UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-346-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	February 6, 2012

FENOC'S ANSWER OPPOSING INTERVENORS' MOTION FOR ADMISSION OF CONTENTION NO. 5 ON SHIELD BUILDING CRACKING

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I. INTRODUCTION

On January 10, 2012, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio ("Intervenors") filed a Motion with the Atomic Safety and Licensing Board ("Board") to admit newly-proposed Contention 5 ("proposed Contention") regarding Shield Building cracking.[1] FirstEnergy Nuclear Operating Company ("FENOC") files this timely Answer in opposition to both the Motion and proposed Contention, pursuant to 10 C.F.R. § 2.309(h)(1) and the Board's June 15, 2011 Initial Scheduling Order ("ISO").[2] As demonstrated below, the Board should deny the Motion and the proposed Contention because they are untimely under 10 C.F.R. § 2.309(f)(2) and (c)(1), and because they do not satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). For the reasons discussed below, FENOC notes that Intervenors will have one or more opportunities to fashion timely, properly-pled contentions based upon anticipated new information related to the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse") Shield Building cracking. The

[1] Motion for Admission of Contention No. 5 on Shield Building Cracking (Jan. 10, 2012) ("Motion").

[2] Under 10 C.F.R. § 2.309(h)(1), an applicant may file an answer to a proffered contention within 25 days of the service of the contention. The ISO in this proceeding reiterates that FENOC may file an answer to a motion for leave to file a new contention and a proposed contention within 25 days after service of those pleadings. Initial Scheduling Order, at 13 (June 15, 2011) (unpublished).

instant Motion, however, must stand or fall based upon its own merits; and for that reason should not be admitted.

Specifically, the Motion is untimely under 10 C.F.R. § 2.309(f)(2) because, contrary to the ISO, Intervenors filed it more than 60 days after the public availability of the information upon which both it and the newly-proposed contention are based. As fully explained below, subsequent documents or events do not present materially-different information. Thus, the Motion and proposed Contention are untimely. Moreover, Intervenors also have failed to demonstrate good cause under 10 C.F.R. § 2.309(c)(1) justifying their late filing.

To the extent Intervenors rely on future events or future documents as support for their arguments, they must await those events or publication of those documents before attempting to proffer an admissible contention. FENOC is preparing a Root Cause Evaluation of the Shield Building cracking that is to be submitted to the NRC by February 28, 2012. Based on the results of the Root Cause Evaluation and any other assessments, FENOC will assess long-term monitoring requirements and will determine whether changes to the Davis-Besse License Renewal Application ("LRA")[3] are necessary. Once those documents are available, Intervenors may consider proposing a new contention, consistent with the timeliness and other admissibility requirements applicable to late-filed contentions. Intervenors' current proposed Contention based on the future Root Cause Evaluation or any future changes to the Davis-Besse LRA is premature.

Additionally, both the Motion and the proposed Contention make wide-ranging environmental and non-environmental arguments that fail to satisfy the contention admissibility requirements specified in 10 C.F.R. § 2.309(f)(1). The environmental arguments should be

[3] License Renewal Application, Davis-Besse Nuclear Power Station (Aug. 2010) ("LRA"), *available at* ADAMS Accession No. ML102450572.

rejected because they challenge generic conclusions in the NRC regulations without a waiver petition, fail to challenge the Davis-Besse LRA, and lack adequate factual support. Intervenors' safety arguments similarly should be rejected because they challenge issues outside the scope of license renewal, fail to directly challenge the Davis-Besse LRA, and lack adequate factual support.

For these many reasons, the Motion and proposed Contention should be rejected.

II. BACKGROUND

A. Procedural Posture of the Davis-Besse License Renewal Proceeding

Davis-Besse is located in Ohio, and generates 908 MWe of baseload electrical power.[4] The current operating license for Davis-Besse expires at midnight on April 22, 2017.[5] On August 27, 2010, FENOC submitted its LRA,[6] requesting that the NRC renew the Davis-Besse operating license for an additional 20 years (*i.e.*, until midnight on April 22, 2037).[7] The NRC accepted the LRA for docketing, and published a Hearing Notice in the *Federal Register* on October 25, 2010.[8]

On December 27 and 28, 2010, Intervenors jointly filed a Request for Public Hearing and Petition for Leave to Intervene ("Intervention Petition"). In LBP-11-13, dated April 26, 2011, the Board admitted Intervenors as parties to the proceeding and admitted two contentions.[9]

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4 Applicant's Environmental Report, Operating License Renewal Stage, Davis-Besse Nuclear Power Station, at 3.1-1, 7.2-1 (Aug. 2010) ("ER"), *available at* ADAMS Accession No. ML102450568.

5 *Id.* at 1.1-1, *available at* ADAMS Accession No. ML102450563.

6 Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License No. NPF-003 for an Additional 20-Year Period; FirstEnergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, 75 Fed. Reg. 65,528, 65,529 (Oct. 25, 2010) ("Hearing Notice").

7 ER at 1.1-1.

8 *See* Hearing Notice, 75 Fed. Reg. at 65,528-529.

9 *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC __, slip op. at 64-65 (Apr. 26, 2011).

FENOC's appeal of that ruling is pending before the Commission.[10] Subsequently, on April 14, 2011, Intervenors submitted a request to suspend the proceeding based on publication of the Fukushima Task Force Report.[11] This request was rejected by the Commission on September 9, 2011.[12] On August 11-12, 2011, Intervenors submitted a motion and a proposed contention also related to the Fukushima Task Force Report.[13] The Board rejected that motion and the proposed contention on November 23, 2011.[14]

On January 10, 2012, Intervenors filed the instant Motion with the proposed Contention regarding various environmental and aging management issues associated with cracking of the Davis-Besse Shield Building discovered this past Fall. Background information pertaining to the Shield Building cracking is summarized below.

B. Discovery of Davis-Besse Shield Building Cracking

On October 1, 2011, Davis-Besse shut down for a scheduled outage to install a new reactor vessel head and to complete other maintenance activities.[15] On October 10, 2011, workers identified indications of cracking below the surface of the Shield Building.[16] The

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10 FirstEnergy's Brief in Support of the Appeal of LBP-11-13 (May 6, 2011).

11 Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (dated Apr. 14-18, 2011, served Apr. 14, 2011); Amendment and Errata to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 21, 2011); Letter from T. Lodge, Counsel for Intervenors, to the NRC (dated Mar. 21, 2011, served Apr. 21, 2011).

12 *See Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, slip op. at 1, 41-42 (Sept. 9, 2011).

13 Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011); Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 12, 2011).

14 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-34, 74 NRC __, slip op. at 2, 18 (Nov. 23, 2011).

15 Letter from R. Seeholzer, FirstEnergy, to the Investment Community, at 1 (Oct. 31, 2011) ("Investment Community Letter") (FENOC Attachment 1).

16 *Id.*; *see also* FENOC Presentation Slides, NRC Public Meeting, at 19 (Jan. 5, 2012) ("FENOC Slides") (FENOC Attachment 2).

workers identified the cracking during hydro-demolition activities in which they used high-pressure water to remove a portion of the Shield Building to create an opening.[17]

As stated in the LRA:

> The Shield Building is a concrete structure surrounding the Containment Vessel. It is designed to provide biological shielding during normal operation and from hypothetical accident conditions. The building provides a means for collection and filtration of fission product leakage from the Containment Vessel following a hypothetical accident through the Emergency Ventilation System, an engineered safety feature designed for that purpose. In addition, the building provides environmental protection for the Containment Vessel from adverse atmospheric conditions and external missiles.[18]

The Shield Building is a reinforced concrete structure with 2 1/2-foot thick walls that surrounds the 1 1/2-inch carbon steel containment vessel.[19] There is a 4 1/2-foot annulus (*i.e.*, air space) between the Shield Building walls and the containment vessel.[20] The outer surface of the Shield Building includes "flute shoulders," which are non-structural, architectural elements on the façade of the Shield Building.[21]

Upon the initial identification of the cracking, FENOC promptly notified the NRC Resident Inspector, placed the issue into the Corrective Action Program, and mobilized a team of experts to investigate,[22] including extensive visual inspections, electronic testing, and concrete sampling of the building's walls in addition to its architectural elements.[23] FENOC's assessments demonstrated that the Shield Building is structurally sound, meets all applicable

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17 Investment Community Letter, at 1; FENOC Slides, at 12, 19.

18 LRA, at 2.4-3; *see also* Investment Community Letter, at 1; FENOC Slides, at 13.

19 Investment Community Letter, at 1; FENOC Slides, at 15.

20 Investment Community Letter, at 1; FENOC Slides, at 15.

21 FENOC Slides, at 16-17; *see also* Investment Community Letter, at 1.

22 FENOC Slides, at 20.

23 *Id.* at 22-29.

strength requirements, and is capable of performing its safety functions.[24] As summarized by FENOC at a January 5, 2012 NRC public meeting:

- Cracking is generic to flute shoulder regions and can be assumed to be present at any elevation in the flute shoulders. Cracking observed to be more prevalent on the south side of the building.
- Cracking exists at the top 20 feet of the Shield Building wall outside the flute shoulder region.
- Two small regions adjacent to the Main Steam Line penetrations have similar cracks. The extent of these regions is localized and unique to these particular penetrations.
- Cracks are located near the outer reinforcing mat. No cracking was observed in interior reinforcing mat.
- Cracks are very tight.[25]

In summary, FENOC promptly informed the NRC of the Shield Building cracking when it was first identified.[26] Onsite NRC inspectors have independently observed and evaluated FENOC's activities, and NRC structural engineers have reviewed FENOC's analysis of the cracking, including review of structural calculations.[27] On December 2, 2011, NRC issued a Confirmatory Action Letter that documented FENOC's commitments to provide the Root Cause Evaluation to the NRC and to perform future examinations of the cracking.[28] The NRC concluded that the Shield Building remains capable of performing its safety function and, therefore, FENOC could safely restart the plant.[29] The NRC found that "FENOC provided reasonable assurance that the shield building is capable of performing its safety functions."[30]

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24 *Id.* at 31-38.

25 *Id.* at 30; *see also* Investment Community Letter, at 1-2.

26 NRC Public Meeting Slides, Davis Besse Shield Building Cracks, at 4 (Jan. 5, 2012) ("Staff Slides") (FENOC Attachment 3).

