

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO INTERVENORS' THIRD AND FOURTH
MOTIONS TO AMEND AND/OR SUPPLEMENT PROPOSED
CONTENTION NO. 5 (SHIELD BUILDING CRACKING)

Brian G. Harris
Catherine E. Kanatas
Counsel for NRC Staff

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Atomic Safety and Licensing Board's ("Board") Orders,¹ the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the Intervenor's Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking), ("Intervenor's July Motions") jointly filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively "Intervenor's")² regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").³

¹ See Initial Scheduling Order (Jun. 15, 2011) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML111662021) ("ISO") at B.2. See also Order (Setting Dates for Answers and Reply to Motions to Amend Contention 5) (July 17, 2012) (ADAMS Accession No. ML12199A341).

² See Intervenor's Third Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 16, 2012) (ADAMS Accession No. ML12198A561); Intervenor's Fourth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 23, 2012) (ADAMS Accession No. ML12205A507).

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 set forth below, the Board should deny Intervenor's July Motions because they: (1) are based on claimed "discrepancies" and "inconsistencies" with FENOC and Performance Improvement International's ("PII") root cause analyses, which are not relevant to their proposed Contention 5 or to the Shield Building Monitoring Aging Management Plan ("AMP"), (2) do not demonstrate that the proposed additional bases for proposed Contention 5 are based on new and materially different information from information previously available, (3) fail to plead the non-timely filing requirements, and (4) do not meet the 10 C.F.R. § 2.309(f)(1) admissibility requirements, as they continue to raise issues that are outside the scope of this limited proceeding, unsupported, and/or immaterial. For all of these reasons, Intervenor's July Motions 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, 2017.⁴ 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")⁵ discussed the procedural history for this proceeding through the filing of proposed new Contention 5,⁶ so the Staff will not unduly repeat it here.⁷

As discussed in the Staff's most recent filing related to proposed Contention 5,⁸ the Staff opposed the admission of Contention 5 as submitted,⁹ but recognized that a limited portion of

⁴ LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

⁵ 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).

⁶ See "Motion for Admission of Contention No. 5 on Shield Building Cracking," ("Intervenor's Motion to Admit Contention 5") (ADAMS Accession No. ML12010A172).

⁷ Staff's Answer to Contention 5 at 2-3.

⁸ See NRC Staff's Answer to Motion to Amend and Supplement Proposed Contention 5 (Jun. 29,

Contention 5, as revised by the Staff, could be admitted by the Board as a contention of omission.¹⁰ On February 6, 2012, FENOC filed an answer opposing the admission of Contention 5.¹¹ 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 5.¹² On February 13, 2012, Intervenors filed a combined Reply to the Staff's and FENOC's Answers to Contention 5 ("Intervenors' Reply"),¹³ and the Board issued an order denying FENOC's motion for leave to respond to the

2012) (ADAMS Accession No. ML12181A013). While the June 29, 2012 Answer outlines the procedural history regarding proposed Contention 5 through the filing of the instant motions, the Staff repeats the procedural history to (1) improve readability and (2) highlight issues pertinent to Intervenors' July Motions like references to the exact same documents and the same arguments as previous motions to supplement proposed Contention 5.

⁹ 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, as well as past and current management practices.

¹⁰ 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.").

¹¹ FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012) (ADAMS Accession No. ML12037A245).

¹² 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).

¹³ 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).

Staff's Answer to Contention 5, and setting this matter for oral argument on the admissibility of Contention 5 at a time and place to be announced.¹⁴

On February 27, 2012, Intervenor filed a motion to supplement their motion for admission of Contention 5 based on a claim of new information ("Intervenor's Initial Motion to Amend Contention 5").¹⁵ 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 evaluation and corrective actions, including long-term monitoring requirements."¹⁶ The Root Cause Report was developed using a contractor-developed root cause assessment report by PII.¹⁷ 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."¹⁸ On March 8, 2012, both FENOC and Staff filed answers opposing Intervenor's motion to amend

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

¹⁵ See Intervenor's Initial Motion to Supplement Contention 5.

¹⁶ 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.").

¹⁷ See May 16, 2012 cover letter for L-12-205. The Root Cause Report noted that PII "was the prime contractor with prior industry experience in both root cause investigation and modeling and analysis capability of nuclear containment structures." Root Cause Report at 8. The Root Cause Report referenced PII's report in several places. See, e.g., *id.* at 40, 42, 43, and 44.

¹⁸ 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.

their motion for admission of contention 5.¹⁹ On March 28, 2012, the Board issued an order scheduling oral argument on the admission of Contention 5 for May 18, 2012.²⁰

On the week-ending March 16, 2012, Staff did an on-site inspection in which they reviewed FENOC's root cause analysis and observed supporting vendor tests, among other things.²¹ At that inspection, Staff "identified minor weaknesses in the [Root Cause Report and PII root cause assessment report] associated with the level of detail in the documentation provided."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 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

¹⁹ See NRC Staff's Answer to Intervenor's Motion to Amend 'Motion for Admission of Contention No. 5' (Mar. 8, 2012) (ADAMS Accession No. ML12068A095); FENOC's Answer Opposing Intervenor's Motion to Amend Proposed Contention 5 on Shield Building Cracking (Mar. 8, 2012) (ADAMS Accession No. ML12068A429).

²⁰ Notice and Order (Scheduling Oral Argument) (Mar. 28, 2012) (ADAMS Accession No. ML12088A340).

²¹ 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) ("NRC's June 21, 2012 Inspection Report.").

²² NRC's June 21, 2012 Inspection Report at cover page.

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."

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

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 The Board granted FENOC’s Motion to Supplement on April 17, 2012.²⁹ 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 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

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).

³¹ *Id.* at 2.

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

On May 16, 2012, FENOC submitted a Revised Root Cause Analysis, which addressed observations made by NRC during its March 2012 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 FENOC also noted that the “contractor root cause assessment report by [PII] was revised to incorporate these observations, and a non-proprietary version³⁴ of the assessment report was submitted to the NRC via letter L-12-196 on May 14, 2012.”³⁵

On June 4, 2012, Intervenors filed a motion to amend and supplement proposed Contention 5 based on the Shield Building Monitoring AMP (“Intervenors’ June 2012 Motion to Supplement”).³⁶ Notably, Intervenors’ June 2012 Motion to Supplement referenced the Revised Root Cause Report and PII’s April 2012 Report and claimed that these documents contained new and material information that exposed discrepancies between FENOC’s Root Cause Report and the Shield Building AMP.³⁷ The Staff issued an inspection report on June 21, 2012, regarding the evaluation of FENOC’s root cause analysis and corrective actions related to the

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 PII made the determinations regarding what material was proprietary. Intervenors claims that the redactions are “aimed at thwarting public access to embarrassing truths about the shabby state of the shield building,” Intervenors’ Fourth Motion to Supplement at 29, are baseless.

³⁵ *See id.* at cover page. *See also* April 20, 2012 PII Report at i (noting that Root Cause Report (“RCR”) was “revised to include comments and responses following NRC and FENOC review.”).

³⁶ *See* Intervenors’ Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 4, 2012) (ADAMS Accession No. ML12156A411). Specifically, Intervenors stated that they were “supplementing their cracking contention for the purpose of exposing discrepancies between FENOC’s February 27, 2012 [Root Cause Report] and the [Shield Building Monitoring AMP].” *Id.* at 2.

³⁷ *See* Intervenors’ June 2012 Motion to Supplement. *See id.* (raising concerns about: new locations and types of structural damage; Root Cause’s conclusions; rebar issues (moisture and spacing); main steam line issues; FENOC’s management style; dome parapet cracking, 2011 RAIs, among other things).

cracking in the shield building.³⁸ The inspection report noted that FENOC's staff, which includes contractor PII, "established a sufficient basis for the causes of the shield building laminar cracking related to: the environmental factors associated with the 1978 blizzard, the lack of an exterior moisture barrier, and the structural design elements of the shield building."³⁹ The NRC's June 21, 2012 Inspection Report also stated that the minor weaknesses identified with the documentation related to the Root Cause Report "did not constitute performance deficiencies or findings because they did not adversely affect the outcome of the root cause process."⁴⁰

On June 29, 2012, Staff and FENOC filed Answers opposing Intervenor's June 2012 Motion to Supplement.⁴¹ Staff's June 29, 2012 Answer stated, among other things, that (1) proposed Contention 5 was moot given the submittal of the Shield Building Monitoring AMP, and (2) the Revised Root Cause Report did not contain any materially different information than information previously available. Intervenor's filed a combined reply on July 6, 2012.⁴²

Intervenor's filed a third motion to amend and/or supplement proposed Contention 5 on July 16, 2012,⁴³ which claimed that the Revised Root Cause Report contained new and material information which indicated that the Shield Building Monitoring AMP was inadequate.

³⁸ NRC's June 21, 2012 Inspection Report.

³⁹ 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) at cover page.

