

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 MOTION TO AMEND AND SUPPLEMENT PROPOSED
CONTENTION NO. 5 (SHIELD BUILDING CRACKING)

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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 to the "Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking)," ("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")² regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").³

¹ Initial Scheduling Order at B.2.

² See Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 4, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12156A411). Intervenors' Motion included a May 25, 2012 letter from the Union of Concerned Scientists entitled "FENOC Violating Federal Regulations (Again)," (ADAMS Accession No. ML12156A410).

³ 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 no longer supports admission of a limited portion of proposed Contention 5.⁴ FENOC's submission of an aging management program ("AMP") to address any possible aging effects of the shield building cracking⁵ has mooted Contention 5 as proposed by Staff⁶ and Intervenor's Motion does not raise a challenge to the adequacy of any specific portion of the AMP. Further, Intervenor's have not demonstrated that their proposed additional bases for Contention 5 meet the Commission's admissibility requirements. Yet again, Intervenor's Motion fails to plead the non-timely filing requirements. Intervenor's continue to raise issues that are simply outside the scope of this limited proceeding, including: (1) assertions that the recently discovered cracks in the shield building constitute a safety issue during the current operating period, and (2) arguments that there is a "safety culture" issue at Davis-Besse. These bases are also inadmissible because they are immaterial to the findings that the Staff must make and the contention lacks an adequate basis. Finally, Intervenor's

⁴ Previously, the Staff recognized that a small portion of Contention 5 as proposed by Intervenor's in their January 10, 2012 filing could be an admissible contention of omission. Specifically, "[t]o 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." 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) at 1-2; 16. The Staff proposed the following language for Contention 5:

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?

⁵ See L-12-028, 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) (ADAMS Accession No. ML12097A520) ("FENOC's April 5, 2012 Submittal").

⁶ Contention 5 as proposed by Intervenor's is also moot since the remainder of their claims and bases, both as initially proposed and as amended in the instant motion, are inadmissible. See *infra* at 23-27 and Staff's Answer to Contention 5.

Motion should be denied because they continue to ignore this Board's clear instructions regarding consultation.⁷ For all of these reasons, Intervenors' Motion should be denied and Contention 5 should not be admitted.

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, 2017.⁸ 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")⁹ discussed the procedural history for this proceeding through the filing of proposed new Contention 5,¹⁰ so the Staff will not unduly repeat it here.¹¹ The Staff's Answer to Contention 5 opposed the admission of Contention 5 as submitted,¹² but recognized that a limited portion of Contention 5, as revised by the Staff, could be admitted by the Board as a

⁷ Board's ISO ("motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. § 2.323(b)."). See *also* FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 NRC __ (Nov. 23, 2011)(slip op. at 12) (noting that a motion must be rejected if it fails to meet 10 C.F.R. § 2.323).

⁸ LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

⁹ See Staff's Answer to Contention 5.

¹⁰ See "Motion for Admission of Contention No. 5 on Shield Building Cracking," ("Intervenors' Motion to Admit Contention 5") (ADAMS Accession No. ML12010A172).

¹¹ Staff's Answer to Contention 5 at 2-3.

¹² In their Motion to Admit Contention 5, Intervenors' proposed Contention 5 stated:

Intervenors 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.

Intervenors also argued that the shield building cracking must be discussed in the ER and the Staff's supplemental environmental impact statement. *Id.* at 3-4, 8-9. Intervenors also made several arguments about the current safety of Davis-Besse, and past and current management practices.

contention of omission.¹³ On February 6, 2012, FENOC filed an answer opposing the admission of Contention 5.¹⁴ On February 13, 2012, Intervenors filed a combined Reply to the Staff's and FENOC's Answers to Contention 5 ("Intervenors' Reply").¹⁵ 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 5.¹⁶ 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.¹⁷

On February 27, 2012, Intervenors filed a motion to amend their motion for admission of Contention 5 based on a claim of new information ("Intervenors' Initial Motion to Amend Contention 5").¹⁸ On February 27, 2012, FENOC submitted a Shield Building Root Cause Report ("Root Cause Report") to the NRC, which "included the results of the root cause

¹³ See, e.g., Staff's Answer to Contention 5 at 1-2;16 ("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.").

¹⁴ FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012) (ADAMS Accession No. ML12037A245).

¹⁵ See "Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5," (Feb. 13, 2012) ("Intervenors' Reply") (ADAMS Accession No. ML12044A361). FENOC filed a motion to strike portions of Intervenors' Reply. 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). Intervenors and Staff timely filed answers to FENOC's motion to strike. See "Intervenors' Answer to FENOC's 'Motion to Strike,'" (Feb. 27, 2012) (ADAMS Accession No. ML12058A260); 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).

¹⁶ 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).

¹⁷ 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).

¹⁸ See Intervenors' Initial Motion to Amend Contention 5.

evaluation and corrective actions, including long-term monitoring requirements.”¹⁹ The Root Cause Report concluded that the direct cause of the shield building cracking was “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...that did not specify application of an exterior sealant from moisture.”²⁰ On March 8, 2012, both FENOC and Staff filed answers opposing Intervenors’ motion to amend their motion for admission of contention 5.²¹ On March 28, 2012, the Board issued an order scheduling oral argument on the admission of Contention 5 for May 18, 2012.²²

On April 5, 2012, FENOC submitted revisions to the LRA²³ which included an AMP related to the recently identified shield building cracking in response to an NRC request for additional information (“Shield Building Monitoring AMP”).²⁴ FENOC’s submission explained that while the Root Cause Report did not identify any new aging effects associated with the shield building cracking, “a new plant-specific aging management program titled ‘Shield Building Monitoring Program’ is provided to periodically inspect the [shield building] to confirm that there

¹⁹ 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). See *also* CAL No. 3-11-001 (Dec. 2, 2011) (ADAMS Accession No. ML11336A355) (noting that “FENOC will provide the results of the root cause evaluation and corrective actions to the NRC, including any long-term monitoring requirements, by February 28, 2012.”).

