UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-346-LA
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	
	)	June 14, 2013
(Davis-Besse Nuclear Power Station, Unit 1)	)	

FIRSTENERGY NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING PETITION TO INTERVENE AND REQUEST FOR HEARING REGARDING TECHNICAL SPECIFICATION LICENSE AMENDMENT REQUEST

Timothy P. Matthews
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5527
E-mail: tmatthews@morganlewis.com

David W. Jenkins
Senior Corporate Counsel II
FirstEnergy Service Company
Mailstop: A-GO-15
76 South Main Street
Akron, OH 44308
Phone: 330-384-5037
E-mail: djenkins@firstenergycorp.com

Counsel for FirstEnergy Nuclear Operating Company

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), FirstEnergy Nuclear Operating Company ("FENOC") submits this Answer opposing the "Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request" ("Petition")[1] submitted by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario ("CEA"), Don't Waste Michigan, and the Ohio Sierra Club ("Petitioners") to the U.S. Nuclear Regulatory Commission ("NRC") on May 20, 2013 and supplemented on May 29, 2013. Petitioners submitted the Petition in response to a March 19, 2013 *Federal Register* notice[2] regarding FENOC's January 18, 2013 License Amendment Request ("LAR") seeking to amend four Technical Specifications (3.4.17, 3.7.18, 5.5.8, and 5.6.6) for the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse") to support plant operations following replacement of the steam generators, which is scheduled to be completed in April 2014. The Petition and its one "Proposed Contention" argue that FENOC

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1 Petition to Intervene and for an Adjudicatory Public Hearing of FENOC License Amendment Request (May 20, 2013) ("Petition"), *available at* ADAMS Accession No. ML13141A250.

2 Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 78 Fed. Reg. 16,876 (Mar. 19, 2013) ("Hearing Notice").

must obtain additional license amendments with associated public hearings before implementation of the Davis-Besse replacement steam generator project.

As explained below, Petitioners have neither demonstrated standing to intervene nor submitted an admissible contention. Therefore, the Petition should be rejected in its entirety.

II. SUMMARY OF ARGUMENT

The Petition suffers from multiple, independent, deficiencies. As a preliminary matter, Petitioners have failed to demonstrate standing to participate in this proceeding. Petitioners request a hearing based on the standing of their members, but those members themselves do not have standing. Petitioners cannot claim standing based only on geographic proximity to Davis-Besse because the LAR at issue here (amendment of four Technical Specifications) does not present an "obvious potential for offsite consequences," as required for the proximity presumption relied upon by Petitioners.

Petitioners also have not demonstrated standing using traditional standing rules (*i.e.*, injury-in-fact, causation, and redressability). With respect to injury-in-fact, Petitioners make general claims about the risk of being harmed by operation of the facility, but those claims are not tied in any way to the subject of the LAR. With respect to causation, Petitioners have not demonstrated that their alleged injury would be caused by issuance of the Technical Specification amendments. With respect to redressability, Petitioners do not explain how disapproval or modification of the LAR would redress the harm they allege. For these reasons, Petitioners have not demonstrated the requisite standing to participate in a hearing on this LAR, and the Petition must therefore be rejected.

Additionally, the Proposed Contention does not satisfy several of the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements, all of which must be satisfied to support an admissible contention.

- First, the Proposed Contention does not demonstrate a genuine dispute with the LAR. In fact, the Petition does not reference the LAR at all. Additionally, Petitioners incorrectly assert that FENOC must amend additional Davis-Besse Technical Specifications, even though the LAR already seeks to amend all of the Technical Specifications that Petitioners identify.
- Second, the Proposed Contention is outside the scope of the LAR proceeding. Rather than raise challenges with the amendment of the four Technical Specifications identified in the LAR, Petitioners raise other allegations that are outside the scope of the LAR, raise issues that otherwise cannot be challenged in this proceeding, or inappropriately challenge NRC regulations. Indeed, Petitioners attempt to challenge the entire steam generator replacement project, but that challenge is well beyond the changes to the four Technical Specifications identified in the LAR, and thus outside the scope of this proceeding.
- Third, the Proposed Contention raises issues that are not material to any of the findings that the NRC must make in order to approve the LAR.
- Finally, the Proposed Contention is not adequately supported. Petitioners and their expert mischaracterize the regulations at 10 C.F.R. § 50.59 that are used to determine whether NRC approval of a change to a facility is needed, and provide only speculation regarding the alleged inadequacies of FENOC's review of the replacement steam generator project under Section 50.59.

Thus, independent of Petitioners' failure to establish standing, the Petition must also be rejected because it lacks an admissible contention.

III. BACKGROUND

Davis-Besse is located on the southwestern shore of Lake Erie in Ottawa County in northwestern Ohio. FENOC is the licensed operator of Davis-Besse. Davis-Besse has a single pressurized water reactor nuclear steam supply system using a Babcock & Wilcox ("B&W") design.

The Davis-Besse design includes two Once Through Steam Generators ("OTSGs"). The steam generators are vertical, straight-tube-and-shell heat exchangers that produce superheated steam at approximately a constant pressure over the power range. Reactor coolant water enters the steam generators at the upper primary head, flows down the inside of the tubes while transferring heat to the secondary shell-side fluid, and leaves through the lower primary head. This generates steam on the shell side, which is used to drive a turbine-generator to create electricity.

FENOC is replacing its original steam generators (which were installed in the 1970s) to address corrosion and other efficiency issues present in the original steam generators as are common to other nuclear power plants in the United States. B&W, the original equipment supplier, is providing the replacement steam generators, which will include improved materials to reduce corrosion. Additionally, AREVA Inc. is providing engineering analysis and Bechtel Power Corporation is providing installation services to support the replacement steam generator project. FENOC plans to complete the replacement of the steam generators in early 2014.[3] As is

[3] *See* Letter from R. Lieb, FENOC, to NRC, License Amendment Request for Proposed Revision of Technical Specification (TS) 3.4.17, "Steam Generator (SG) Tube Integrity"; TS 3.7.18, "Steam Generator Level"; TS 5.5.8, "Steam Generator (SG) Program"; and TS 5.6.6, "Steam Generator Tube Inspection Report," Cover Letter, at 1 (Jan. 18, 2013) ("LAR"), *available at* ADAMS Accession No. ML13018A350.