27 Staff Slides, at 12-13; *see also* Investment Community Letter, at 2.

28 Staff Slides, at 22; Letter from NRC to FENOC, Confirmatory Action Letter – Davis-Besse Nuclear Power Station, at 1-3 (Dec. 2, 2011) ("CAL") (FENOC Attachment 4).

29 *Id.* at 19. Davis-Besse restarted on December 5, 2011.

30 CAL, at 1.

FENOC and its contractors are preparing a formal Root Cause Evaluation of the cracking.[31] The results of this evaluation and any corrective actions will be provided to the NRC by February 28, 2012.[32] Based on the results of the Root Cause Evaluation and any other assessments, FENOC will develop any necessary long-term monitoring requirements[33] and will determine whether changes to the Davis-Besse LRA are necessary.

III. LEGAL STANDARDS

As discussed below, Intervenors must satisfy the requirements in: (1) 10 C.F.R. § 2.309(f)(2) and (c) governing timeliness of late-filed contentions; and (2) 10 C.F.R. § 2.309(f)(1) to demonstrate contention admissibility. Failure to satisfy any of these requirements compels the rejection of the proposed Contention.[34]

A. Timeliness

Pursuant to the Hearing Notice and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired on December 27, 2010, over a year ago. Therefore, the Motion is subject to 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), which govern nontimely requests and/or petitions and contentions.[35] Intervenors bear the burden of

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31 FENOC Slides, at 36-37.

32 CAL, at 1.

33 *Id.*

34 *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC __, slip op. at 9-10 (Sept. 30, 2010) (stating that for a late-filed contention to be admissible, it must satisfy the admissibility requirements in Section 2.309(f)(1) and must satisfy the timeliness requirements in Section 2.309(f)(2)).

35 The Commission has indicated that for new contentions filed by an admitted party, the timeliness standard is 10 C.F.R. § 2.309(f)(2), not 10 C.F.R. § 2.309(c). *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 86 n.171 (2010) (discussing the applicability of Section 2.309(f)(2) versus Section 2.309(c), and stating: "To be clear, in the circumstances presented here, where [the intervenor] was admitted to this case as a party at the time it filed [the new contention], consideration of the contention's admissibility is governed by the provisions of § 2.309(f)(2), as well as the general contention admissibility requirements of § 2.309(f)(1)."). Therefore, because the proposed Contention does not meet the timeliness requirements of Section 2.309(f)(2), the analysis should end. To be conservative and consistent with the ISO, however, FENOC also evaluates the timeliness requirements of Section 2.309(c).

successfully addressing the "stringent" late-filing criteria.[36] As the Commission explained last year in *Vermont Yankee*: "We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions."[37]

Under the Board's ISO,[38] a new contention must meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) through (iii), which provide that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

The ISO provides that "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*."[39]

The ISO further states that if a motion and new contention are filed after the 60 day time period, then they "shall be deemed nontimely under 10 C.F.R. § 2.309(c)."[40] Section 2.309(c) sets forth the following eight-factor balancing test for nontimely filings:

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[36] *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009); *see also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 5 & n.19 (Mar. 10, 2011).

[37] *Vt. Yankee*, CLI-11-02, slip op. at 5.

[38] *See* ISO at 12.

[39] *Id.* (emphasis added). This Board has strictly interpreted timeliness requirements that are based on information availability, as exhibited in its recent January 10, 2012 Order. *See* Memorandum and Order (Denying Motion to Dismiss Contention 1), at 3-7 (Jan. 10, 2012) (denying a Motion to Dismiss because it was submitted more than 10 days after the event triggering the motion).

[40] ISO at 12.

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

The burden is on Intervenors to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[41] The eight factors in Section 2.309(c)(1) are not of equal importance. The first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[42] If good cause is lacking, then a "compelling showing" must be made as to the remaining factors to outweigh the lack of good cause.[43] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is

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41 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

42 *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009) ("[Section 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time. Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.") (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 164-65 (1993)).

43 *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

the most significant factor.[44] Factors five (availability of other means) and six (interests represented by other parties) are entitled to the least weight.[45]

B. Contention Admissibility

In addition to satisfying the late-filing criteria set forth above, a newly-proposed contention also must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[46] Specifically, under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." The regulation specifies that each contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[47] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a new contention.[48]

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44 *See, e.g.*, *Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394 (1976).

45 *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 154 (2000) (citing *Braidwood*, CLI-86-8, 23 NRC at 244-45).

46 *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); *see also Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 364 (2009) (stating that the timeliness of the late-filed contention need not be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)). These requirements are discussed in detail in FENOC's January 21, 2011 Answer opposing the Intervention Petition.

47 10 C.F.R. § 2.309(f)(1)(i)-(vi).

48 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

The Commission's rules on contention admissibility are "strict by design."[49] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[50] As the Commission has stated, "we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them."[51] In this regard, "notice pleading," in which a petitioner identifies a topic for litigation without any supporting details or specific allegations, is not permitted. The Commission has stated:

> Nor does our practice permit "notice pleading," with details to be filled in later. Instead, we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them.[52]

Additionally, to raise a *genuine* dispute under Section 2.309(f)(1)(vi),[53] a petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[54] If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is

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49 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

50 *Id.* (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

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

52 *Id.*

53 This regulation requires a contention to "provide sufficient information to show that a genuine dispute exists *with the applicant/licensee* on a material issue of law or fact. This information *must* include references to *specific portions of the application* (including the applicant's environmental report and safety report) that the petitioner disputes." 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added).

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

to "explain why the application is deficient."[55] A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[56]

IV. THE MOTION AND PROPOSED CONTENTION ARE UNTIMELY AND DO NOT SATISFY THE CONTENTION ADMISSIBILITY REQUIREMENTS

A. The Motion Does Not Satisfy the Timeliness Requirements in 10 C.F.R. § 2.309(f)(2) and (c)(1)

1. The Motion Is Untimely Under 10 C.F.R. § 2.309(f)(2)

As discussed above and acknowledged by Intervenors,[57] the Motion is subject to the 10 C.F.R. § 2.309(f)(2) timeliness requirements. Intervenors' interpretation of the governing regulations and ISO, however, are seriously flawed. Namely, Intervenors state that "*unless a deadline has been specified in the scheduling order for the proceeding*, the determination of timeliness is subject to a reasonableness standard that depends on the facts and circumstances of each situation."[58] Their statement, however, completely ignores the ISO, the specific timeliness standard set forth therein, and the Board's recent interpretation of timeliness requirements.[59] In particular, the ISO requires that the Motion be "filed within sixty (60) days of the date when the material information on which it is based first becomes available" in order to satisfy Section

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55 Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 & 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

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

57 Motion at 6-7 ("The requirements for determining the timeliness of a new contention are set forth in 10 C.F.R. §2.309(f)(2), but 10 C.F.R. §2.309(c) is also potentially relevant given that it provides criteria for boards to apply in deciding whether to admit 'nontimely filings.'").

58 *Id.* at 7 (emphasis added) (citing *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007)).

59 *See* Memorandum and Order (Denying Motion to Dismiss Contention 1), at 3-7.

2.309(f)(2)(iii).[60] As the Board recently explained in its January 10, 2012 Order, these regulatory requirements "are strict by design and must be applied *rigorously*."[61]

The proposed Contention as currently proffered relates to the *discovery and existence* of Shield Building cracking. As pled by Intervenors, the proposed Contention states that "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."[62] Thus, the "date when the material information on which [the proposed Contention] is based first [became] available" is the key to timeliness.

FENOC identified the Shield Building cracks and reported them to the NRC, on October 10, 2011.[63] As acknowledged by Intervenors, the cracks were publicly known at least by October 12, 2011.[64] Therefore, such a broadly-proposed contention could only have been timely if filed no later than 60 days after October 12 (*i.e.*, December 12, 2011).[65] Because the Motion and the proposed Contention were filed *after* December 12, 2011, they are clearly untimely under Section 2.309(f)(2)(iii) and the ISO. Indeed, the Motion and proposed Contention were not filed until January 10, 2012, nearly a month late.[66]

Even if the timeliness of the Motion was not based on the initial public disclosure of the Shield Building cracking as identified by Intervenors as October 12, 2011, the Motion still would

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60 ISO at 12.

61 Memorandum and Order (Denying Motion to Dismiss Contention 1), at 5 (citations omitted) (emphasis added).

62 Motion at 11.

63 FENOC Slides, at 24; Staff Slides, at 4.

64 Motion at 13 (referencing an October 12, 2011 *Cleveland Plain Dealer* article regarding the cracking).

65 Although 60 days after October 12, 2011 is December 11, 2011, December 11 is a Sunday. After accounting for this Sunday pursuant to 10 C.F.R. § 2.306(a), the Motion should have been filed by December 12, 2011.

66 *See* Memorandum and Order (Denying Motion to Dismiss Contention 1), at 5 (concluding that regulatory timing requirements "are strict by design and must be applied rigorously").

be untimely. This is because a significant amount of detailed information about the Shield Building cracking was available from other sources more than 60 days before the Motion was filed on January 10, 2012. For example, as acknowledged by Intervenors, FirstEnergy Corp. made an SEC disclosure, issued a press release, and sent a letter to investors on October 31, 2011, describing the Shield Building cracking.[67] That letter discussed evaluation of the Shield Building cracking, described the extent of cracking (including on non-architectural element portions of the Shield Building), and stated that a "team of industry-recognized structural concrete experts and Davis-Besse engineers evaluating this condition has determined the cracking does not affect the facility's structural integrity or safety."[68] Furthermore, in addition to quotes from or references to news articles published more than 60 days prior to submission of the Motion, Intervenors extensively quote from the November 4, 2011 letter from David Lochbaum of Union of Concerned Scientists to the NRC on the Shield Building cracking.[69] Any information referenced by Intervenors post-dating these documents did not provide any new "material information." Therefore, the Motion is clearly untimely under Section 2.309(f)(2)(iii) and the ISO because it was not filed within 60 days of the public information disclosing the existence of cracking in the Davis-Besse Shield Building.

Aside from Section 2.309(f)(2)(iii), the Motion also is untimely under Section 2.309(f)(2)(ii) because any other events or information relied upon are not "materially different than information previously available." Pertinent to this analysis of timeliness, Intervenors rely on six events/statements.[70] As shown below, none supports a ruling of timeliness:

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67 Motion at 17; Investment Community Letter, at 1. The Investment Community Letter was made publicly available on October 31, 2011. *See* SEC Form 8-K, Current Report, FirstEnergy Corp. (filed on Oct. 31, 2011) (attaching Investment Community Letter) (FENOC Attachment 5).

