

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)	)	
	)	

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

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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") Order,<sup>1</sup> the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the Intervenor's Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking)("Fifth Motion to Supplement"), jointly filed by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively "Intervenor's")<sup>2</sup> regarding FirstEnergy Nuclear Operating Company's ("FENOC") license renewal application for Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").<sup>3</sup>

As set forth below, the Board should deny Intervenor's Fifth Motion to Supplement because (1) it does not demonstrate that it is based on new and materially different information, and (2) it does not meet the Commission's contention admissibility standards. Instead, the

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<sup>1</sup> See Initial Scheduling Order (Jun. 15, 2011) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML111662021) ("ISO") at B.2.

<sup>2</sup> See Intervenor's Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012) (ADAMS Accession No. ML12229A584).

<sup>3</sup> Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse (ADAMS Accession No. ML102450565) ("LRA").

motion simply repeats previously argued out-of-scope, unsupported, and/or immaterial assertions regarding (1) the Staff's safety review; (2) the Staff's decision to allow restart on December 2, 2011; and (3) the root cause evaluation's adequacy. Thus, Intervenor's Fifth Motion to Supplement should be denied and Contention 5 should be denied as moot.<sup>4</sup>

### 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.<sup>5</sup> The Staff's August 17, 2012 Answer to Intervenor's Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) ("Staff's Answer to Third and Fourth Motions to Supplement")<sup>6</sup> discussed the procedural history for this proceeding, including FENOC and NRC reports on the root cause investigation,<sup>7</sup> through the filing of the instant motion,<sup>8</sup> so the Staff will not unduly repeat it here.<sup>9</sup>

Once again, Intervenor's instant motion moves the Board for leave to further supplement and amend Intervenor's proposed Contention No. 5 on the recently identified shield building

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<sup>4</sup> See Staff's June 29, 2012 and August 17, 2012 Answers explaining why proposed Contention 5, as reworded by Staff, should be found moot given the submission of FENOC's Shield Building Monitoring Aging Management Program ("AMP").

<sup>5</sup> LRA at 1.2-1. If the LRA is approved, Davis-Besse's new license expiration date would be April 22, 2037.

<sup>6</sup> See NRC Staff's Answer to Third and Fourth Motions to Amend and/or Supplement Proposed Contention to Admit new Contention No. 5 (Shield Building Cracking) (Aug. 17, 2012) ("Staff's Answer to Third and Fourth Motions to Supplement") (ADAMS Accession No. ML12230A212).

<sup>7</sup> See FENOC's Root Cause Report and Revised Root Cause Report, supported by PII's Report. See NRC Staff Inspection reports from May 7, 2012 and June 21, 2012.

<sup>8</sup> See Staff's Answer to Third and Fourth Motions to Supplement at 2-9.

<sup>9</sup> Still pending before the Board is "FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking," (Feb. 23, 2012) which the Staff Answered on March 5, 2012. See NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking (Mar. 5, 2012) (ADAMS Accession No. ML12065A341) (responding to Intervenor's baseless claims of fraud, among other things).

cracking,<sup>10</sup> which was submitted over seven months ago,<sup>11</sup> and remains pending before the Board.<sup>12</sup>

Like Intervenor's Fourth Motion to Supplement, Intervenor's Fifth Motion to Supplement claims that documents from Appendix B of NRC's June 12, 2012 response to Intervenor's January 26, 2012 Freedom of Information Act ("FOIA") request contains new and materially different information regarding their proposed contention 5.<sup>13</sup> Intervenor asserts that this new and materially different information "bolsters" their proposed Contention 5 regarding the recently identified shield building cracking.<sup>14</sup>

Contrary to their vague assertions regarding proposed Contention 5, Intervenor's Fifth Motion to Supplement inexplicably focuses on issues outside the limited scope of license renewal proceedings including: (1) the adequacy of Staff's review of the shield building cracking with respect to current operations, (2) the Staff's December 2, 2011 decision to allow restart of the reactor, (3) the shield building's compliance with current licensing requirements,<sup>15</sup> and (4)

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<sup>10</sup> Fifth Motion to Supplement at 1.

<sup>11</sup> See Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012) (ADAMS Accession No. ML12010A172) ("Motion to Admit Contention 5").

<sup>12</sup> See Board Order (Granting Unopposed Motion to Vacate Oral Argument) (May 15, 2012) (ADAMS Accession No. ML12136A456).

<sup>13</sup> Fifth Motion to Supplement at 1; Intervenor's Fourth Motion to Supplement at 9, 21-25. Intervenor's Fifth Motion to Supplement includes nine appendices listing some of these documents from Appendix B of the Staff's FOIA response. Notably, Intervenor's Fourth Motion to Supplement also relied on some of the same Appendix B documents identified in their Fifth Motion to Supplement.

<sup>14</sup> Fifth Motion to Supplement at 15. Intervenor also "reserve the right to submit a contention supplement based on relevant revelations in Appendix D [another set of FOIA documents received from Staff in response to their January 26, 2012 FOIA request]." *Id.* at 6. Additionally, Intervenor's August 24, 2012 reply suggests they may submit a contention supplement based on FENOC's August 16, 2012 Shield Building Monitoring AMP. Intervenor's Combined Reply to NRC and FENOC Answers to Intervenor's Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 24, 2012) (ADAMS Accession No. ML12237B197) at 9-10.

<sup>15</sup> See Intervenor's Fifth Motion to Supplement at 95 (discussing Intervenor's basis for having a genuine dispute with the applicant).

the adequacy of FENOC's root cause evaluation of the shield building cracking.<sup>16</sup> Notably, Intervenor's never amended proposed Contention 5 to address any specific part of FENOC's Shield Building Monitoring AMP.<sup>17</sup> Instead, Intervenor's Fifth Motion to Supplement raises the same issues and arguments found in their previous supplements, which have been opposed by the Staff.<sup>18</sup> Staff has also opposed Intervenor's baseless accusations of misconduct by the Staff.<sup>19</sup>

#### I. Legal Requirements for Amended Contentions

Intervenor's Fifth Motion to Supplement moves the Board for leave to further supplement proposed Contention 5,<sup>20</sup> which was originally submitted on January 10, 2012.<sup>21</sup> As discussed

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<sup>16</sup> See Intervenor's Fifth Motion to Supplement at 91 (describing basis for contention). *Id.* at 95 ("Until there is a thorough, global investigation of the nature, extent and causation [of the shield building cracking], the muted warnings of the NRC Staff stand as creating a genuine dispute of fact.").

<sup>17</sup> When Intervenor's proposed a contention related to the shield building, FENOC's LRA did not have an AMP directed to this specific type of cracking. On April 5, 2012, FENOC amended its LRA to address this newly identified shield building cracking phenomenon. Intervenor's seemingly acknowledged this amendment when they asked the Board to vacate the oral argument. See Intervenor's Unopposed Motion to Vacate and Reschedule Oral Argument on Proposed Contention No. 5 (May 14, 2012) (ADAMS Accession No. ML12135A405) at 2 (noting FENOC's submission of Shield Building Monitoring AMP). Intervenor's have repeatedly moved to amend and supplement their contention, although the actual impact of their motions was to only try to add supplemental bases to the contention. On August 16, 2012, the day Intervenor's began service of their Fifth Motion to Supplement, FENOC amended its previously submitted Shield Building Monitoring AMP. Putting aside FENOC's latest amendment, Intervenor's Fifth Motion to Supplement again failed to amend their contention to address either of the Shield Building Monitoring AMPs submitted by FENOC.

<sup>18</sup> See Staff's Feb. 6, 2012 Answer at 17-31; Mar. 8, 2012 Answer; June 29, 2012 Answer; Aug. 17, 2012 Answer. Thus, the instant motion acts more as a surreply not contemplated by the Commission's regulations. Moreover, the instant motion continues to mischaracterize the Staff's position regarding proposed Contention 5. Contrary to Intervenor's assertion, Staff did not oppose the contention itself. Instead, the Staff recognized that the contention, as rephrased by Staff, was an admissible contention of omission. Feb. 6, 2012 Answer. As a result of FENOC's LRA amendment to include a Shield Building Monitoring AMP, this omission no longer exists. Therefore, as explained in Staff's previous answers on June 29, 2012 and August 17, 2012, proposed Contention 5 should be found moot and Intervenor's motions to supplement should be denied.

<sup>19</sup> See NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenor's Reply for the Proposed Contention 5 on Shield Building Cracking (Mar. 5, 2012) at 4-5. As discussed below, Intervenor's Fifth Motion to Supplement raises similar unsupported accusations of malfeasance.