common in the industry, FENOC is performing the design modification in accordance with the provisions of 10 C.F.R. § 50.59, "Changes, tests and experiments."[4]

On January 18, 2013, FENOC submitted a LAR pursuant to 10 C.F.R. § 50.90 to modify the Davis-Besse Technical Specifications to support the replacement steam generators.[5] The changes to the Technical Specifications are necessary to accommodate continued plant operation considering the dimensional and material differences between the original steam generators and the replacement steam generators.[6] The proposed changes also are required to address implementation issues associated with inspection periods, and to address other administrative changes and clarifications, consistent with the guidance provided in Technical Specification Task Force ("TSTF") Traveler 510, Revision 2, "Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection," which was approved by the NRC on October 27, 2011.[7]

Specifically, the LAR seeks to revise four Technical Specifications ("TS"):

- TS 3.4.17, "Steam Generator (SG) Tube Integrity"
- TS 3.7.18, "Steam Generator Level"
- TS 5.5.8, "Steam Generator (SG) Program"
- TS 5.6.6, "Steam Generator Tube Inspection Report"

As explained in the LAR:

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4 *Id.*, Enclosure, at 2. The review of the replacement steam generator project is ongoing. If necessary once that review is complete, FENOC would consider a license amendment.

5 *See id.*, Cover Letter, at 1.

6 *Id.*, Enclosure, at 2.

7 *Id.* The TSTF is an industry group that develops generic industry positions on Technical Specifications. TSTF travelers are approved standard Technical Specification changes that have not yet been incorporated into the next revision of the Improved Standard Technical Specifications for a particular reactor design. The Improved Standard Technical Specifications for B&W plants are provided in NUREG-1430, Rev. 4, Standard Technical Specifications – Babcock and Wilcox Plants (Apr. 2012).

> TSs 3.4.17, 5.5.8, and 5.6.6 impose monitoring, inspection, repair and reporting requirements that ensure SG tube integrity is maintained consistent with DBNPS accident analysis assumptions and regulatory requirements. The requirements currently imposed by these TSs are based on the analyses and tube materials of the original SGs. The proposed changes would impose requirements that reflect the analyses and tube materials of the replacement SGs, consistent with the guidance provided in TSTF-510, Revision 2.
>
> TS 3.7.18 imposes SG secondary side inventory restrictions based on analyses specific to the original SG physical design characteristics, to ensure that plant operation remains bounded by the values used in the Main Steam Line Break (MSLB) analyses presented in the DBNPS Updated Safety Analysis Report (USAR). The proposed changes would impose inventory restrictions that are appropriate for the physical characteristics of the replacement SGs.[8]

FENOC requested that the NRC approve the requested amendment by February 1, 2014 to support the planned timing of the steam generator replacement.[9] FENOC would implement the amendments to the Technical Specifications prior to startup following the refueling outage in which the steam generators are replaced.[10] The NRC accepted the LAR for review on February 13, 2013.[11]

The NRC published the Hearing Notice for the LAR in the *Federal Register* on March 19, 2013.[12] The Hearing Notice described the LAR, provided the NRC Staff's proposed No Significant Hazards Consideration determination for the LAR, and provided interested parties 60 days (*i.e.*, until May 20, 2013 after accounting for the weekend) in which to request a hearing related to the changes requested in the LAR.[13]

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8 LAR, Enclosure, at 2.

9 *Id.*, Cover Letter, at 1.

10 *Id.*

11 E-mail from B. Purnell, NRC, to P. Lashley, FENOC, Acceptance Review for Davis-Besse LAR to Revise TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6 – TAC No. MF0536 (Feb. 13, 2013), *available at* ADAMS Accession No. ML13044A765.

12 Hearing Notice at 16,876, 16,883-884.

13 *Id.* at 16,877, 16,883-884.

Petitioners submitted their Petition to the NRC on May 20, 2013.[14] The Petition includes one "Proposed Contention":

> Significant changes to the Replacement Once Through Steam Generator (ROTSG) modification project and to the reactor containment structures, all planned by FirstEnergy Nuclear Operating Company to be made to the Davis-Besse Nuclear Power Station, require that the steam generator replacement project be deemed an "experiment" according to 10 C.F.R. § 50.59, and that an adjudicatory public hearing be convened for independent analysis of the project, before it is implemented. Moreover, FENOC has applied after the fact for a technical specifications license amendment, which comprises an additional, automatic, trigger under 10 CFR § 50.59 and necessitates adjudication of the license amendment request.[15]

At the same time as the Petition, Petitioners submitted standing declarations for Beyond Nuclear, Don't Waste Michigan, and the Ohio Sierra Club, and a report from Mr. Arnold Gundersen in support of the Petition.[16] Nine days later, on May 29, 2013, Petitioners submitted additional standing declarations related to CEA.[17]

IV. LEGAL STANDARDS

Under the Commission's regulations, 10 C.F.R. § 2.309, the Petition will be granted only if it demonstrates that (1) Petitioners have standing under 10 C.F.R. § 2.309(d); and (2)

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[14] Petition at 1. FENOC's Answer to the Petition is due 25 days after FENOC is served with the Petition. *See* 10 C.F.R. § 2.309(i)(1). However, FENOC was never properly served with the Petition. The NRC's Office of the Secretary typically notifies an applicant, and adds the applicant to the electronic service list, when a petitioner has requested that an electronic hearing docket be established or when a petitioner submits a hearing request, because otherwise there is no mechanism for an applicant to learn of a new petition. That did not happen here. Instead, FENOC only learned of the Petition on May 22, 2013 when a reporter contacted FENOC to discuss the Petition. Thereafter, FENOC contacted the Office of the Secretary to be added to the electronic service list for this proceeding and then obtained the Petition and related documents from the NRC's Agencywide Documents Access and Management System ("ADAMS"). Out of an abundance of caution, FENOC is filing this Answer 25 days after Petitioners submitted the Petition to the NRC on May 20, 2013.

[15] Petition at 12.

[16] Expert Witness Report of Arnold Gundersen to Support the Petition for Leave to Intervene and Request for Hearing by Beyond Nuclear (Takoma Park, MD), Citizens Environment Alliance SW Ontario Canada, Don't Waste Michigan (MI), and Sierra Club Ohio Chapter (May 20, 2013) ("Gundersen Report"), *available at* ADAMS Accession No. ML13141A243.