²⁰ Root Cause Report at 59. Notably, the Root Cause Report concluded that “[t]here was no evidence of typical concrete time-dependent aging failure modes.” *Id.* at 6.

²¹ See NRC Staff’s Answer to Intervenors’ Motion to Amend ‘Motion for Admission of Contention No. 5’ (Mar. 8, 2012) (ADAMS Accession No. ML12068A095); FENOC’s Answer Opposing Intervenors’ Motion to Amend Proposed Contention 5 on Shield Building Cracking (Mar. 8, 2012) (ADAMS Accession No. ML12068A429).

²² Notice and Order (Scheduling Oral Argument) (Mar. 28, 2012) (ADAMS Accession No. ML12088A340).

²³ FENOC’s April 5, 2012 Submittal.

²⁴ See *id.* The new AMP is in Section B.2.43 and is entitled “Shield Building Monitoring Program.”

are no changes in the nature of the identified laminar cracks.”²⁵ The Shield Building Monitoring AMP’s stated purpose is to “provide reasonable assurance that the existing environmental conditions will not cause aging effects that could result in a loss of component intended function.”²⁶

On April 16, 2012, FENOC filed an unopposed motion for leave to supplement its answer to proposed Contention 5 regarding shield building cracking (“FENOC’s Motion to Supplement”).²⁷ In its Motion to Supplement, FENOC argued that the Shield Building Monitoring AMP “moots both (1) the proposed Contention [5]’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.”²⁸ On April 17, 2012, the Board granted FENOC’s Motion to Supplement.²⁹ On May 14, 2012, Intervenors filed an unopposed motion to vacate and reschedule oral argument on Contention No. 5 (“Intervenors’ Motion to Vacate Oral Argument”).³⁰ In that motion, Intervenors requested that the Board vacate the May 18, 2012

²⁵ FENOC’s April 5, 2012 Submittal at 5. The Shield Building Monitoring AMP is described in Section B.2.43 of the LRA.

²⁶ FENOC’s April 5, 2012 Submittal, Enclosure at 15. FENOC indicated that the “requirements of the plant-specific Shield Building Monitoring [AMP] are to be administered in conjunction with the existing Structures Monitoring Program.” FENOC’s April 5, 2012 Submittal, at 6.

²⁷ See FENOC’s Unopposed Motion for Leave to Supplement Its Answer to the Proposed Shield Building Cracking Contention (Apr. 16, 2012) (ADAMS Accession No. ML12107A485) (“FENOC’s Motion to Supplement”).

²⁸ *Id.* at 2. See also *id.* (stating that 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”).

²⁹ Board Order (Granting FENOC’s Unopposed Motion for Leave to Supplement Its Answer) (Apr. 17, 2012) (ADAMS Accession No. ML12108A213).

³⁰ See Intervenors’ Unopposed Motion to Vacate and Reschedule Oral Argument on Proposed Contention No. 5 (May 14, 2012) (ADAMS Accession No. ML12135A405).

oral argument so that they could “move to amend or supplement their proposed Contention 5 based upon the [Shield Building Monitoring AMP].”³¹

On May 15, 2012, the Board issued an order granting Intervenors’ Motion to Vacate Oral Argument.³² On May 16, 2012, FENOC submitted a Revised Root Cause Analysis, which incorporated observations made by NRC during an on-site inspection. (“Revised Root Cause Report”). FENOC noted that “[t]hese observations did not affect the overall conclusions [of the Root Cause Report] or the corrective actions being taken.”³³ On June 4, 2012, Intervenors filed the instant motion to amend/supplement proposed Contention 5. On June 21, 2012, Staff issued an inspection report regarding the evaluation of FENOC’s root cause analysis and corrective actions related to the cracking in the shield building.³⁴

I. Legal Requirements for Amended Contentions

Intervenors’ Motion “move[s] the Board to allow them to supplement and amend their proposed Contention 5,”³⁵ which was submitted on January 10, 2012.³⁶ As discussed in the Staff’s Answer to Intervenors’ Initial Motion to Amend Contention 5, the Commission does not

³¹ *Id.* at 2.

³² See Order (Granting Unopposed Motion to Vacate Oral Argument) (May 15, 2012) (ADAMS Accession No. ML12136A456).

³³ L-12-205, Submittal of Revision 1 of Shield Building Root Cause Evaluation (May 16, 2012) (ADAMS Accession No. ML12142A053). See *also id.* at 5-7 (summarizing revisions and noting that the NRC’s inspection observations do not invalidate the methodology, assessment and analysis, or conclusions of the root cause analysis report, but do identify areas for improvement).

³⁴ Davis-Besse Nuclear Power Station – Inspection to Evaluate the Root Cause Evaluation and Corrective Actions for Cracking in the Reinforced Concrete Shield Building of the Containment System 05000346/2012 009 (DRS) (June 21, 2012) (ADAMS Accession No. ML12173A023).

³⁵ Intervenors’ Motion at 1. See *generally Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 & n.103 (2010) (“The reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”) (emphasis in original; footnote and internal quotation marks omitted).

³⁶ Intervenors’ Motion to Admit Contention 5.

look with favor on new or amended contentions filed after the initial filing,³⁷ 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).”³⁸ 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.³⁹ Additionally, late-filed contentions must meet the threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1).⁴⁰

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.⁴¹

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

³⁷ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004)(noting that the Commission “does not look with favor on ‘amended or new contentions filed after the initial filing.’”).

³⁸ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009) (internal citations omitted).

³⁹ See Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (ADAMS Accession No. ML110490269).

⁴⁰ *Oyster Creek*, CLI-09-7, 69 NRC 235, 261 (2009).

⁴¹ 10 C.F.R. § 2.309(f)(2).