<sup>20</sup> Intervenor's Fifth Motion to Supplement at 1. Because Intervenor's do not seek to amend the text of their contention, but only the supporting bases, the Staff considers the motion only a motion 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

in previous Staff Answers related to proposed Contention 5,<sup>22</sup> the Commission does not look with favor on new or amended contentions filed after the initial filing,<sup>23</sup> 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).”<sup>24</sup> This Board has likewise held that Intervenor 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.<sup>25</sup> Additionally, late-filed contentions must meet the threshold admissibility standards contained in 10 C.F.R. § 2.309(f)(1).<sup>26</sup>

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;

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terms *coupled with* its stated bases.”) (emphasis in original; footnote and internal quotation marks omitted).

<sup>21</sup> Intervenor’s Motion to Admit Contention 5 at 5.

<sup>22</sup> See, e.g., Staff’s Answer to Second Motion to Supplement at 9-10; Staff’s Answer to First Motion to Supplement at 5-7.

<sup>23</sup> 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.’”).

<sup>24</sup> *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009) (internal citations omitted). The NRC recently changed its Part 2 regulations regarding the filing of new and amended contentions. The rules took effect on September 4, 2012, so they do not apply to Intervenor’s Fifth Motion to Supplement, which was filed beginning on August 16, 2012. The amendments to Part 2 eliminate the provisions for “nontimely filings,” currently in 10 C.F.R. § 2.309(c)(1), and move the provisions on new or amended contentions currently in § 2.309(f)(2) to § 2.309(c)(1). Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46562, 46566-67, 46571-72, 46582-83, 46,591 (Aug. 3, 2012). Because Intervenor only pled § 2.309(f)(2) in their Fifth Motion to Supplement, the Staff’s analysis of the motion’s timeliness would be the same under the current and new rules.

<sup>25</sup> See Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) at 3 (Feb. 18, 2011) (ADAMS Accession No. ML110490269).

<sup>26</sup> *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.<sup>27</sup>

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)."<sup>28</sup>

The Staff's March 8, 2012 and June 29, 2012 Answers outlined relevant Commission precedent regarding what constitutes new and materially different information for the purposes of 10 C.F.R. § 2.309(f)(2), so the Staff will not unduly repeat it here, except to emphasize that repeating old arguments and old information that simply appears in a newly available document does not satisfy the materially different standard in § 2.309(f)(2)(ii).<sup>29</sup>

## II. Admissibility of Proposed Supplements to Contention 5 in Intervenors' Fifth Motion to Supplement

As discussed below, Intervenors' Fifth Motion to Supplement should be denied because (1) it does not demonstrate that there is any new and materially different information than previously available, and (2) it fails to satisfy the Commission's contention admissibility requirements.

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<sup>27</sup> 10 C.F.R. § 2.309(f)(2).

<sup>28</sup> 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' Fifth Motion to Supplement does not address the § 2.309(c) factors, and does not demonstrate good cause despite a failure to plead it.

<sup>29</sup> *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 53 (2010).

A. Intervenors' Fifth Motion to Supplement Does Not Indicate How Any of the Information Cited is New and Materially Different

Intervenors' Fifth Motion to Supplement should be denied because Intervenors do not meet the Commission's new and amended contention standards. Intervenors claim that their instant motion is timely filed pursuant to 10 C.F.R. § 2.309(f)(2),<sup>30</sup> which requires a showing that the information on which the contention is based is materially different than information previously available, among other things. Intervenors cite over 50 documents in Appendix B of NRC's June 12, 2012 FOIA response, claiming that these documents contain new and materially different information than previously available.<sup>31</sup>

Specifically, Intervenors assert, without analysis, that the information is new and not previously available because the NRC's FOIA response "was date stamped June 12, 2012...and received by Intervenors a number of days later."<sup>32</sup> Intervenors argue that the information in the FOIA documents is materially different than information previously available because:

Intervenors can begin to unravel the chronology of the decision-making process, carried out behind closed doors by NRC and FENOC, regarding the shield building cracking investigation of root cause, extent of condition, safety and environmental significance, and corrective actions; the rushed reactor restart; and prospective plans addressing the cracking in the 2017-2037 timeframe.<sup>33</sup>

Intervenors assert that their Fifth Motion to Supplement is timely filed because it was

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<sup>30</sup> Fifth Motion to Supplement at 95-97.

<sup>31</sup> Intervenors also reference several other documents, including *Toledo Blade* articles. See, e.g., Fifth Motion to Supplement at 80 (citing December 3, 2011 article discussing restart and "use-as-is"). However, none of the non-Appendix B documents cited are new and materially different information.

<sup>32</sup> See Fifth Motion to Supplement at 96-97. See also *id.* at 54 ("The public has only now gained access to [these documents] thanks to Intervenors' FOIA request, made necessary by NRC's withholding of its decision-making documents surrounding the Davis-Besse shield building cracking scandal.").

<sup>33</sup> Intervenors' Fifth Motion to Supplement at 43. See also *id.* at 97 (claiming information on which contention is based is materially different because it relates to findings and provides facts which did not exist when Intervenors moved for admission of Contention 5 in January 2012).

“filed within sixty (60) days of the [NRC’s June 12, 2012 FOIA response], and conforms with the [Board’s ISO], as complimented by a 3 day allowance of time for U.S. Postal Service First Class Mail delivery.”<sup>34</sup>

As outlined below, Intervenor’s Fifth Motion to Supplement should be denied because it does not demonstrate that any of the information cited is new and materially different. Intervenor’s arguments seemingly misapprehend the regulations’ requirements and their obligations: the issue is not simply when Intervenor came into possession of documents and the date received is not dispositive on the timeliness of their filings. Even a cursory examination of the Appendix B documents shows that Intervenor have raised these issues multiple times in their previous motions to supplement, as the emails primarily concern the December 2, 2011 restart and preliminary discussions or analyses regarding the root cause investigation.<sup>35</sup> These issues are not new and are not within the scope of this limited license renewal proceeding. Thus, they should not be allowed to supplement proposed Contention 5.

Moreover, Intervenor never provide any reasonable connection between their out-of-scope concerns on the adequacy of the Staff’s review, the Staff’s December 2, 2011 restart decision, or FENOC’s root cause evaluation and a litigable issue, like the adequacy of the Shield Building Monitoring AMP. Because Intervenor do not show how any of the information cited is new and materially different than previously available information on (1) the NRC’s December 2, 2011 restart authorization or (2) FENOC’s root cause evaluation, Intervenor’s Fifth Motion to Supplement should be denied.

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<sup>34</sup> Fifth Motion to Supplement at 97 (citing 10 C.F.R. § 2.306(b)(1) and *Shaw Areva MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 57 NRC 460, 493 (2008)).

<sup>35</sup> See Appendices I-IX of Fifth Motion to Supplement. To the extent Intervenor do raise concerns related to proposed Contention 5 and/or the Shield Building Monitoring AMP, they do not meet the Commission’s contention admissibility requirements.

1. Information in the FOIA Documents Regarding Restart and the Root Cause Evaluation Is Not New and Materially Different Information

Intervenors' Fifth Motion to Supplement claims that information in Appendix B provides new and materially different information about (1) the Staff's decision to allow Davis-Besse to restart on December 2, 2011 and (2) the adequacy of FENOC's root cause evaluation. Notably, neither of these issues is material to proposed Contention 5 or the Shield Building Monitoring AMP. The restart of the reactor is a current operating issue and is outside the scope of this proceeding.<sup>36</sup> Likewise, the root cause of the recently identified shield building cracking is a current operating issue and not relevant to proposed Contention 5 or the Shield Building Monitoring AMP.<sup>37</sup> FENOC determined that the recently identified shield building cracking was not aging related.<sup>38</sup> And the Shield Building Monitoring AMP will inspect the cracking as it exists and will monitor it for any change in conditions on a set schedule.<sup>39</sup>

Even assuming these issues were related to proposed Contention 5 and/or the Shield Building Monitoring AMP, Intervenors do not indicate how any information cited is new and materially different in relation to proposed Contention 5 or the Shield Building Monitoring AMP.<sup>40</sup>

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<sup>36</sup> See Staff's Feb. 6, 2012 Answer to Intervenors' January 10, 2012 Motion at 20 (outlining why challenges to NRC's decision to allow Davis-Besse to restart are outside the scope of this proceeding).

<sup>37</sup> As discussed in Staff's August 17, 2012 Answer, the Staff's aging management review focuses on managing the functionality of systems, structures, and components in the face of detrimental aging effects as opposed to identification and mitigation of aging mechanisms. The purpose of the Shield Building Monitoring 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*." 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. 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.

<sup>38</sup> See FENOC's May 16, 2012 cover letter transmitting Revised Root Cause Report.

<sup>39</sup> Intervenors' Third Motion to Supplement appeared to recognize this, as Intervenors noted that the AMP's purpose is to "to oversee and deal with the shield building's...cracking." Intervenors' Third Motion to Supplement at 2.