[17] Notice of Filing of Individual and Organization Declarations in Support of Standing of Citizens Environmental Alliance of Southwest Ontario (May 29, 2013), *available at* ADAMS Accession No. ML13149A057.

Petitioners have submitted an admissible contention that meets all of the requirements of 10 C.F.R. § 2.309(f)(1). Failure to meet any of these criteria is fatal and grounds for dismissal of the Petition.[18] Each of these requirements is explained below.

A. Standing

Section 189(a) of the Atomic Energy Act of 1954, as amended ("AEA"), states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."[19] The Commission's regulations implementing this requirement include the standing requirements in 10 C.F.R. § 2.309(d)(1). In order to demonstrate standing, Section 2.309(d)(1) requires, among other things, a petitioner provide: (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

In assessing these factors, the NRC applies "contemporaneous judicial concepts of standing."[20] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[21] These three criteria are referred to as injury-in-fact, causation, and redressability, respectively. Only under some limited circumstances may a petitioner be presumed to have fulfilled the judicial standards for standing based on his or her

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18 *See* 10 C.F.R. § 2.309(a).

19 42 U.S.C. § 2239(a)(1)(A).

20 *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914-16 (2009) (internal citation omitted); *see also Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

21 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

geographic proximity to a facility or source of radioactivity.[22] These standing concepts are discussed further below.

1. Standing Based on Geographic Proximity

Under some limited circumstances, standing is presumed based on the petitioner's geographical proximity to the nuclear power plant.[23] In some proceedings involving power reactors, "proximity" standing has been found for petitioners who reside within 50 miles of the facility in question.[24] The Commission has explained, however, that this proximity presumption only applies to certain types of proceedings, including those for a "construction permit, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool."[25] The presumption applies because "those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences."[26] Thus, in license amendment proceedings, absent an "obvious potential for offsite consequences," a petitioner must satisfy the traditional standing requirements.[27]

2. Traditional Standing

First, a petitioner's injury-in-fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[28] The injury

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22 *See Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

23 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001).

24 *See, e.g.*, *Calvert Cliffs*, CLI-09-20, 70 NRC at 916.

25 *Fla. Power & Light Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989) (citing *Va. Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979)).

26 *St. Lucie*, CLI-89-21, 30 NRC at 329.

27 *Id.* at 329-30; *see also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999); *Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 539 (2008).

28 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

must be "concrete and particularized," not "conjectural" or "hypothetical."[29] As a result, standing will be "denied when the threat of injury is too speculative."[30] Additionally, the alleged "injury-in-fact" must lie within "the zone of interests" protected by the statutes governing the proceeding—either the AEA or the National Environmental Policy Act of 1969, as amended.[31] The injury-in-fact, therefore, must generally involve potential radiological or environmental harm.[32] The Commission has further explained that "a petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility."[33]

Second, a petitioner must establish that the injuries alleged are "fairly traceable to the proposed action,"[34] which in this case is the amendment of the four specific Davis-Besse Technical Specifications identified in the LAR. Petitioners must show that the "chain of causation is plausible."[35] The relevant inquiry is "whether a cognizable interest of the petitioner might be adversely affected" by one of the possible outcomes of the proceeding.[36] The Commission has explained that "[a] petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences."[37]

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29 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

30 *Id.*

31 *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 6 (1998).

32 *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

33 *Zion*, CLI-99-04, 49 NRC at 188.

34 *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

35 *Id.*

36 *Nuclear Eng'g Co., Inc.* (Sheffield, Ill., Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

37 *Zion*, CLI-99-04, 49 NRC at 192.

Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of the [NRC]."[38] In other words, each petitioner must demonstrate that the injury can be "redressed" by a favorable decision in this proceeding. Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[39]

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[40] To establish representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right; (2) identify that member; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[41]

B. Contention Admissibility

The contention admissibility requirements are set forth in 10 C.F.R. § 2.309(f)(1). Specifically, under Section 2.309(f)(1), a petitioner "must set forth with particularity the contentions sought to be raised." The regulation specifies that each contention must:

> (1) provide a specific statement of the legal or factual issue sought to be raised;
>
> (2) provide a brief explanation of the basis for the contention;

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38 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

39 *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

40 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (citing *Ga. Inst. of Tech*. (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995)).

41 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

> (3) demonstrate that the issue raised is within the scope of the proceeding;
>
> (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and
>
> (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[42]

As the Commission has explained, failure to comply with any one of the six admissibility criteria is grounds for rejection.[43] The Commission further explained that its "strict contention rule is designed to avoid resource-intensive hearings where petitioners have not provided sufficient support for their technical claims, and do not demonstrate a potential to meaningfully participate and inform a hearing."[44] As the Commission has stated:

> Nor does our practice permit "notice pleading," with details to be filled in later. Instead, we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them.[45]

The NRC specifically revised the admissibility rules in 1989 "to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.'"[46]

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42 10 C.F.R. § 2.309(f)(1)(i)-(vi).

43 *See, e.g.*, *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 3 (Mar. 27, 2012) (stating that proposed contentions "must satisfy all six of the [admissibility] requirements"); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

44 *Davis-Besse*, CLI-12-08, slip op. at 31; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (explaining that the Commission's rules on contention admissibility are "strict by design").

45 *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

46 *Davis-Besse*, CLI-12-08, slip op. at 3-4 (citations omitted) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

For license amendment proceedings, such as this one, the requirement in 10 C.F.R. § 2.309(f)(1)(iii) that contentions raise issues within the scope of the proceeding is particularly important. The Hearing Notice explains: "Contentions shall be limited to matters within the scope of the amendment under consideration."[47] The scope of a proceeding is defined by the Commission's notice of opportunity for a hearing.[48] Moreover, contentions are necessarily limited to issues that are germane to the specific application pending before the licensing board.[49] The Commission has explained that "the scope of any hearing should include the proposed license amendments, and any health, safety or environmental issues fairly raised by them."[50] Any contention that falls outside the specified scope of the proceeding must be rejected.[51] In that regard, contentions that challenge the current licensing basis, rather than the proposed amendment, are not admissible in a license amendment proceeding.[52]

V. THE PETITION SHOULD BE REJECTED

A. Petitioners Have Not Demonstrated Standing

Petitioners seek representational standing based upon the standing of their individual members.[53] Beyond Nuclear seeks to participate in the hearing process based on the standing of three of its members: Mark Farris, Phyllis Oster, and Joseph DeMare.[54] CEA seeks to participate

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47 Hearing Notice, 78 Fed. Reg. at 16,877.