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).⁴²

As discussed in the Staff's Answer to Intervenors' Initial Motion to Amend Contention 5, 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.⁴³ 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 motion.⁴⁴ 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."⁴⁵ As the Commission noted in *Prairie Island*⁴⁶, 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.

⁴² Board's 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. Intervenors' Motion does not address the § 2.309(c) factors, and does not demonstrate good cause despite a failure to plead it.

⁴³ *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).

⁴⁴ *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)).

⁴⁵ *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).

⁴⁶ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

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.⁴⁷ Thus, the Commission has noted that alleged new and materially different information must articulate a “reasonably apparent” foundation for the contention.⁴⁸ Fourth, simply rehashing old arguments is not enough to meet the materially different standard in 10 C.F.R. § 2.309(f)(2)(ii).⁴⁹ Instead, the Commission has stated that petitioners filing amended contentions must show how their arguments supporting the contention differ from their previous arguments.⁵⁰ Finally, the Commission considers information new and materially different when the Staff is considering the information for the first time in responding to issues relevant to the contention.⁵¹

II. Mootness Doctrine Regarding Contentions of Omission

Intervenors and FENOC recognize that Contention 5, as proposed by the Staff, is a contention of omission.⁵² As the Commission has repeatedly stated, 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

⁴⁷ 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).

⁴⁸ *Id.* at 495.

⁴⁹ 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).

⁵⁰ *Id.*

⁵¹ See *Pa’ina Hawaii, LLC*, (Materials License Application), CLI-10-18, 72 NRC 56, 79 (2010).

⁵² Intervenors’ Motion at 2 (“The NRC Staff has proposed alternative wording [for Contention 5] which would transform the contention into a contention of omission.”); FENOC’s Motion to Supplement at 2 (noting that Staff’s revised contention was one of omission that was mooted by Shield Building Monitoring AMP).

application.”⁵³ A “‘classic’ contention of omission ... [is] an argument that an application omits one or more necessary safety-related steps or analyses.”⁵⁴ The Commission has explained:

Where a contention challenges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. Without requiring submission of a new or amended contention, the original “omission” contention could be transformed into a broad series of disparate claims. This approach would, in turn, circumvent NRC contention pleading standards and defeat the contention rule’s purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual genuine dispute with the applicant on a material issue of law or fact.

Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002), *clarifying* CLI-02-17, 56 NRC 1 (2002). *See also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-7, 59 NRC 259, 263 (2004).

Therefore, when a contention claims that an application fails to include a particular analysis, the subsequent inclusion of the analysis in the application moots the contention. *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 36 n. 44 (2010). “The contention must then be modified as a contention attacking the adequacy of the now-included analysis, or dismissed as moot.” *Id.* A contention can be found moot by the presiding officer as part of the contention admission phase of the proceeding.⁵⁵

Importantly, the Commission has made clear that when challenging the adequacy of an analysis included in an application, it is not enough for an intervenor to merely state it is deficient. Instead, an intervenor must “indicate what is wrong with [the analysis or

⁵³ *Progress Energy Carolinas, Inc.*, (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010); *See also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)).

⁵⁴ *South Carolina Electric & Gas Co. & South Carolina Public Service Authority* (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1,9 (2010).

⁵⁵ *USEC* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (2006). *See also South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, 70 NRC 581, 596 (2009) (holding that proposed contention was moot given submission of additional information by applicant).

discussion.]”⁵⁶ Here, despite FENOC’s submission of a specific AMP for the shield building, Intervenor’s remain silent as to any issue they take with any specific portion of the AMP.

III. Admissibility of Intervenor’s Proposed Amendments or Supplements to Contention 5

As discussed in detail below, Intervenor’s Motion should be denied because (1) Intervenor’s did not include a certification in their Motion or consult with the parties, (2) Intervenor’s did not indicate how any information was new and material, (3) the Shield Building Monitoring AMP renders proposed Contention 5 moot, (4) Intervenor’s do not challenge the adequacy of any specific portion of the Shield Building Monitoring AMP, and (5) Intervenor’s Motion does not meet the contention admissibility requirements.

A. Intervenor’s Motion Does Not Include the Required Certification and Intervenor’s Did Not Consult Before Filing Their Motion

Once again, Intervenor’s Motion contains no certification that Intervenor’s made a sincere attempt to resolve the issues raised by their Motion.⁵⁷ Therefore, pursuant to the Commission’s regulations and the Board’s ISO, the Intervenor’s 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

⁵⁶ *Progress Energy Carolinas, Inc.*, (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010). See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002)).

⁵⁷ Intervenor’s also failed to include a certification in their initial Motion to Amend Contention 5. See NRC Staff’s Answer to Intervenor’s Motion to Amend ‘Motion for Admission of Contention No. 5’. This Board has held that motions that do not meet § 2.323 can be dismissed on that ground alone. See *Davis-Besse*, LBP-11-34, 74 NRC at ___ (slip op. at 12) (noting that Intervenor’s “made no attempt to contact FirstEnergy or its counsel and resolve the issues raised in the Motion and New Contention” and that “Intervenor’s 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.”). Additionally, the Board’s ISO states that “motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. § 2.323(b).” Board’s ISO at 18. Therefore, Intervenor’s should know that these procedural deficiencies are grounds for dismissal of their motion.

clearly 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.”⁵⁸

Additionally, the Intervenors did not consult with the parties before filing their motion. Instead, Intervenors only indicated an intent to file a motion to amend or supplement Contention 5 in their Motion to Vacate Oral Argument.⁵⁹ But Intervenors did not consult with the parties before filing the instant motion. Therefore, the parties did not have notice about the Intervenors’ concerns.⁶⁰ Moreover, in their Motion to Vacate Oral Argument, Intervenors only indicated that any motion to amend or supplement would be based on the Shield Building Monitoring AMP.⁶¹ But Intervenors’ Motion discusses several other documents as allegedly having “troubling new information” regarding the shield building cracking which allegedly render the Shield Building Monitoring AMP “suspect.”⁶² Given these procedural deficiencies, the Intervenors’ Motion should be denied.

