, CLI-06-9, 63 NRC at 444-45.

<sup>25</sup> *Id.* at 445.

proposed contentions.<sup>26</sup> Thus, the mootness doctrine not only applies to admitted contentions, but also to proposed contentions.

#### **IV. THE PROPOSED CONTENTION SHOULD BE REJECTED**

The new AMP moots the proposed Contention's claims that FENOC did not address aging management of Shield Building cracking.

As discussed in the FENOC Answer, the proposed Contention can be divided into both environmental arguments and non-environmental arguments (or "safety" arguments).<sup>27</sup> As explained in Section IV.B.1 of the FENOC Answer, the environmental arguments are inadmissible because (1) they are outside the scope of this proceeding because they impermissibly challenge NRC regulations; (2) they fail to challenge the Davis-Besse LRA; and (3) they lack adequate factual support.<sup>28</sup> As explained in Section IV.B.2.a of the FENOC Answer, some of the safety arguments likewise are outside the scope of this proceeding.<sup>29</sup>

Once the environmental arguments and the out-of-scope safety arguments are set aside, the proposed Contention is reduced to unsupported allegations that aging management of Shield Building cracking at Davis-Besse is deficient due to the absence of an AMP. As discussed in Sections IV.B.2.b and IV.B.2.c of the FENOC Answer, these arguments fail to challenge any

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<sup>26</sup> See, e.g., *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 21 (2008) ("Because AmerGen has cured the omission alleged in [petitioners'] newly proffered contention, the April 18 motion to reopen the record in order to add a new contention has been rendered moot. And because [petitioners'] motion is moot and, thus, no longer raises a litigable controversy, it fails, definitionally and functionally, to present a significant safety issue."), *aff'd*, CLI-08-28, 68 NRC 658, 676 n.72 (2008); *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-10-05, 71 NRC 329, 339-40 (2010) (concluding that a *proposed* contention was moot based on the submission of additional information by the applicant); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, 70 NRC 581, 596 (2009) (concluding that a *proposed* contention was moot based on the submission of additional information by the applicant).

<sup>27</sup> FENOC Answer at 23.

<sup>28</sup> See *id.* at 24-32.

<sup>29</sup> See *id.* at 32-39.

portion of the Davis-Besse LRA and lack adequate factual support.<sup>30</sup> Moreover, now that FENOC has submitted the RAI Response with a revision to the Davis-Besse LRA to include a new AMP addressing Shield Building cracking, these arguments should be rejected for an independent reason—they are moot.<sup>31</sup>

As explained above, “[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot,” and “the contention *must* be disposed of or modified.”<sup>32</sup> Through the new AMP, FENOC now has provided its program for aging management of Shield Building cracking during the period of extended operation. As discussed above, the new AMP moots Intervenor’s arguments. Intervenor has not yet challenged the new AMP. Therefore, for the reasons stated in the FENOC Answer, as supplemented here, Intervenor’s proposed Contention should be rejected.

## **V. THE STAFF’S REVISED CONTENTION IS MOOT**

In the Staff Answer to the proposed Contention, the Staff agrees with FENOC’s conclusions that much of the proposed Contention is not admissible. As explained above, however, the Staff does not object to admission of a limited portion of the proposed Contention,

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<sup>30</sup> See *id.* at 39-46.

<sup>31</sup> Although Intervenor did not clearly use the term “omission” in the proposed Contention, that is what their submittal describes. To describe a contention of adequacy, Intervenor would have had to challenge the ability of some specific aspect of FENOC’s LRA to address the effects of aging. This they did not do. Many of Intervenor’s arguments directly challenged FENOC’s failure to provide a plan regarding the Shield Building cracking. Until FENOC submitted the RAI Response with the new AMP, FENOC had not revised the LRA to address the Shield Building cracking, and Intervenor was unable to challenge FENOC’s plans to address the cracking. With the new AMP, FENOC has superseded any other documents challenged by Intervenor. Therefore, regardless of whether Intervenor now style their proposed contention as one of adequacy or omission, any earlier challenges regarding the Shield Building cracking must be viewed as mooted by the new AMP.

<sup>32</sup> *McGuire*, CLI-02-28, 56 NRC at 382-83 (emphasis added).

which the Staff characterizes as a “contention of omission.”<sup>33</sup> The Staff proposed the following revised language for the proposed Contention:

Is the Structures AMP adequate to address any aging effects for the shield building that are related to the cracks identified by FENOC during the October 10, 2011 reactor head replacement and subject to a root cause evaluation to be provided by FENOC on February 28, 2012 such that the shield building would be unable to perform its intended functions of: 1) protecting the steel containment from environmental effects, including wind, tornado, and external missiles, 2) providing biological shielding, 3) providing controlled release to the annulus during an accident, and 4) providing a means for collection and filtration of fission product leakage from the Containment Vessel following a hypothetical accident?<sup>34</sup>

This proposed contention of omission, developed by the Staff, also has been entirely mooted by the new AMP regarding Shield Building cracking. Although the Staff’s proposed wording addresses the “Structures AMP,” and FENOC has provided the new AMP, rather than revise the existing Structures AMP, the effect is identical.<sup>35</sup> As noted above, the AMP states: “Implementation of the Shield Building Monitoring Program will provide reasonable assurance that the existing environmental conditions will not cause aging effects that could result in a loss of component intended function.”<sup>36</sup> Therefore, the AMP fully addresses and moots the revised contention of omission proposed by the Staff.

As explained above, “[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the

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<sup>33</sup> Staff Answer at 16.

<sup>34</sup> *Id.*

<sup>35</sup> As discussed in the RAI Response, “[t]he requirements of the plant-specific Shield Building Monitoring Program are to be administered in conjunction with the existing Structures Monitoring Program.” Attachment L-12-028 at 6.

<sup>36</sup> Enclosure L-12-028 at 15.



contention is moot,” and “the contention *must* be disposed of or modified.”<sup>37</sup> Because the Staff’s revised wording for the proposed Contention is now moot, it too must be rejected.

## **VI. CONCLUSION**

As demonstrated above, the new AMP regarding Shield Building cracking moots both (1) the proposed Contention’s challenges to whether FENOC addressed aging management of Shield Building cracking, and (2) the revised contention of omission set forth by the NRC Staff in its Answer. Therefore, for the reasons stated in its Answer, as supplemented here, FENOC respectfully requests that the Board reject Intervenor’s proposed Contention and the entirety of the Staff’s revised contention.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

*Signed (electronically) by Timothy P. Matthews*

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Dated in Washington, D.C.  
this 16th day of April 2012

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<sup>37</sup> *McGuire*, CLI-02-28, 56 NRC at 382-83 (emphasis added).

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Docket No. 50-346-LR

April 16, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, a copy of “FENOC’s Unopposed Motion for Leave to Supplement Its Answer to the Proposed Shield Building Cracking Contention” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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