48 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

49 *See Yankee*, CLI-98-21, 48 NRC at 204.

50 *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981); *see also Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-88, 16 NRC 1335, 1342 (1982) (holding that it is not "appropriate to permit an intervenor to question the original design of the reactor or the systems not directly involved in [the license amendment] application").

51 *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (affirming the board's rejection of issues raised by intervenors that fell outside the scope of issue identified in the notice of hearing).

52 *Point Beach*, LBP-82-88, 16 NRC at 1342.

53 *See* Petition at 3-8.

54 *Id.* at 5.

in the hearing process based on the standing of two of its members: Derek Coronado and Richard Coronado.[55] Don't Waste Michigan seeks to participate in the hearing process based on the standing of one of its members: Michael Keegan.[56] The Ohio Sierra Club seeks to participate in the hearing process based on the standing of three of its members: Gary Majeski, Kristina Moazed, and Anthony Szilagye.[57] To establish representational standing, each Petitioner must show that one or more of its members has standing in his or her own right. They have not done so. These members do not have standing under either a proximity presumption or based on evaluation of the traditional standing requirements.

Petitioners and their members do not have standing based on geographic proximity to Davis-Besse. For license amendment proceedings, the proximity presumption applies only if the amendment results in an "obvious potential for offsite consequences."[58] The LAR simply revises four Davis-Besse Technical Specifications to conform dimensional and material differences between the original and replacement steam generators, to address implementation issues

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[55] *Id.* at 6. Petitioners did not submit a declaration from any CEA member authorizing CEA to act on their behalf until May 29, 2013, nine days after the due date for the Petition. Petitioners did not address any of the requirements for nontimely filings specified in 10 C.F.R. § 2.309(c), and did not demonstrate good cause for the late filing under 10 C.F.R. § 2.307. Therefore, Petitioners have failed to timely demonstrate the standing of CEA to participate in this proceeding.

Although this is the first error of this sort in this proceeding, the same Petitioners have filed late or error laden pleadings in the Davis-Besse license renewal proceeding. As one example from that proceeding, the licensing board chastised Petitioners for their "unacceptable" reply to their petition to intervene due to their failure to paginate, proof-read, and cite-check the reply, and their need for numerous errata to the filing. *See* Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply), Docket No. 50-346-LR, at 4 (Feb. 18, 2011) (unpublished). As another example, Petitioners filed certain documents late in that proceeding. Although the licensing board excused the late filings due to extenuating circumstances, the board stated that Petitioners "are strongly advised to prepare their pleadings well in advance of any deadlines, and if any portion of a filing is untimely tendered, it must be accompanied by a motion pursuant to 10 C.F.R. §§ 2.309(c)(1) and 2.323." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC 534, 545 (2011). No such motion addressing the late filing requirements was filed here. In summary, the timing and filing requirements should be strictly applied to Petitioners, who are experienced intervenors and represented by counsel, and these continued pleading deficiencies that add unnecessary confusion to a proceeding should not be tolerated.

[56] Petition at 7.

[57] *Id.* at 8.

[58] *See St. Lucie*, CLI-89-21, 30 NRC at 329-30; *Zion*, CLI-99-04, 49 NRC at 191.

associated with inspection periods, and to address other administrative changes and clarifications.[59] For example, the LAR removes the option in the Technical Specifications to repair steam generator tubes that meet repair criteria, and instead requires FENOC to plug tubes that meet the criteria.[60] Other changes remove special visual inspections that are not applicable to the replacement steam generators or modify steam generator level limits due to the dimensions of the replacement steam generators.[61] These revisions do not present an obvious potential for offsite consequences. More important, Petitioners have not carried their burden to demonstrate otherwise.[62] In fact, Petitioners do not reference the LAR itself in any manner whatsoever.

Moreover, both the LAR and the NRC Staff's proposed No Significant Hazards Consideration determination conclude that the LAR does not involve a significant increase in the probability or consequences of an accident previously evaluated, does not create the possibility of a new or different kind of accident from any accident previously evaluated, and does not involve a significant reduction in a margin of safety.[63] Furthermore, the LAR does not involve any physical alterations to the facility. The LAR also does not implicate the full steam generator replacement project; instead, it narrowly seeks approval of changes to four Technical Specifications.[64] For these reasons as well, the LAR does not have an obvious potential for offsite consequences, and there is no proximity presumption.

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59 *See* LAR, Enclosure, at 2.

60 *See id.* at 3.

61 *See id.* at 3-4.

62 Indeed, Petitioners themselves state the correct standard that the proximity presumption only applies if there is an "obvious potential for offsite consequences," but they never attempt to explain why such an obvious potential exists with the LAR at issue here. *See id.* at 3.

63 *See id.* at 7-9; Hearing Notice, 78 Fed. Reg. at 16,884.

64 *See* LAR, Enclosure, at 2 ("Nuclear Regulatory Commission (NRC) review and approval of the modification is not being requested herein."). Petitioners are incorrect in claiming that "[t]his proposed amendment calls for installation of new, untested steam generator equipment." Petition at 4.

Because there is no proximity presumption, Petitioners must demonstrate their members' standing using traditional standing rules. Under traditional rules of standing, Petitioners must demonstrate injury-in-fact, causation, and redressability. They have not done so. Petitioners only indirectly speculate as to injury-in-fact and causation, and completely fail to address redressability in their standing argument.

With respect to injury-in-fact, the Petition states that Petitioners have standing because "continued operation of the nuclear reactor at Davis-Besse continues to present a tangible and particular harm to the health and well-being of members living within 50 miles of the site."[65] This general objection to Davis-Besse does not satisfy the injury-in-fact requirement because it is unrelated to the LAR at issue in this proceeding.[66] Petitioners also make general claims about being harmed by environmental impacts from the plant, additional Shield Building penetrations, inadequate information about the replacements, and steam generator failures at other plants.[67] Contrary to the injury-in-fact requirement, these topics also are unrelated to the four Technical Specifications that are the subject of the LAR. Further, such general allegations of harm without any support whatsoever cannot demonstrate standing.[68]

Moreover, Petitioners' general concerns about the safety of Davis-Besse due to the new steam generators, Shield Building penetrations, or their other arguments do not support the causation prong of standing, because these concerns are not "traceable to the proposed action,"[69] which relates to amending four Davis-Besse Technical Specifications to account for material and

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65 Petition at 4.