<sup>40</sup> 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

Instead, Intervenors' Fifth Motion to Supplement, like the Fourth Motion to Supplement, relies on documents in Appendix B, which contain preliminary and internal emails between Staff, mostly regarding the December 2, 2011 restart of the reactor, to suggest that NRC has concerns regarding the December 2, 2011 restart and the results of the root cause analysis done by PII and/or FENOC.<sup>41</sup>

As explained in Staff's August 17, 2012 Answer to the Fourth Motion to Supplement, the Appendix B documents (1) do not contain new and materially different information<sup>42</sup> and (2) do not serve as Staff's conclusions on FENOC's Root Cause Report, which was not issued until February 27, 2012.<sup>43</sup> Once again, Intervenors do not indicate how the information in the Appendix B documents is new and materially different than information previously available. Thus, the Board should not admit Intervenors' claims, summarized below, to supplement the bases for proposed Contention 5, which should be found moot given the submission of the Shield Building Monitoring AMP.<sup>44</sup>

a. The Fact that the December 2, 2011 Restart Occurred Before the Root Cause Was Known is Not New and Materially Different Information

Intervenors' Fifth Motion to Supplement claims that certain FOIA documents contain new and materially different information about the December 2, 2011 restart occurring before the

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Building Monitoring AMP. The Staff will evaluate the response and/or submit additional RAIs if needed as part of their ongoing review.

<sup>41</sup> See Fourth Motion to Supplement at 21-24 and 36 (citing emails of NRC Staff Abdul Sheikh and Pete Hernandez); Fifth Motion to Supplement at 12-14, 39-41 (citing same emails).

<sup>42</sup> Instead, they were preliminary discussions by Staff based on still emerging information and were subject to substantial change and revision as additional information became available. Moreover, the documents contain discussion of the Dec. 2, 2011 restart of the reactor and preliminary discussions about the root cause investigation. Both of these issues are outside the scope of this proceeding.

<sup>43</sup> Staff's Answer to Third and Fourth Motions to Supplement at 31-32.

<sup>44</sup> See Staff's June 29, 2012 Answer to Second Motion to Supplement and Aug. 17, 2012 Answer to the Third and Fourth Motion to Supplement. Contrary to Intervenors' assertion, Staff has not "insist[ed] that any aging related aspects of the shield building are ameliorated by that AMP." Fifth Motion to Supplement at 92. Staff's review of the Shield Building Monitoring AMP is ongoing.

root cause of the shield building cracking was known. But Intervenor's do not demonstrate that any information cited is new and materially different as it relates to the proposed Contention 5, or the adequacy of the Shield Building Monitoring AMP. Instead, Intervenor's repeat their out-of-scope arguments that the December 2, 2011 restart was improper.<sup>45</sup>

For example, Intervenor's argue that the FOIA documents show "that more than a month and a half after NRC issued its rushed [Confirmatory Action Letter ("CAL")] approving Davis-Besse restart, NRC technical Staff were *still* brainstorming ways to justify why that was acceptable under their regulations."<sup>46</sup> This is not new and materially different information for several reasons. First, Intervenor's mischaracterize the Staff's actions. The Staff was not "brainstorming" or "justif[ying]" its actions regarding restart.<sup>47</sup> The Staff does not rely on "faith based regulation," as Intervenor's claim.<sup>48</sup> Instead, the Staff was preparing slides for a public meeting and trying to make them accessible to a wide audience. Second, the fact that the restart was approved before the root cause was known is not new information. The CAL issued on December 2, 2011 indicated that FENOC was to submit a Root Cause Evaluation by February 28, 2012.<sup>49</sup> Therefore, Intervenor's cannot demonstrate that this is new and materially different information.

Intervenor's also claim that certain FOIA documents "reveal" the existence of the draft CAL, and that this information is materially different because it shows that NRC "changed their messaging regarding Davis-Besse's shield building cracking."<sup>50</sup> Intervenor's claim that before

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<sup>45</sup> As noted in other answers to Intervenor's motions to supplement proposed Contention 5, if Intervenor's wish to challenge the current operation of the plant, they can file a § 2.206 petition.

<sup>46</sup> Fifth Motion to Supplement at 85.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> CAL.

<sup>50</sup> Fifth Motion to Supplement at 44.

the draft CAL, NRC “had assured the media and public that NRC’s questions about root cause, extent of condition, safety and environmental significance, and corrective actions must be answered before reactor restart would be authorized.”<sup>51</sup> Intervenor assert that the FOIA documents “show” that NRC had a “shift in attitude [that] has yet to be explained”<sup>52</sup> and that Staff approved the restart without “a clear understanding and mastery of safety- and environmentally-significant issues.”<sup>53</sup>

But Intervenor made this same argument over seven months ago, in their January 10, 2012 Motion to Admit Contention 5. Specifically, Intervenor’s claimed that “[d]espite its assurances, NRC did *not* require a full understanding of ‘how [the shield building cracking] happened and the full extent of it’ before blessing FENOC’s hasty re-start of Davis-Besse.”<sup>54</sup> Intervenor’s Motion to Admit Contention 5 cited local newspaper articles from October 2011 as “proof” that the NRC “promised” to answer all questions about the shield building cracking before restart.<sup>55</sup> Notably, Intervenor’s Fifth Motion to Supplement cites the same *Cleveland Plain Dealer* article.<sup>56</sup> This information from October 2011 is neither new nor materially different.

Moreover, as Intervenor themselves noted in their Motion to Admit Contention 5, what NRC actually said was that the reactor would not restart until the NRC had “confidence that the

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<sup>51</sup> Fifth Motion to Supplement at 44.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 50.

<sup>54</sup> See Motion to Admit Contention 5 at 17.

<sup>55</sup> See *e.g.*, *id.* at 14 (“On October 14, 2011 the same FENOC spokeswoman cited above assured the *Toledo Blade* that ‘We will make sure we fully understand the issue before we re-start the plant.’ [http://www.toledoblade.com/news/2011/10/14/Crack-in-Davis-Besse-shield-buildingcontinues.html] (Emphasis added). But even as of the date of this Contention filing in January 2012, neither FENOC nor NRC ‘fully understand the issue,’ and yet FENOC has chosen to re-start Davis-Besse, with NRC’s blessing.”).

<sup>56</sup> See Fifth Motion to Supplement at 57.

cracks in the Shield Building don't have any safety implications.”<sup>57</sup> Despite Intervenor's repeated assertions in their Fifth Motion to Supplement that NRC's safety related questions went unanswered,<sup>58</sup> the NRC's questions regarding the integrity of the shield building to perform its intended functions were answered before restart was authorized on December 2, 2011. In fact, Intervenor's Fifth Motion to Supplement specifically points the Board to a December 2, 2011 email from NRC Staff that states:

Tech staff unanimously concurred on the decision that the licensee provided reasonable assurance [that] the Shield Building will perform its safety function. There are no further questions from the NRC to be answered before startup can commence.<sup>59</sup>

And NRC's May 7, 2012 Inspection Report noted that:

On December 1, 2011, the licensee provided revised calculations to address remaining concerns of the NRC technical review team. On December 1 and December 2, 2011, a portion of the NRC technical review team conducted additional onsite discussions with the licensee technical staff and the licensee's contractors to ensure appropriate understanding of the latest calculation revisions. The remainder of the NRC technical review team continued to provide offsite support. On December 2, 2011, the NRC technical review team concluded that the licensee provided reasonable assurance that the [shield building] had sufficient structural capacity to perform its design functions if subjected to a postulated design basis earthquake, tornado wind, or tornado generated missiles.<sup>60</sup>

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<sup>57</sup> Motion to Admit Contention 5 at 21 (quoting NRC Staff member Viktoria Mytling).

<sup>58</sup> See, e.g., Fifth Motion to Supplement at 48 (asserting that “revelations” in documents related to the December 2, 2011 restart and the root cause investigation make it “retrospectively clear that NRC's questions and concerns were not resolved by the time the CAL was issued on December 2, 2011.”); *id.* at 46-7 (claiming there were lingering unanswered questions).

<sup>59</sup> Intervenor's Fifth Motion to Supplement at 53 (citing B/36). Intervenor's claim that a grammatical error in the email message, i.e., the word “for” being used instead of “that” in the sentence stating that reasonable assurance was provided, “may be a reflection of the speed at which the restart approval was granted.” *Id.* However, a grammatical error in an internal email summarizing NRC activities that does not change the substantive meaning of the message does not indicate that Staff “rushed” in performing its mission, and is not new and materially different information.

<sup>60</sup> See Davis-Besse Nuclear Power Station Reactor Vessel Head Replacement and Shield Building Cracking Inspection Report 05000346/2012007(DRS) (May 7, 2012) (ADAMS Accession No. ML12128A443) at 9. This inspection report was served on the parties on May 10, 2012. See Letter from Brian G. Harris to the Board (May 10, 2012) (ADAMS Accession No. ML12131A031).