⁵⁸ Board’s ISO at G.1.

⁵⁹ See Intervenors’ Motion to Vacate Oral Argument at 2 (noting that Intervenors wish to avail themselves of the option to move to amend or supplement their proposed Contention 5 based upon FENOC’s Shield Building Monitoring AMP).

⁶⁰ See Davis-Besse, LBP-11-34, 74 NRC at ___ (slip op. at 12) (noting that one purpose of consultation is for parties to resolve the issues raised in a motion).

⁶¹ See Intervenors’ Motion to Vacate Oral Argument at 2 (noting that Intervenors wish to avail themselves of the option to move to amend or supplement their proposed Contention 5 based upon FENOC’s Shield Building Monitoring AMP).

⁶² Intervenors’ Motion at 3 (citing to Revised Root Cause Report and Performance Improvement International’s “Root Cause Assessment, Davis-Besse Shield Building Laminar Cracking Report”). Notably, Intervenors’ Motion states that they reserve their right to *later* supplement Contention 5 based on the Revised Root Cause Report. Intervenors’ Motion at 2 (emphasis added). This suggests that the instant motion is not alleging new and material information related to that document. But then the motion goes on to assert that the Revised Root Cause Report contains “troubling new information.” *Id.* at 3.

B. Only the Shield Building Monitoring AMP is New and Material Information

Intervenors' Motion purports to amend or supplement the bases for proposed Contention 5, which was filed on January 10, 2012.⁶³ In order to admit their new contention under 10 C.F.R. § 2.309(f)(2), Intervenors must show that the information upon which Contention 5 is based was not previously available, that such information is materially different from the information previously available, and that they submitted the contention in a timely fashion based on the availability of this information. Pursuant to the Board's initial scheduling order, a new contention is deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty days of the date when the information on which it is based first becomes available to the moving party through service, publication, or any other means.⁶⁴

Here, Intervenors only assert that "their supplemental facts are timely submitted under the Commission's standard in 10 C.F.R. § 2.309(f)(2)(i)-(iii),"⁶⁵ and do not address the non-timely filing standards in 10 C.F.R. § 2.309(c).⁶⁶ Intervenors argue that the purpose of their motion is to "expos[e] discrepancies between FENOC's February 27, 2012 [Root Cause Report] and the [Shield Building Monitoring] AMP."⁶⁷ Intervenors assert that the "information on which the [proposed amended and/or supplemented Contention 5] is based is materially different than information previously available ... because it relates to findings and commitments that did not

⁶³ Intervenors' Proposed Contention 5, submitted on January 10, 2012, stated: Intervenors 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.*

⁶⁴ Board's ISO at B.1. "If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c)." *Id.*

⁶⁵ Intervenors' Motion at 13.

⁶⁶ *Id.* at 8. See discussion of § 2.309 *infra*. The Staff notes that Commission precedent provides that a failure to plead the non-timely factors is reason enough for dismissal. *Calvert Cliffs*, CLI-06-21, 64 NRC at 33. Intervenors also did not plead the non-timely factors in their Initial Motion to Amend Contention 5.

⁶⁷ Intervenors' Motion at 2.

exist when Intervenors moved for admission of Contention 5 in January 2012.”⁶⁸ Specifically, Intervenors note that their Motion is timely “because it is filed within sixty (60) days of the [Shield Building Monitoring AMP] release on April 5, 2012, and 60 days is the period ordered by the [Board] in which Intervenors must act.”⁶⁹

The Staff recognizes that the Shield Building Monitoring AMP is new information that is relevant to proposed Contention 5. Specifically, the Shield Building Monitoring AMP was submitted less than 60 days prior to Intervenors’ Motion, and directly addresses the recently identified shield building cracking and FENOC’s plans to manage any possible aging effects associated with the cracking. The Staff is currently reviewing FENOC’s Shield Building Monitoring AMP. As discussed above, the Commission considers information new and materially different when the Staff is considering the information for the first time in responding to issues relevant to the contention.⁷⁰ Therefore, Intervenors’ Motion properly describes the Shield Building Monitoring AMP as new and materially different information related to proposed Contention 5.⁷¹

C. Other Documents Referenced By Intervenors Do Not Contain New and Material Information

However, Intervenors’ Motion also attempts to use the Shield Building Monitoring AMP to justify supplementing the bases of their proposed Contention 5 with information that cannot satisfy the timeliness standards. For example, Intervenors seek to supplement proposed Contention 5 with references to RAIs from 2011, the Root Cause Report, the Revised Root Cause Report, and Performance Improvement International’s “Root Cause Assessment, Davis-

⁶⁸ Intervenors’ Motion at 13-14.

⁶⁹ *Id.* at 14.

⁷⁰ See *Pa’ina*, CLI-10-18, 72 NRC at 79 (2010).

⁷¹ As discussed below, the Shield Building Monitoring AMP moots proposed Contention 5.

Besse Shield Building Laminar Cracking” report,⁷² which all preceded their motion by more than 60 days, including some that preceded the initial proposed Contention 5. Intervenors’ Motion should be denied because these documents are either not new and/or Intervenors have not demonstrated that information in these documents is materially different from information previously available.