68 Investment Community Letter, at 1.

69 Motion at 19-21.

70 *See id.* at 8.

1. Intervenors state: "It is based on structural damage – cracks – which were noticed by FENOC's contractors or employees in September 2011 and soon reported to the NRC." As a threshold matter, this statement is factually incorrect because the cracks were identified in October 2011, not September (as stated later in the Motion).[71] FENOC agrees, however, that identification of the cracking is the determining factor for timeliness. As discussed above, because the Motion was filed after December 12, 2011, it is untimely.

2. Intervenors state: "The NRC initially kept the plant shut down for analytical work, but in early December 2011 allowed Davis-Besse to resume power generation." The proposed Contention relates to aging management of the Shield Building cracking, not the current operation of Davis-Besse. Therefore, plant restart is irrelevant to the proposed Contention and does not support its timeliness.

3. Intervenors state: "The NRC presently has established a February 28, 2012 deadline for provision by FENOC of a 'root cause analysis' and further actions by regulator and utility." This event does not support timeliness because it is in the future.[72] The NRC regulations require that contentions be filed "based on documents or other information available at the time" they are filed.[73]

4. Intervenors state that they learned "[o]nly on January 5, 2012 . . . that one or more cracks extended the full 225-foot height of the reactor shield building." This statement mischaracterizes the facts, because, as explained in the Motion itself,[74] the 225-foot value referenced by Intervenors is a bounding analysis assumption by the NRC Staff and FENOC, not the actual length of any identified crack. However, even if it were true, the length of the cracks is not "materially different than information previously available." The proposed Contention challenges the aging management of Shield Building cracking based on the existence of the cracks, not on the specific length of cracks. Therefore, this information is irrelevant to the proposed Contention and does not support its timeliness.

5. Intervenors state that they learned "[o]nly on January 5, 2012 . . . that those cracks were numerous." This statement cannot support timeliness, because this information was available more than 60 days before the Motion. For example, in the November 4, 2011 letter quoted by Intervenors in the Motion, Mr. Lochbaum characterized the cracking as "numerous."[75] If the November 4, 2011 letter were used for the 60-day trigger, then the Motion would have been due on January 3, 2012.

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71 *Id.* at 13 (stating that the cracks were identified in October 2011 when the Shield Building was opened for installation of the new reactor head).

72 *See, e.g.*, *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), LBP-09-3, 69 NRC 139, 155-58 (2009) (rejecting proposed contentions that were "open-ended, placeholder contentions" that are not based on "documentary material or expert analysis," but on future developments); *see also supra* Section IV.A.3.

73 *See* 10 C.F.R. § 2.309(f)(2).

74 Motion at 37.

75 *Id.* at 20.

6. Intervenors state that they learned "[o]nly on January 5, 2012 . . . that those cracks were not confined to the architecturally 'decorative' elements of the building." This statement cannot support timeliness, because this information was available more than 60 days before the Motion. For example, a November 1, 2011 *Toledo Blade* article quoted by Intervenors in the Motion discusses "subsurface cracks 'not associated' with cracks in the structure's architectural features" that were disclosed in a letter from FirstEnergy to investors.[76] If the November 1, 2011 article were used for the 60-day trigger, then the Motion would have been due on January 3, 2012.

Additionally, the Commission recently reiterated that the publication of a new document, standing alone, does not meet the requirements of 10 C.F.R. § 2.309(f)(2) unless the *facts* in that document are new and materially different from what was previously available.[77] Because any more recent publication of information referenced by Intervenors does not provide any "materially different" facts, the more recent information does not render the Motion timely.

In summary, the Motion and proposed Contention are untimely under Section 2.309(f)(2)(iii) and the ISO because they were filed after December 12, 2011, which is 60 days after the date when the material information on which the proposed Contention is based first became available. Additionally, the Motion and the proposed Contention are untimely under Section 2.309(f)(2)(ii) because any other events or information relied upon are not "materially different than information previously available."

2. The Untimely Motion Does Not Satisfy the Late-Filed Requirements of 10 C.F.R. § 2.309(c)(1)

Because Intervenors do not satisfy the criteria of 10 C.F.R. § 2.309(f)(2), their proposed Contention is considered nontimely, and they must satisfy the late-filing criteria in Section 2.309(c)(1)(i)-(viii).[78]

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[76] *Id.* at 18. In fact, Intervenors reference the October 31, 2011 Investment Community Letter and state that "FENOC itself admitted additional cracks in *structural* parts of the concrete shield building." *Id.* at 17. Therefore, Intervenors concede that this information was available prior to the January 5, 2012 meeting.

[77] *See, e.g.*, *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 13 (Mar. 10, 2011); *see also Prairie Island*, CLI-10-27, slip op. at 13-18.

[78] *See supra* Section III.A; *see also* ISO at 12; 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.").

Although Intervenors acknowledge that a contention that does not satisfy the Section 2.309(f)(2) timeliness requirements must satisfy the Section 2.309(c)(1) criteria, they provide absolutely no justification for their tardiness as required by those criteria.[79] This failure alone is a sufficient basis to reject the proposed Contention, as the Commission has affirmed rejection of late-filed contentions for failure to address late-filing criteria.[80]

Nonetheless, even if the Section 2.309(c)(1) factors are considered, the Motion should be dismissed as untimely. As explained below, nowhere have Intervenors demonstrated the necessary "good cause" for not filing on time under 10 C.F.R. § 2.309(c)(1)(i). Further, Intervenors have made no "compelling showing" as to the remaining factors to outweigh the lack of good cause.[81] Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) demands rejection of the Motion and proposed Contention. The Board already has supplied a generous interpretation of timeliness in the ISO for proposed contentions. Intervenors have demonstrated that the topic of the proposed Contention was a very public issue, but have not offered any reason justifying their delay.

a. Intervenors Have Not Shown Good Cause for Failing to File on Time

Intervenors do not claim that they have "good cause" for filing late. To show "good cause," Intervenors must show that they raised their contention in a timely manner, following the availability of new information.[82] The Commission has explained that to demonstrate good

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79 *See* Motion at 7-8.

80 *See, e.g.*, *Millstone*, CLI-09-5, 69 NRC at 126 ("The Board correctly found that failure to address the requirements [of 10 C.F.R. §§ 2.309(c) and (f)(2)] was reason enough to reject the proposed new contentions."); *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) ("Indeed, the Commission has itself summarily dismissed petitioners who failed to address the . . . factors for a late-filed petition.").

81 *Braidwood*, CLI-86-8, 23 NRC at 244.

82 *See Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 162-63 (2005) (finding that the requirements for a good cause showing under 10 C.F.R. § 2.309(c)(1)(i) "are analogous to the requirements of Sections 2.309(f)(2)(i) (information not previously available) and (f)(2)(iii) (submitted in a

cause, a petitioner must show not only that it "acted promptly after learning of the new information, but the information itself must be *new* information, not information already in the public domain."[83] As explained above, the Motion is untimely because Intervenors filed it after December 12, 2011 and Intervenors have not demonstrated that any materially different information first became available within 60 days prior to filing of the Motion.[84] Thus, for the same reasons that Intervenors have not satisfied the timeliness requirements in 10 C.F.R. § 2.309(f)(2)(i)-(iii), discussed above, they have not demonstrated good cause under 10 C.F.R. § 2.309(c)(1)(i).[85]

b. Intervenors Have Not Made a Compelling Showing on the Remaining Factors

Since Intervenors failed to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors must weigh compellingly in their favor in order for the proposed Contention to be admitted.[86] They do not.

The proposed Contention, if admitted, would greatly broaden the scope of the current proceeding with new issues. First, the proposed Contention relates to a new safety issue—aging management of Shield Building cracking. This is a completely separate topic from those raised in the two admitted National Environmental Policy Act ("NEPA") contentions, which relate to evaluation of alternative energy sources and to the costs of a severe accident as part of the Severe

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timely fashion)"), *review denied*, CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (2006).

83 *Comanche Peak*, CLI-92-12, 36 NRC at 70 (emphasis added).

84 In this regard, one licensing board explained that permitting any recent publication "reflecting information widely available previously, to be good cause for filing would virtually wipe out the requirement of cause." *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-11, 15 NRC 348, 352 (1982).

85 *See Clinton ESP*, LBP-05-19, 62 NRC at 162-63.

86 *Braidwood*, CLI-86-8, 23 NRC at 244.

Accident Mitigation Alternatives ("SAMA") evaluation.[87] Additionally, as discussed below in Section IV.B, many of the issues raised in the proposed Contention relate to issues clearly outside the scope of this license renewal proceeding. Consideration of such issues would inappropriately broaden the current proceeding and could result in corresponding delay. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor seven), weighs heavily and most clearly against Intervenors.

As discussed below, many of the issues raised by Intervenors in the Motion relate to issues beyond the scope of this license renewal proceeding, such as the current safety of Davis-Besse operation, restart of the plant after the Shield Building cracking, and the adequacy of the NRC review process. Intervenors have other means to protect their interests on these topics, such as submitting a rulemaking petition or other petition to the NRC. The appropriate forum for these issues is not this license renewal proceeding. This proceeding provides no means to address Intervenors' concerns associated with these issues. As such, factor five also weighs against the Motion and admission of the proposed Contention.

Furthermore, Intervenors provide no indication that their participation would contribute to the development of a sound record (factor eight). The Commission has stated that to make a showing on this factor, an intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[88] Intervenors have failed to satisfy any of those requirements, and have otherwise failed to identify how they would assist in developing a sound record. Additionally, the "evidence" alleged by Intervenors in the Motion consists primarily of a regurgitation of public information, with no analysis whatsoever of its import to this proceeding. Moreover, Intervenors do not identify any expert who could

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87 *Davis-Besse*, LBP-11-13, slip op. at 64-65.

88 *See Braidwood*, CLI-86-8, 23 NRC at 246.

contribute to the record on either the cracking phenomenon or strategies on aging management. While an expert is not necessary *per se*, given the highly technical nature of Shield Building cracking, an expert certainly would be needed to contribute to the development of a sound record on this topic. For these reasons, Intervenors provide absolutely no basis to suggest they can be expected to contribute to the record.