While Intervenor's are concerned that internal staff briefing materials were not updated,<sup>61</sup> and that Staff asked questions and were reviewing calculations and analyses on the day restart was authorized,<sup>62</sup> Intervenor's do not indicate how any of the information in the FOIA documents is new and materially different,<sup>63</sup> or how these issues are relevant to their proposed Contention 5 or the Shield Building Monitoring AMP. Therefore, these claims should not be allowed to supplement proposed Contention 5 and the motion should be dismissed.

b. Intervenor's Do Not Demonstrate That There is Any New and Materially Different Information Regarding the Risks of the Shield Building Cracking

Intervenor's Fifth Motion to Supplement also claims that there is new and materially different information in the FOIA documents concerning the safety and environmental risks associated with the shield building cracking.<sup>64</sup> Once again, Intervenor's arguments are similar if not identical to arguments made in multiple previous motions related to proposed Contention 5 that the restart of the reactor was improper given the significance of the shield building cracking.<sup>65</sup> As discussed below, Intervenor's do not demonstrate that any information in the FOIA documents discussing the "Hole-in-the-Head" incident, the shield building's non-conformance, or Crystal River, is new and materially different than information previously available, or related to their proposed Contention 5 or the Shield Building Monitoring AMP.

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<sup>61</sup> See, e.g., Fifth Motion to Supplement at 49-50 (citing B/33).

<sup>62</sup> See, e.g., Fifth Motion to Supplement at 50 (citing B/34 and claiming that "[t]his document shows that NRC staff concerns about Davis-Besse shield building cracking persisted up to the final moments before NRC's rushed CAL authorized reactor restart.").

<sup>63</sup> The October 12, 2011 *Cleveland Plain Dealer* article is also not new information under the Board's ISO.

<sup>64</sup> See, e.g., Fifth Motion to Supplement at 46-47 (asserting that restart occurred "despite the lingering, unanswered, complex, safety- and environmentally-significant questions and concerns related to the shield building cracking.").

<sup>65</sup> See, e.g., Motion to Admit Contention 5 at 53 (suggesting that there is such rapid degradation of the shield building concrete that Davis-Besse cannot safely operate to the end of its existing license). *Id.* at 31 (claiming restart was premature and unsafe because FENOC and NRC did not fully understand the causes, extent, and significance of the cracking). See also Third Motion to Supplement at 2 (claiming that there is potential for further concrete and rebar problems in the Davis-Besse shield building).

i. References to Hole-in-the-Head Incident Are Not New and Materially Different Information

Intervenors' Fifth Motion to Supplement claims that a communication plan sent between Staff, which was related to cracking of the reactor pressure vessel ("RPV") head penetration nozzles, "tends to show that Davis-Besse's 2011 shield building cracking discovery is the most significant safety and environmental scandal to beset FENOC since the 2002 Hole-in-the-Head Fiasco."<sup>66</sup>

But Intervenors do not demonstrate that this information is new and materially different. In fact, Intervenors argued in their Motion to Admit Contention 5 that the recently identified shield building cracks are similar to the cracking of the RPV head. Specifically, Intervenors' January 10, 2012 Motion to Admit Contention 5 asserted that the shield building "cracking phenomena suggest[s] another round of 'Radioactive Russian Roulette' at Davis-Besse."<sup>67</sup>

Notably, the Board has already stricken Intervenors' references to the "Hole-in-the Head" incident in this proceeding.<sup>68</sup> Despite this, Intervenors have repeatedly referenced this incident in several motions related to proposed Contention 5.<sup>69</sup> In any event, Intervenors do not demonstrate how any information in the FOIA documents is new and materially different from information previously available, or how these claims are related to proposed Contention 5 or the adequacy of the Shield Building Monitoring AMP.<sup>70</sup> Therefore, these claims should not be

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<sup>66</sup> Fifth Motion to Supplement at 45. Intervenors also claim that there might be more boric acid leakage, and cite event notification reports from Turkey Point and Salem, as well as a statement made by "Arnie Gundersen at Fairewinds Associates in Vermont." *Id.* at 67. As Intervenors recognize, *id.*, these event notifications concern plants with "lined containments" which does not apply to Davis-Besse.

<sup>67</sup> Motion to Admit Contention 5 at 18. *Id.* at 49 (claiming that the cracking in the shield building could have same consequences as 2001 cracking almost did and/or Fukushima did).

<sup>68</sup> See Memorandum and Order (Granting Motion To Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) at 2-3 (ADAMS Accession No. ML110490269).

<sup>69</sup> See, e.g., Motion to Admit Contention 5 at 17, 18, 25, 46, 53; Second Motion to Supplement at 17, 18; Fourth Motion to Supplement at 9-10.; Fifth Motion to Supplement at 87.

<sup>70</sup> Intervenors also point to FOIA documents (B/41) which discuss cracking "3 inches deep into the shield building wall." Fifth Motion to Supplement at 61. See also *id.* at 69. Intervenors claim that this

allowed to supplement proposed Contention 5, which should be found moot given the submission of the Shield Building Monitoring AMP.<sup>71</sup>

ii. References to Non-Conformance of Shield Building Are Not New and Materially Different Information

Intervenors' Fifth Motion to Supplement also claims that certain FOIA documents contain new and materially different information "revealing" that there were issues related to Davis-Besse's design basis that were not resolved before restart.<sup>72</sup> Intervenors appear to argue that because the plant was non-conforming when restart was approved on December 2, 2011, there are greater safety and environmental risks than previously indicated, and that Davis-Besse should not be allowed to operate at full-power.<sup>73</sup> But Intervenors do not demonstrate that any information in the FOIA documents is new and materially different than information previously available.<sup>74</sup>

Instead, Intervenors' Fifth Motion to Supplement repeats similar arguments to those raised in their Fourth Motion to Supplement. Specifically, Intervenors' Fourth Motion to

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cracking "does not account for admissions, in FENOC's February 28, 2012 root cause analysis report, of cracks as deep as 15 inches or more...[in] the shield building wall." *Id.* Intervenors do not demonstrate how information in the FOIA documents is materially different than information previously available about cracking near the outer reinforcing mat.

<sup>71</sup> See Staff's Answer to Second Motion to Supplement (noting that proposed Contention 5, as reworded by Staff, is moot); Staff's Answer to Third and Fourth Motions to Supplement (noting same).

<sup>72</sup> See, e.g., Fifth Motion to Supplement at 55, 63, 71 (citing B/46); *id.* at 72-73 (citing B/48); *id.* at 76-77 (questioning how changes to slides for an internal presentation affected "insights"). *Id.* at 92 ("It is worth noting that NRC is currently only requiring FENOC to devise a 'plan for a plan,' by December 2012, to restore licensing and design bases conformance at Davis-Besse, given the severely cracked shield building.").

<sup>73</sup> See, e.g., Fifth Motion to Supplement at 93 ("Intervenors question the appropriateness of such a lax, open-ended time period during which FENOC has the opportunity to 'restore conformance' with Davis-Besse licensing and design bases – all the while allowing FENOC's operation of Davis-Besse at full power..."). As discussed, restart and the plant's full power operation is outside the scope of this proceeding.

<sup>74</sup> Intervenors also cite to a December 3, 2011 Toledo Blade article discussing FENOC's "use-as-is disposition for the existing concrete cracking configuration...". Fifth Motion to Supplement at 80. This article is well more than 60 days old, and so is not new under the Board's ISO. Further, it is related to restart and the current operation of the plant, which are outside the scope of this proceeding.

Supplement pointed to FOIA documents from Appendix B and claimed that “the NRC staff wrestled with FENOC’s ‘operability/functionality’ approach to returning Davis-Besse to full power operations, as opposed to a ‘design conformance’ or ‘licensing basis’ ” approach.<sup>75</sup> As noted in Staff’s Answer to the Third and Fourth Motions to Supplement, the fact that the plant was non-conforming given the shield building cracking is not new and materially different information. It was discussed in the Root Cause Report, which was available on February 29, 2012.<sup>76</sup> Intervenor seemingly recognized this in their Fourth Motion to Supplement, stating that FENOC “admitted in its February 2012 [Root Cause Report] that the shield building cracking has left the shield building ‘non-conforming to the current design and licensing bases’ ”<sup>77</sup> Thus, this information is not new and materially different information under the Board’s ISO or the regulations, and should not be admitted to supplement proposed Contention 5.

Moreover, restoration of the design basis is a current operating issue, not a license renewal issue related to proposed Contention 5 or the Shield Building Monitoring AMP.<sup>78</sup> Notably, Intervenor’s Fifth Motion to Supplement recognizes this is a current operating issue, and references FOIA documents indicating that:

Davis-Besse’s current non-conformances with its licensing and design bases, due to shield building cracking, are being overseen by NRC in “operations space” (see NRC FOIA Document B/22 and B/24) or “inspection space” (see NRC FOIA Document B/48, Slide # 11) – that is, during the course of routine, regular, ongoing operational “inspections.”<sup>79</sup>

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<sup>75</sup> See Intervenor’s Fourth Motion to Supplement at 9 (citing “Memo, NRC’s Hernandez to Sanchez-Santiago, 11/17/2011 (from NRC FOIA responses)”).