⁴⁰ *Id.*

⁴¹ FENOC's Answer Opposing Intervenor's Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 29, 2012) (ADAMS Accession No. ML12181A303); NRC Staff's Answer to Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 29, 2012) (ADAMS Accession No. ML12181A013).

⁴² Intervenor's Combined Reply to FENOC and NRC Staff Opposition to 'Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking)' (July 6, 2012) (ADAMS Accession No. ML12188A792).

⁴³ Intervenor's Third Motion to Supplement.

Intervenors' Third Motion to Supplement stated that Intervenors intended to file a fourth motion to amend proposed Contention 5 no later than Monday, July 23, 2012. On July 17, 2012, the Board issued an order instructing Staff and FENOC to each file one answer responding to both of these motions no later than August 17, 2012.⁴⁴ Intervenors filed their fourth motion to amend and/or supplement proposed contention 5 on July 23, 2012.⁴⁵ Intervenors' Fourth Motion to Supplement claimed that PII's April 20, 2012 Root Cause Report contained new and materially different information than previously available which indicated that the Shield Building Monitoring AMP was inadequate.

On August 16, 2012, FENOC submitted to the NRC a response to a "Request for Additional Information" ("RAI") and accompanying revision to the Shield Building Monitoring AMP.⁴⁶ From August 16, 2012 to August 17, 2012, Intervenors submitted their Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking),⁴⁷ which is based on documents received from the NRC in response to Intervenors' January 26, 2012, Freedom of Information Act ("FOIA") request. Notably, Intervenors' instant motions contain references to some of the same FOIA documents.

⁴⁴ Order (Setting Dates for Answers and Reply to Motions to Amend Contention 5) (July 17, 2012) (ADAMS Accession No. ML12199A341).

⁴⁵ Intervenors' Fourth Motion to Supplement.

⁴⁶ See L-12-284 Davis-Besse Nuclear Power Station, Unit No. 1 Docket No. 50-346, License Number NPF-3, Reply to Request for Additional Information for the Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Revnewal Application (TAC No. ME4640) and License Renewal Application Amendment No. 31 (Aug. 16, 2012). Staff's evaluation of the RAI response and Shield Building Monitoring AMP is ongoing.

⁴⁷ See Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012) ("Intervenors' Fifth Motion to Supplement"). Intervenors' Fifth Motion to Supplement included nine appendices referencing documents Intervenors received from the NRC in response to their January 26, 2012 FOIA request. Intervenors' Fifth Motion and appendices 1-7 were filed on August 16, 2012, while appendices 8 and 9 were filed on August 17, 2012. The Staff is currently reviewing the Intervenors' pleading and will respond within 25 days.

I. Legal Requirements for Amended Contentions

Intervenors' July Motions move the Board for leave to further supplement their proposed Contention 5,⁴⁸ which was submitted on January 10, 2012.⁴⁹ As discussed in previous Staff Answers related to proposed Contention 5,⁵⁰ the Commission does not look with favor on new or amended contentions filed after the initial filing,⁵¹ 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)."⁵² This Board has likewise held that Intervenors should 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.⁵³ Additionally, late-filed contentions must meet the threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1).⁵⁴

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;

⁴⁸ Intervenors' Third Motion to Supplement at 1; Intervenors' Fourth Motion to Supplement at 1. Because Intervenors do not seek to amend the text of their contention, but only the supporting bases, the Staff considers the motions only motions to supplement, not amend. *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).

⁴⁹ Intervenors' Motion to Admit Contention 5.

⁵⁰ *See, e.g.,* June 29, 2012 Answer; March 8, 2012 Answer (ADAMS Accession No. ML12068A095).

⁵¹ *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.'").

⁵² *Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009)* (internal citations omitted).

⁵³ *See* Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (ADAMS Accession No. ML110490269).

⁵⁴ *Oyster Creek, CLI-09-7, 69 NRC at 261.*

- (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.⁵⁵

Pursuant to the Board's ISO, "a motion and proposed new contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when the material information on which it is based first becomes available to the moving party through service, publication, or any other means. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c)."⁵⁶

The Staff's June 29, 2012 Answer outlined relevant Commission precedent regarding what constitutes new and materially different information for purposes of 10 C.F.R. § 2.309(f)(2), so the Staff will not unduly repeat it here, except to emphasize that 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.⁵⁷

II. Admissibility of Proposed Amendments or Supplements to Contention 5 in Intervenors' July Motions

As discussed in detail below, Intervenors' July Motions should be denied because they do not (1) indicate how any of the information cited is new and materially different from other previously available information, or (2) meet the contention admissibility requirements.

⁵⁵ 10 C.F.R. § 2.309(f)(2).

⁵⁶ 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.

⁵⁷ See *Pa'ina Hawaii, LLC*, (Materials License Application), CLI-10-18, 72 NRC 56, 79 (2010).

A. Intervenors' July Motions Do Not Indicate How Any of the Information Cited is New and Materially Different

Intervenors' July Motions seek to supplement the bases for proposed Contention 5, which was filed on January 10, 2012.⁵⁸ Intervenors argue that the purpose of their Third Motion to Supplement is to expose discrepancies between FENOC's Root Cause Report and the Shield Building Monitoring AMP.⁵⁹ Notably, this was the same stated purpose of the Intervenors' June 2012 Motion to Supplement.⁶⁰ Intervenors' Fourth Motion to Supplement aims to itemize inconsistencies between FENOC's Root Cause Report and the findings of PII.⁶¹ In other words, Intervenors repeatedly stated purpose for these serial motions is not to identify material issues of dispute with FENOC's LRA, but to catalog for the Board and parties "discrepancies" between two related documents on the mechanism of crack initiations propagating in the shield building.

Intervenors' Third Motion to Supplement lists 11 claimed discrepancies, while Intervenors' Fourth Motion to Supplement lists 27 claimed inconsistencies. Notably, each item relates to an observation the NRC made on root cause documents. Intervenors' intense focus on the consistency of these two reports and its impact on FENOC's ability to fully understand the mechanism of the shield building cracking is at odds with their proposed contention, which states that the cause of cracking is not material.⁶² It is also at odds with the Staff's aging management review, which focuses on "managing the functionality of systems, structures, and components [SSCs] in the face of detrimental aging effects as opposed to identification and

⁵⁸ 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.*

⁵⁹ Intervenors' Third Motion to Supplement at 2.

⁶⁰ Intervenors' June 2012 Motion to Supplement at 2.

⁶¹ See Intervenors' Fourth Motion to Supplement at 2.

⁶² See, e.g., Intervenors' Third and Fourth Motion to Supplement at 1, which note that the cause of the recently identified shield building cracking is unknown.

mitigation of aging mechanisms.”⁶³ Intervenor never explain why knowledge of the cracking mechanics is necessary for developing an adequate AMP based on monitoring the cracks through multiple inspections over the period of extended operation.

Instead, Intervenor assert, *ipse dixit*, 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 and/or facts that did not exist when Intervenor moved for admission of Contention 5 in January 2012.⁶⁴ Intervenor assert that their filings are timely because: (1) the Third Motion to Supplement was filed within sixty (60) days of the Revised Root Cause Report’s release on May 16, 2012, and (2) the Fourth Motion to Supplement was filed within 60 days of the April 20, 2012 PII Report being made publicly available.⁶⁵ While this could be sufficient to demonstrate that the information is new, it is insufficient to demonstrate that it is materially different from previously available information.

The Staff notes that at times it is unclear to what extent, if any, Intervenor’s claims in their Third and Fourth Motion to Supplement overlap each other, and those in prior supplements. Therefore, this answer responds to Intervenor’s claims based on the documents referenced, (e.g., claims based on the Revised Root Cause) instead of by line-item in the motions.⁶⁶ However, in every instance, the Intervenor’s instant motions do not satisfy the

⁶³ Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22461, 22488 (May 8, 1995).

⁶⁴ Intervenor’s Third Motion to Supplement at 13; Intervenor’s Fourth Motion to Supplement at 48.

⁶⁵ 60 days is the period ordered by the Board in which Intervenor must act to timely file new or amended contentions. See Board’s ISO.