The other factors in 10 C.F.R. § 2.309(c)(1) are less important and do not outweigh Intervenors' failure to demonstrate good cause or meet factors five, seven, and eight.[89] Having failed to establish good cause and make a compelling showing on these factors, the balance of the untimely factors weighs against Intervenors. Therefore, Intervenors fail to satisfy 10 C.F.R. § 2.309(c)(1), and their Motion and proposed Contention should be denied.

3. Intervenors' Reference to Future Documents Is Premature and Does Not Cure the Untimely Motion

Intervenors' reference to future documents, yet to be written, does not cure the untimeliness of the Motion. For example, in their timeliness discussion, Intervenors state that "the [Draft Supplemental Environmental Impact Statement ("DSEIS")] for Davis-Besse has not yet been issued (although issuance may be imminent). Hence by bringing this contention now, Intervenors are avoiding the procedural peril of sitting-and-waiting while in possession of information that should be included and analyzed in the NEPA document in this proceeding."[90] The Motion likewise refers to a future NRC Inspection Report and a future FENOC Root Cause Evaluation on the Shield Building cracking.[91] These attempts to rely on future documents must

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89 *See, e.g.*, *Diablo Canyon*, CLI-08-1, 67 NRC at 8; *Comanche Peak*, CLI-93-4, 37 NRC at 165. Additionally, factors two through four speak towards standing. Therefore, their applicability is limited here because Intervenors are already parties to this proceeding and are seeking admission of nontimely contentions, rather than nontimely intervention.

90 Motion at 8-9.

91 *See id.* at 31, 59. The NRC has not yet issued an Inspection Report regarding the Shield Building cracking.

be rejected as a justification for the timeliness of the proposed Contention as filed on January 10, 2012.

The NRC regulations unequivocally require contentions to be based on documents available at the time the contention is submitted. Section 2.309(f)(2) states in part:

> Contentions *must be based on documents or other information available at the time the petition is to be filed*, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. *The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.*[92]

Therefore, the regulations require contentions to be based on documents currently available, but allow petitioners to submit new contentions on new information if they can satisfy certain standards.

As stated above, FENOC and its contractors are preparing a Root Cause Evaluation (due by February 28, 2012) of the Shield Building cracking. Based on the results of the Root Cause Evaluation and any other assessments, FENOC will assess long-term monitoring requirements, and will determine whether changes to the Davis-Besse LRA are necessary. Any attempts to challenge the future Root Cause Evaluation or adequacy of any future changes to the Davis-Besse LRA are simply premature. This deficiency is illustrated by the wording of the proposed Contention itself, which, absent any identified basis, alleges that the Shield Building cracking is

[92] 10 C.F.R. § 2.309(f)(2) (emphasis added).

"an aging-related feature of the plant."[93] Only when the Root Cause Evaluation is complete will FENOC know the cause of the cracking.

The Commission has rejected pleadings intended to function as a "placeholder" for a future pleading, stating that "our regulations do not contemplate such filings, which are tantamount to impermissible 'notice pleadings.'"[94] Similarly, licensing boards have repeatedly rejected "placeholder" contentions based on future developments.[95] Intervenors' reliance on the future documents transforms the proposed Contention into such a placeholder contention that awaits publication of the DSEIS, the future Root Cause Evaluation, or future changes to the Davis-Besse LRA. In this regard, one licensing board rejected a proposed contention seeking to litigate the content of a future Environmental Impact Statement, stating that "[u]ntil the statement is issued and its contents known, any treatment of it is speculative, premature and does not provide a basis for an admissible contention."[96] Furthermore, judicial economy and efficiency are served by dismissing this improperly-pled contention, especially because Intervenors certainly will have another opportunity to file a properly-pled contention in the future.

In summary, Intervenors' reference to future documents does not cure the untimely Motion. Once those future documents are published, Intervenors may consider promptly filing a new technically sufficient contention and attempt to satisfy the timeliness and admissibility requirements for late-filed contentions.

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93 Motion at 11.

94 *Millstone*, CLI-09-5, 69 NRC at 120.

95 *See, e.g.*, *Vogtle*, LBP-09-3, 69 NRC at 155-58 (rejecting proposed contentions that were "open-ended, placeholder contentions" that are not based on "documentary material or expert analysis," but on future developments); *Shaw Areva MOX* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 489-90 (2008) (rejecting a contention as a "placeholder for the future").

96 *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 406 (1984).

4. Summary of Timeliness Arguments

FENOC anticipates that Intervenors will argue that this Answer presents a "Catch 22" situation in which they are both too late and too early, but never timely. This is not the case, and it is Intervenors who have created this situation through trying to save a late contention by reference to future documents.

The Motion and the proposed Contention are late to the extent that they rely upon *past information*. Specifically, as discussed above, the Motion and the proposed Contention are late under Section 2.309(f)(2) and the ISO because they were filed more than 60 days after the date when the material information on which the proposed Contention is based first became available and any other events or information relied upon are not "materially different than information previously available." Additionally, the balance of the non-timely factors in 10 C.F.R. § 2.309(c)(1) does not support timeliness of the Motion and the proposed Contention.

The Motion and the proposed Contention are premature to the extent that they rely upon *future information*, such as the future Root Cause Evaluation or future possible changes to the LRA. As stated above, FENOC and its contractors are preparing a Root Cause Evaluation (due by February 28, 2012) of the Shield Building cracking. Based on the results of the Root Cause Evaluation and any other assessments, FENOC will assess long-term monitoring requirements and will determine whether changes to the Davis-Besse LRA are necessary. Once those future documents are published, Intervenors may consider filing a timely new contention. Until that time, however, the proposed Contention is too late.

B. Intervenors' Proposed Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

The proposed Contention consists of both environmental and non-environmental arguments (referred to below as "safety" arguments). As demonstrated below, the proposed Contention should be rejected because neither its environmental nor its safety arguments satisfy

the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1). For organizational purposes, FENOC first addresses the environmental arguments**.**

1. The Environmental Arguments Do Not Support Admission of the Proposed Contention

A relatively minor portion of the proposed Contention attempts to present environmental arguments. In their entirety, the vague statements proffered by Intervenors in the proposed Contention are as follows:

- "[T]he cracking should be analyzed within the forthcoming Supplemental Environmental Impact Statement."[97]
- "Despite the 'small' significance assigned to Category 1 'Postulated Accidents' at 10 C.F.R. Part 51, Subpart A, Appendix B, Intervenors contend that the rather unique cracking phenomenon at Davis-Besse suggests that this generic finding is inapplicable in this instance. Similarly, the potential for severe accidents might be implicated were the cracking to be accepted without any repair or other mitigation, such as replacement of the entire shield building."[98]
- "But this very risk, the potential loss of shield building safety and security function over time, is exactly the kind of analysis that should be included in FENOC SAMA analyses regarding the Davis-Besse license extension."[99]

As explained above, Intervenors' reliance upon the future content of the DSEIS, that has not yet been published, cannot form the basis of an admissible contention.[100] As demonstrated below, however, the environmental arguments also should be rejected because they challenge

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97 Motion at 2-6.

98 *Id.* at 6.

99 *Id.* at 26.

100 Intervenors' arguments regarding these future documents are similar to an argument in *Diablo Canyon* in which the petitioner sought to have an Environmental Impact Statement issued for a proposed amendment. *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-93-1, 37 NRC 5, 35-36 (1993). The licensing board denied the contention, concluding that the proposed contention was premature because the Staff had not yet issued any environmental document, such as an Environmental Assessment. *Id.* Therefore, it was unknown whether the Environmental Assessment would conclude that an Environmental Impact Statement is required. *See id.* Similarly, here, Intervenors are challenging future documents when the content of those documents is unknown. Furthermore, because those documents are not yet issued, and the contents are unknown, they cannot support an admissible contention. For example, these future documents do not provide support for the proposed Contention, contrary to 10 C.F.R. § 2.309(f)(1)(v), because it is not known what will be in these future documents. Additionally, these future documents do not raise a genuine dispute with the LRA, contrary to 10 C.F.R. § 2.309(f)(1)(vi), again because their content is unknown.

generic conclusions in the regulations without a waiver petition, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a); fail to challenge the Davis-Besse LRA, contrary to 10 C.F.R. § 2.309(f)(1)(vi); and lack adequate factual support, contrary to 10 C.F.R. § 2.309(f)(1)(v).

a. Some of the Environmental Arguments Are Outside the Scope of this License Renewal Proceeding Because They Impermissibly Challenge NRC Regulations

Intervenors challenge the Commission's "Category 1" determination for "Postulated Accidents" in 10 C.F.R. Part 51, Subpart A, Appendix B based on the Shield Building cracking.[101] Aside from this argument being completely unsupported (discussed below), this is an improper challenge to an NRC regulation.[102]

Briefly by way of background, the Commission has concluded that many environmental issues that apply to license renewal applicants could be resolved generically.[103] Thus, in 1996, the NRC published its generic findings in NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS").[104] The NRC also amended its environmental regulations at 10 C.F.R. Part 51 to reflect certain findings in the GEIS.[105] Part 51 divides the environmental requirements for license renewal into Category 1 and Category 2 issues.[106] Category 1 issues are those resolved generically by the GEIS or that otherwise need

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101 Motion at 6.

102 A contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a).

103 *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,467-468 (June 5, 1996).

104 NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Vol. 1 (May 1996), *available at* ADAMS Accession No. ML040690705. Although the NRC has published a proposed rule regarding license renewal environmental reviews for public comment, the proposed rule does not propose changes to the conclusions regarding postulated accidents. *See* Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,138 (July 31, 2009) (showing that the proposed rule does not change the categories or impact findings for postulated accidents).

105 *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,467.

106 *See generally* 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1.

not be addressed as part of license renewal, whereas Category 2 issues require plant-specific review.[107] For each license renewal applicant, Part 51 requires that the NRC Staff prepare a plant-specific supplement to the GEIS that adopts applicable generic impact findings from the GEIS, evaluates any new and significant information, and discusses site-specific impacts.[108]

(1) Design Basis Accidents

Intervenors challenge consideration of design basis accidents because they state that "[d]espite the 'small' significance assigned to Category 1 'Postulated Accidents' at 10 C.F.R. Part 51, Subpart A, Appendix B, Intervenors contend that the rather unique cracking phenomenon at Davis-Besse suggests that this generic finding is inapplicable in this instance."[109]

The Category 1 Postulated Accidents are design basis accidents. The NRC regulations specify that design basis accidents are a Category 1 issue with a "SMALL" impact, and state that "the environmental impacts of design basis accidents are of small significance for all plants."[110] Additionally, 10 C.F.R. § 51.53(c) states that a license renewal applicant need not provide a site-specific analysis of these environmental impacts. Intervenors impermissibly challenge this regulation by claiming that the Category 1 issue is inapplicable.[111] A proposed contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[112]

Intervenors have not requested a waiver, much less satisfied the stringent requirements governing such a waiver request. In order to seek waiver of a rule in a particular adjudicatory

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107 *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,474.