<sup>76</sup> Staff’s Answer to Third and Fourth Motions to Supplement at 31.

<sup>77</sup> Fourth Motion to Supplement at 9. See *also* Second Motion to Supplement at 8.

<sup>78</sup> As Intervenor recognizes, license renewal review focuses on “those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs.” Fifth Motion to Supplement at 93 (citing Florida Power & Light Co (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7 (20010; Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-24, 64 NRC 257, 275-76 (2006)).

<sup>79</sup> Fifth Motion to Supplement at 93.

As stated in previous Staff Answers to Intervenor's motions related to proposed Contention 5, if Intervenor's are concerned about the timing of resolving the non-conformance, they can file a § 2.206 petition.<sup>80</sup> Because there is no new and materially information cited on this issue, these claims should not be allowed to supplement proposed Contention 5.

iii. References to Crystal River Are Not New and  
Materially Different Information

Intervenor's also suggest that certain FOIA documents discussing Crystal River suggest that there is new and materially different information than previously available regarding Davis-Besse's shield building cracking.<sup>81</sup> Intervenor's reference FOIA documents indicating that a computer model used at Crystal River was also used at Davis-Besse. But Intervenor's Fifth Motion to Supplement does not demonstrate that any information in the FOIA documents is new and materially different information than previously available. In fact, the Root Cause Report noted that:

Performance Improvement International used concrete stress and fracture analysis modeling techniques originally developed as part of the Crystal River Unit 3 containment concrete delamination cracking root cause investigation. The modeling and analysis was updated to reflect the design characteristics of the DBNPS shield building. The material properties and failure criteria used in the analysis and modeling were based upon the results of the DBNPS shield building concrete laboratory tests and examinations.<sup>82</sup>

This information was available on February 29, 2012 and Intervenor's could have timely raised a concern in one of their earlier motions to supplement. Because Intervenor's do not demonstrate that the FOIA documents contain any new and materially different information

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<sup>80</sup> See, e.g., Staff's Answer to Third and Fourth Motions to Supplement at 37 n. 166; Staff's Answer to Second Motion to Supplement at 25 n. 114; Staff's Answer to Motion to Admit Contention 5 at 20-21.

<sup>81</sup> See, e.g., Fifth Motion to Supplement at 79-80 (discussing use of model used at Crystal River and how at SONGs, the use of a computer model has led to shut down of the SONGs reactors since January 2012). *Id.* at 89-90 (claiming there needs to be third party validation of model).

<sup>82</sup> Root Cause Report at 40.

than previously available, these claims should not be allowed to supplement proposed

Contention 5.

c. Intervenors Do Not Demonstrate That There is Any New and Materially Different Information Indicating That the Investigation Into the Root Cause of the Shield Building Cracking Was Inadequate

As in other motions related to proposed Contention 5, Intervenors' Fifth Motion to Supplement claims that FENOC's investigation into the root cause of the shield building cracking was inadequate,<sup>83</sup> in that it did not identify all types of cracking and/or potential root causes,<sup>84</sup> among other things.<sup>85</sup> Intervenors argue that "[g]iven the safety significance of the shield building cracking...NRC [should have demanded] that more empirical data be collected."<sup>86</sup> Intervenors argue that several FOIA documents in Appendix B include new information that is materially different than information previously available demonstrating that: (1) there are "numerous different types/areas of cracking"<sup>87</sup> (2) FENOC's "Blizzard of 1978" theory is wrong<sup>88</sup> and (2) there has been an "incomplete accounting of the extent of the cracking

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<sup>83</sup> Intervenors' Second, Third, and Fourth Motions to Supplement were all based in part on the claim that "in light of a wholly-incomplete, tokenistic investigation...the true extent of the cracking and deterioration of the shield building remains unknown." Second Motion to Supplement at 6. *See also* Third Motion to Supplement at 2 ("The scope of the admitted cracking is far narrower than the identified cracking..."); Fourth Motion to Supplement at 3 ("The scope of the admitted cracking is far narrower than the identified cracking..."). Intervenors' Motion to Admit Contention 5 claimed that carbonation was a potential root cause of the cracking, citing an Oak Ridge National Study. Motion to Admit Contention 5 at 26-29. Intervenors' Fifth Motion to Supplement likewise claims that the root cause investigation was a "token exercise," *id.* at 82, and repeats arguments made in previous pleadings (e.g., carbonation argument made in Motion to Admit Contention 5). *Id.* at 81.

<sup>84</sup> *See, e.g.,* Fifth Motion to Supplement at 72 (talking about discussion of dome parapet cracking in the Revised Root Cause Report). *Id.* at 81 (noting concern that FENOC applied "no specific logic" in its shield building cracking investigation).

<sup>85</sup> Intervenors question the accuracy, robustness, and value of FENOC's modeling. Fifth Motion to Supplement at 84.

<sup>86</sup> Fifth Motion to Supplement at 82.

<sup>87</sup> *See* Fifth Motion to Supplement at 60 (claiming that document B/41 provides information representing "yet another additional form of cracking, in addition to those FENOC has chosen to focus so exclusively upon in just a few select areas.").

<sup>88</sup> Fifth Motion to Supplement at 60 ("These numerous different/types/areas of cracking challenge

and safety/environmental risk significance, and consequently inadequate corrective actions.”<sup>89</sup>

Intervenors argue that “essential truth and facts about the shield building cracking [were] sacrificed to arbitrary schedules, lame excuses, and, apparently, corporate profitability.”<sup>90</sup>

But Intervenors do not indicate how the FOIA documents contain new and materially different information regarding the type or extent of cracking, or undermining the conclusions in the (1) Root Cause Report, (2) Revised Root Cause Report, (3) PII Report, (4) May 7, 2012 NRC Inspection Report, or (5) June 21, 2012 NRC Inspection Report.<sup>91</sup> Moreover, Intervenors do not indicate how the NRC’s June 12, 2012 FOIA response provides new and materially different information related to the adequacy of the Shield Building Monitoring AMP. Instead, Intervenors repeat the same or similar arguments made in previous motions related to proposed Contention 5<sup>92</sup> and either point to information that is already before the Board,<sup>93</sup> or fail to

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FENOC’s ‘Blizzard of 1978’ theory. Just as NRC’s own questioning, documented in the PII revised root cause assessment report, indicated, FENOC’s theory cannot account for all this.”); *id.* at 76 (“Meanwhile, FENOC fished around for the most convenient root cause it could conjure up, and settled on the Blizzard of 1978, inappropriately and inexplicably excluding other potential, and even likely, root cause explanations...”); *id.* at 83 (claiming that FENOC had “weak foundation” on which to rule out freeze/thaw cycles as contributing to the “various forms and locations of cracking on the shield building); *id.* at 84 (“It appears to Intervenors that FENOC cherry-picked a single root cause that it could claim was not aging related, thereby minimizing needed corrective actions...allowing it to deny the possibility that cracking could worsen over time...”); *id.* at 86-87 (claiming that Blizzard of 1978 was a convenient, as opposed to accurate, comprehensive, or truthful, root cause explanation).

<sup>89</sup> Fifth Motion to Supplement at 61.

<sup>90</sup> *Id.* at 82.

<sup>91</sup> The NRC’s June 21, 2012 Inspection Report found that FENOC’s Root Cause Report established a sufficient basis for the causes of the shield building laminar cracking.

<sup>92</sup> See, e.g., Fifth Motion to Supplement at 95 (“There is extensive information, much of which is from NRC’s own Staff,...suggesting the universal presence of cracking in the shield building from different origins (from the pouring and original drying of the concrete, the construction of the shield building significantly out of plumb, micro-cracking, moisture infiltration, carbonation and corrosion), of high safety and environmental risk significance.”). See Fourth Motion to Supplement at 47 (raising same issues).

<sup>93</sup> The discussion below focuses on Intervenors’ references to FOIA documents, but Intervenors’ Fifth Motion to Supplement also references information already put forth before the Board in other pleadings and/or information that is not new. For example, Intervenors reference statements by Representative Kucinich that were in their Motion to Admit Contention 5. See, e.g., Fifth Motion to Supplement at 81. Intervenors also reference information in Sandia’s “Calculation of Reactor Accident Consequences” (CRAC-2) report, which they recognize has been public since 1982. *Id.* at 68.

demonstrate how information in the FOIA documents is new and materially different than information previously available to the Intervenor.