⁶⁶ In particular, Staff does not go through the 27 claimed inconsistencies in the Fourth Motion to Supplement in a line-by-line fashion because it appears that these claims are essentially the same as arguments raised in the Third Motion to Supplement, which outlines 11 claimed discrepancies. While the Third Motion references the Revised Root Cause Report and the Fourth Motion references the PII report, because the PII report was done in support of the Revised Root Cause Report, the challenges are ultimately to the Revised Root Cause Report. Intervenor do not demonstrate that either the Revised Root Cause Report or the April 20, 2012 PII Report have any new and materially different information regarding proposed Contention 5 or the Shield Building Monitoring AMP.

timeliness standards, as Intervenor do not demonstrate how any of the documents cited to, including the Revised Root Cause Report, the April 20, 2012 PII Report, and documents received from a January 26, 2012 FOIA request,⁶⁷ are both new and materially different information from information previously available. Merely electing to obtain documents through the FOIA process does not establish that the information is new and material.⁶⁸

1. The Revised Root Cause Report Does Not Contain New and Materially Different Information Than Previously Available

Intervenor state that the purpose of their Third Motion to Supplement is to expose “discrepancies” between the Revised Root Cause Report and the Shield Building Monitoring AMP.⁶⁹ Intervenor argue that the NRC’s questions related to the root cause analysis challenge FENOC’s root cause conclusions, and that there is new and material information in the Revised Root Cause Report that shows there is “serious incongruity between the cracking problems as defined by FENOC, and the proposed remedy, exemplified by the [Shield Building Monitoring] AMP.”⁷⁰ Thus, Intervenor appear to argue that revisions to the Root Cause Report constitute new and materially different information that render the Shield Building Monitoring AMP

⁶⁷ Intervenor also appear to assert that RAIs from 2011 contain information indicating water problems inside the shield building. Intervenor’s Fourth Motion to Supplement at 5. These claims are similar to, if not identical, to claims made in Intervenor’s June 2012 Motion. The Staff’s June 29, 2012 Answer described in detail why this information is neither new nor materially different than information previously available. It is not enough to simply rehash old arguments to meet the materially different standard in 10 C.F.R. § 2.309(f)(2)(ii). Thus, the Board should not allow Intervenor to supplement their proposed Contention 5 based on these claims.

⁶⁸ As noted above, Intervenor’s Fifth Motion to Supplement is based on documents received from the same FOIA request. Staff will respond to Intervenor’s Fifth Motion to Supplement separately.

⁶⁹ Intervenor’s Third Motion to Supplement at 2. As in their June motion to supplement, Intervenor Third Motion actually says it is based on the Root Cause Report, but goes on to discuss the Revised Root Cause Report and how it allegedly renders the Shield Building Monitoring AMP deficient. Because their Fourth Motion to Supplement indicates that the Third Motion is meant to address the Revised Root Cause, the Staff only addresses the claims that the Revised Root Cause Report is a source of new and material information.

⁷⁰ *Id.*

inadequate. Notably, Intervenor made this same argument in their June 2012 Motion to Supplement, which Staff opposed.⁷¹ For the same reasons, Staff opposes the instant motions.

a. The Root Cause of the Shield Building Cracking is Not Part of Proposed Contention 5 or Relevant to the Purpose of the Shield Building Monitoring AMP

Since Intervenor has begun to engage in serial supplementation of their proposed Contention 5, it is important to repeat⁷² and emphasize that the root cause of the shield building cracking is not relevant to proposed Contention 5. Intervenor's proposed Contention 5 asserts that *regardless of the cause*, 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."⁷³ Therefore, the root cause of the cracking is irrelevant for purposes of proposed Contention 5. Notably, while Intervenor has repeatedly moved to supplement their support for proposed Contention 5, they have not sought to amend the contention itself. Thus, Intervenor's claims about "discrepancies" and/or "inconsistencies" in the root cause analysis and report are not material to proposed Contention 5, and the Board should not allow these claims to supplement proposed Contention 5.

Likewise, the root cause of the recently identified shield building cracking is irrelevant to the stated purpose of the Shield Building Monitoring AMP. Specifically, the purpose of that AMP 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*."⁷⁴ FENOC determined

⁷¹ See NRC's June 29, 2012 Answer (responding to claims raised in Intervenor's June 2012 Motion to Supplement).

⁷² See *id.*

⁷³ Intervenor's Third Motion to Supplement at 1 (noting cracking was "of unknown origin"). This is in line with the Staff's aging management review, which focuses on managing the functionality of SSCs instead of identifying and mitigating aging mechanisms. See 60 Fed. Reg. at 22488.

⁷⁴ FENOC's April 5, 2012 Submittal, Enclosure at 15 (emphasis added). 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. As

that the recently identified shield building cracking was not aging related.⁷⁵ And the Shield Building Monitoring AMP will inspect the cracking as it exists.⁷⁶ Intervenor's do not indicate how the NRC's questions related to the root cause analysis and/or any claimed "discrepancies" or "inconsistencies" between the Revised Root Cause Report and the Shield Building Monitoring AMP are new and materially different information in relation to proposed Contention 5 or the Shield Building Monitoring AMP.⁷⁷ Thus, the Board should not admit these claims to supplement the bases for proposed Contention 5.

b. The Revised Root Cause Report Does Not Contain
Materially Different Information Regarding the Root
Cause of the Shield Building Cracking

Even assuming the root cause was relevant to proposed Contention 5, Intervenor's instant motions should be denied because Intervenor's do not indicate how any changes in the Revised Root Cause Report are materially different from information previously available.⁷⁸

As discussed in the Staff's June 29, 2012 Answer, the Revised Root Cause Report does not contain any materially different information than information previously available. As repeatedly stated in the Revised Root Cause Report, the revisions made to the Root Cause

discussed, FENOC submitted a revised Shield Building Monitoring AMP on August 16, 2012. Staff notes that the stated purpose of that revised AMP is similar to the stated purpose in the April 5, 2012 AMP. See L-12-284 at page 6 of 12.

⁷⁵ See FENOC's May 16, 2012 cover letter transmitting Revised Root Cause Report.

⁷⁶ Intervenor's appear to recognize this, as they note that the AMP's purpose is to "to oversee and deal with the shield building's...cracking." Intervenor's Third Motion to Supplement at 2.

⁷⁷ The Staff's review of the Shield Building Monitoring AMP is ongoing. As noted above, FENOC submitted a response to a Staff RAI on August 16, 2012, along with corresponding changes to the Shield Building Monitoring AMP. The Staff will evaluate the response and/or submit additional RAIs if needed as part of their ongoing review.

⁷⁸ The Staff also notes that Intervenor's appear to have raised very similar claims in their June 2012 Motion to Supplement. That motion, like the instant motions, cited the Revised Root Cause Report and PII's report, and claimed that new information in those documents was materially different and rendered the Shield Building Monitoring AMP suspect. And like the instant motions, Intervenor's June 2012 Motion to Supplement raised concerns about the Root Cause Report's conclusions, FENOC's management practices, 2011 RAIs, dome parapet cracking, the 2002 construction opening, rebar (spacing and moisture issues), among other things.

Report were based on NRC's observations during on-site inspections in March 2012, and do not "invalidate the methodology, assessment and analysis, conclusions, or corrective actions of the root cause analysis report..."⁷⁹ Likewise, the NRC's June 21, 2012 Inspection Report notes that the NRC only identified "minor weaknesses...associated with level of detail in the documentation...These weaknesses did not constitute performance deficiencies or findings because they did not adversely affect the outcome of the root cause process."⁸⁰ Thus, while the Revised Root Cause Report has been publicly available since May 17, 2012,⁸¹ the underlying methodology, assessment and analysis, conclusions, and corrective actions have been publicly available since February 29, 2012.⁸² Thus, Intervenor's assertions based on the Revised Root Cause Report are undeniably late as the information was previously available substantially prior to the Revised Root Cause Report's release.

Despite this, Intervenor's allege in their instant motions, as they did in their June 2012 Motion to Supplement, that the changes in the Revised Root Cause Report are new and material information not previously available. Specifically, Intervenor's claim that there are 11 "discrepancies" between the Revised Root Cause Report and the Shield Building Monitoring AMP that constitute new and materially different information. For the reasons discussed below,

⁷⁹ Revised Root Cause Report at 5. *Id.* at cover page (noting that revisions based on NRC observations did not affect the overall conclusions or corrective actions being taken).

⁸⁰ NRC's June 21, 2012 Inspection Report.

⁸¹ See FENOC's Notification of Filing Related to Proposed Shield Building Cracking Contention (May 17, 2012) (ADAMS Accession No. ML12138A361).

⁸² See FENOC's Notification of Filing Related to Proposed Shield Building Cracking Contention (Feb. 29, 2012) (ADAMS Accession No. ML12060A191). For example, Intervenor's challenge the concrete tensile strength values used in the root cause analysis. See Intervenor's Fourth Motion to Supplement at 31, 43. However, the revisions made to the Root Cause Report and the PII Report did not involve changes in the tensile strength values used. Instead, more detail was provided on the values, but this did not change the analyses or conclusions. Likewise, Intervenor's challenge the conclusions regarding the Blizzard of 1978. See, e.g., *id.* at 40-42. However, any changes made to the PII report and Root Cause Report did not undermine the Revised Root Cause Report's conclusions regarding the Blizzard of 1978.

none of these “discrepancies” is new and materially different information from information previously available.⁸³

i. Intervenors Cite to Passages from the Revised Root Cause Report which are Identical to Passages in the Root Cause Report and So are Not New and Materially Different Information

Intervenors claim that information in the Revised Root Cause Report is new and material in relation to the Shield Building Monitoring AMP. But in multiple instances, the information Intervenors cite from the Revised Root Cause Report is identical to information in the Root Cause Report, which was available on February 29, 2012 and has been considered by the Staff. The April 5, 2012 Shield Building Monitoring AMP has likewise been available for more than 60 days prior to the filing of Intervenors’ instant motions and is under Staff’s consideration. And Intervenors are clearly aware of both documents, as previous motions to supplement have been based on them.⁸⁴ Therefore, information in the Root Cause Report, which is also in the Revised Root Cause Report, is not new and materially different from previously available information.