66 *See Zion*, CLI-99-04, 49 NRC at 188.

67 *See* Petition at 4-8 (and referenced standing declarations).

68 *See Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001) (requiring a petitioner to "show that the amendment will cause a 'distinct new harm or threat' apart from the activities already licensed. . . . Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing.").

69 *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

dimension changes in the new steam generators.[70] As a result, these issues are outside the scope of the LAR and cannot be used as a basis for standing in this proceeding.

Finally, Petitioners' generalized concerns about the safety of Davis-Besse due to the installation of new steam generators cannot be redressed in this proceeding, because this proceeding relates only to amendments to the Davis-Besse Technical Specifications, not the steam generator replacement project generally. In other words, there is no remedy in this proceeding that would redress Petitioners' concerns about the safety of Davis-Besse due to the steam generator replacement.

In summary, Petitioners and their members do not have standing based on geographical proximity to Davis-Besse or traditional standing in their own right. As a result, Petitioners have not demonstrated representational standing to participate in the LAR proceeding. For this independent reason, the Petition should be rejected.

B. Petitioners Have Not Submitted an Admissible Contention

Petitioners proposed one contention as part of their Petition. As demonstrated below, the Proposed Contention fails to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). Specifically, the Proposed Contention is inadmissible because it does not raise a genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi); it is outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii); it does not identify any issue that is material to this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iv); and it is not adequately supported, contrary to 10 C.F.R. § 2.309(f)(1)(v). Because the Petition does not include an admissible contention, it must be rejected.

[70] *See* LAR, Enclosure, at 2.

1. The Proposed Contention Does Not Raise a Genuine Dispute

The Proposed Contention does not "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," as required by 10 C.F.R. § 2.309(f)(1)(vi). Section 2.309(f)(1)(vi) requires that a proposed contention "include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute."[71] If a contention does not directly controvert a position taken by the applicant, it is subject to dismissal.[72] Therefore, a petitioner must "read the pertinent portions of the license application, . . . state the applicant's positions and the petitioner's opposing view," and explain why it disagrees with the applicant.[73]

Contrary to these requirements, the Proposed Contention provides no references to any specific portion of the LAR that Petitioners dispute, much less any reasons for such dispute. In fact, the Proposed Contention makes no specific reference to the January 18, 2013 LAR in any manner whatsoever. In this regard, Petitioners provide no specific challenges to FENOC's request to amend four Davis-Besse Technical Specifications.[74] Instead, the Proposed Contention raises issues unrelated to those specific changes.[75] For these reasons, Petitioners have not satisfied the requirements of 10 C.F.R. § 2.309(f)(1)(vi), and the Proposed Contention must be dismissed consistent with NRC regulations and governing Commission precedent.[76]

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71 10 C.F.R. § 2.309(f)(1)(vi).

72 *S.C. Elec. & Gas* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 21-22 (2010).

73 Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Millstone*, CLI-01-24, 54 NRC at 358.

74 Petitioners instead reference the March 19, 2013 Hearing Notice related to the LAR, and incorrectly characterize it as FENOC's "notice of its intention to amend the technical specifications . . . ." Petition at 1. To the contrary, the Hearing Notice was published by the NRC and relates to FENOC's actual LAR to amend the Davis-Besse Technical Specifications, not a notice of intention.

75 To the extent Petitioners challenge the replacement of the steam generators under 10 C.F.R. § 50.59, those issues are addressed below.

76 *See, e.g.*, *Summer*, CLI-10-1, 71 NRC at 21-22.

Additionally, Petitioners incorrectly assert that FENOC must amend additional Davis-Besse Technical Specifications beyond those identified in the LAR. For example, Petitioners quote Mr. Gundersen as stating that "formal license amendment review is required due to the numerous and unreviewed proposed changes to the [Davis-Besse] Technical Specifications."[77] Petitioners further state that "extensive modifications to the Davis-Besse technical specifications" necessitate "a full NRC license application."[78] To support these statements, Petitioners and Mr. Gundersen point to a March 20, 2013 FENOC presentation at a public meeting, which they claim provides "an extensive list of changes to the [Davis-Besse] Technical Specifications."[79] That FENOC presentation, however, only identifies changes to TS 3.4.17, TS 3.7.18, TS 5.5.8, and TS 5.6.6.[80] Those are in fact the exact Technical Specifications that FENOC proposed to amend in the January 18, 2013 LAR, and that gave rise to the opportunity for Petitioners to request a hearing.[81] Petitioners do not identify any other Technical Specifications that they believe should be amended or suggest how the proposed amendments are not adequate. These claims for a license amendment proceeding, when the requested proceeding already exists to amend all of the Technical Specifications that Petitioners identify, do not demonstrate a genuine dispute with the LAR or with FENOC. For these reasons, the Proposed Contention should be denied pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

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77 Petition at 16; Gundersen Report at 6.

78 Petition at 18-19.

79 *Id.* at 16; Gundersen Report at 6 (referencing FENOC Presentation Slides, Davis-Besse Steam Generator Replacement Project, at 15-17 (Mar. 20, 2013) ("FENOC Presentation Slides"), *available at* ADAMS Accession No. ML13078A249).

80 FENOC Presentation Slides at 16.

81 *See* LAR, Cover Letter, at 1; Hearing Notice, 78 Fed. Reg. at 16,883.