For example, Intervenor claim that FOIA documents provide new and materially different information indicating that FENOC did not completely characterize the extent of cracking in the shield building and/or the risks associated with the cracking.<sup>94</sup> Notably, two of the FOIA documents cited, B/9 and B/26, are exactly the same documents cited in Intervenor's Fourth Motion to Supplement.<sup>95</sup> Intervenor do not indicate how any of the information cited in these documents is new and materially different than information previously available. As stated in Staff's Answer to the Third and Fourth Motions to Supplement, this information is not new and materially different.<sup>96</sup>

Similarly, Intervenor's Fifth Motion to Supplement claims that FOIA documents contain new and materially different information suggesting that FENOC failed to meet the CAL's February 28, 2012 deadline for (1) determining the root cause of the cracking and (2) developing a long-term monitoring program by February 28, 2012.<sup>97</sup> Specifically, Intervenor assert that because FENOC did not submit (1) its Revised Root Cause Report until May 16, 2012, or (2) its Shield Building Monitoring AMP until April 5, 2012, it failed to meet the February

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Intervenor's claim that the CRAC-2 report contains information about the consequences of a "catastrophic radioactivity release at Davis-Besse." *Id.* Intervenor also cite a June 2011 piece by Jeff Donn. *Id.* Neither the CRAC-2 report or Donn's article are new information under the Board's ISO.

<sup>94</sup> Fifth Motion to Supplement at 61. Intervenor also argue that FOIA documents show that "FEOC seems content to collect the bare minimum of data points, sometimes even by accident, as by 'nicking' a portion of rebar." *Id.* at 87 (citing B/53). Intervenor further assert that "freeze/thaw is ongoing and a form of age-related degradation..." *Id.* at 83. Staff notes that the Structures Monitoring AMP deals with this issue and that Intervenor make no specific challenge to either the Structures Monitoring AMP or the Shield Building Monitoring AMP.

<sup>95</sup> See Fourth Motion to Supplement at 21-25; Fifth Motion to Supplement at 61-63.

<sup>96</sup> Staff's Answer to Third and Fourth Motions to Supplement at 14, 31-32.

<sup>97</sup> See Fifth Motion to Supplement at 63.



28, 2012 deadline outlined in the CAL, and violated 10 C.F.R. § 50.9.<sup>98</sup> First, Intervenor's argument conflates the Shield Building Monitoring AMP with the long-term monitoring plan<sup>99</sup> submitted as part of the Root Cause Report.<sup>100</sup> The long-term monitoring plan is associated with current operation, while the Shield Building Monitoring AMP is associated with license renewal. Second, Intervenor's claims that FENOC "failed" to submit the root cause determination and long-term monitoring plan in a timely fashion are not correct. As discussed above and in Staff's Answer to the Third and Fourth Motions to Supplement, the Staff found the Root Cause Report submitted on February 27, 2012, which contained FENOC's determination regarding the root cause of the cracking and the long-term monitoring plan, acceptable.<sup>101</sup> Intervenor does not point to any new and materially different information in the FOIA documents that undermines this determination. Third, Intervenor's arguments about a § 50.9 violation and the Root Cause Report's conclusions have already been put before the Board.<sup>102</sup> The Staff has already indicated why these claims are inaccurate and outside the scope of this proceeding.<sup>103</sup>

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<sup>98</sup> Fifth Motion to Supplement at 64, 86. See also *id.* at 86 ("Never mind that the February 28 root cause report was so half-baked that NRC sent it back to the kitchen, only for FENOC to re-publish it with many revisions on May 16, 2012.").

<sup>99</sup> See Fifth Motion to Supplement at 74 (arguing that the CAL's inclusion of a commitment to develop a long-term-monitoring program confirms that the shield building cracking is aging related).

<sup>100</sup> See cover letter to Root Cause Report at page 1 ("The root cause evaluation of the DBNPS Shield Building cracks has been completed, and a copy of the Root Cause Analysis Report is enclosed. *This report includes the corrective actions being taken along with long-term monitoring requirements.*") (emphasis added).

<sup>101</sup> Staff's Answer to Third and Fourth Motions to Supplement at 28 (citing June 21, 2012 Inspection Report); *id.* at 30.

<sup>102</sup> See Second Motion to Supplement at 3 ("Had the information been deemed by the NRC to either be complete and accurate or be incomplete/inaccurate but immaterial during its inspections, the re-submittals of the root cause assessment and root cause evaluation would not have been necessary. The re-submittals under these circumstances constitute *prima facie* evidence that FENOC violated §50.9.").

<sup>103</sup> See Staff's Answer to Second Motion to Supplement at 17 (noting that NRC did not force FENOC to revise its Root Cause Report and submittal of Revised Root Cause Report did not constitute a violation of § 50.9). *Id.* at 24-25 (noting that violation of § 50.9 raises current safety issue and is outside scope of proceeding).

Fourth, these arguments are not timely, as the Revised Root Cause Report was publicly available on May 17, 2012. For all these reasons, Intervenor's do not demonstrate that information in the FOIA documents is new and materially different.

Intervenor's also argue that FOIA document B/41 contains new and materially different information indicating that not all 16 flute shoulders were core bored.<sup>104</sup> However, the Root Cause Report indicates that not all 16 flute shoulders were core bored.<sup>105</sup> Notably, Intervenor's pointed to the Root Cause Report's discussion of this issue in their Second Motion to Supplement, where they made the same argument as in this instant motion that all 16 flute shoulders should have been core bored.<sup>106</sup> The Staff's June 29, 2012 Answer to the Second Motion to Supplement discussed why this information was not new and materially different information.<sup>107</sup> Once again, Intervenor's do not demonstrate that any information cited is new and materially different information than previously available. Thus, these claims should not be allowed to supplement proposed Contention 5.

Similarly, Intervenor's assert that some of the FOIA documents indicate that there is new and materially different information about a failed test related to freeze/thaw.<sup>108</sup> However, the

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<sup>104</sup> See Fifth Motion to Supplement at 60. Document B/41 contains Staff's slides discussing FENOC's condition assessment, which were prepared before the Root Cause Report was completed. The slides indicated that "core bores [were] taken on 12 shoulders to confirm crack boundaries."

<sup>105</sup> Root Cause Report at 18.

<sup>106</sup> Second Motion to Supplement at 9 ("Only 15 of the 16 flute shoulders were analyzed for damage. "Impulse Response testing and cores [sic] bores taken using man-lifts from the ground and scaffold from building roofs across 15 of the 16 architectural flute shoulders confirmed that a similar concrete crack phenomenon in the architectural flute shoulders exists in other regions around the perimeter of the shield building..." But "Shoulder 14 was not accessible from the ground due to interference with a start-up transformer." RCA at 18."). The Second Motion to Supplement argued that this indicated FENOC's decisions put convenience over safety concerns. Second Motion to Supplement at 9.

<sup>107</sup> Staff's Answer to Second Motion to Supplement at 17-18. *Id.* at 24 and n. 107 (noting that these claims were also outside the scope of the proceeding).

<sup>108</sup> Fifth Motion to Supplement at 81.

Root Cause Report discusses a failed test related to freeze/thaw.<sup>109</sup> The Root Cause Report has been publicly available since February 29, 2012 when it was served on all parties in this proceeding. Intervenors are well aware of the Root Cause Report, as several of their motions to supplement have been based on and/or referenced it. Thus, this most recent supplement does not indicate how any information in the FOIA documents is new and materially different than information previously available. Therefore, these claims should not be allowed to supplement proposed contention 5.

d. The FOIA Documents Do Not Contain New and Materially Different Information Than Previously Available Concerning the Shield Building Cracking Being Addressed in the LRA

Intervenors also claim that certain FOIA documents in Appendix B show that the shield building cracking issue is relevant to this license renewal proceeding.<sup>110</sup> For example, Intervenors note that an internal NRC email dated December 2, 2011 states that NRC's Division of license renewal: (1) recognize that degraded concrete is a Part 50 issue affecting license renewal, (2) need to understand if the degradation in the shield building concrete is age-related and if so, how the aging-effect will be managed, (3) drafted a RAI asking FENOC to explain how the recently identified shield building cracking (i.e., unique operating experience) will be addressed by its AMPs, and (4) added an open item in the Safety Evaluation Report regarding this issue.<sup>111</sup> Intervenors also point out that NRC's internal power point slides reference the shield building cracking's "Impact on License Renewal"<sup>112</sup> and assert that this information "clearly confirms the merits of Intervenors' request for a hearing."<sup>113</sup> Further, Intervenors point

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<sup>109</sup> Root Cause Report at 23.

<sup>110</sup> See Fifth Motion to Supplement at 51-52 (citing B/35).

<sup>111</sup> See Fifth Motion to Supplement at 51-52.

<sup>112</sup> *Id.* at 59-60 (citing B/40 and B/41).