For example, Intervenors suggest that a passage in the Revised Root Cause Report regarding the 2002 temporary access opening is new and materially different information which renders the Shield Building AMP inadequate.⁸⁵ However, this passage was in the Root Cause Report, which was publicly available as of February 29, 2012:⁸⁶

⁸³ Some of the “discrepancies” appear to be referenced in both motions, so the Staff makes reference to both the Third and Fourth Motions to Supplement as appropriate. See e.g, microcracking, and dome cracking. And as noted, Intervenors’ June 2012 Motion to Supplement made similar, if not identical arguments, which Staff already opposed. See Staff’s June 29, 2012 Answer.

⁸⁴ See Intervenors’ June 2012 Motion to Supplement.

⁸⁵ Intervenors’ Third Motion to Supplement at 8.

⁸⁶ Further, Intervenors’ June 2012 Motion to Supplement discussed the 2002 temporary access opening.

Root Cause Report	Revised Root Cause Report
<p>There was no previous DBNPS experience with shield building concrete laminar cracking. In 2002, a similar temporary access opening was created using hydrodemolition for the replacement of the reactor pressure vessel closure head. The 2002 temporary access opening was confined within the blockout used for the original construction opening and was not in an area exposed to similar regions where laminar cracks were found in 2011. There were no symptoms of concrete distress observed on the exterior of the shield building that would indicate laminar cracks were located below the surface. P. 51</p>	<p>There was no previous DBNPS experience with shield building concrete laminar cracking. In 2002, a similar temporary access opening was created using hydrodemolition for the replacement of the reactor pressure vessel closure head. The 2002 temporary access opening was confined within the blockout used for the original construction opening and was not in an area exposed to similar regions where laminar cracks were found in 2011. There were no symptoms of concrete distress observed on the exterior of the shield building that would indicate laminar cracks were located below the surface. P. 56</p>

Therefore, this information is not new under the Board's ISO.

Intervenors further reference a slide from a January 2012 public meeting.⁸⁷ Clearly information in the January 2012 slide is not new information and Intervenors have not indicated how information in the slide is materially different than information previously available.

Likewise, Intervenors assert that the Revised Root Cause Report contains information that is new and materially different than information previously available regarding the below-grade shield building walls which renders the Shield Building Monitoring AMP inadequate.⁸⁸ Specifically, Intervenors note that the Revised Root Cause Report "contains an apparent commitment from FENOC" to complete "a Maintenance Rule Structures evaluation inspection of the shield building exterior sealant system..."⁸⁹ But this exact statement is in the Root Cause Report, which was publicly available as of February 29, 2012:⁹⁰

⁸⁷ Intervenors' Third Motion to Supplement at 8.

⁸⁸ *Id.* at 8-9. Intervenors argue that the Shield Building Monitoring AMP is "unduly narrow in scope," since the Revised Root Cause addresses the issue but the Shield Building Monitoring AMP does not.

⁸⁹ *Id.* at 9.

⁹⁰ See Root Cause Report at 69.

Root Cause Report	Revised Root Cause Report
In accordance with NOBP-LP-2011 section 4.7.4: Complete a Maintenance Rule Structures evaluation inspection of the shield building exterior sealant system per procedure (EN-DP-01511) to ensure the moisture barrier is still effective with no areas of unacceptable degradation. P. 67.	In accordance with NOBP-LP-2011 section 4.7.4: Complete a Maintenance Rule Structures evaluation inspection of the shield building exterior sealant system per procedure (EN-DP-01511) to ensure the moisture barrier is still effective. with no areas of unacceptable degradation. P. 72.

Intervenors could have timely raised this claim in their June 2012 Motion to Supplement, which raised timely challenges to the April 5, 2012 Shield Building Monitoring AMP. Because this exact information has been available for well more than 60 days since the filing of the Shield Building Monitoring AMP, it is not new and materially different than information previously available. Moreover, Intervenors do not indicate what these claims have to do with their proposed Contention 5 or the adequacy of the Shield Building Monitoring AMP.

Additionally, Intervenors claim that the Revised Root Cause Report's description of extent of condition corrective action 1 is new and materially different information.⁹¹ Specifically, Intervenors note that the Revised Root Cause Report's description "simply says 'Additional Examination of the Shield Building Exterior Wall.'"⁹² Intervenors argue that the description "needs considerable exposition in order to confirm or disaffirm the conclusions of the Root Cause Report – that is, to perform Impulse Response Testing and core-bore analysis in other safety-related structures."⁹³ But even assuming the conclusions of the Root Cause Report were relevant to Intervenors' proposed Contention 5 or the Shield Building Monitoring AMP, this

⁹¹ Intervenors' Third Motion to Supplement at 11.

⁹² *Id.*

⁹³ *Id.*

information is not new and materially different than information previously available as this exact description of Extent of Condition 1 was in the Root Cause Report:⁹⁴

Root Cause Report	Revised Root Cause Report
Extent of Condition Corrective Action #1: Additional Examination of the Shield Building Exterior Wall. P. 54	Extent of Condition Corrective Action #1: Additional Examination of the Shield Building Exterior Wall. P. 59.

ii. Intervenors Fail to Demonstrate that the Revised Root Cause Report Contains Materially Different Information

Even where Intervenors cite to actual revisions to the Root Cause Report, they fail to indicate how the information cited is materially different from information previously available. Instead, Intervenors offer bare assertions that because words changed between the Root Cause Report and the Revised Root Cause Report, the changes are material. Bare assertions are insufficient to support admission of a contention. Thus, even assuming the root cause was relevant to proposed Contention 5 or the Shield Building Monitoring AMP, Intervenors' claims should not be allowed to supplement their proposed contention 5.

For example, Intervenors assert that there is new information in the Revised Root Cause Report regarding micro-cracking present in particular core-bore samples.⁹⁵ Specifically, Intervenors point out that NRC had a question about why the Root Cause Report did not address micro-cracking that was observed by another contractor (CTL Group) and identified in PII Exhibit 2.⁹⁶ In the Revised Root Cause Report, FENOC addressed this concern by explaining that those cracks were not representative of the areas observed by PII. FENOC noted that the "cores observed by PII were from locations exposed to repetitive loading and not

⁹⁴ Root Cause Report at 54.

⁹⁵ See Intervenors' Third Motion to Supplement at 3-4. Intervenors also claim there is information in the PII Report that is new and materially different information regarding the microcracking. See Intervenors' Fourth Motion to Supplement at 7-8, 26-27. 39-40.

⁹⁶ Intervenors' Third Motion to Supplement at 3. See *also* Intervenors' Fourth Motion to Supplement at 7-8.

the near-surface concrete observed [in Exhibit 2].”⁹⁷ Intervenor’s do not indicate why this explanation results in materially different information from information previously available.

Instead, Intervenor’s claim that there “is indisputably a connection between micro-cracking and age-related degradation,”⁹⁸ and that the Shield Building Monitoring AMP “contains literally no reference to micro-cracking.”⁹⁹ But Intervenor’s could have timely raised a complaint that the April 5, 2012 Shield Building Monitoring AMP contained no reference to micro-cracking on or before June 4, 2012. Furthermore, FENOC’s Structures Monitoring Program, which was submitted with the LRA, inspects for visual indications of cracking. Thus, if the micro-cracking were to grow, the Structures Monitoring AMP should identify the growth. Intervenor’s assertion that the possibility of micro-cracking is new and material information relevant to the adequacy of FENOC’s Shield Building Monitoring AMP is incorrect. For all of these reasons, the Board should not allow Intervenor’s to supplement proposed Contention 5 based on this information.

Intervenor’s also claim that the Revised Root Cause Report contains new and materially different information regarding radial cracking. Specifically, Intervenor’s point out that the Revised Root Cause Report contains an explanation as to why the Root Cause Report did not discuss radial cracking identified in particular core bores.¹⁰⁰ But the information added to the Revised Root Cause Report on this issue served only to clarify that the radial cracking in these cores, like the radial cracking in other cores discussed in the Root Cause Report, was attributed to concrete shrinkage.¹⁰¹ Intervenor’s do not indicate how this clarification is new and materially different from previously available information. If anything, this only shows that Intervenor’s had

⁹⁷ Intervenor’s Third Motion to Supplement at 4 n.3 (quoting PII report at p. 3); *id.* at 3 (quoting Revised Root Cause at 27).

⁹⁸ *See id.* at 5.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 5 (citing Revised Root Cause Report at 5).