108 *See* 10 C.F.R. § 51.95(c).

109 Motion at 6.

110 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1.

111 Motion at 6.

112 10 C.F.R. § 2.335(a).

proceeding, a petitioner must submit a petition pursuant to 10 C.F.R. § 2.335. The requirements for a Section 2.335 petition are as follows:

> The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.[113]

Further, such a petition "*must be accompanied by an affidavit* that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted," and "*must state with particularity* the special circumstances alleged to justify the waiver or exception requested."[114]

In accordance with NRC precedent, a Section 2.335 petition "can be granted only in unusual and compelling circumstances."[115] The Commission decision in the *Millstone* case states the test for Section 2.335 petitions, under which the petitioner must demonstrate that it satisfies each of the following four criteria:

> (i) the rule's strict application "would not serve the purposes for which [it] was adopted"; (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities"; and (iv) a waiver of the regulation is necessary to reach a "significant safety problem."[116]

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113 *Id.* § 2.335(b).

114 *Id*. (emphasis added).

115 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd*, CLI-88-10, 28 NRC 573, 597 (1988), *recons. denied*, CLI-89-3, 29 NRC 234 (1989) (citation omitted).

116 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989); *Seabrook*, CLI-88-10, 28 NRC at 597). The Commission recently reiterated this same standard. *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC __, slip op. at 23-30 (Oct. 12, 2011) (denying intervenor's waiver request, filed contemporaneously with petition to intervene, for failure

If the petitioner fails to satisfy any of the factors of the four-part test required for making a prima facie showing, then the matter may not be litigated, and "the presiding officer may not further consider the matter."[117] Even if they had submitted a waiver request, Intervenors could not satisfy the above test given the lack of connection between Shield Building cracking and consideration of design basis accidents during the license renewal environmental review.

Because Intervenors have not submitted a waiver request, have not submitted the required affidavit, have not demonstrated "unusual and compelling circumstances," and cannot satisfy the *Millstone* test, their arguments regarding Category 1 "Postulated Accidents" should be rejected as an improper challenge to NRC regulations and outside the scope of this proceeding.

(2) Severe Accidents

Intervenors also challenge consideration of severe accidents by speculating that "the potential for severe accidents *might be* implicated were the cracking to be accepted without any repair or other mitigation, such as replacement of the entire shield building."[118] This argument improperly challenges the Commission's generic determination regarding severe accidents as discussed immediately below.

With respect to severe accidents, the GEIS provides a generic "bounding" evaluation of severe accident impacts and the technical basis for that evaluation.[119] Based on the GEIS evaluation, Part 51 concludes that "[t]he probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic

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to show special circumstances at Diablo Canyon requiring site-specific analysis of the environmental impacts of spent fuel pool storage).

117 10 C.F.R. § 2.335(c); *see also Millstone*, CLI-05-24, 62 NRC at 560 ("The use of 'and' in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.").

118 Motion at 6 (emphasis added).

119 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 316 (2010); GEIS § 5.3.3.

impacts from severe accidents are *small for all plants*."[120] The Commission determined that the GEIS analysis for the impacts of severe accidents would generally over-predict environmental consequences.[121] The Commission stated in *Pilgrim* that "[b]ecause the GEIS provides a severe accident impacts analysis that envelopes the potential impacts at *all* existing plants, the environmental impacts of severe accidents during the license renewal term already have been addressed generically in bounding fashion."[122] Thus, a plant-specific analysis of severe accident impacts is not required in individual license renewal proceedings.[123]

Consistent with these principles, this Board has acknowledged that "[t]he regulation codifying the Commission's determination that the probability-weighted consequences of a severe accident (risk) are small in the context of a license renewal proceeding cannot be challenged in this proceeding."[124] Furthermore, in rejecting an earlier argument by Intervenors challenging the same generic conclusion regarding severe accident impacts, this Board explained: "The statement challenges the agency regulation codifying the Commission's determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small. Unless a party first successfully petitions for a waiver or exception, it may not challenge Commission rules or regulations in an adjudicatory hearing. Intervenors have not petitioned for a waiver or exception to the small risk

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120 10 C.F.R. pt. 51, subpt. A, app. B, tbl. B-1 (Postulated Accidents; Severe Accidents) (emphasis added).

121 *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,480.

122 *Pilgrim*, CLI-10-11, 71 NRC at 316.

123 *See* Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,480; *see also* Pilgrim, CLI-10-11, 71 NRC at 316 ("NRC SAMA analyses are not a substitute for, and do not represent, the NRC NEPA analysis of potential impacts of severe accidents."); Nuclear Energy Institute; Denial of Petition for Rulemaking, 66 Fed. Reg. 10,834, 10,834 (Feb. 20, 2001) (stating that "the impacts of severe accidents are encoded in the rule and are not open for review in individual license renewal actions").

124 *Davis-Besse*, LBP-11-13, slip op. at 35.

determination. Accordingly, the argument that severe accident risk is not small is in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and so is outside the scope of this proceeding."[125]

Intervenors have provided no basis for disturbing this generic finding regarding severe accidents, and have proffered no waiver petition pertaining to such a challenge. Therefore, their arguments should be rejected as an improper challenge to the NRC's regulations and outside the scope of this proceeding.

b. The Environmental Arguments Fail to Challenge the Davis-Besse LRA

Section 2.309(f)(1)(vi) requires that a proposed contention "include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute." Intervenors have not done this. Rather, they generally claim that the environmental analysis for Davis-Besse license renewal is somehow inadequate because consideration of Shield Building integrity is insufficient.

For example, while Intervenors state that "the potential loss of shield building safety and security function over time, is exactly the kind of analysis that should be included in FENOC SAMA analyses regarding the Davis-Besse license extension,"[126] they fail to identify or challenge any part of the LRA, including the ER, that they consider deficient. ER Section 4.20 discusses SAMAs and ER Attachment E provides a full SAMA analysis for Davis-Besse.[127] This failure to challenge the ER is particularly noteworthy here, because it is unclear how Shield

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125 *Id.* at 38-39; *see also NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-02, 73 NRC __, slip op. at 17 (Feb. 15, 2011) ("Additionally, 'no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding' unless the petitioner first obtains a waiver. One such regulation that cannot be challenged is the determination that, for any license renewal of a nuclear power plant, the probability-weighted consequences of a severe accident are small." (citations omitted)).

126 Motion at 26.

127 ER at 4.20-1, App. E.

Building cracking could even affect any environmental evaluation, much less the SAMA evaluation, and Intervenors have supplied no such articulation or bases for their musings.

Therefore, the environmental arguments in the proposed Contention should be denied pursuant to 10 C.F.R. § 2.309(f)(1)(vi) because they simply do not demonstrate a genuine dispute.

c. The Environmental Arguments Lack Adequate Factual Support

Further underscoring its inadmissibility, the proposed Contention is devoid of supporting alleged facts or expert opinions regarding the environmental arguments. For example, the proposed Contention merely states: "But this very risk, the potential loss of shield building safety and security function over time, is exactly the kind of analysis that should be included in FENOC SAMA analyses regarding the Davis-Besse license extension."[128] This conclusory sentence is the full statement of supporting alleged facts and expert opinions regarding the SAMA argument.

Such "notice pleading" does not support admission of the proposed Contention.[129] The proposed Contention does not in any way describe a single inadequacy with the contents of the SAMA evaluation in the LRA, nor does it point to any study or expert describing improper consideration of Shield Building cracking in the Davis-Besse SAMA evaluation. Similarly, Intervenors neither explain, nor provide support for, why Shield Building cracking presents an environmental issue, why the future DSEIS will be inadequate, why cracking would affect any accident analysis, or why the generic determination for postulated accidents should not apply. Indeed, Intervenors' environmental claims are devoid of any support, whatsoever.

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128 Motion at 26.

129 *Seabrook*, CLI-99-6, 49 NRC at 219 (holding that mere notice pleading, based on nothing more than unspecified information and unsupported belief, is insufficient for a petition to intervene); *see also Fansteel, Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 203 (2003).

The Commission has found that an admissible contention may not rest on such "bare assertions and speculation."[130] The environmental arguments in the proposed Contention are text book examples of bare assertions. Therefore, these arguments should be denied pursuant to 10 C.F.R. § 2.309(f)(1)(v).[131]

2. The Safety Arguments Do Not Support Admission of the Proposed Contention

The proposed Contention states:

> ***Contention 5: Cracked Shield Building/Secondary Reactor Radiological Containment Structure***
>
> Interveners 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.[132]

Intervenors claim that "the cracking should be considered as an aging feature at Davis-Besse, which requires explicit plans for remediation and management."[133]

As demonstrated below, the safety arguments should be rejected because they challenge issues outside the scope of license renewal, contrary to 10 C.F.R. § 2.309(f)(1)(iii); fail to directly challenge the Davis-Besse LRA, contrary to 10 C.F.R. § 2.309(f)(1)(vi); and lack adequate factual support, contrary to 10 C.F.R. § 2.309(f)(1)(v). Additionally, Intervenors' complaints about access to documents do not support an admissible contention.

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130 *Fansteel*, CLI-03-13, 58 NRC at 203 (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

131 Intervenors also argue that the Shield Building cracking supports their admitted renewable energy contention because of "the potential for Davis-Besse's cracked shield building to cause its early retirement." Motion at 26. This argument is unrelated to the proposed Contention on aging management of the Shield Building. If Intervenors want to attempt to supplement their admitted contention on alternatives, then they needed to submit a motion to do so. Additionally, Intervenors provide absolutely no support for their stated possibility that Davis-Besse would need to shut down earlier due to cracking and they do not identify any portion of the LRA they dispute. Therefore, this argument also does not satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).