<sup>113</sup> See Fifth Motion to Supplement at 52. See also *id.* at 65 (citing B/42).

to a January 12, 2012 email that was referenced in a previous pleading related to proposed Contention 5,<sup>114</sup> which outlines Staff's position that the NRC did not oppose a limited version of Intervenor's originally proposed Contention 5 prior to FENOC's amended LRA application proposing a Shield Building Monitoring AMP.<sup>115</sup>

Staff agrees that the information in the December 2, 2011 and January 12, 2012 emails and references to a draft RAI regarding the shield building cracks' license renewal impact indicates that a portion of Intervenor's proposed Contention 5 was an admissible contention when submitted on January 10, 2012. This information has already been brought before the Board and has not been transformed in to new material by being included in the Staff's June 12, 2012 FOIA response. In fact, the draft RAI cited in Intervenor's Fifth Motion to Supplement is the RAI that was (1) finalized and sent on December 27, 2011 to FENOC, (2) cited in Intervenor's January 10, 2012 Motion to Admit Contention 5,<sup>116</sup> (3) referenced in Staff's February 6, 2012 Answer as a reason Staff did not oppose proposed Contention 5 as a contention of omission to the extent it identified FENOC's failure to describe how its AMPs will account for the shield building cracks during the period of extended operation,<sup>117</sup> and (4) answered by FENOC on April 5, 2012. In fact, Intervenor's Second Motion to Supplement was based on FENOC's April 5, 2012 answer to this RAI, which included the Shield Building

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<sup>114</sup> See 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) (citing B/50).

<sup>115</sup> See Fifth Motion to Supplement at 77-78 (citing B/50).

<sup>116</sup> See Motion to Admit Contention 5 at 23 ("On December 27, 2011, as will be shown, NRC's RAIs extended directly to aging management *vis-a-vis* cracking in the concrete shield building." *Id.* at 30 ("NRC's RAIs from December, 2011 have directly to do with shield building cracking, a critical safety-significant aging management issue that should be addressed in the license extension proceeding, as urged by this contention."). *Id.* at 50; *Id.* at 53-54 (quoting the RAI, which is the finalized form of the draft RAI cited in Intervenor's Fifth Motion to Supplement).

<sup>117</sup> Staff's Feb. 6, 2012 Answer to Motion to Admit Contention 5 at 16.

Monitoring AMP.<sup>118</sup> And the January 12, 2012 email outlining Staff's position is the same position taken in Staff's February 6, 2012 Answer to proposed Contention 5. Therefore, this information is not new and materially different and Intervenor's motion should be denied.

As indicated in its June 29, 2012 and August 17, 2012 Answers, Staff's position is that proposed Contention 5 should be found moot given the submittal of the Shield Building Monitoring AMP.<sup>119</sup> Staff recognizes that the recent shield building cracking is a license renewal issue, and continues to review the Shield Building Monitoring AMP to ensure that it will address the shield building cracking during the PEO.<sup>120</sup> But nothing in the Fifth Motion to Supplement, or any of the four prior motions to supplement proposed Contention 5, suggests that there is new and materially different information regarding proposed Contention 5 or the adequacy of the Shield Building Monitoring AMP.<sup>121</sup> Therefore, Intervenor's Fifth Motion to Supplement should be denied and proposed Contention 5 should be dismissed as moot.

2.     The FOIA Documents Do Not Contain New and Materially  
Different Information Indicating That the Shield Building  
Cracking Is Related to FENOC's SAMA Analysis

Intervenors' Fifth Motion to Supplement also repeats Intervenor's argument that the

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<sup>118</sup> See April 5, 2012 submission. See Second Motion to Supplement. Intervenor's Fifth Motion to Supplement states that Intervenor is "keenly interested" in the answers to "many more" questions as well. Fifth Motion to Supplement at 71. But Intervenor does not indicate how the questions or answers they seek are new and materially different information than previously available.

<sup>119</sup> See Staff Answer to Second Motion to Supplement at 21-22. *Id.* at 10-12 (discussing mootness doctrine regarding contentions of omission); Staff Answer to Third and Fourth Motions to Supplement at 8, 33, 34.

<sup>120</sup> See Staff Answer to Third and Fourth Motions to Supplement at 16 n.77.

<sup>121</sup> Instead of raising specific challenges to the Shield Building Monitoring AMP and/or the LRA, Intervenor makes unsupported and generic challenges to the Shield Building Monitoring AMP. For example, Intervenor cites to FOIA document B/53 and claims that "a robust Quality Assurance program be applied to the very foundations of 'site programs for managing the aging effects of safety related structures.'" Fifth Motion to Supplement at 90. Intervenor states that "this issue of lacking QA is most deserving of further inquiry in a hearing, for it completely undermines the safety and soundness of 20 year license extension decision making. Such decisions are made while 'flying blind,' due to the lack of QA." *Id.* This unsupported statement is not the type of challenge to the adequacy of an AMP that would support a hearing.

recently identified shield building cracking implicates FENOC's SAMA analysis,<sup>122</sup> and asserts that there is new and materially different information in the FOIA documents on the issue. In particular, Intervenor's cite a December 2, 2011 NRC press release received from their FOIA request, and note that the press release states that Davis-Besse is about 40 miles southeast of Toledo, instead of 21 miles east-southeast of Toledo as stated on NRC's website.<sup>123</sup>

First, the press release is not new and materially different information. While Intervenor's received a copy of it as part of the NRC's June 12, 2012 FOIA response, the press release was publicly available on December 2, 2011. Thus, Intervenor's could have timely raised a complaint about this press release within 60 days of December 2, 2011. Second, the press release is not part of the SAMA analysis or related to proposed Contention 5 or the Shield Building Monitoring AMP. Intervenor's neither claim nor demonstrate that FENOC made a similar error in its SAMA analysis. Instead, Intervenor's only assert that the NRC's opposition to their SAMA contention is "absurd" because the press release's "gross error in estimating the distance from an atomic reactor to a population center carries numerous implications, from radiological doses suffered downwind, to emergency preparedness, SAMA analyses, etc."<sup>124</sup> The press release is simply not part of the LRA, and cannot affect the SAMA analysis in any way. Intervenor's bare assertions are not sufficient to support a hearing.

Intervenor's also assert that the FOIA documents provide new and materially different information indicating that a power uprate has been granted,<sup>125</sup> and that this information "holds potential environmental and safety implications for both Intervenor's' SAMA and cracked

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<sup>122</sup> See, e.g., Fifth Motion to Supplement at 57. See Motion to Admit Contention 5 at 26.

<sup>123</sup> Fifth Motion to Supplement at 56-57.

<sup>124</sup> *Id.* at 58.

<sup>125</sup> *Id.*

concrete containment contentions.”<sup>126</sup> Specifically, Intervenor cite FOIA document B/38, which is a December 2, 2011 magazine article in *Power Engineering Magazine*. Intervenor note that the article states that Davis-Besse’s electric output is 913 Megawatts-electric, which is the same output noted on NRC’s website, but 5 MWe higher than the figure listed in FENOC’s ER.<sup>127</sup> Intervenor assert that “[i]f there has been an electrical output increase at Davis-Besse since late 2010, when this proceeding began, this increases safety and environmental risks, due to the reactor’s increased thermal output.”<sup>128</sup>

Once again, Intervenor cite information that is not new and materially different from information previously available. The NRC licenses reactors based on thermal output, not electric output. The thermal output noted in Davis-Besse’s license, the LRA, and the NRC’s website indicates that Davis-Besse is licensed to 2817 MW-thermal. In any event, the 913 MWe figure is not new information, as it was in the publicly available magazine article published on December 2, 2011, well more than 60-days ago. Intervenor have an “iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention.”<sup>129</sup> Further, Intervenor do not demonstrate that this information is materially different than information previously available.

Instead, Intervenor only offer the assertion that a “high operating temperature is theorized to be associated with the boric acid leakage, and consequent lid corrosion, that has

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<sup>126</sup> See Fifth Motion to Supplement at 58.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* Intervenor also appear to imply that this somehow implicates their energy alternatives contentions, which were consolidated by the Board and dismissed by the Commission. See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08 (Mar. 27, 2012) (slip op. at 5-17). Intervenor offer no support for this claim.

<sup>129</sup> *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC \_\_\_ (Sept. 30, 2010) (slip op. at 18). See also Feb. 6, 2012 Answer to Jan. 10 Motion at 10.

necessitated Davis-Besse's not one, but two, lid replacements in a single decade (2002-2011)."<sup>130</sup> Notably, Intervenor's Motion to Admit Contention 5 raised similar concerns about the multiple lid replacements, citing FENOC's ER among other things.<sup>131</sup> Because Intervenor does not demonstrate that there is new and materially different information than previously available, their claims should not be allowed to supplement proposed Contention 5.<sup>132</sup>

B. Intervenors' Fifth Motion to Supplement Does Not Meet the Commission's Contention Admissibility Requirements

Intervenors' Fifth Motion to Supplement should also be denied because it does not meet the Commission's contention admissibility requirements, as it, like Intervenors' four prior motions to supplement, raises issues that are outside the scope of this limited license renewal proceeding, unsupported and/or immaterial.<sup>133</sup> Additionally, Intervenors fail to challenge a specific aspect of the Shield Building Monitoring AMP, which has been part of FENOC's LRA since April 5, 2012.