¹⁰¹ *Id.*

sufficient information to raise this issue earlier. Therefore, the Board should not allow Intervenor to supplement proposed Contention 5 based on this information.

Additionally, Intervenor points out that the Revised Root Cause Report no longer discusses the need for further investigation of reinforcing steel, and asserts that this revision is new and materially different information.¹⁰² Intervenor argues that it is a truism that “the presence of high-density rebar, and small rebar spacing, causes cracking,” and that the Shield Building Monitoring AMP is inadequate because the AMP does not plan to extensively check the status of these areas.¹⁰³ But Intervenor’s reliance on truisms amounts to mere attorney speculation, and does not demonstrate how this deletion of information results in materially different information than what was previously available.¹⁰⁴ Therefore, the Board should not allow Intervenor to supplement proposed Contention 5 with this claim.

Further, Intervenor asserts that the Revised Root Cause Report contains new and materially different information regarding laminar cracking in the main steam line room.¹⁰⁵ However, laminar cracking in the main steam line room was discussed in the Root Cause Report.¹⁰⁶ The Revised Root Cause Report’s discussion of laminar cracking in the main steam line room was only revised to address a documentation issue noted by NRC Staff during on-site inspection of the root cause analysis. Specifically, NRC noted that “[t]he root cause report has insufficient Impulse Response documentation to conclude that laminar cracking initiated in the shoulder regions and propagated to areas of high density

¹⁰² *Id.* at 6.

¹⁰³ *Id.*

¹⁰⁴ Intervenor’s June 2012 Motion to Supplement also made several claims regarding rebar based on the Revised Root Cause Report. Staff opposed these arguments in their June 29, 2012 Answer.

¹⁰⁵ Intervenor’s Third Motion to Supplement at 6. Intervenor also claims that there is information in the PII report that is new and materially different regarding this issue. See Intervenor’s Fourth Motion to Supplement at 27-28, 37-38.

¹⁰⁶ See Root Cause Report at 5, 6, 23, 65, 97, 107.

reinforcement, specifically in the areas of the Main Steam Line Penetrations.”¹⁰⁷ In response, FENOC added “Information regarding the propagation of laminar cracking into areas of high density reinforcement...to section 3.3.8 -Shield Building Modeling and Analysis [page 46].”¹⁰⁸ Intervenor do not indicate how FENOC’s clarification is new and materially different information.

Similarly, Intervenor assert that the Revised Root Cause Report contains new and material information regarding the shield building dome parapet area.¹⁰⁹ Intervenor appear to assert that the dome parapet cracking is new and materially different information because (1) it is related to the recently discovered shield building cracking, and could, along with other cracking, lead to the failure of the shield building¹¹⁰ and (2) FENOC only first “admitted” that there was cracking in the dome in between when it was built in 1973 and sealed in 1976 in the Revised Root Cause Report.¹¹¹

Even assuming Intervenor’s assertions are correct, Intervenor do not indicate how this information is (1) materially different than information previously available or (2) related to the Shield Building Monitoring AMP.¹¹² In fact, Intervenor admit that they have already discussed

¹⁰⁷ Revised Root Cause Report at 6; Intervenor’s Third Motion to Supplement at 7.

¹⁰⁸ Revised Root Cause at 6, 46.

¹⁰⁹ Intervenor’s Third Motion to Supplement at 7-8; Intervenor’s Fourth Motion to Supplement at 12 (“Intervenor have noted the significance of admitted 1976 dome cracking in previous supplements to this contention.”); *id.* at 16-18 (discussing revisions in PII report regarding Staff’s questions on the standing water between roof dome and parapet); Intervenor’s June 2012 Motion to Supplement at 4. In the June 2012 Motion, Intervenor asserted that the Revised Root Cause Report contains new and material information regarding the coating on the shield building dome parapet area. In the instant motions, Intervenor appear to raise similar if not identical concerns about shield building dome parapet cracking. See, e.g., Intervenor’s Fourth Motion to Supplement at 32-34

¹¹⁰ Intervenor’s Third Motion to Supplement at 7-8 (claiming that the presence of so many different forms of cracking/degradation all across the shield building may comprise a cumulative effect wherein they could all add up to “fail” the shield building).

¹¹¹ *Id.* at 8. See also Intervenor’s Fourth Motion to Supplement at 11-12.

¹¹² As noted, FENOC has other AMPs in place to manage aging effects of other forms of cracking. The Staff also notes that Intervenor raised similar claims in their June 2012 Motion to

this issue in other filings,¹¹³ and that “these cracks were documented as early as 1976.”¹¹⁴

Thus, the Board should not allow these claims to supplement proposed Contention 5.

Intervenors also claim that there is new and materially different information in the Revised Root Cause Report regarding ettringite.¹¹⁵ Intervenors assert that information added to the Revised Root Cause report regarding ettringite is new and material information that undermines FENOC’s conclusions regarding rebar corrosion.¹¹⁶ However, the presence of ettringite in the exact samples Intervenors cite in their instant motions was discussed in the Root Cause Report.¹¹⁷ And as Intervenors recognize, the Revised Root Cause Report’s discussion of ettringite in those samples was only revised to address a documentation issue noted by NRC Staff during on-site inspection of the root cause analysis.¹¹⁸

Intervenors also assert that the depth of the core samples indicates “long-term exposure to moisture migrating through the concrete.”¹¹⁹ Intervenors do not indicate

Supplement. In terms of Intervenors’ “shield building failure” claims, these are outside the scope of license renewal.

¹¹³ See Intervenors’ Fourth Motion to Supplement at 12 (“Intervenors have noted the significance of admitted 1976 dome cracking in previous supplements to their contention.”).

¹¹⁴ *Id.*

¹¹⁵ Intervenors’ Third Motion to Supplement at 10. As noted in page 6 of the Root Cause Report, ettringite is crystal formation from sulfate reaction with calcium aluminates. Intervenors’ Fourth Motion to Supplement appears to claim that the April 20, 2012 PII Report also contains new and materially different information regarding ettringite. See Intervenors’ Fourth Motion to Supplement at 3-4.

¹¹⁶ Intervenors’ Third Motion to Supplement at 11. See *also* Intervenors’ Fourth Motion to Supplement at 4 (discussing similar information in the PII report).

¹¹⁷ See Root Cause Report at 22.

¹¹⁸ Specifically, NRC noted that “[t]he root cause report did not document the depth of the core samples at which ettringite was present in samples that contained ettringite deposits.” Revised Root Cause Report at 6. In response, FENOC added “[i]nformation regarding the core sample ettringite depth... to section 3.3.3 Petrographic and Destructive Examination [page 25].” *Id.* at 6, 25.

¹¹⁹ Intervenors’ Third Motion to Supplement at 10. Intervenors’ Fourth Motion to Supplement makes similar statements and arguments concerning PII’s report. Intervenors’ Fourth Motion to

how this information is materially different than information previously available. In fact, Intervenor note that FENOC already indicated in the Root Cause Report that the presence of ettringite in air voids “suggests long-term exposure to moisture migration.”¹²⁰ Thus, the Board should not allow these claims to supplement the bases for proposed Contention 5.

Finally, Intervenor claim that the Revised Root Cause Report has new and materially different information “regarding slip-form induced friction forces resulting in laminar cracking as a potential failure mode....”¹²¹ Notably, in making this claim, Intervenor reference multiple passages of the Revised Root Cause Report which are actually identical to sections in the Root Cause Report in describing the plumb issue.¹²² Thus, as Intervenor’s instant motion makes clear, the Root Cause Report did consider whether “the out-of plumb ‘lean’ of the shield building might have influenced or caused some of the cracking.”¹²³ The Root Cause Report concluded that the “effect of the out of tolerance plumb was insignificant to structure integrity.”¹²⁴ While there was information added to the Revised Root Cause Report on the “plumb” issue, Intervenor do not demonstrate that it is new and materially different information than information previously available.

Instead, the new information was added in response to NRC’s observation that “[t]he

Supplement at 4 and 18-19.

¹²⁰ Intervenor’s Third Motion to Supplement at 10.

¹²¹ Intervenor’s Third Motion to Supplement at 11. Intervenor’s Fourth Motion to Supplement raises similar concerns regarding the plumb issue. See Intervenor’s Fourth Motion to Supplement at 24-25 (citing same Revised Root Cause passages regarding plumb issue that are in Root Cause Report).

¹²² Intervenor’s Third Motion to Supplement at 11. See *also* Intervenor’s Fourth Motion to Supplement at 25-26.

¹²³ Intervenor’s Third Motion to Supplement at 12.

