

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of)	
)	Docket No. 50-346-LR
<i>First Energy Nuclear Operating Company</i>)	
(Davis-Besse Nuclear Power Station, Unit 1))	July 6, 2012
)	

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**INTERVENORS' COMBINED REPLY TO FENOC AND NRC STAFF OPPOSITION
TO 'MOTION TO AMEND AND SUPPLEMENT PROPOSED CONTENTION NO. 5
(SHIELD BUILDING CRACKING)'**

Now come Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario (CEA), Don't Waste Michigan, and the Green Party of Ohio (collectively, "Intervenors"), by and through counsel, and reply in support of their June 4, 2012 Motion to Amend and Supplement Contention No. 5 (Shield Building Cracking)" and to reply in answer to "FENOC's Answer Opposing Intervenors' Motion to Amend Proposed Contention No. 5" and the "NRC Staff's Opposition to Motion to Amend and Supplement Proposed Contention No. 5."

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MEMORANDUM

A. Reply as to lack of 10 C.F.R. 2.323 consultation

Judging from the vehemence with which the NRC Staff and FENOC have opposed the

proffered supplementation of Contention 5, the Licensing Board need not waste much time speculating about what would have happened had there been a consultation. Intervenors considered the conversation they had with counsel for the Staff and FENOC on May 14, 2012, wherein Intervenors expressed their intentions of moving to vacate the May 18, 2012 oral argument on Contention 5, to have comprised some level of consultation; Intervenors were quite clear on their intentions of supplementing Contention 5.

Intervenors apologize to the Board for failing to explicitly consult with the other parties about the specific grounds for amendment, but indubitably, consultation would have been futile and academic. The Staff and FENOC have vigorously opposed previous filings by Intervenors about this very cracking problem. The certainty that they would have not consented, if asked, to further amendment, when both have suggested in their pleadings that dismissal of the contention is in order, was 100%.

Intervenors are not suggesting that consultation has no value, nor are they shirking their responsibility to consult. Their counsel mistakenly omitted to ask here. The opposing parties are not claiming that they were blindsided; they knew an additional filing was coming from the discussion among the parties on May 14, 2012. Intervenors erroneously failed to consult; they certainly would not have compiled so lengthy a filing with the end of botching matters procedurally for themselves. The Staff's and FENOC's protestations on this score are a bit philistine. Intervenors have made an error in not conducting what would have been a futile consultation, while the increasing increasing evidence about the damaged shield building at Davis-Besse could make an entire time zone into a dead zone with radioactive contamination from breach in the event of a radiological accident. The integrity of that building is, we now know, far more compromised than the public has been told by

the regulators. Fraught as the shield building cracking issue is with implications for the continued safe and economic operation of Davis-Besse for an additional 20 years, the lack of consultation is a junk objection.

Perhaps what's at stake is exemplified at what tactics the parties use. The NRC Staff ventured very close to the line of bad faith pleading on this teapot tempest. At p. 12, fn. 57 of their Answer, the Staff accuses Intervenors of "fail[ing] to include a certification in their initial Motion to Amend Contention 5." The Staff carefully did not accuse Intervenors of failing to consult, because counsel for the Staff well knows that on February 26, 2012, Intervenors' counsel consulted with him prior to filing that February Motion to Amend. The insinuation by the Staff is of note because there is additional cynical argument raised by its Answer, discussed *infra*, which suggests anxiety as new information continues to surface about the history and current damaged state of the Davis-Besse reactor containment/shield building.

B. Reply as to New Information Going Beyond Scope of Proceeding

FENOC repeatedly accuses Intervenors of going beyond the scope of the proceeding with the supplemental information they provide. FENOC Answer at 19, 20, 22. FENOC characterizes these as "offensive, baseless allegations" (p. 20), suggesting that rebar corrosion and associated cracking, and the growing perception that the shield building cracking has been understated or trivialized, does not involve "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs", the standard of *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7-8 (2001). But the cracking problems at Davis-Besse certainly analogize to the parade of horrors cited by the *Turkey Point* panel: "Detrimental aging effects can result from, for example, metal fatigue, erosion, corrosion, thermal and radiation

embrittlement, microbiologically induced effects, creep, and shrinkage.” *See id.* at 7-8. Intervenor urge that the growing ooze of information about potential failure of concrete exposed to the elements in the foundation of the shield building, and the shield building walls and roof may not be adequately addressed by the April 5, 2012 AMP. As Intervenor asserted in their February

The Staff is more overt in its assault: “Instead of attacking the adequacy of the Shield Building Monitoring AMP, Intervenor’s 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 Cause Report, among other things.” NRC Answer pp. 23-24. But to launch this attack, the Staff again traveled close to, or perhaps even crossed, the line of bad faith pleading.