1. 2011 RAIs Do Not Contain New and Material Information

Intervenors argue that the 2011 RAIs contain information indicating “other water problems inside the shield building.”⁷³ First, the 2011 RAIs have been publicly available for more than a year.⁷⁴ Therefore, under the Board’s ISO, they are not timely raised and Intervenors did not plead the non-timely factors in § 2.309(c). Second, Intervenors do not indicate how information in the 2011 RAIs is materially different than information previously available. Intervenors do not indicate how this alleged water problem relates to the cracking in the shield building, the subject of their proposed Contention 5. As discussed above, alleged new and materially different information must (1) support the proposed contention,⁷⁵ and (2) articulate a “reasonably apparent” foundation for the contention.⁷⁶ Thus, even if these documents were newly available, Intervenors have not shown they contain materially different

⁷² Intervenors’ Motion at 2-3. As discussed, Intervenors failed to consult with the other parties regarding these documents before filing their motion on June 4, 2012. Therefore, Intervenors’ Motion should be denied.

⁷³ Intervenors’ Motion at 12 (citing to a May 24, 2011 RAI response).

⁷⁴ See L-11-153, Davis-Besse Nuclear Power Station, Unit No. 1, Docket No. 50-346, License Number NPF-3, Reply to Requests for Additional Information for the Review of the Davis-Besse Nuclear Power Station, Unit No. 1. License Renewal Application, Batch 2 and Batch 1 (TAC No. ME4640), and License Renewal Application Amendment No. 7 (May 24, 2011) (ADAMS Accession No. ML11151A090). This RAI response was made available in ADAMS on May 31, 2011, more than seven months before Intervenors filed their initial motion on Contention 5.

⁷⁵ 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).

⁷⁶ *Id.* at 495.

information. Third, Intervenors did not plead the late-filed factors, and do not meet them despite a failure to plead them, particularly since the 2011 RAIs were available months before their initial proposed Contention 5 was filed. For all these reasons, the Board should not allow Intervenors to amend or supplement proposed Contention 5 with any bases related to the 2011 RAIs.

2. The Root Cause Report Does Not Contain New and Material Information

Regarding the Root Cause Report, Intervenors assert that there are “discrepancies between FENOC’s [Root Cause Report] and the [Shield Building Monitoring AMP],”⁷⁷ and that these discrepancies constitute new and materially different information. Intervenors argue that because FENOC submitted revisions to the Root Cause Report to the NRC (i.e., the Revised Root Cause Report), (1) FENOC has violated 10 C.F.R. § 50.9 and (2) the Shield Building Monitoring AMP “should be held suspect.”⁷⁸ Specifically, Intervenors assert that the NRC “forced FENOC to revise its [Root Cause Report] to explain why it had not weather-sealed its shield building ... [and that] FENOC still has not explained why.”⁷⁹

As an initial matter, the NRC did not force FENOC to revise its Root Cause Report and submittal of the Revised Root Cause Report did not constitute a violation of 10 C.F.R. § 50.9. The Staff identified minor weaknesses associated with the level of detail in the documentation provided, and reviewed FENOC’s corrective actions to address the causes of the shield building

⁷⁷ Intervenors’ Motion at 2. While Intervenors’ Motion only mentions the Root Cause Report, later in their Motion, they discuss the Revised Root Cause Report and how it allegedly renders the Shield Building Monitoring AMP suspect, so the Staff addresses both the Root Cause Report and the Revised Root Cause Report as sources of new and material information.

⁷⁸ Intervenors’ Motion at 3.

⁷⁹ *Id.*

laminar cracking.⁸⁰ FENOC voluntarily entered these observations into its corrective action system, and submitted a Revised Root Cause Report to incorporate the NRC's observations.⁸¹

In any event, the root cause of the shield building cracking is not at issue in Intervenor's proposed Contention 5. Intervenor's proposed Contention 5 asserts that regardless of the cause,⁸² the shield building cracking 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." Therefore, the root cause of the cracking is irrelevant for purposes of proposed Contention 5. Intervenor has not indicated how information related to the root cause of the cracking is new and material within the meaning of the Board's ISO, the regulations, and Commission caselaw.⁸³ This is especially important in light of Intervenor's admission that the cause of the cracking is not material.⁸⁴ Therefore, the Board should not admit these proposed amended/supplemental bases.

⁸⁰ Davis-Besse Nuclear Power Station – Inspection to evaluate the Root Cause Evaluation and Corrective Actions for Cracking in the Reinforced Concrete Shield Building of the Containment System 05000346/2012 009 (DRS) (June 21, 2012) (ADAMS Accession No. ML12173A023). The Staff noted that "the NRC has ongoing reviews as part of your Davis-Besse License Renewal Application that will evaluate your proposed program for monitoring of the shield building cracking. Overall, the team concluded that your corrective and preventative actions for the causes of the shield building laminar cracking, if adequately implemented, would prevent recurrence, and provide reasonable assurance for maintaining the shield building safety functions." *Id.* at coverage.

⁸¹ See Revised Root Cause Report.

⁸² The proposed contention stated that at the time filed, the cracking was "of unknown origin." Intervenor's Motion at 2.

⁸³ Additionally, while Intervenor claims that FENOC did not explain why the shield building was not weather sealed, Intervenor's Motion quotes the exact portion of the Revised Root Cause Report that explains why an exterior protective sealant on the shield building was not applied. See Intervenor's Motion at 4 (citing page 33 of Revised Root Cause). See also Intervenor's Motion at 4 (citing Revised Root Cause Report p. 5 "Information regarding why the shield building design did not include a requirement for an exterior protective sealant was added in section 3.3.5 – Design [page 33], and Attachment 6 – Shield Building Milestones [pages 86 & 88]."

⁸⁴ As discussed, the proposed contention stated that at the time filed, the cracking was "of unknown origin." Intervenor's Motion at 2. Thus, the cause of the cracking was not a concern described in the proposed contention.