For example, as in several other motions related to proposed Contention 5,<sup>134</sup> Intervenors' Fifth Motion to Supplement asserts that the Staff has acted improperly during its review. Intervenors' Fifth Motion to Supplement argues that the NRC (1) rushed its decision on

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<sup>130</sup> Fifth Motion to Supplement at 58.

<sup>131</sup> Motion to Admit Contention 5 at 11-13.

<sup>132</sup> It is unclear how these claims are even related to proposed Contention 5 or the Shield Building Monitoring AMP.

<sup>133</sup> Intervenors' Fifth Motion to Supplement also fails to plead the nontimely § 2.309(c) factors, which the Staff has indicated in previous answers could be an independent reason to deny Intervenors' motion. See, e.g., Staff's Answer to Third and Fourth Motions to Supplement at 32.

<sup>134</sup> See, e.g., Motion to Admit Contention 5 at 16 ("From what little information the public has been provided thus far, NRC's supposedly independent assessment of the safety significance of the cracking appears to be woefully inadequate."); Intervenors' Combined Reply to NRC and FENOC Answers to Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 24, 2012) (ADAMS Accession No. ML12237B197) at 5 ("Intervenors' position is thus within the sweep of aging management review, while the artful dodges and concealments of discrepancies between the facts as found by the Staff's investigating experts, and the Commission's acquiescence in the suspect root cause finding by FENOC, have not produced a complete understanding of the degraded component condition and heightened potential for failure of the shield building.").



Davis-Besse's restart in order to preserve FENOC's profitability; (2) rubberstamped FENOC's root cause evaluation; (3) misled the public, and (4) colluded with FENOC, among other things.

As an initial matter, Intervenor's claims of malfeasance by the Staff are baseless and unsupported. Intervenor seems to make these assertions only because they would disagree with the Staff's careful analysis, conclusions, and decisions. These unsupported and vague claims have not changed since Intervenor first started raising these issues almost eight full months ago.<sup>135</sup> Contrary to Intervenor's assertions of malfeasance, their Fifth Motion to Supplement identifies the Staff's dedication to public health and safety including working nights, weekends, and over holidays to analyze information related to the shield building cracking, asking multiple questions concerning FENOC's restart calculations, and eventually deciding to allow restart on December 2, 2011.

Regardless of Intervenor's baseless assertions regarding the Staff's review, these claims cannot support the admission of a contention. The Commission has repeatedly emphasized that the adequacy of the Applicant's application and not the Staff's review is the issue to be resolved in a license renewal proceeding. The Commission stated that "[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."<sup>136</sup> Thus, these types of claims are outside the scope of this proceeding<sup>137</sup> and

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<sup>135</sup> See Motion to Admit Contention 5 at 46 ("Verification and oversight long *after restart* authorization is a very dubious approach to safety regulation enforcement. This is especially unacceptable at Davis-Besse in 2011-2012, given the December 2002 NRC Office of Inspector General Report on Davis-Besse's Hole-in-the-Head fiasco, which found that not only did FENOC place profits ahead of safety (earning a record fine from NRC, amounting to \$33.5 million altogether), but also that NRC – at the highest levels of the agency – also put FENOC's profits ahead of public safety. The December 2, 2011 NRC restart authorization, without resolving the root cause, extent, or solution to the concrete shield building cracking problem, is a repeat of FENOC putting profits ahead of safety, and NRC letting FENOC get away with it.").

<sup>136</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008) (citing Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (citing Curators of the University of Missouri, CLI-95-1, 41 NRC at 121-22, and prior agency rulings holding same)).

should not be allowed to supplement proposed Contention 5.<sup>138</sup>

The Fifth Motion to Supplement also continues to rely on preliminary internal Staff documents and to criticize the December 2, 2011 restart of the plant and/or the root cause investigation rather than demonstrating a material dispute with FENOC's LRA. But the December 2, 2011 restart, the physical integrity of the shield building,<sup>139</sup> and the investigation into the root cause of the shield building cracking are issues outside the scope of this proceeding and unrelated to Intervenor's proposed Contention 5 and the Shield Building Monitoring AMP. Therefore, these claims are inadmissible and should not be allowed to supplement proposed Contention 5.

Intervenor's instant motion also repeats arguments made in previous motions regarding current operating issues, including (1) the scheduled 2014 steam generator replacement<sup>140</sup> and (2) safety culture concerns.<sup>141</sup> Each of these issues is outside the scope of this proceeding<sup>142</sup>

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<sup>137</sup> To the extent Intervenor's wish to raise these concerns, the proper forum is not a contention, but a request for an investigation by the NRC Inspector General. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 858 (1986) (noting that fact that the Office of Investigation and the Office of Inspector and Auditor are investigating otherwise unidentified allegations is insufficient basis for admitting a contention). Representative Kucinich has requested such an investigation. See <http://kucinich.house.gov/news/email/show.aspx?ID=RQF7CWWP5YWJOI47CB4YXWE3VI>.

<sup>138</sup> These claims also should not be allowed to supplement proposed Contention 5 as they relate to issues (restart and the root cause investigation) which are outside the scope of this proceeding, unsupported, and/or immaterial. Further, Intervenor's unsupported claims (1) about collusion between FENOC and Staff (p. 19, 20, 47), (2) impugning the Staff's safety and environmental review (p. 49, 76), and (3) mischaracterizing Staff's actions (p. 65-66, 79), among other things, are inconsistent with NRC's rules of practice which presume that "parties and their representatives in proceedings subject to [Subpart 2 will] conduct themselves with honor, dignity, and decorum as they should before a court of law." 10 C.F.R. 2.314(a).

<sup>139</sup> See, e.g., Fifth Motion to Supplement at 73 (claiming that operation of the reactor is a "risky 'nuclear experiment'").

<sup>140</sup> Fifth Motion to Supplement at 11. This argument was first brought up in Intervenor's Motion to Admit Contention 5 at 11-13. Staff opposed the argument in its Feb. 6, 2012 Answer at 23-24.

<sup>141</sup> See, e.g., Fifth Motion to Supplement at 49, 88.

<sup>142</sup> See, e.g., *Prairie Island*, CLI-10-27, 72 NRC 481, 490-493 (2010); see also *Diablo Canyon*, CLI-11-11, 74 NRC \_\_\_ (slip op. at 9-13).

and unsupported. Intervenor also make unsupported and immaterial claims regarding the root cause investigation and underlying documents.

Staff's answers to previous motions related to proposed Contention 5 have indicated why Intervenor's similar or identical arguments are (1) outside the scope of this limited proceeding, (2) unsupported,<sup>143</sup> and/or (3) immaterial.<sup>144</sup> The Staff incorporates herein its answers to previous motions related to proposed Contention 5 on these issues that have been raised repeatedly, and notes that the instant motion functions as a surreply not contemplated by the Commission's regulations. For these reasons, Intervenor's Fifth Motion to Supplement should be denied.

### CONCLUSION

Intervenor's Fifth Motion to Supplement does not provide any explanation as to how the information in the NRC's June 12, 2012 FOIA response is materially different from the information previously available and identified repeatedly in its earlier filings. Here, as in other pleadings, Intervenor leaves it to the Board and other parties to determine these important issues. Even assuming that information in Intervenor's Fifth Motion to Supplement was deemed new and materially different, it still cannot support the admission of a contention in this proceeding because Intervenor's claims are outside the scope of this proceeding, unsupported, immaterial, and/or fail to raise a genuine dispute with FENOC's LRA. Additionally, Intervenor's instant motion effectively serves as a surreply not contemplated by the Commission's regulations, as it repeats arguments and claims previously made without identifying new and

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<sup>143</sup> See, e.g., Staff's Answer to Third and Fourth Motions to Supplement at 30 ("While Intervenor clearly disagrees (1) that PII's and/or FENOC's answers were sufficient and (2) with the methods used in the root cause assessment, Intervenor provides 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.").

<sup>144</sup> See February 6, 2012 Answer; June 29, 2012 Answer, August 17, 2012 Answer.

materially different information to support the claims. For these reasons, Intervenor's Fifth Motion to Supplement should be denied.

Respectfully submitted,

***Signed (electronically) by***

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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](mailto:Catherine.Kanatas@nrc.gov)  
Date of Signature: September 10, 2012

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' FIFTH MOTION TO AMEND AND/OR SUPPLEMENT PROPOSED CONTENTION NO. 5 (SHIELD BUILDING CRACKING)" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 10th day of September, 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](mailto: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](mailto: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.trikoros@nrc.gov](mailto:nicholas.trikoros@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](mailto: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](mailto: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](mailto:djenkins@firstenergycorp.com)

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

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

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

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

Anita Rios  
Green Party of Ohio  
2626 Robinwood Avenue  
Toledo, Ohio 43610  
Email: [rhannon@toast.net](mailto: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](mailto:Catherine.Kanatas@nrc.gov)