132 Motion at 10-11.

133 *Id.* at 2.

a. Many of Intervenors' Safety Arguments Are Outside the Scope of this License Renewal Proceeding

The proposed Contention consists of an amalgam of arguments on different subjects not all of which are within the scope of license renewal. Contentions are necessarily limited to issues that are germane to the specific application pending before the Board.[134] This section identifies those topics that are outside the scope of the license renewal proceeding and should be rejected.

(1) Current Licensing Basis

The Commission has stated that "[a]djudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff's review) necessarily examines only the questions our safety rules make pertinent."[135] In this regard, the Commission has specifically limited its license renewal safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29, which focus on the management of aging of certain systems, structures and components, and the review of time-limited aging analyses.[136] Specifically, applicants must "demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation," at a "detailed . . . 'component and structure level,' rather than at a more generalized 'system level.'"[137] Thus, the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory

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134 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998); *see also Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (holding that any contention that falls outside the specified scope of the proceeding must be rejected).

135 *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 10 (2001); *see also* Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995).

136 *See Turkey Point*, CLI-01-17, 54 NRC at 7-8; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 (2002).

137 *Turkey Point*, CLI-01-17, 54 NRC at 8 (quoting Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,462).

oversight programs" are the issues that define the scope of the safety review in license renewal proceedings.[138]

The NRC's license renewal regulations thus deliberately and sensibly reflect the distinction between *aging management issues*, on the one hand, and the *ongoing regulatory process* on the other.[139] The NRC's longstanding license renewal framework is premised upon the notion that, with the exception of aging management issues, the NRC's ongoing regulatory process is adequate to ensure that the current licensing basis ("CLB") of operating plants provides and maintains an acceptable level of safety.[140] As the Commission explained in *Turkey Point*:

> [CLB is] a term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application. . . . The [CLB] represents an "evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety." 60 Fed. Reg. at 22,473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.[141]

For that reason, the Commission concluded that requiring a full reassessment of safety issues that continue to be "routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee programs" would be "both unnecessary and wasteful."[142] The Commission

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138 *Id.* at 7. Detrimental aging effects can result from, for example, metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. *See id*. at 7-8.

139 Specifically, in developing Part 54, the NRC sought "to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term." *Id.* at 7. *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 129 (2007) (reiterating that security issues are unrelated to the detrimental effects of aging, and are outside the scope of license renewal proceedings).

140 *See* Final Rule, Nuclear Power Plant License Renewal; Revisions, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). The term "current licensing basis" is defined in 10 C.F.R. § 54.3. *See also* 10 C.F.R. §§ 54.29, 54.30.

141 *Turkey Point*, CLI-01-17, 54 NRC at 9.

142 *Id.* at 7.

reasonably refused to "throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."[143]

Contentions seeking to challenge the adequacy of the CLB for the Davis-Besse facility are clearly outside the scope of this license renewal proceeding.[144] Thus, for example, issues pertaining to emergency planning are excluded from consideration in license renewal proceedings, because "[e]mergency planning is, by its very nature, *neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application*."[145] Likewise, the NRC has stated that issues such as "quality assurance, physical protection (security), and radiation protection requirements[ ] are not subject to physical aging processes that may cause noncompliance with those aspects of the CLB."[146]

Intervenors raise numerous issues that form part of the Davis-Besse CLB, and are "neither germane to age related degradation nor unique to the period covered by the . . . license renewal application."[147] These include:

- Complaints about the NRC authorizing restart of Davis-Besse and the sufficiency of the NRC's or FENOC's assessments of the Shield Building cracking in determining to restart the plant;[148]
- Complaints about FENOC's planned steam generator replacement at Davis-Besse in 2014 (*prior to the period of extended operation*);[149]

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143 *Id.* at 9.

144 *See id.* at 8-9, 23; *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 117-18 (2006) (holding that "review of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and ongoing regulatory oversight and enforcement"); *McGuire/Catawba*, CLI-02-26, 56 NRC at 364 ("This agency's ongoing regulatory oversight programs routinely address many safety issues and will continue to address them in years 41 through 60 of a plant's life . . . .").

145 *Millstone*, CLI-05-24, 62 NRC at 561.

146 Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,475.

147 *Millstone*, CLI-05-24, 62 NRC at 561.

148 *See* Motion at 8, 14-17, 21, 30-31.

149 *See id.* at 11, 21-22, 55-56.

- Complaints about the evolving knowledge of the extent of the Shield Building cracking, and FENOC's and the NRC's reporting of the extent of cracking;[150]

- Complaints about the current safety (*i.e.*, *prior to the period of extended operation*) of the plant due to the Shield Building cracking;[151]

- Complaints about the adequacy of repairs, including those to the Shield Building and the inner steel containment, due to activities conducted *prior to the period of extended operation*;[152]

- Complaints about the NRC's review of the Shield Building cracking, including the timing and content of its inspector's requests for information from FENOC;[153] and

- Complaints about seismic hazards at the site.[154]

These issues either do not relate to age-related degradation or they do not relate to the period of extended operation that is requested by FENOC in the Davis-Besse LRA, and therefore, are part of the Davis-Besse CLB. Additionally, even if they were to relate to age-related degradation, Intervenors do not identify a sufficient linkage between their arguments and the Davis-Besse period of extended operation. For these reasons, the above arguments fall outside the scope of this license renewal proceeding and should be rejected.

(2) FENOC Integrity and Safety Culture

Intervenors also liberally make allegations related to FENOC's integrity and "safety culture" that are outside the scope of this license renewal proceeding. For example, Intervenors challenge the safety culture at Davis-Besse based on the 2002 reactor vessel head degradation event[155] and claim that the NRC's and FENOC's recent actions "belie their verbal assurances" and that FENOC had admitted that early assurances are "false."[156] Intervenors also quote

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150 *See id.* at 16-19, 24-25, 30-37.

151 *See id.* at 19-26, 57-58.

152 *See id.* at 21-22, 24.

153 *See id.* at 45-46.

154 *See id.* at 57.

155 Intervenors' reliance on these 2002 events further illustrates the untimeliness of the proposed Contention.

156 *See* Motion at 17-19, 46.

statements from Representative Kucinich regarding the 2002 event and FENOC's actions and integrity regarding the Shield Building cracking.[157]

These types of challenges regarding a company's integrity and safety culture are outside the scope of license renewal, as demonstrated by the Commission rejecting similar challenges in the *Prairie Island* and *Diablo Canyon* license renewal proceedings. In *Prairie Island*, the Commission reversed admission of a contention challenging an applicant's safety culture to ensure effective aging management during the period of extended operation based on historical performance.[158] In agreeing with the applicant and the NRC Staff that the contention would bring operational issues that are already addressed by existing NRC regulatory processes within license renewal proceedings, the Commission stated:

> We stated unambiguously in our License Renewal Rule that "license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity." We specifically indicated that other broad-based issues akin to safety culture – such as operational history, quality assurance, quality control, management competence, and human factors – were beyond the bounds of a license renewal proceeding. This is because these conceptual issues fall outside the bounds of the passive, safety-related physical systems, structures and components that form the scope of our license renewal review.[159]

In *Diablo Canyon*, the Commission reversed admission of a contention on similar issues regarding whether past actions demonstrate whether aging management will be adequately managed during the period of extended operation.[160] The Commission reversed the admission of the contention for reasons similar to those in *Prairie Island*, concluding that "[c]laims of

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157 *See id.* at 48-50.

158 *Prairie Island*, CLI-10-27, slip op. at 1-2.

159 *Id.* at 10-11 (citations omitted).

160 *See Diablo Canyon*, CLI-11-11, slip op. at 4-13.

'management competence' generally relate to current operations" and are beyond the scope of a license renewal proceeding.[161]

For these same reasons, Intervenors' recycled and unsupported arguments regarding management actions and FENOC safety culture fall well outside the scope of this license renewal proceeding, and therefore should be rejected.

(3) Challenges to NRC Review/Licensing Process

Intervenors further raise issues related to the NRC's review and licensing process that are outside the scope of this license renewal proceeding. For example, Intervenors challenge the NRC's review of the Shield Building cracking, including the timing and content of its inspectors' requests for information from FENOC.[162] Intervenors also challenge NRC's interactions with FENOC through the Request for Additional Information ("RAI") process, including NRC allowing additional time for FENOC to respond to RAIs.[163]

In rejecting requests to alter the license renewal process, the Commission has explained that "[t]he purpose and scope of a licensing proceeding is to allow interested persons the right to challenge the sufficiency of the application. The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."[164] It is well established that contentions concerning the adequacy of the Staff's review of a license application (as distinguished from the application itself) are inadmissible in licensing hearings.[165] The

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161 *Id.* at 9-11.

162 Motion at 45-46.

163 *Id.* at 53.

164 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); *see also* Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2202; *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 170-71 (2000) (rejecting a contention regarding the performance of the NRC Staff in overseeing the plant).

165 Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,171 ("With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance."); *see also Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 396 (1995) ("[I]n adjudications, the issue for

Commission also has stated that "[a]s a general matter, the Commission's licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews."[166]

Intervenors' challenges regarding the NRC's timing and content of RAIs, or other aspects regarding the adequacy of the NRC's review, present these impermissible challenges rejected by the Commission.

b. The Safety Arguments Fail to Challenge the Davis-Besse LRA

Once the out-of-scope arguments discussed above are dismissed, the proposed Contention is reduced to allegations that aging management at Davis-Besse is deficient in some undefined respect due to the Shield Building cracking. These arguments, however, fail to adequately challenge the LRA, contrary to 10 C.F.R. § 2.309(f)(1)(vi), as discussed immediately below, and lack adequate factual support, contrary to 10 C.F.R. § 2.309(f)(1)(v), as discussed in the next section. Each of these deficiencies is independently sufficient to reject all of the safety arguments.

Section 2.309(f)(1)(vi) requires that a proposed contention "include references to specific portions of the application (including applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute." Intervenors have not done this. For example, LRA Appendix B.2.39 presents an aging management program ("AMP"), "Structures Monitoring Program," that includes monitoring of the Shield Building. Intervenors do not even cite, let alone directly challenge, any of this information in the LRA.

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decision is not whether the Staff performed well, but whether the license application raises health and safety concerns."); *see also Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121-22, 121 n.67 (1995) (citing reactor cases in which this principle has been applied).

166 *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 121; *see also Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168, 170 (1993); *Northeast Nuclear Energy Co.* (Montagne Nuclear Power Station), LBP-75-19, 1 NRC 436, 437 (1975).