3. The Revised Root Cause Report Does Not Contain Materially Different Information

The Revised Root Cause Report is new information, in that it contains revisions from the Root Cause Report that were made available within 60 days of the filing of Intervenors' Motion. However, Intervenors have not indicated how any of the revisions are materially different from information previously available about the shield building cracking.⁸⁵ Notably, the Revised Root Cause Report repeatedly states that the revisions to the Root Cause Report do not "invalidate the methodology, assessment and analysis, or conclusions of the root cause analysis report..."⁸⁶ Despite these statements, Intervenors allege that the Revised Root Cause Report was "extensively revised,"⁸⁷ and that the Revised Root Cause Report renders the Shield Building Monitoring AMP suspect.⁸⁸ Even assuming the revisions were extensive, Intervenors do not indicate how any of these revisions to the Root Cause Report are materially different from information previously available.⁸⁹

For example, Intervenors appear to assert that the Revised Root Cause Report contains new and material information regarding the coating on the shield building dome parapet area.⁹⁰ Intervenors state that to their knowledge, "FENOC has never acknowledged that the shield

⁸⁵ Intervenors' Motion states that it is based on differences in the Feb. 27 version of the Root Cause and the Shield Building Monitoring AMP, but that they reserve their right to supplement based on a closer reading of the Revised Root Cause Report. But then Intervenors discuss "troubling new information" in the Revised Root Cause that "undermines" the Shield Building Monitoring AMP."

⁸⁶ Revised Root Cause Report at 5. *Id.* at coveragepage (noting that revisions based on NRC observations did not affect the overall conclusions or corrective actions being taken).

⁸⁷ Intervenors' Motion at 13.

⁸⁸ *Id.* at 3.

⁸⁹ The Revised Root Cause Report contains a summary of changes made to the Root Cause Report (see pages 5-7 of Revised Root Cause Report). Additionally, FENOC italicized all changes in the Revised Root Cause Report. See coveragepage to Revised Root Cause Report ("information added or clarified in the report is identified by italics text."). See, e.g., pgs. 22, 25, 27, 29, 33, and 46.

⁹⁰ See Intervenors' Motion at 4 (noting that on page 29 of the Revised Root Cause Report, FENOC reported that the dome parapet coating was laid on 1/4 inch thick). See *also id.* at 4-5 (discussing how the Revised Root Cause Report discussed how a thinner replacement coat was applied).

building dome parapet had been weather sealed until the May 16 Revised [Root Cause Report.]”⁹¹ While this may be true, Intervenors do not show how information in the Revised Root Cause Report regarding the dome parapet is materially different from information previously available in terms of proposed Contention 5.⁹² It appears that Intervenors are arguing that had the shield building been sealed like the dome parapet, then the shield building cracking would not have occurred.⁹³ But as discussed above, the cause of the shield building cracking is not at issue in Intervenors’ proposed Contention 5, and Intervenors seem to be fully aware of this issue and thus the information is clearly not new.

Instead, Intervenors’ apparent concern was that FENOC did not discuss the cracking in the LRA or propose a plan to adequately manage any aging effects associated with the cracking.⁹⁴ FENOC’s LRA has been amended to include (1) a discussion of the shield building cracking and (2) a new AMP specific to monitoring the shield building cracking. Intervenors do not indicate how the dome parapet information relates to the Shield Building Monitoring AMP or how the dome parapet information constitutes new and material information related to Intervenors’ proposed Contention 5. Therefore, the Board should not allow Intervenors to supplement or amend proposed Contention 5 based on this information.

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

⁹¹ *Id.* at 5.

⁹² Intervenors also do not indicate how the dome parapet coating relates to the shield building cracking. Likewise, Intervenors state that there are “construction defects” related to the rebar installation. See Intervenors’ Motion at 8. However, Intervenors do not indicate what these claimed defects have to do with the Shield Building Monitoring AMP’s adequacy.

⁹³ See Intervenors’ Motion at 5.

⁹⁴ The remaining assertions and bases did not meet the admissibility requirements, as outlined in Staff’s Answer to Contention 5 and below.

required criteria in 10 C.F.R. § 2.309(c) when attempting to add new bases and supporting material for a contention.⁹⁵

Thus, Intervenor's Motion should be denied because they do not meet the timely filing requirements, did not plead the non-timely filing requirements, and did not adequately consult as to this information.

D. The Shield Building Monitoring AMP Renders Proposed Contention 5 Moot

Intervenor's Motion should also be denied because the Shield Building Monitoring AMP renders proposed contention 5 moot, even as supplemented. Specifically, Intervenor argued that the LRA was deficient because it did not discuss the recently identified cracking in the shield building, a safety significant issue for license renewal.⁹⁶ Intervenor further argued that "the cracking should be considered as an aging feature at Davis-Besse, which requires explicit plans for remediation and management."⁹⁷ The Staff agreed with this proposition, assuming the cracking was found to be aging-related, and argued that proposed Contention 5 could be an admissible contention of omission to the extent it claimed the LRA did not discuss how an AMP would manage any aging effects associated with the recently identified shield building cracking.⁹⁸

FENOC responded by submitting the Shield Building Monitoring AMP, which revised its LRA. Therefore, the LRA now includes a discussion of the recently identified shield building

⁹⁵ 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).

⁹⁶ Specifically, Intervenor asserted that "[t]he shield structure is a feature requiring aging-management review [and] the cracking problem must be addressed as part of the license extension determination." Intervenor's Motion to Admit Contention 5 at 2. See *also id.* (asserting that "cracking should be considered as an aging feature at Davis-Besse, which requires explicit plans for remediation and management").

⁹⁷ Intervenor's Motion to Admit Contention 5 at 2. Intervenor also asserted that the cracking should be analyzed in the Staff's SEIS. However, this claim is inadmissible, as detailed in Staff's Answer to Contention 5.