At pp. 15-16 of the Staff Answer, the NRC accuses Intervenor of supplementing “with information that cannot satisfy the timeliness standards. For example, Intervenor seek to supplement proposed Contention 5 with reference to RAIs from 2011, the Root Cause Report, the Revised Root Cause Report and Performance Improvement International’s ‘Root Cause Assessment, Davis-Besse Besse Shield Building Laminar Cracking’ report, which all preceded their motion by more than 60 days. . . .” The Staff is incorrect in at least two major respects. The Revised Root Cause Report was uploaded to ADAMS on **May 16, 2012** (which would have been just two days before the May 18 oral argument on the proposed Contention 5). The Performance Improvement International report was uploaded to ADAMS on **May 14, 2012**. Intervenor wonder if perhaps the Staff has deliberately misled the ASLB.

The Staff seems to be trying to transmute the rules of pleading into a rigid, constrained tightrope walk, which reveals either a rank misunderstanding of the adversarial process, or a fear of

it. If in preparing for an evidentiary hearing on a contention, an intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would – even if not specifically stated in the original contention and bases – be relevant if it falls within the “envelope,” “reach,” or “focus” of the contention when read with the original bases offered for it. If it falls outside such ambit, then an amended contention would be necessary in order for the new information to be considered relevant and admissible. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-12, 59 NRC 388, 391 (2004) (*characterizing Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002) and *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)). Where the additional specific information falls within the ambit of the original admitted contention, it is not really an “amendment” at all. *Duke Energy Corp., supra*.

As Intervenors pointed out in their February 13, 2012 Combined Reply in Support of Motion to Admit Contention 5 (p. 10), there is a reasonably close causal relationship between the Davis-Besse relicensing and the need for adequate structural integrity of the shield building in the 2017-2037 time period. Analysis of that causal relationship must account for actual and anticipated physical changes and exterior environmental factors occurring both before and after 2017. The accounting for all those changes is not yet complete. It is vital to get to the bottom of what is known about historic as well as recent cracking problems at Davis-Besse - and any connections between them - not to critique the February 2012 Blizzard of 1978 diversion, but to facilitate serious consideration at the question of the adequacy of the AMP for overseeing and managing the cracking. The cracking cannot be limited to the sanitized fable concocted by FENOC, but must include within

its sweep what FENOC's own consultant has identified .

The utility experienced shield building cracking problems before the plant had even opened, and the foundation and interior walls of the shield building, we now know, were exposed for a period of years to the elements during the construction phase. These facts must be considered in light of the 2011 cracking discoveries, when fashioning an AMP. It is FENOC, aided and abetted by the NRC Staff, which wants to use a truncated scope to divert official attention away from the looming questions of negligent construction and inadequate finishing work on the shield building. FENOC and the Staff are working hard to avoid discussion of the consequent structural problems which may exist.

It has been left to the Intervenors to disclose the inadequate "roots" of the Root Cause Analysis.

C. Reply As to the Revised Root Cause Analysis

No less than the NRC Staff stooped to help FENOC clean up its act, reflected in the May 16, 2012 revisions to the February 28, 2012 Root Cause Analysis Report. That May 16 revision filing, amending the February 28 Root Cause Analysis, was unknown, of course, to Intervenors when they moved on May 14, 2012 to vacate the May 18 hearing. But the impending disclosure of those revisions was surely known to counsel for FENOC and the Staff on May 14. FENOC was required to provide complete and accurate information by February 28, and revealing innumerable revisions of substance to the February 28 Analysis literally on the eve of the May 18 hearing would have caused considerable embarrassment to regulator and regulated, had the oral argument proceeded. But instead of excoriating FENOC for failing to give complete and truthful responses on February 28 (declining to cite the utility for violations being always *de rigueur*) , the NRC Staff lambasts

Intervenors for not asking the Staff to consent to the supplementation of Contention 5 from the May 16 Root Cause revisions, which the Staff didn't bother to mention were about to be disclosed, two days before they were delivered to the ASLB, and just 4 days before the slated May 18 oral argument.