2. The Proposed Contention Is Outside the Scope of this Proceeding

As the Hearing Notice explains: "Contentions shall be limited to matters within the scope of the amendment under consideration."[82] The scope of the January 18, 2013 LAR is limited to the revisions to the four Davis-Besse Technical Specifications identified in that request. Significantly, it does not include, and is not required to include, approval of the entire replacement steam generator project.[83] Accordingly, it does not include, nor is it required to include, any changes to the Davis-Besse Final Safety Analysis Report, as updated ("UFSAR"). Controlling NRC precedent explains that the scope of a proceeding is defined by the Commission's notice of opportunity for a hearing,[84] and contentions are limited to issues material to the specific application.[85] The LAR Hearing Notice references only the revisions to the four Davis-Besse Technical Specifications,[86] and the LAR itself specifically states that "review and approval of the [replacement steam generator] modification is not being requested herein."[87] Thus, any proposed contentions challenging issues unrelated to the changes to the four Davis-Besse Technical Specifications are outside the scope of this proceeding and must be rejected for failing to satisfy 10 C.F.R. § 2.309(f)(1)(iii).[88]

The Proposed Contention states in part:

> Significant changes to the Replacement Once Through Steam Generator (ROTSG) modification project and to the reactor containment structures, all planned by [FENOC] to be made to [Davis-Besse], require that the steam generator replacement project be deemed an 'experiment" according to 10 C.F.R. § 50.59, and

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82 Hearing Notice, 78 Fed. Reg. at 16,877.

83 *See generally* LAR.

84 *See Catawba*, ALAB-825, 22 NRC at 790-91.

85 *See Yankee*, CLI-98-21, 48 NRC at 204.

86 Hearing Notice, 78 Fed. Reg. at 16,883.

87 LAR, Enclosure, at 2.

88 *See, e.g.*, *Trojan*, ALAB-534, 9 NRC at 289 n.6.

> that an adjudicatory public hearing be convened for independent analysis of the project, before it is implemented.[89]

Specifically, the Petition raises the following issues: multiple openings in the Davis-Besse Shield Building,[90] Davis-Besse Shield Building cracking,[91] design modifications between the original and replacement steam generators,[92] steam generator or containment problems at other nuclear plants,[93] the adequacy of any 50.59 review,[94] and the adequacy of publicly available information regarding the replacement steam generators.[95] These issues are unrelated to the LAR at issue in this proceeding, because they do not address the changes to the four specific Davis-Besse Technical Specifications identified in the LAR. Therefore, these issues are outside the scope of this proceeding.[96]

The Petition also appears to inappropriately challenge the NRC Staff's proposed No Significant Hazards Consideration determination for the LAR by discussing the proposed determination set forth in the LAR Hearing Notice, and then concluding that it is inadequate and does not satisfy the requirements for such determinations under 10 C.F.R. § 50.92(c).[97] Such challenges are impermissible under 10 C.F.R. § 50.58(b)(6). As this regulation states: "No

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89 Petition at 12.

90 *Id.* at 4, 12.

91 *Id.* at 4.

92 *Id.* at 9, 14.

93 *Id.* at 12, 15-17.

94 *Id.* at 13-19.

95 *Id.* at 13-14.

96 *See Dresden*, CLI-81-25, 14 NRC at 624 ("[T]he scope of any hearing should include the proposed license amendments, and any health, safety or environmental issues fairly raised by them."); *see also Trojan*, ALAB-534, 9 NRC at 289 n.6.

97 *See* Petition at 9-10. The AEA expressly authorizes the NRC to grant and make immediately effective a license amendment that "involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person." AEA §189a(2)(A); 42 U.S.C. § 2239a(2)(A). A license amendment involves No Significant Hazards Consideration if the amendment would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) Involve a significant reduction in a margin of safety. 10 C.F.R. § 50.92(c).

petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission."[98] Therefore, that argument is outside of the scope of this proceeding as well.

Furthermore, the Petition improperly attempts to challenge FENOC's 50.59 review of whether a license amendment is necessary for the Davis-Besse replacement steam generators. Such a challenge is not appropriate in this proceeding, because the Commission has stated that "[a] member of the public may challenge an action taken under 10 C.F.R. § 50.59 *only* by means of a petition under 10 C.F.R. § 2.206."[99] Therefore, a 10 C.F.R. § 2.309 hearing request on this topic is not appropriate even if the Petition met the other standing and contention admissibility requirements—which it does not. Instead, Petitioners would need to submit a 10 C.F.R. § 2.206 petition for action at the appropriate time to challenge FENOC's 50.59 review. Rejection of Petitioners' challenges to the 50.59 review is consistent with recent Commission precedent. Specifically, other petitioners raised a similar challenge to a 50.59 review of the San Onofre plant's steam generator replacement, arguing that the licensee violated 10 C.F.R. § 50.59 because it should have obtained additional license amendments for its replacement steam generators.[100] The Commission rejected that challenge, and ruled that 10 C.F.R. § 2.206 provides the appropriate forum for such challenges.[101]

Additionally, a challenge under Section 2.206 would be premature at this time because FENOC's review of the replacement steam generators as required by 10 C.F.R. § 50.59 is not yet

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98 10 C.F.R. § 50.58(b)(6).

99 *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), CLI-12-20, 76 NRC __, slip op. at 3 n.10 (Nov. 8, 2012) (quoting *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 101 n.7 (1994)) (emphasis added).

100 *San Onofre*, CLI-12-20, slip op. at 3-4.

101 *Id.*

complete.[102] Consistent with industry experience, FENOC does not anticipate that any additional license amendments will be needed, but the 50.59 review cannot be completed until the analyses and manufacturing of the replacement steam generators are complete. If the 50.59 review process determines that an additional license amendment is necessary for the replacement of the steam generators, FENOC will seek one at that time, and that would provide a new opportunity to request a hearing that is separate from this proceeding commenced by the January 18, 2013 LAR.

Finally, Petitioners make conclusory statements about needing an additional license amendment under 10 C.F.R. § 50.59 for the replacement steam generators, but do not identify any specific requirements in Section 50.59 supporting that result.[103] For example, neither Mr. Gundersen nor the Petition evaluate the design changes or other issues under the specific requirements of 10 C.F.R. § 50.59 to determine whether a license amendment is needed. The Petition appears to be arguing that replacement steam generator projects *per se* require license amendments that cover the entire project. That is not the standard under Section 50.59.[104] Therefore, the Petition's conclusion that an additional license amendment is needed is an impermissible challenge to the NRC's regulations at 10 C.F.R. § 50.59.

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[102] According to the NRC's Management Directive 8.11 on the review of 2.206 petitions, a petition will be rejected if it "fails to provide sufficient facts to support the petition." Review Process for 10 CFR 2.206 Petitions, Handbook 8.11, at 12 (Oct. 25, 2000). Without a completed 50.59 review to challenge, there are no facts Petitioners could provide to support their claim that the 50.59 review was performed inadequately.