The closest Intervenors come to challenging the LRA is to point to a few RAIs issued by the NRC to FENOC.[167] For example:

- Intervenors reference a summary of a conference call between FENOC and the NRC Staff, and the resulting FENOC supplemental response to RAI B.2.1-2 in which FENOC transmitted sections of various documents related to inspections.[168] Although Intervenors make observations regarding the procedures, they do not discuss the LRA itself, much less any deficiencies in the LRA.

- Intervenors reference RAIs B.1.4-2 and B.1.4-3 regarding consideration of operating experience in aging management.[169] In its discussion of these RAIs, however, Intervenors still do not identify a deficiency in the LRA, and the topic of considering operating experience during the period of extended operation is not directly relevant to the proposed Contention on Shield Building cracking.

- Intervenors reference RAI B.2.39-13 regarding Shield Building cracking.[170] While this RAI is related to the Structures Monitoring Program AMP, Intervenors still do not identify any problems with the LRA. Instead, Intervenors state that they "have exactly the same questions as NRC does above, and incorporates them by reference into this contention regarding Davis-Besse's shield building cracking."[171] Intervenors further state that "[i]f FENOC insists on pursuing a license extension, it should explain in detail the answers to these safety-significant questions in this ASLB licensing proceeding before the 20 additional years is approved."[172] Intervenors provide no further discussion as to why this RAI presents an admissible contention, but instead state that FENOC needs to answer these questions. That is exactly what FENOC will do when it responds to this RAI. The fact that FENOC has not yet responded to an RAI does not support an admissible contention.

- Intervenors reference RAI 3.1.2.2.16-3 regarding Steam Generator tube-to-tubesheet welds.[173] Here again, Intervenors fail to identify a deficiency in the LRA, and the topic of tubesheet welds is not relevant to this proposed Contention on Shield Building cracking.

Intervenors' copying of these RAIs as a basis for the proposed Contention clearly does not support an admissible contention. It is a long-standing NRC adjudicatory principle that RAIs

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167 *See* Motion at 30, 37-40, 47-48, 50-56.

168 *See id.* at 37-40, 47-48.

169 *See id.* at 50-53.

170 *See id.* at 53-55.

171 *See id.* at 55.

172 *See id.*

173 *See id.* at 55-56.

are a common and expected feature of the review process and do not form the basis for admissible contentions.[174] Therefore, Intervenors' copying of these RAIs into the proposed Contention does not support an admissible contention. In this regard, the Commission has stated that "general assertions, without some effort to show why the assertions undercut findings or analyses in the [application], fail to satisfy the requirements of Section 2.309(f)(1)(vi)."[175] Intervenors' general assertions in the proposed Contention regarding aging management of the Shield Building are insufficient and should be rejected.

As noted by Intervenors in the proposed Contention, FENOC is preparing a Root Cause Evaluation.[176] Based on the results of that evaluation or any other information FENOC identifies regarding the cracking, FENOC will consider whether and how the LRA must be revised to address aging management issues given the Shield Building cracking. FENOC will respond to all relevant RAIs on this topic. The response to the pending RAI on Shield Building cracking likely would include any LRA changes. The Root Cause Evaluation, however, has not been completed and no changes have yet been made to the LRA. This illustrates the premature nature of the proposed Contention as Intervenors are relying on the results of these future evaluations. If Intervenors disagree with the Root Cause Evaluation or any LRA revision, then they will have an opportunity to timely challenge them—subject to satisfying all applicable timeliness and admissibility requirements based on that information.

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174 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 242 (2008) ("The mere issuance of RAIs does not mean an application is incomplete for docketing."); *Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-06, 63 NRC 161, 164 (2006) ("[W]e have held repeatedly that the mere issuance of a staff RAI does not establish grounds for a litigable contention."); *Oconee*, CLI-99-11, 49 NRC at 336-37 (stating that RAIs are a standard part of NRC licensing reviews and do not suggest that the application is incomplete, and petitioners must do more than rest on the mere existence of RAIs as a basis for contentions).

175 *Summer*, CLI-10-1, 71 NRC at 21-22.

176 *See, e.g.*, Motion at 8.

c. The Safety Arguments Lack Adequate Factual Support

Section 2.309(f)(1)(v) requires that a contention provide "alleged facts or expert opinions which support the requestor's/petitioner's position on the issue." Intervenors have not done this. FENOC acknowledges that Intervenors have constructed a lengthy document (almost 60 pages) with many quotations (entire pages); however, volume alone does not lead to admissibility. Intervenors have proffered no expert for the proposed Contention, thereby leaving the parties and the Board to ferret out an adequate basis for the claims in the allegedly supporting material. Having combed through the numerous quotations and recitation of factual information, FENOC concludes that the requisite bases for a sufficient challenge to aging management of the Shield Building are absent.

The Commission has stated that a contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[177] Additionally, regarding the determination of factual and legal support for a proposed contention, the Commission has further stated:

> It is simply insufficient, for example, for a petitioner to point to an Internet Web site or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention. . . . We expect our licensing boards to examine cited materials to verify that they do, in fact, support a contention. But it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply "infer" unarticulated bases of contentions. It is a "contention's proponent, not the licensing board," that "is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[178]

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[177] *Fansteel*, CLI-03-13, 58 NRC at 203.

[178] *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (citations omitted).

The proposed Contention does not satisfy the requirements for adequate support. While Intervenors point to many issues and make many conclusory statements throughout the proposed Contention, these issues either are unrelated or irrelevant to the contention topic of aging management of the Shield Building due to the cracking, or they consist of the "bare assertions and speculation" that the Commission has repeatedly deemed insufficient to support an admissible contention. Similarly, Intervenors' quotation of large portions of documents—devoid of analysis or explanation of why or how the quotations support a contention on aging management of the Shield Building due to the cracking—runs afoul of the Commission's admonition that the burden is on Intervenors (not the Board) to explain why these references support the proposed Contention.[179]

These arguments raised by Intervenors and the reasons for FENOC concluding that they do not provide adequate support are provided below. Many of these issues also fail to support an admissible contention for additional reasons discussed in other sections of this Answer.

- *Arguments regarding Steam Generator replacement in 2014* (*see* Motion at 11, 21-22, 55-56) – These arguments consist of bare assertions and speculation; and do not support challenges to the existing aging management plans for the Shield Building. For example, Intervenors identify the 2014 Steam Generator replacement planned at Davis-Besse and claim that "[t]his will increase the risk that Davis-Besse's concrete shield building/secondary reactor containment structure will be subjected to new stresses and will display additional cracking and consequently will not adequately perform its safety- and security-related functions."[180] Intervenors provide only bare assertions and speculation for future cracking during the Steam Generator replacement or that the Shield Building will not perform its function.

- *Arguments regarding additional cuts in the Shield Building* (*see* Motion at 11-13) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; and consist only of bare assertions and speculation. For example, Intervenors state that "[t]here might even be cause for one or

[179] The Commission has stated that "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy [the contention admissibility requirements]." Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

[180] Motion at 11.

more additional cuts into the shield building."[181] Intervenors, however, provide absolutely no support for this statement other than another nuclear plant needed a second Steam Generator. Most importantly, they do not explain how an additional cut would affect aging management due to cutting of the Shield Building. Intervenors assume, without stated basis, some causal linkage between maintenance openings and the observed cracking indications. However, FENOC has reported cracking in areas not located near the maintenance cuts.[182]

- *Arguments regarding the restart of the Davis-Besse plant* (*see* Motion at 14-17, 21, 46) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; and consist only of bare assertions and speculation. For example, Intervenors repeatedly complain about FENOC's decision and the NRC's approval of restart of Davis-Besse in December 2011.[183] Intervenors, however, provide no explanation or justifications for how this restart even relates to aging management of the Shield Building.[184]

- *Arguments regarding the extent of knowledge of Shield Building cracking* (*see* Motion at 16-19, 24-25, 30-37, 49-50) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; consist only of bare assertions and speculation; and do not explain why the quoted information supports the proposed Contention. Intervenors merely describe and reference news articles and other documents regarding the progression of publicly available information about the Shield Building cracking, and then complain that the information had changed over time. These complaints do not support the proposed Contention.

- *Arguments regarding "safety culture" and 2002 reactor vessel head degradation* (*see* Motion at 17-18, 25, 48-50) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; and consist only of bare assertions and speculation. For example, Intervenors state: "Despite lessons that should have been learned, and despite assurances from within NRC and FENOC over the past decade, including that 'safety culture' has been strengthened, and safety returned to its top priority status, NRC and FENOC's current actions belie their verbal assurance, and hark back to the 'profit over safety' days of the Hole-in-the Head debacle."[185]

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181 *Id.* at 12.

182 FENOC Slides, at 30.

183 *See* Motion at 14-17, 21, 46.

184 Additionally, Intervenors make unsupported allegations that FENOC restarted Davis-Besse without understanding the "safety significance" of the cracking. *Id.* at 15. These types of statements have no basis. FENOC, of course, evaluated the effects of the cracking before restarting and concluded that the Shield Building is structurally sound and meets strength requirements. This conclusion is supported by the Motion itself, which quotes a statement from the NRC that it "had been provided 'reasonable assurance that the shield building is capable of performing its safety functions.'" *Id.* at 30. Nonetheless, as discussed above, this issue is outside the scope of this license renewal proceeding.

185 *Id.* at 18.

Intervenors provide absolutely no support for these statements other than the bare assertions and speculation that have been rejected by the Commission as support for an admissible contention.

- *Arguments regarding the current safety of the plant due to Shield Building cracking* (*see* Motion at 19-29, 57-59) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; and do not explain why the quoted information supports the proposed Contention. For example, Intervenors quote a November 4, 2011 letter prepared by David Lochbaum from the Union of Concerned Scientists.[186] Intervenors, however, provide no explanation for why this letter (quoted in its entirety) relates to the proposed Contention on aging management of the Shield Building. Additionally, the letter appears to support a position contrary to Intervenors, because it states that "UCS also understands that the numerous cracks, even if also within the shield building's walls, do not in themselves demonstrate that the design function has been compromised."[187]

- *Arguments regarding license renewal RAIs, including RAIs on inspections, operating experience, Shield Building cracking, and tubesheet welds* (*see* Motion at 23-24, 30, 37-40, 47-48, 50-56) – These arguments do not support challenges to the existing aging management plans for the Shield Building; consist only of bare assertions and speculation; and do not explain why the quoted information supports the proposed Contention. As discussed in the previous section, although Intervenors reference a number of RAIs, they provide no explanation for how these RAIs result in challenges to the aging management plans for the Shield Building. For example, Intervenors quote RAI B.2.39-13 regarding the Structures Monitoring Program AMP in its entirety, and then state that Intervenors "have exactly the same questions as NRC does" in this RAI.[188] This does not support an admissible contention.[189] As discussed above, it is a long-standing NRC adjudicatory principle that RAIs are a common and expected feature of the review process and by themselves do not form the basis for admissible contentions.[190]

- *Arguments regarding carbonation* (*see* Motion at 27-29) – These arguments do not present challenges to the existing aging management plans for the Shield Building; and

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186 *Id.* at 19-21.