¹²⁴ Root Cause Report at attachment 12.

root cause report did not document all the reviews and evaluations performed that evaluated slip forming induced cracking as a potential failure mode.”¹²⁵ In response, FENOC added “[i]nformation regarding Slip-form induced friction forces resulting in laminar cracking as a potential failure mode... to Attachment 12 -Failure Modes Analysis (2.12 Plumb) [page 109].”¹²⁶

Thus, while the Revised Root Cause Report now provides some additional clarification on this issue, the conclusion remains the same. Specifically, the plumb issue is still refuted as a root cause, and the Revised Root Cause Report still concludes that the “effect of the out of tolerance plumb was insignificant to structure integrity.”¹²⁷ Instead of indicating how the information about the plumb issue is new and materially different, Intervenor’s attack the conclusions made by PII and FENOC.¹²⁸ However, these attacks are unsupported and do not indicate how the information is materially different than information previously available. Moreover, the conclusions in the Root Cause Report and the Revised Root Cause Report are not material to the issue presented before the Board. Therefore, the Board should not allow these claims in to amend the bases for proposed contention 5.

2. The April 20, 2012 Revised PII Report Is Not
Materially Different Information

Intervenor’s Fourth Motion to Supplement asserts that the April 20, 2012 PII Report on the Davis-Besse shield building cracking contains new and materially different information¹²⁹ because there are inconsistencies between PII’s responses to 27 questions raised by NRC and the proposed Shield Building Monitoring AMP. While this information is new, in that it was made

¹²⁵ Revised Root Cause Report at 5.

¹²⁶ *Id.* at 5, 109.

¹²⁷ *Id.* at 109.

¹²⁸ See, e.g., Intervenor’s Third Motion to Supplement at 12 (“PII disclaims the ability to authoritatively conclude[e] that there is no cracking at identified slipform excessive friction areas – and [PII’s] illusory reinforcement of FENOC’s position appears not to be backed up by Impulse Response testing and/or core bores.”).

¹²⁹ Intervenor’s Fourth Motion to Supplement at 1.

publicly available on May 24, 2012, Intervenor's do not demonstrate that any of the information is materially different information than previously available.¹³⁰

As discussed above, FENOC's Root Cause Report was developed using PII's root cause assessment report.¹³¹ During on-site inspection activities in March 2012, Staff reviewed both FENOC's Root Cause Report and PII's root cause assessment report and asked both FENOC and PII questions. PII responded to each of the NRC's questions, and revised its root cause report accordingly, resulting in the April 20, 2012 PII Report. FENOC then submitted a non-proprietary version of the April 20, 2012 PII Report to the NRC on May 14, 2012, followed by its Revised Root Cause Report, which also addressed the minor weaknesses identified by Staff during its on-site inspection.

Importantly, the NRC determined that PII had sufficiently responded to its questions, either during the inspection or in the revisions to the report. Further, the NRC confirmed that

FENOC's "Ro[o]t Cause Analysis team as augmented with vendor subject matter experts [including PII] was appropriately trained, followed site procedures for root cause investigations, and had considered relevant site and external operating experience. The NRC team concluded that [FENOC's staff, including PII] established a sufficient basis for the causes of the shield building laminar cracking related to: the environmental factors associated with the 1978 blizzard, the lack of an exterior moisture barrier, and the structural design elements of the shield building. Specifically, the weather records, core boring sample results, impulse response testing, and shield building analytical modeling provided a sufficient basis to support the causes of the laminar cracking. The NRC team identified minor weaknesses in the Root Cause Analysis Report associated with the level of detail in the documentation provided. These weaknesses did not constitute performance deficiencies or findings because they did not adversely affect the outcome of the root cause process.

NRC's June 21, 2012 Inspection Report at cover page.

¹³⁰ As noted above, Intervenor's June 2012 Motion to Supplement claimed that the April 20, 2012 PII Report contained new and materially different information than information previously available. See Staff's June 29, 2012 Answer in opposition.

¹³¹ See May 16, 2012 cover letter for L-12-205. The Root Cause Report noted that PII "was the prime contractor with prior industry experience in both root cause investigation and modeling and analysis capability of nuclear containment structures." Root Cause Report at 8. The Root Cause Report referenced PII's report in several places. See, e.g., *id.* at 40, 42, 43, and 44.

Despite this, Intervenor's claim that the changes made to the PII root cause assessment report in response to NRC's questions were "quite significant."¹³² Further, Intervenor's argue that redactions made in the report "complicat[e] the task of trying to understand PII's, and by extension FENOC's, root cause assessments and analyses."¹³³ Since the PII root cause assessment underlies FENOC's Root Cause Report, Intervenor's appear to argue that the changes to the PII report in response to Staff's 27 questions led to changes that significantly affected findings or conclusions in FENOC's Revised Root Cause Report, which was also revised to address Staff's questions during the on-site inspection in March 2012.¹³⁴

But as discussed above, the Revised Root Cause Report's conclusions and findings did not change in response to the minor weaknesses identified by Staff.¹³⁵ Intervenor's do not demonstrate that any changes to the PII report based on Staff's 27 questions are new and materially different information than information previously available concerning the proposed Contention 5 or the Shield Building Monitoring AMP. Thus, the Board should not allow Intervenor's to supplement their contention based on these claims.

Instead of discussing how any of the information is new and materially different than information previously available, Intervenor's repeatedly claim that (1) PII's answers were "not adequate answers to NRC's important questions,"¹³⁶ (2) NRC's questions suggest that there are other "neglected" potential causes of "significant shield building damage over the past years and

¹³² Intervenor's Fourth Motion to Supplement at 3.

¹³³ *Id.* at 30. *See also id.* at 42.

¹³⁴ *Id.* at 3 ("Barry Allen claimed in a May 16, 2012 cover letter to NRC, attached to FENOC's own [Revised Root Cause Report], that any changes required of FENOC by NRC upon its review of FENOC's Feb. 28, 2012 root cause report were minor and did not significantly affect any findings or conclusions. But the changes and revelations prompted by statements appearing on pp i-iv of PII's report are quite significant."). *See also* Intervenor's Fourth Motion to Supplement at 12 (noting that challenges to PII are by extension challenges to FENOC).

¹³⁵ *See* FENOC's cover letter transmitting Revised Root Cause Report.

¹³⁶ Intervenor's Fourth Motion to Supplement at 17.

decades with portents for the future, *i.e.*, the proposed 20-year license extension,”¹³⁷ and (3) the revisions in the PII report indicate that the Shield Building Monitoring AMP is inadequate. However, mere speculation as to other potential issues without support and disagreement with a licensee’s current performance do not raise a litigable issue.

Furthermore, these assertions are not correct. First, the NRC’s questions related to minor weaknesses in documentation, not in the results or analyses used in the root cause analysis. As Intervenor’s Fourth Motion to Supplement makes clear, PII answered NRC’s questions,¹³⁸ and the NRC found those answers reasonable and acceptable. While Intervenor’s clearly disagree (1) that PII’s and/or FENOC’s answers were sufficient¹³⁹ and (2) with the methods used in the root cause assessment,¹⁴⁰ Intervenor’s provide no support for their claims, again leaving it to the Board and other parties to expend their resources trying to respond to unclear and repetitive arguments in serial supplements. Second, NRC found the Root Cause Report acceptable, and found PII’s responses to its questions acceptable. Thus, even if the root cause were relevant to Intervenor’s proposed Contention 5, Intervenor’s instant motions should

¹³⁷ *Id.* See also *id.* at 20 (“NRC’s questions point out compellingly that there is not a single root cause to shield building cracking, but potentially multiple root causes.”); *id.* at 29-30 (discussing concrete thermal conductivity issue as possible root cause). *Id.* at 32-34 (discussing uneven snow loads and a top-down moisture transport mechanism). Intervenor’s assert that “NRC’s questions raise the specter that PII and FENOC have not adequately explained the origin of all [shield building] cracking.” *Id.* at 20; *Id.* at 35 (discussing Intervenor’s concern that PII, and by extension FENOC, has “cherry-picked areas of the shield building for analysis...”); *Id.* at 40 (claiming cherry-picking by PII). See also *id.* (claiming NRC inquiry “directly questioned the Blizzard of 1978 root cause at a very fundamental level.”).

¹³⁸ While Intervenor’s claim questions went unanswered, see, *e.g.*, Intervenor’s Fourth Motion to Supplement at 13 and 18, Intervenor’s go through NRC’s 27 questions and then cite to PII’s response.

¹³⁹ See, *e.g.*, *id.* at 34 (“As is the case throughout its revised root cause assessment, PII has not answered NRC’s questions, and NRC has not required PII to answer its questions.”); *id.* at 37 (“PII’s inadequate responses and FENOC’s AMP fail to answer or account for the NRC’s safety-significant, aging-related questions.”).

¹⁴⁰ See, *e.g.*, *id.* at 15 (“Intervenor’s also challenge the acceptability of FENOC performing only three full depth core bores.”). *Id.* at 9 and 20 (claiming sensitivity studies should have been done); *Id.* at 16 (claiming rigorous and robust tests were not done).

be denied because Intervenor's do not demonstrate that any of the information in the April 20, 2012 PII Report is materially different from information previously available.