D. The Staff's Contention of Omission Strategy.

The NRC Staff's strategic counterproposal to Intervenors' proposed Contention 5 of a contention of omission was astucious. Using FOIA, Intervenors have obtained a summary of a January 12, 2012 meeting between NRC legal staff and technical personnel from the Division of License Renewal. A copy of the summary is attached to this Reply.

In that meeting, convened two (2) days after Intervenors filed their motion to admit Contention 5, the NRC legal staff noted the concern of the Division of License Renewal over the discovery of cracking in the Davis-Besse shield building and settled upon the idea of proposing the AMP-related contention of omission in their February 6, 2012 filing. But now, *before the Board has even ruled on any aspect of this motion proceeding and before even the Staff has completed its review of the adequacy of the AMP*, the Staff has repudiated its own proposal and wants Contention 5 dismissed as moot.¹

Despite Intervenors' revelations of information suggesting that the true extent and nature of the cracking of the shield building and its foundation have not been disclosed to the public and are not yet fully known, the Staff shadow boxes against its own contention of omission. The Staff has

¹From June 29, 2012 Staff Answer p. 22: "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.' Therefore, Contention 5, as proposed by Staff, is moot."

scored its proposal as a knockout - or perhaps more succinctly, has knocked out its mere proposal.

A petitioner does not have to prove its contention at the admissibility stage. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). The factual support required is “a minimal showing that material facts are in dispute.” All that is needed at this juncture is “alleged facts” and the factual support “need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.” *First Energy Nuclear Operating Company* (Davis-Besse Nuclear Power Station, Unit 1), ASLBP No. 11-907-01-LR-BD01, LBP-11-13 at 17 (April 26, 2011) (slip op.).

E. Reply that Intervenors Did Not AMP Up to the Aging Management Plan

Perhaps the most lubricious tactic of FENOC and the Staff is to claim, as the Staff puts it, that “despite FENOC’s submission of a specific AMP for the shield building, Intervenors remain silent as to any issue they take with any specific portion of the AMP.” Staff Answer at 12.

This is false. Intervenors criticized the AMP as a “plan to have a plan” (Motion to Amend and Supplement Contention 5, p. 8), meaning that the gathering of data for a detailed structural analysis of the shield building and to consider applicable effects is months or years away from completion. This precludes presentation of a current, actionable management plan for addressing age-related effects to the shield building.

Intervenors challenged other facets of the basis for the alleged AMP. They pointed out (Motion to Amend and Supplement at 8) that the AMP does not accurately reflect the known extent of cracking in the shield building exterior because FENOC excluded cracking narrower than 1/16". FENOC, in its Answer at 33, upbraids Intervenors for not knowing the difference between cracks on the surface of the shield building and those “internal” cracks which were being examined as part

of the Root Cause Analysis. That admission in FENOC's rebuke proves Intervenor's point: comprehensive identification and assessment of cracking at all locations is an obligatory predicate for an Aging Management Plan.

Intervenor further pointed out that there is data on 15 of the 16 concrete flute shoulders of the shield building, because it was inconvenient to analyze the 16th one. Motion at 9. Intervenor pointed out that spalling - pitting in the concrete of up to 2" depth - has been documented in the shield building walls since at least 1996, but did not figure into the AMP. *Id.* They suggested that the lack of quality assurance information from 40 years ago militates in favor of a wider investigation for purposes of constructing an Aging Management Plan. Intervenor urged that the interior of the shield building and even its foundation were exposed to the elements and might have cracking problems dating back to the era of the Blizzard. Intervenor's point was that the AMP, as formulated, is unduly limited to a few known areas (and, apparently, types) of cracking on the shield building walls and hence was inadequate in light of the growing body of information about cracking causation.

F. Conclusion

By their proffered amendment of the body of facts underlying Contention 5, Intervenor have demonstrated that a genuine dispute exists with the applicant on a material issue of fact. The presence of cracking in shield building structures, and its oversight, is certainly relevant to the extended, 20-year, period of operation being pursued by the utility.

"[A]t the contention filing stage,] the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." "Rules of Practice for Domestic Licensing

Proceedings: Procedural Changes in the Hearing Process, Final Rule,” 54 FR 33168, 33171 (Aug. 11, 1989). The ASLB should allow amendment. Where warranted, contentions may be amended so long as the scope of admitted contentions is not extended beyond their reasonably inferred bounds. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 28).