⁹⁸ Staff's Answer to Contention 5 at 1-2, 16.

cracks and FENOC's plans to address these cracks during the period of extended operation. FENOC created a site-specific AMP to prevent and manage any possible aging effects associated with the recently identified shield building cracking, even though the Root Cause Report concluded that the cracking was not aging-related.⁹⁹ FENOC submitted this AMP on the docket on April 5, 2012, to amend its LRA, and has supplemented its Answer to Contention 5 with this information. Therefore, the LRA now includes a discussion of the recently identified shield building cracking and an AMP to address any possible aging effects associated with the cracking. The Staff continues to review the Shield Building Monitoring AMP. While the Staff's review is still ongoing, Commission caselaw states that "[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."¹⁰⁰ Therefore, Contention 5, as proposed by Staff, is moot.¹⁰¹

E. Intervenors Do Not Challenge the Adequacy of the Shield Building Monitoring AMP

Because the Shield Building Monitoring AMP moots Contention 5, the Intervenors' Motion must challenge the adequacy of the Shield Building Monitoring AMP. *Levy County*, CLI-10-2, 71 NRC at 36 n. 44. As discussed above, this challenge must be more than merely alleging that the analysis is deficient. *Progress Energy Carolinas, Inc.*, (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010). Intervenors must point to the specific ways in which the Shield Building Monitoring AMP is wrong or inadequate. *Id.* However, the Intervenors' Motion does not do this. Instead, Intervenors' Motion generally

⁹⁹ FENOC's April 5, 2012 Submittal.

¹⁰⁰ *McGuire*, CLI-02-28, 56 NRC at 382-83.

¹⁰¹ And Contention 5 as initially proposed by Intervenors is also moot to the extent that the remainder of the claims and bases underlying the proposed contention are inadmissible.

attacks the Shield Building Monitoring AMP, calling it a “plan to have a plan.”¹⁰² However, the Shield Building Monitoring AMP provides specific details on the inspections, tests, and monitoring that will be performed.

For example, FENOC notes that the Shield Building Monitoring AMP will “periodically inspect the structure to confirm that there are no changes in the nature of the identified laminar cracks.”¹⁰³ In terms of testing, FENOC notes that the Shield Building Monitoring AMP includes “inspections or testing to monitor the condition of the sealant or coating that is planned to be applied to the Shield Building ... and that the current Davis-Besse procedures for the evaluation of structures ... is being revised to incorporate a section specifically for the long term monitoring of the Shield Building laminar cracks.”¹⁰⁴

Intervenors do not indicate why these planned activities, or any others associated with the Shield Building Monitoring AMP, would be inadequate, even assuming that the blizzard of 1978 was not the cause of the cracking.¹⁰⁵ As discussed, intervenors must do more to claim that a discussion of an issue is deficient; they must identify what is wrong. *Shearon Harris*, CLI-10-9, 71 NRC at 270. Therefore, Intervenors’ Motion should be denied.

F. Intervenors Do Not Meet the Contention Admissibility Requirements

Instead of attacking the adequacy of the Shield Building Monitoring AMP, Intervenors’ Motion attacks the (1) investigation done on the shield building cracking, (2) decision 40 years ago to not weather seal the shield building, (3) management practices of FENOC, and (4) Root

¹⁰² Intervenors’ Motion at 6, 8, and 9.

¹⁰³ FENOC’s April 5, 2012 Submittal, at page 5, item 3 (citing RAI Request #4 for more information).

¹⁰⁴ *Id.* at 6.

¹⁰⁵ Intervenors note that the “conclusion that the ‘Blizzard of ’78 did it’ is viewed with skepticism because the engineering literature is disputed over how forceful the delivery of precipitation must be for it to penetrate concrete.” Intervenors’ Motion at 6. But as discussed, the cause of the cracking is not at issue in proposed Contention 5. Whether or not “something much less than the drama of the Blizzard might have produced the [shield building cracks],” *id.* at 6, the issue is whether the Shield Building Monitoring AMP is adequate to manage any aging effects of the cracks.

Cause Report, among other things. However, these assertions, bases, and arguments are simply beyond the scope of this narrow license renewal proceeding. Therefore, Intervenors' Motion should be denied and Contention 5 should be found inadmissible.

1. Claims Related to Davis-Besse's Current Operation are Outside the Scope of this Proceeding

Like both the Motion to Admit Contention 5 and the Initial Motion to Amend Contention 5, the instant motion contains several claims that the recently identified shield building cracks constitute a current safety issue. For example, Intervenors claim the Shield Building Monitoring AMP is deficient because it is not currently managing the shield building cracking.¹⁰⁶ Intervenors also claim that the investigation into the shield building cracking is "wholly-incomplete [and] tokenistic," leaving the "true extent of the cracking and deterioration of the shield building...unknown."¹⁰⁷ Further, Intervenors assert that FENOC provided incomplete and erroneous information in the Root Cause Report and that the re-submittal of the Revised Root Cause Report "constitute[s] *prima facie* evidence that FENOC violated [10 C.F.R.] § 50.9."¹⁰⁸ Intervenors also reference other components which have failed and suffered degradation.¹⁰⁹

¹⁰⁶ "Where one might expect immediate, priority current regulation activities to be complete, they are relegated to be dealt with in the future in the RAI AMP." Intervenors' Motion at 8. Intervenors also reference FENOC's plan to re-establish the design and licensing basis conformance of the shield building. *Id.* This relates to the current operation of the plant, and is therefore outside the scope of this proceeding.

¹⁰⁷ *Id.* at 6. *See also id.* at 9-10 (noting the "limited scope of the investigation of the cracking which has taken place to date" and a "failure to inspect in a serious fashion"); *id.* (noting that only 15 of 16 flute shoulders were analyzed for damage); *id.* at 12 -13 (arguing that lack of quality assurance control 40 years ago should spur complete investigation); *id.* at 13 (claiming that FENOC should address "potential for concrete damage emanating outward from inside the shield building").

¹⁰⁸ *Id.* at 3 (citing Union of Concerned Scientists' May 25, 2012 letter).