[103] *See, e.g.*, Petition at 16-17; Gundersen Report at 7 (claiming that FENOC would be "manipulating loopholes in the 50.59 process").

[104] A licensee's actions require a license amendment only if the actions meet the criteria in 10 C.F.R. § 50.59. As provided in 10 C.F.R. § 50.59(c)(1), a license amendment is needed for a change in the facility or procedures as described in the UFSAR (or for a test or experiment not described in the UFSAR), if the change requires a change to the Technical Specifications or if the change meets any of the eight criteria in 10 C.F.R. § 50.59(c)(2).

Similarly, the Petition's and Mr. Gundersen's claim that other steam generator replacement projects "manipulat[ed] loopholes in the 50.59 process,"[105] without providing any demonstration that those licenses incorrectly applied Section 50.59 requirements, is a direct challenge to Section 50.59. Petitioners also complain about a "secret determination" made by FENOC under Section 50.59, but do not identify any requirement for FENOC to publicly disclose additional information.[106] Once again, Petitioners are challenging Section 50.59. Such challenges to the NRC regulations are forbidden by 10 C.F.R. § 2.335, which states that "no rule or regulation of the Commission, or any provision thereof, . . . is subject to attack . . . in any adjudicatory proceeding."[107] If Petitioners seek a change in the regulatory process for license amendments, they must submit a petition for rulemaking under 10 C.F.R. § 2.802 instead of raising these issues in a hearing request under 10 C.F.R. § 2.309.

For these reasons, the Proposed Contention should be denied pursuant to 10 C.F.R. § 2.309(f)(1)(iii) because it is outside the scope of this LAR proceeding.

3. The Proposed Contention Does Not Raise a Material Issue

The Proposed Contention does not demonstrate that the "issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding," as

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105 Petition at 16; Gundersen Report at 7.

106 Petition at 13; Gundersen Report at 4. The recordkeeping and reporting requirements for 50.59 reviews are specified in 10 C.F.R. § 50.59(d). For example, Section 50.59(d)(2) requires licensees to submit "a report containing a brief description of any changes, tests, and experiments, including a summary of the evaluation of each" at intervals not to exceed 24 months. Additionally, this also is not a "secret determination" because the NRC reviews the 50.59 results as part of its steam generator replacement inspection. NRC's Inspection Procedure 50001 states that the inspection will: "Verify that selected design changes and modifications to systems, structures, and components (SSCs) described in the Final Safety Analysis Report (FSAR) are reviewed in accordance with 10 CFR 50.59." Inspection Procedure 50001, Steam Generator Replacement Inspection at 2 (Nov. 8, 2011).

107 10 C.F.R. § 2.335.

required by 10 C.F.R. § 2.309(f)(1)(iv). An issue is material "if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[108]

As described above, the aspects of the replacement steam generator project that the Proposed Contention challenges are not related to the changes to the four Technical Specifications at issue in this proceeding. The Proposed Contention focuses on multiple openings in the Davis-Besse Shield Building,[109] Davis-Besse Shield Building cracking,[110] design modifications between the original and replacement steam generators,[111] steam generator or containment problems at other nuclear plants,[112] the adequacy of any 50.59 review,[113] and the adequacy of publicly available information regarding the replacement steam generators.[114] These generalized challenges are not material to any required finding in this proceeding. Therefore, the Proposed Contention should be denied for failing to satisfy 10 C.F.R. § 2.309(f)(1)(iv).[115]

4. The Proposed Contention Is Not Adequately Supported

The Proposed Contention also must fail because Petitioners have not provided the alleged facts and expert opinion required by 10 C.F.R. § 2.309(f)(1)(v) to support the Proposed Contention.

First, Petitioners mischaracterize the 50.59 process and corresponding hearing rights. The Proposed Contention states in part: "Moreover, FENOC has applied after the fact for a

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108 *Oconee*, CLI-99-11, 49 NRC at 333-34 (quotations omitted) (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172).

109 Petition at 4, 12.

110 *Id.* at 4.

111 *Id.* at 9, 14.

112 *Id.* at 12, 15-17.

113 *Id.* at 13-19.

114 *Id.* at 13-14.

115 *See Oconee*, CLI-99-11, 49 NRC at 333-34 (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172).

technical specifications license amendment, which comprises an additional, automatic, trigger under 10 CFR § 50.59 and necessitates adjudication of the license amendment request."[116] Under 10 C.F.R. § 50.59(c), a licensee cannot make changes to a facility without obtaining a license amendment if changes to the Technical Specifications are required. But this proceeding only provided an opportunity to request a hearing on the Technical Specifications identified in the LAR.[117] Section 50.59 does not provide a separate opportunity to request other hearings or expand the scope of the opportunity presented by the LAR. Additionally, Petitioners are incorrect that there is any "automatic" hearing right. Instead, any hearing is conditional upon satisfaction of all of the requirements of 10 C.F.R. § 2.309.

Mr. Gundersen claims that FENOC should have obtained a license amendment six years ago.[118] This claim is inconsistent with both Section 50.59 and the process for replacing steam generators. The replacement of steam generators is a lengthy process that takes many years. A 50.59 review could not have been performed, nor a license amendment request submitted, at the beginning of this process six years ago, because the design features and analyses would not have been finalized.

Mr. Gundersen also points to nine specific design changes between the original and replacement steam generators.[119] He states without basis that each change is "significant" and leaps to the characterization of them as "experimental."[120] Mr. Gundersen provides no review using the factors required in Section 50.59 to determine whether a license amendment is

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116 Petition at 12.

117 *See* LAR, Enclosure, at 2 ("The proposed change would revise four Technical Specifications . . . .").

118 Petition at 14; Gundersen Report at 4-5.

119 Gundersen Report at 5. The last two of these changes ("180-degree elbow design will be extensively modified" and "alloy of the hot leg nozzles was also changed") do not relate specifically to the replacement steam generators, but instead relate to the Reactor Coolant System hot leg piping replacement.