3. FOIA Response Documents Do Not Contain Materially Different Information

Finally, Intervenor's claim that documents dated June 12, 2012 from the NRC in response to a FOIA request contain new and materially different information regarding their proposed contention.¹⁴¹ Intervenor's appear to claim that these FOIA documents suggest that (1) the recently identified shield building cracking left the reactor in a non-conforming state and/or unsafe to restart and (2) the Root Cause Report is inadequate. But Intervenor's do not indicate how any information cited to from the FOIA documents is materially different than information previously available.

First, the Intervenor's themselves note that the Root Cause Report stated that the recently identified shield building cracking left the reactor in a non-conforming state.¹⁴² Thus, this information is not new and materially different than information previously available. Second, Intervenor's' reliance on preliminary emails between Staff to suggest that there is concern regarding the results of the root cause analysis done by PII and/or FENOC is misplaced.¹⁴³ These emails from November 2011 were preliminary discussions among Staff regarding the December 2011 restart of the reactor, not the conclusions of the Root Cause Report, which was not issued until February 27, 2012.¹⁴⁴ Notably, these emails do not relate to the root cause analysis, and thus, could not ever stand as Staff's concerns with that analysis by

¹⁴¹ *Id.* at 36. Notably, Intervenor's' Fifth Motion to Supplement is based on information Intervenor's claim is new and materially different in this same set of documents received from the NRC in response to their January 26, 2012 FOIA request. See Intervenor's' Fifth Motion to Supplement at 3-4.

¹⁴² Intervenor's' Fourth Motion to Supplement at 9.

¹⁴³ See *id.* at 21-24 and 36 (citing emails of NRC Staff Abdul Sheikh and Pete Hernandez).

¹⁴⁴ See *id.* at 9 ("As revealed by a June 12, 2012 partial response by the NRC Staff to a [FOIA] request..., the NRC staff wrestled with FENOC's 'operability/functionality' approach to returning Davis-Besse to full power operations...").

PII or FENOC. Moreover, preliminary discussions by Staff based on still emerging information are subject to substantial change and revisions when more information becomes available.¹⁴⁵ Intervenor do not indicate how this information is new and materially different than information previously available. Therefore, the Board should not allow the claims to amend proposed Contention 5.

B. Intervenor's July Motions Do Not Meet the Commission's Admissibility Requirements

In addition to not demonstrating that any information cited in their July Motions is new and materially different than information previously available, Intervenor's July Motions also do not meet the Commission's admissibility requirements. First, Intervenor do not plead the late-filed factors in 10 C.F.R. § 2.309(c), and do not meet these factors despite their failure to plead them. Second, Intervenor's July Motions do not meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

1. Intervenor's July Motions Do Not Plead or Meet the § 2.309(c) Factors

Intervenor's July Motions do not address the non-timely filing standards in 10 C.F.R. § 2.309(c).¹⁴⁶ In fact, Intervenor claim that "[i]f a contention satisfied the timeliness requirement of 10 C.F.R. 2.309(f)(2)(iii), then, by definition, it is not subject to 10. C.F.R. 2.309(c)..."¹⁴⁷ But both the Commission and this Board have stated that intervenors should address the criteria in

¹⁴⁵ See Hernandez and Abdul emails. Notably, these email discussions focused on the December 2011 restart of the reactor, which is outside the scope of this proceeding. Further, while Intervenor bring up these FOIA documents in the instant motions to supplement, they have also consulted with FENOC and Staff about filing at least one more motion to supplement based on other documents received in the FOIA response. See Attached August 8, 2012 e-mail from Terry Lodge.

¹⁴⁶ 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. *Florida Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 & 2, et al.), CLI-06-21, 64 NRC 30, 33 (2006). Intervenor have now failed to plead the non-timely factors in each of their motions to amend proposed contention 5.

¹⁴⁷ Intervenor's Third Motion to Supplement at 14; Intervenor's Fourth Motion to Supplement at 48.

10 C.F.R. § 2.309(c) when attempting to add new bases and supporting material for a contention.¹⁴⁸ Thus, Intervenor's July Motions should be denied because they did not plead the non-timely filing requirements, and do not meet them despite a failure to plead them.

2. Intervenor's Do Not Meet the Commission's Contention Admissibility Requirements

Not only do Intervenor's July Motions not satisfy the requirements of 10 C.F.R. §§ 2.309(c), (f)(2), the July Motions also do not satisfy the requirements of 10 C.F.R. § 2.309(f)(1). Intervenor's claims are unsupported, immaterial, and/or beyond the scope of this proceeding.

a. Intervenor's Claims Regarding the Adequacy of the Shield Building Monitoring AMP Are Unsupported and Immaterial.

Intervenor's July Motions should be denied because their claims regarding the alleged deficiencies of the Shield Building Monitoring AMP are unsupported and immaterial.

As discussed in the Staff's June 29, 2012 Answer, the Shield Building Monitoring AMP renders proposed contention 5 moot, even as supplemented.¹⁴⁹ Because the LRA now includes a discussion of the recently identified shield building cracks and FENOC's plans to address these cracks during the period of extended operation, Intervenor must challenge the adequacy of the Shield Building Monitoring AMP.¹⁵⁰ *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 36 n. 44 (2010). 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).

¹⁴⁸ See *Calvert Cliffs*, 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). The Staff notes that Part 2 has been revised and that these revisions will be effective in September 2012. See 77 Fed. Reg. 46562 (Aug. 3, 2012). Under both versions of the rules, Intervenor fails to meet the timely standards.

¹⁴⁹ See Staff's June 29, 2012 Answer.

¹⁵⁰ As discussed, there are other AMPs, like the Structures Monitoring AMP, that account for other aging effects.

Intervenors must point to the specific ways in which the Shield Building Monitoring AMP is wrong or inadequate. *Id.*

While the Intervenors state that the Shield Building Monitoring AMP is deficient, their claims (1) suggest a misunderstanding of the AMP's purpose and the Staff's aging management review, (2) are unsupported and/or immaterial, and (3) do not identify any error or inadequacy in the AMP.

As discussed above, Intervenors claims focus on claimed "discrepancies" and/or "inconsistencies" between FENOC and PII's root cause reports and the Shield Building Monitoring AMP. Intervenors claim that NRC's questions regarding the root cause analysis raise "safety-significant, aging related questions" which PII and FENOC did not adequately respond to and FENOC's Shield Building Monitoring AMP does not account for.¹⁵¹ Here, again, Intervenors leave it up to the Board and other parties to try to discern the specifics of their claims. Intervenors further assert that the "root cause of each kind of cracking and other shield building degradation must be accurately determined, so that adequate corrective actions and aging management plans can be put in place."¹⁵² But the root cause of the cracking is irrelevant to proposed Contention 5, which has now been mooted by submission of the Shield Building Monitoring AMP. And the Staff's aging management review focuses on managing the functionality of SSC's, not identifying and mitigating aging mechanisms. Thus, Intervenors' assertions that the Shield Building Monitoring AMP is inadequate are unsupported and immaterial.

The Shield Building Monitoring AMP's purpose is to ensure that the effects of aging on the intended function(s) of the shield building will be adequately managed for the period of

¹⁵¹ See, e.g., Intervenors' Fourth Motion to Supplement at 37.

¹⁵² *Id.* at 38.

extended operation.¹⁵³ In achieving this purpose, the AMP will periodically inspect the shield building “to confirm that there are no changes in the nature of the identified laminar cracks.”¹⁵⁴ In addition, other AMPs, including the Structures Monitoring AMP, are tailored to address other cracking and aging-effects.

Intervenors do not indicate why the Shield Building Monitoring AMP’s planned activities are inadequate or why the root cause is material to Staff’s review of the Shield Building Monitoring AMP. 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. And in identifying what is wrong, Intervenors must do more than make bare assertions. *Id.* It is not enough for Intervenors to claim that the Shield Building Monitoring AMP should “model growth rate” and include a “rigorous sensitivity study.”¹⁵⁵ Intervenors must indicate what is wrong with the planned inspections and other activities. Therefore, the claims in Intervenors’ July Motions are unsupported and immaterial and should be denied.

b. Intervenors’ July Motions Make Claims That Are Outside the Scope of This Proceeding

Additionally, Intervenors’ July Motions should be denied because several of Intervenors’ claims challenge (1) the investigation done on the shield building cracking, (2) the decision 40 years ago to not weather seal the shield building,¹⁵⁶ and (3) the Root Cause Report, among other things. As stated in previous Answers to proposed Contention 5, these assertions, bases, and arguments are simply beyond the scope of this narrow license renewal proceeding.

¹⁵³ See 10 C.F.R. § 54.21(c)(iii).

¹⁵⁴ FENOC’s April 5, 2012 Submittal at 5. The Shield Building Monitoring AMP is described in Section B.2.43 of the LRA.

¹⁵⁵ Intervenors’ Fourth Motion to Supplement at 39.

¹⁵⁶ See *id.* at 42 (“Weather-sealing the shield building 40 years late does not reverse the damage already inflicted.”).