¹⁰⁹ *Id.* at 7 (discussing dome parapet roof coating and other components). *See id.* at 8 (discussing purported construction defects). *Id.* at 12 (noting "history of ground water infiltration into the annular space between the concrete shield building and steel containment.").

Finally, Intervenor's assert that there are multiple deficiencies in the Root Cause Report¹¹⁰ and Revised Root Cause Report.¹¹¹

These claims are not only inaccurate,¹¹² but they raise current safety issues and are therefore outside the scope of the proceeding. *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, CLI-01-17, 54 NRC 3, 8-10.¹¹³ If there are questions about the integrity of the shield building or a violation of § 50.9, the Commission will address them as part of its continuing responsibility to oversee the safety and security of ongoing plant operations. See *Turkey Point*, CLI-01-17, 54 NRC at 8-10 (holding that for license renewal, the Commission has found it unnecessary to include a review of issues already monitored and reviewed in the ongoing regulatory oversight processes). Thus, the Intervenor's claims regarding current operation are outside the scope of the proceeding.¹¹⁴

2. "Safety Culture" Claims are Outside the Scope of the Proceeding

Intervenor's Motion asserts that Davis-Besse's operational history suggests that there is a "safety culture" issue at the plant.¹¹⁵ Specifically, Intervenor's assert that there is a "history of misleads and reluctance on FENOC's part to be candid with the public," and that FENOC is

¹¹⁰ *Id.* at 10 (noting concrete spalling discussed in a 2011 RAI).

¹¹¹ *Id.* at 10-11 (discussing history of cracking in dome). See *id.* at 11-12 (claiming that Root Cause Report and Revised Root Cause Report are deficient because they do not discuss interior of shield building); *id.* at 11 ("But the root cause investigation narrowly scrutinizes the shield building exterior weather factors affecting the exterior only from 1978 forward.").

¹¹² The NRC determined that the cracks, as they are, do not impact the structural integrity of the building. See CAL No. 3-11-001. And the Staff has not found that FENOC violated § 50.9, and the revisions to the Root Cause Report do not constitute *prima facie* evidence of a violation of that rule.

¹¹³ See, e.g., 10 C.F.R. § 54.30(a) and (b) (noting that if license renewal review of a plant demonstrates that plant will not comply with its CLB during the current licensing term, the licensee must take actions to address the noncompliance, and the licensee's compliance with this requirement is not within the scope of the license renewal review).

¹¹⁴ To the extent Intervenor's believe there are existing operational issues at Davis-Besse that warrant immediate action, their remedy is to file a § 2.206 petition.

¹¹⁵ Intervenor's Motion at 17, 18. See also Intervenor's Motion to Admit Contention 5.

being “specious” in justifying its reasons for not coating the shield building.¹¹⁶ Further, Intervenor claim that FENOC must be “coddled and pressured for facts and explanations.”¹¹⁷ Intervenor state that there is an “absurd theme that runs throughout FENOC’s management decisions over the years...that convenience outweighs safety concerns.”¹¹⁸ Intervenor conclude that the “history of crisis management at Davis-Besse – or certainly, the public perceptions of the same – is shameful. FirstEnergy is not transparent in its investigations and repeatedly has been found not to be forthright with the public.”¹¹⁹

Intervenor’s “safety culture” claims amount to a challenge that Davis-Besse is unsafe to operate currently and/or during the period of extended operation based on past operational experience. The Commission has found that such “safety culture” contentions are outside the scope of license renewal, as they impermissibly raise issues that are relevant to current plant operation and are being addressed by the NRC’s established and ongoing oversight activities. See *Prairie Island*, CLI-10-27, 72 NRC at 490-92; see also *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __ (Oct. 12, 2011) (slip op. at 9-13). Thus, these “safety culture” claims are inadmissible.¹²⁰

3. Even if Intervenor’s Claims Regarding Current Operation Were Within the Scope of this Proceeding, They Lack an Adequate Basis and Are Immaterial

Even assuming Intervenor’s claims about the current safety of Davis-Besse were within the scope of the proceeding, these portions of Contention 5 would not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1), as they lack an adequate basis and are immaterial.

¹¹⁶ Intervenor’s Motion at 5-6.

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.* at 14.

¹²⁰ To the extent Intervenor believe there are existing operational issues at Davis-Besse that warrant immediate action, their remedy is to file a § 2.206 petition.

Intervenors give no facts, expert support, or reasons why the recently identified cracks impact the shield building's ability to perform its intended safety functions. Instead, Intervenors only claim that the shield building should have been "moisture-sealed 40 years ago," and that the investigation into the shield building was inadequate.¹²¹ Thus, Intervenors have not provided adequate support for their claims regarding the Shield Building Monitoring AMP's ability to adequately manage any aging-effects related to the shield building cracks. Instead, they have provided the type of unsupported assertions the Commission has stated will not trigger an adjudicatory hearing. *Jersey Central Power & Light Co. and Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000). As discussed, the NRC performed independent evaluations, analyses, and inspections in support of the restart authorization, which confirmed that the shield building was able to perform its intended safety functions. And the NRC's ongoing oversight will ensure the shield building continues to perform its intended safety functions.

Moreover, Intervenors have not illustrated that their claims regarding current operations at Davis-Besse raise a material issue. To renew a license, the Commission must find "reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB." 10 C.F.R. § 54.29. Intervenors have not indicated how any of their claims prevent the Staff from making the required license renewal findings. Therefore, these arguments do not raise a material issue and are inadmissible.

For all the reasons outlined above, these portions of Proposed Contention 5 are inadmissible.

¹²¹ Intervenors' Motion at 6.

CONCLUSION

For the reasons set forth above, the Board should deny Intervenors' Motion and find proposed Contention 5 inadmissible.

Respectfully submitted,

Signed (electronically) by

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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 AND SUPPLEMENT PROPOSED CONTENTION NO. 5 (SHIELD BUILDING CRACKING)" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 29th day of June, 2012.

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