120 *Id.*

required, nor does he provide any explanation for why he characterizes the changes as an "experiment" as defined in Section 50.59.[121] He also claims that an additional perforation of the Davis-Besse containment structure should have been reviewed under Section 50.59 and that such a review would have identified the cut as "problematic."[122] Mr. Gundersen does not explain why he believes Section 50.59 would have identified a problem with the cut, or how such problems, if any, relate in any way to the four proposed Technical Specification changes. Moreover, Section 50.59 does not review the safety of a change, but instead determines whether a license amendment is required.[123]

The Petition and Mr. Gundersen provide only speculation without a reasoned basis or even fact-based explanation. Purely conclusory statements absent a "reasoned basis or explanation" are inadequate to provide support for a contention, "because [they] deprive[] the Board of the ability to make the necessary, reflective assessment of the opinion" as they are alleged to provide a basis for the contention.[124] Some examples of this speculation include:

- Mr. Gundersen argues that FENOC's Section 50.59 review was inadequate.[125] Specifically, he claims that the replacement steam generators do "not meet the criteria of 10 C.F.R. § 50.59."[126] Nowhere does Mr. Gundersen actually evaluate the replacement steam generators against the Section 50.59 requirements. Instead, he makes generalized

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121 Moreover, the label of whether an action is a "change" or a "test or experiment" is not dispositive under 10 C.F.R. § 50.59. Neither label automatically requires a license amendment. A license amendment would only be required if a review under Section 50.59 mandates one. *See* 10 C.F.R. § 50.59.

122 Gundersen Report at 5-6.

123 Mr. Gundersen also states that "10 C.F.R. § 50.59 requires a formal license renewal application when a license amendment change is required as a result of such a modification." Petition at 15; Gundersen Report at 6. Section 50.59 does not require a license "renewal" application in any situation.

124 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) ("[A]n expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion . . . .").

125 Gundersen Report at 4-5, 7.

126 *Id.* at 5, 8-10.

statements about those requirements and speculates that the Davis-Besse replacement steam generators require a license amendment.[127]

- Mr. Gundersen argues that the nine identified changes to the steam generator design require a license amendment.[128] Once again, Mr. Gundersen does not evaluate any of those changes under the criteria in Section 50.59, but instead speculates that "[e]ach and every one of these aforementioned changes is significant individually, and when taken together provide that the Replacement OTSG contains many experimental parameters, especially in comparison to the Original OTSG."[129] He provides no support whatsoever for those claims.
- Mr. Gundersen argues that an additional cut in the Davis-Besse Shield Building and containment would impact the Section 50.59 review.[130] Once again, nowhere does Mr. Gundersen demonstrate why or how an additional cut would require a license amendment. Instead, he states that no other containment has required so many cuts, and speculates that Section 50.59 would have identified the cut as "problematic," therefore requiring a new license amendment application.[131]
- Mr. Gundersen argues that previously identified cracking in the Davis-Besse Shield Building will impact the Section 50.59 review.[132] Once again, he has not explained why

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127 For example, Mr. Gundersen repeats a licensing board decision stating that "a licensee must request a license amendment if the proposed action requires that existing technical specifications be changed. If a licensee is unable to operate a reactor in strict accordance with its license, it must seek authorization from the NRC for a license amendment (10 C.F.R. §§ 50.59, 50.90 to 50.92) . . . ." *Id.* at 6. This statement only repeats the requirement in 10 C.F.R. § 50.59(c)(1) that a change to the Technical Specifications requires prior NRC approval. FENOC does not dispute this requirement, and complied with Section 50.59(c)(1) when it submitted the January 18, 2013 LAR.

128 *Id.* at 5, 10.

129 *Id.* at 5.

130 *Id.* at 5-6.

131 *Id.*

132 *Id.* at 10-11.

laminar cracking of the Shield Building would affect the Section 50.59 review for the steam generators, but provides only speculation.

- Mr. Gundersen argues that operating experience from San Onofre and other plants should be applied to Davis-Besse.[133] For example, he concludes: "Quite simply, the Davis-Besse ROTSG could not have been modified to reflect any lessons learned from the technical failures at San Onofre Units 2 and 3."[134] Mr. Gundersen does not explain why the San Onofre experience or experiences at any other plants should be considered any more than they already have, and speculates that the Davis-Besse steam generators must be modified to reflect this experience.
- Mr. Gundersen argues that steam generator problems at other plants would not have occurred had there been a public hearing.[135] He claims that "[e]vading the 10 C.F.R. § 50.59 license amendment processes allowed design errors to reach through fabrication and into plant operation before regulators even began examining these significant design and fabrication failures."[136] Mr. Gundersen provides no support, but liberally speculates that any problems with these other plants would not have occurred had there been a public hearing. He does not explain how these problems would have been identified, he does not explain how these other licensees avoided the Section 50.59 process, and he does not explain how the same problems could occur at Davis-Besse.

Mr. Gundersen's report is devoid of support for his conclusions, but instead provides only bare assertions and speculation.[137]

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133 *Id.* at 7-10.

134 *Id.* at 8.

135 *Id.* at 7.

136 *Id.*

137 *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000) ("A petitioner's issue will

For the above reasons, the Proposed Contention should be denied for failing to satisfy 10 C.F.R. § 2.309(f)(1)(v).

VI. CONCLUSIONS

For the numerous reasons discussed above, Petitioners have not demonstrated standing and have not submitted an admissible contention. Therefore, the Petition should be rejected by the Board.

Respectfully submitted,

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

Timothy P. Matthews
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5527
E-mail: tmatthews@morganlewis.com

David W. Jenkins
Senior Corporate Counsel II
FirstEnergy Service Company
Mailstop: A-GO-15
76 South Main Street
Akron, OH 44308
Phone: 330-384-5037
E-mail: djenkins@firstenergycorp.com

Counsel for FirstEnergy Nuclear Operating Company

Dated in Washington, DC
this 14th day of June 2013

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be ruled inadmissible if the petitioner has offered . . . only bare assertions and speculation." (internal quotation marks omitted))).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-346-LA
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	
	)	June 14, 2013
(Davis-Besse Nuclear Power Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "FirstEnergy Nuclear Operating Company's Answer Opposing Petition to Intervene and Request for Hearing Regarding Technical Specification License Amendment Request" was filed through the E-Filing system.

Signed (electronically) by Stephen J. Burdick

Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-5059
E-mail: sburdick@morganlewis.com

Counsel for FirstEnergy Nuclear Operating Company

DB1/ 74313037