WHEREFORE, Intervenors respectfully ask that the factual basis for their proposed Contention 5 be amended/supplemented with the information they provided in support of this Motion; and that Contention 5 be admitted for hearing.

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**CERTIFICATE OF SERVICE OF ‘INTERVENORS’ COMBINED REPLY TO FENOC
AND NRC STAFF OPPOSITION TO ‘MOTION TO AMEND AND SUPPLEMENT
PROPOSED CONTENTION NO. 5 (SHIELD BUILDING CRACKING)’**

I hereby certify that a copy of the “INTERVENORS’ COMBINED REPLY TO FENOC AND NRC STAFF OPPOSITION TO ‘MOTION TO AMEND AND SUPPLEMENT PROPOSED CONTENTION NO. 5 (SHIELD BUILDING CRACKING)’ was sent by us to the following persons via electronic deposit filing with the Commission’s EIE system on the 6th day of July, 2012:

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30

CuadradoDeJesus, Samuel

From: Morey, Dennis *mark*
Sent: Thursday, January 12, 2012 4:51 PM
To: Galloway, Melanie; Delligatti, Mark
Cc: Auluck, Rajender; CuadradoDeJesus, Samuel; Sheikh, Abdul; Davis-BesseHearingFile Resource; Harris, Brian; Subin, Lloyd; Kanatas, Catherine
Subject: FW: Summary of meeting with OGC to discuss Davis Besse's new contention on the shield building crack
Attachments: Davis-Besse Shield Building Contention.pdf
Importance: High

Melanie and Mark,

Sam Cuadrado, Abdul Sheikh and I met with OGC today to discuss the new Davis-Besse contention on the shield building cracks. Since DLR has a documented concern with the cracks, OGC does not want to oppose the contention but will instead propose a revised contention that focuses on the license renewal safety issue: the adequacy of the AMP to address age-related cracking in the shield building. We agreed and will support developing a revised contention.

Thanks,
Dennis Morey

From: CuadradoDeJesus, Samuel *mark*
Sent: Thursday, January 12, 2012 4:34 PM
To: Morey, Dennis
Cc: Sheikh, Abdul; Davis-BesseHearingFile Resource
Subject: Summary of meeting with OGC to discuss Davis Besse's new contention on the shield building crack
Importance: High

Dennis,

Summary of Meeting with OGC to discuss Davis Besse's New Contention No. 5 on the Shield Building Crack

On January 10, 2012, a "Motion for Admission of Contention No. 5 on Shield Building Cracking" for Davis-Besse was submitted before the Atomic Safety and Licensing Board (ASLB). The new Contention No. 5 reads as follows:

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

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.

Per request of Brian Harris (OGC lawyer) a meeting was scheduled to discuss with the technical staff the merits of the contention. The meeting was held on January 12, 2012, and the participants were the following:

- Brian Harris (OGC)
- Lloyd Subin (OGC)

- Catherine Kanatas (OGC)
- Abdul Sheikh
- Dennis Morey
- Samuel Cuadrado

During the meeting Abdul Sheikh presented and explained to OGC (1) the sequence of events since the discovery of the cracks on October 2011 and (2) the technical concerns within the scope of license renewal associated with the shield building cracks. The staff also pointed out that an RAI was issued on December 2011 (RAI B.2.39-13) requesting the applicant to provide the shield building cracks root cause and to explain whether the Structures Monitoring Program AMP, will be adequate to manage aging of the shield building during the period of extended operation. The staff also stated that the applicant will provide information on the root cause by the end of February 2012. The staff further stated that an assessment on the adequacy of an AMP won't be possible until we receive the applicant's determination of the root cause and proposed AMP.

Given the information provided by the staff, OGC does not want to oppose Contention No. 5 but will propose rewording it. OGC will prepare a revised contention that reflects a concern with the adequacy of the Structures Monitoring Program AMP to address the shield building cracks. OGC will provide the staff with a draft revised contention in order to receive comments and feedback before submitting the February 6 ASLB response. The DLR PM will contact Region III inspectors and related LR supporting staff to keep them up to date with the discussions associated with OGC and Contention No. 5.

Thanks,

Samuel Cuadrado de Jesús

Project Manager

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