Therefore, Intervenor's July Motions should be denied and Contention 5 should be found inadmissible.

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

Like several other prior motions related to proposed Contention 5, the July Motions contain several claims that the recently identified shield building cracks constitute a current safety issue. For example, Intervenor's appear to assert that the restart of the reactors in December 2011 was improper.¹⁵⁷ Intervenor's also claim that the shield building has a "significant design flaw that compromises shield building integrity."¹⁵⁸ Similarly, Intervenor's "question, for both environmental protection and public safety reasons, the ability of...the shield building to fulfill [its] radiologically-critical function."¹⁵⁹

Intervenor's also claim that the Root Cause Report and Revised Root Cause Report remain incomplete,¹⁶⁰ leaving the extent of the cracking and deterioration of the shield building unknown.¹⁶¹ Further, Intervenor's assert that there are multiple deficiencies in the Root Cause Report, the Revised Root Cause Report, and the April 20, 2012 PII Report.¹⁶² Additionally,

¹⁵⁷ See Intervenor's Fourth Motion to Supplement at 19. *Id.* at 9.

¹⁵⁸ *Id.* at 28 (discussing rebar spacing and citing FOIA documents and PII report).

¹⁵⁹ *Id.* at 39. As discussed in Staff's initial answer to proposed contention 5, Intervenor's environmental claims are inadmissible. Intervenor's July Motions do not provide any additional support for their safety or environmental claims.

¹⁶⁰ Intervenor's Third Motion to Supplement at 5.

¹⁶¹ Intervenor's Fourth Motion to Supplement at 3 ("the scope of the admitted cracking is far narrower than the identified cracking, and the potential for further concrete and rebar problems in the Davis-Besse shield building may include the loss of up to 90% of the shield building walls with the collapse of outer layers of concrete and rebar").

¹⁶² See, e.g., Intervenor's Third Motion to Supplement at 6-7 (discussing clarification added to the Revised Root Cause regarding laminar cracking in main steam line room). See also *id.* at 10-11 (discussing additions made to the Revised Root Cause regarding ettringite and how it allegedly affects FENOC's conclusion regarding rebar corrosion). Intervenor's do not indicate how this conclusion is inaccurate. The Staff notes that if moisture gets to the rebar in the future and leads to corrosion, it will lead to visual indications that will be detected under the Structures Monitoring AMP. See also Intervenor's Fourth Motion to Supplement at 4 ("While PII makes qualitative, deductive arguments, which it then asserts as proof of shield building integrity, these are not backed by empirical data.").

Intervenors claim that the “Davis-Besse shield building may have been out of licensing conformance since before the reactor was initially fired up.”¹⁶³

These claims are not only inaccurate,¹⁶⁴ 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 (2001).¹⁶⁵ If there are questions about the integrity of the shield building, 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 Intervenors’ claims regarding current operation are outside the scope of the proceeding.¹⁶⁶

ii. “Safety Culture” Claims are Outside the Scope of the Proceeding

Once again, Intervenors’ instant motions improperly assert that Davis-Besse’s operational history suggests that there is a “safety culture” issue at the plant.¹⁶⁷ Specifically, Intervenors assert that FENOC, and the NRC, have again “put profits ahead of public safety” in responding to the shield building cracking.¹⁶⁸ Further, Intervenors assert that FirstEnergy is not

¹⁶³ Intervenors’ Third Motion to Supplement at 12. See *also* Fourth Motion to Supplement at 9 (discussing NRC’s restart operability approach).

¹⁶⁴ The NRC determined that the cracks, as they are, do not impact the structural integrity of the building. See CAL No. 3-11-001.

¹⁶⁵ 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).

¹⁶⁶ To the extent Intervenors believe there are existing operational issues at Davis-Besse that warrant immediate action, their remedy is to file a § 2.206 petition.

¹⁶⁷ See, e.g., Intervenors’ Fourth Motion to Supplement at 9-10. Intervenors’ June 2012 Motion to Supplement at 17, 18. See *also* Intervenors’ Motion to Admit Contentions 5.

¹⁶⁸ *Id.* at 9-10 (citing hole-in-the head incident).

transparent or forthright in its investigations,¹⁶⁹ and that the reactor has a “very troubled safety record.”¹⁷⁰

As stated in multiple answers related to proposed Contention 5, 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 Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 490-92 (2010); *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.¹⁷¹

c. Intervenors’ Claims Regarding Current Operation 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.

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, Intervenor’s make claims regarding the root cause analysis, methodology and conclusions, and assert that “discrepancies” and “inconsistencies” between the root cause reports and the Shield Building

¹⁶⁹ *See, e.g.,* Intervenor’s Fourth Motion to Supplement at 29 (claiming that redactions in PII report may be “aimed at thwarting public access to embarrassing truths about the shabby state of the shield building.”).

¹⁷⁰ *Id.* at 9.

¹⁷¹ 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.

Monitoring AMP render the AMP inadequate. But Intervenor's 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.¹⁷² 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, Intervenor's 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. As Intervenor's recognize, regarding the shield building, FENOC "must demonstrate that the 'effects of aging will be adequately managed so that the intended function(s) [as defined in § 54.4] will be maintained consistent with the CLB [current licensing basis] for the period of extended operation.' "¹⁷³ Intervenor's 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.

¹⁷² *Jersey Central Power & Light Co. and Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000).

¹⁷³ Intervenor's' Fourth Motion to Supplement at 45.

CONCLUSION

The Board should deny Intervenor's July Motions and find proposed Contention 5 inadmissible because these motions do not (1) demonstrate that any information cited is new and materially different than previously available information (2) plead the non-timely filing requirements, or (3) meet the 10 C.F.R. § 2.309(f)(1) admissibility requirements.

Respectfully submitted,

Signed (electronically) by

Catherine E. Kanatas
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
Telephone: (301) 415-2321
E-mail: Catherine.Kanatas@nrc.gov
Date of Signature: August 17, 2012

Harris, Brian

From: Terry Lodge [tjlodge50@yahoo.com]
Sent: Wednesday, August 08, 2012 11:41 AM
To: Timothy P. Matthews
Cc: Kanatas, Catherine; Subin, Lloyd; Harris, Brian; Kevin Kamps
Subject: Davis-Besse (10 CFR 2.323 consultation re additional amendment of cracking contention)

Counsel, Intervenors propose another amendment to supplement the factual averments of proposed Contention 5, the cracking contention, with an additional filing predicated upon recent FOIA disclosures provided us by the NRC Staff.

We expect to file by Monday, August 13 2012 a motion to amend/supplement in which we will cite new material appearing in the FOIA disclosures provided us at the end of July.

We ask that you consent to allow us to file this proposed motion.

If anyone desires to confer on this matter with us, we propose a phone conference either between 10 a.m. and noon on Friday, August 10, or between 1 p.m. and 3 p.m. that day.

Tim, I would appreciate it if you would please provide a call-in number and pass code as you generously have done in the past.

Thank you.

Terry Lodge

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' THIRD AND FOURTH MOTIONS TO AMEND AND/OR SUPPLEMENT PROPOSED CONTENTION NO. 5 (SHIELD BUILDING CRACKING)" and August 8, 2012 E-mail from Terry Lodge in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 17th day of August, 2012.

William J. Froehlich, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: william.froehlich@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAEmail.resource@nrc.gov

Nicholas G. Trikoros, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: nicholas.trikorous@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

William E. Kastenbergh, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: william.kastenbergh@nrc.gov

David W. Jenkins, Esq.
First Energy Service Company
Mail Stop A-GO-15
76 South Main Street
Akron, OH 44308
E-mail: djenkins@firstenergycorp.com

Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Paul Gunter
E-mail: paul@beyondnuclear.com
Kevin Kamps
Email: Kevin@beyondnuclear.com

Morgan, Lewis & Bockius
Pennsylvania Avenue, NW
Washington, D.C. 20004
Stephen Burdick, Esq.
E-mail: sburdick@morganlewis.com
Alex Polonsky, Esq.
E-mail: apolonsky@morganlewis.com
Kathryn M. Sutton, Esq.
E-mail: ksutton@morganlewis.com
Timothy Matthews, Esq.
E-mail: tmatthews@morganlewis.com
Mary Freeze, Legal Secretary
E-mail: mfreeze@morganlewis.com

Derek Coronado
Citizens Environmental Alliance (CEA)
of Southwestern Ontario
1950 Ottawa Street
Windsor, Ontario Canada N8Y 197
Email: dcoronado@cogeco.net

Michael Keegan
Don't Waste Michigan
811 Harrison Street
Monroe, Michigan 48161
E-mail: mkeeganj@comcast.net

Anita Rios
Green Party of Ohio
2626 Robinwood Avenue
Toledo, Ohio 43610
Email: rhannon@toast.net

/Signed (electronically) by/
Catherine E. Kanatas
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
Telephone: (301) 415-2321
E-mail: Catherine.Kanatas@nrc.gov