187 *Id.* at 20.

188 *Id.* at 53-55.

189 Intervenors also mischaracterize the RAIs and interactions between FENOC and the Staff regarding RAIs. For example, Intervenors quote a summary of a conference call regarding RAI B.2.1-2 regarding visual examiner qualifications, then state that this was the "first indication Interveners had that NRC had concerns about the qualifications of FENOC's Davis-Besse visual examiners' qualifications," this "communication from NRC essentially constituted a reminder to FENOC to provide an adequate response to an RAI issued many months earlier," and "[n]o explanation for FENOC's inadequate responses to date was given." *Id.* at 47-48. This is a blatant misreading of the NRC summary. As quoted by Intervenors, that summary states that FENOC's response to the RAI "was acceptable," and that the NRC simply requested that FENOC docket certain information that it had already provided to the Staff. *Id.* at 47.

190 *See Millstone*, CLI-08-17, 68 NRC at 242; *Monticello*, CLI-06-6, 63 NRC at 164; *Oconee*, CLI-99-11, 49 NRC at 336-37.

consist only of bare assertions and speculation. Intervenors quote the entirety of a November 21, 2011 letter from Representative Kucinich to Chairman Jaczko in which Representative Kucinich hypothesizes that concrete carbonation may be a source of the cracking, but Intervenors say nothing more.[191] Intervenors provide no discussion of this information, but simply quote from an article that explains that FENOC has tested for carbonation and "carbonation appears not to be an issue."[192] Intervenors provide no contrary information or basis to dispute this testing or this conclusion.

- *Arguments regarding access to documents* (*see* Motion at 32, 40-46) – These arguments regarding access to documents are unrelated to aging management of the Shield Building during the period of extended operation and do not support challenges to the existing aging management plans for the Shield Building.

- *Arguments regarding seismic events and Shield Building cracking* (*see* Motion at 57) – These arguments are unrelated to aging management of the Shield Building during the period of extended operation; do not support challenges to the existing aging management plans for the Shield Building; and consist only of bare assertions and speculation. For example, Intervenors state that "[i]f the structural integrity of the shield building is in question – a problem that *very well could be* growing worse over time, even accelerating with age – then seismic activity in the area raises even more concerns."[193] Intervenors provide no support for this statement, only speculation.

In summary, Intervenors have not provided the "alleged facts or expert opinion" in support of its position and required by Section 2.309(f)(1)(v). Therefore, the proposed Contention should be rejected.

d. Intervenors' Complaints About Access to Documents Do Not Support an Admissible Contention

Intervenors raise various complaints about access to documents; these complaints do not support admission of the proposed Contention.

After quoting a December 5, 2011, statement by Congressman Kucinich, Intervenors "call upon both FENOC and NRC to make their shield building cracks related documentation accessible to the Interveners and public in order to make the license extension proceeding and its

[191] Motion at 26-29.

[192] *Id.* at 29.

[193] *Id.* at 57 (emphasis added).

treatment of this safety-significant aging related issue fully transparent and accountable."[194] Intervenors also request that the NRC and FENOC disclose documents referenced in a December 12, 2011, NRC letter to Congressman Kucinich and a December 12, 2011, information request from Inspector Holmberg.[195]

These requests and arguments improperly seek discovery to support a proposed contention. The Commission has stated that such requests are "contrary to our rules and longstanding precedent barring discovery in connection with the preparation of proposed contentions."[196] Similarly, the Commission has stated: "We have long precluded petitioners from using discovery as a device to uncover additional information supporting the admissibility of contentions."[197] Because the requests for access to documents are an unauthorized discovery request, the requests do not support admission of the proposed Contention or any other action by the Board.

V. CONCLUSION

As demonstrated above, the Board should deny the Motion and proposed Contention because they are untimely under 10 C.F.R. § 2.309(f)(2) and (c)(1). In particular, the Motion is untimely under 10 C.F.R. § 2.309(f)(2) because, contrary to the ISO, Intervenors filed it more than 60 days after the public availability of material information supporting both it and the newly-proposed contention. Subsequent documents or events did not present materially-different information and Intervenors have failed to demonstrate good cause under 10 C.F.R. § 2.309(c)(1) justifying their late filing.

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194 *Id.* at 32.

195 *See id.* at 40-46.

196 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 (2008).

197 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 416 (2007) ("Contentions should rest on defects or omissions *in the application*, not on underlying 'discovery' material.").

Additionally, to the extent Intervenors seek to rely on future events or future documents as support for their arguments, they must await those events or publication of those documents before attempting to proffer an admissible contention. FENOC and its contractors are preparing a Root Cause Evaluation of the Shield Building cracking, and will assess long-term monitoring requirements. Based on these and any other analyses, FENOC will determine whether changes to the Davis-Besse LRA are necessary. Once those future documents are published, Intervenors may consider filing a new contention and attempt to satisfy the timeliness and admissibility requirements for late-filed contentions.

Finally, both the Motion and proposed Contention fail to satisfy the contention admissibility requirements specified in 10 C.F.R. § 2.309(f)(1). The environmental arguments should be rejected because they challenge generic conclusions in the NRC regulations without a waiver petition, fail to challenge the Davis-Besse LRA, and lack adequate factual support. The safety arguments similarly should be rejected because they challenge issues outside the scope of license renewal, fail to directly challenge the Davis-Besse LRA, and lack adequate factual support.

For these reasons, the Motion and proposed Contention should be rejected in their entirety.

Respectfully submitted,

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

Signed (electronically) by Timothy P. Matthews

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COUNSEL FOR FENOC

Dated in Washington, D.C.
this 6th day of February 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-346-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	February 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking" was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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FENOC Attachment 1

Ronald E. Seeholzer
Vice President
Investor Relations

FirstEnergy Corp.
76 S. Main Street
Akron, Ohio 44308
Tel 330-384-5415

October 31, 2011

TO THE INVESTMENT COMMUNITY:[1]

Our Davis-Besse Nuclear Power Station safely shut down on October 1 for a scheduled outage to install a new reactor vessel head and to complete other maintenance activities. This past weekend, the new reactor head was successfully transported into containment.

This Letter provides an update on activities at Davis-Besse, where a sub-surface hairline crack was identified in one of the exterior architectural elements on the Shield Building on October 10 following opening of the building for installation of the new reactor head. These elements serve as architectural features and do not have structural significance.

The Shield Building is a 2½-foot-thick reinforced concrete structure that provides protection from natural phenomena including wind and tornados. This building surrounds the 1½-inch carbon steel containment vessel. The containment vessel is a leak-tight pressure barrier that prevents fission products from leaving the plant. There is a 4 ½-foot air space between the containment vessel and the Shield Building. The architectural elements of the Shield Building protrude up to 18 inches from the main portion of the building.

During investigation of the crack at the Shield Building opening, concrete samples and electronic testing found similar sub-surface hairline cracks in most of the building's architectural elements. The team of industry-recognized structural concrete experts and Davis-Besse engineers evaluating this condition has determined the cracking does not affect the facility's structural integrity or safety.

Our investigation also identified other indications. Included among them were sub-surface hairline cracks in two localized areas of the Shield Building similar to those found in the architectural elements. We have determined these two areas are not associated with the architectural element cracking and are investigating them as a separate issue. Our overall investigation and analysis continues. We currently expect Davis-Besse to return to service around the end of November.

[1] Please see the Forward-looking Statements at the end of this letter.

The Nuclear Regulatory Commission's (NRC) inspectors have been on site throughout the outage observing activities, including our assessment of the Shield Building cracks.

A copy of this letter and a diagram and photographs are available on our Investor Information website – *www.firstenergycorp.com/ir*.

Safety is our top priority at Davis-Besse, and we will ensure these issues are appropriately addressed before we restart the facility. As we continue this work, we will keep you informed of our progress and our safe return of Davis-Besse to service.

Upcoming FirstEnergy Investor Events

3rd Quarter, 2011 Earnings Release Conference Call
November 1, 2011

46th Annual EEI Financial Conference
November 6-9, 2011
Lake Buena Vista, FL

BMO Capital Markets 7th Annual Utilities & Pipeline Day
November 29, 2011
New York, NY

If you have any questions concerning the information in this update, please contact me at (330) 384-5415, Irene Prezelj, executive director of Investor Relations, at (330) 384-3859, or Rey Jimenez, manager of Investor Relations, at (330) 761-4239.

Sincerely,

Ronald E. Seeholzer
Vice President, Investor Relations

Forward-looking Statements

This Letter to the Investment Community includes forward-looking statements based on information currently available to management. Such statements are subject to certain risks and uncertainties. These statements include declarations regarding management's intents, beliefs and current expectations. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "believe," "estimate" and similar words. Forward-looking statements involve estimates, assumptions, known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. Actual results may differ materially due to: the speed and nature of increased competition in the electric utility industry, the impact of the regulatory process on the pending matters in the various states in which we do business including, but not limited to, matters related to rates, the status of the PATH project in light of PJM's direction to suspend work on the project pending review of its planning process, its re-evaluation of the need for the project and the uncertainty of the timing and amounts of any related capital expenditures, business and regulatory impacts from ATSI's realignment into PJM Interconnection, L.L.C., economic or weather conditions affecting future sales and margins, changes in markets for energy services, changing energy and commodity market prices and availability, financial derivative reforms that could increase our liquidity needs and collateral costs, the continued ability of FirstEnergy's regulated utilities to collect transition and other costs, operation and maintenance costs being higher than anticipated, other legislative and regulatory changes, and revised environmental requirements, including possible GHG emission, water intake and coal combustion residual regulations, the potential impacts of any laws, rules or regulations that ultimately replace CAIR including the Cross-State Air Pollution Rule (CSAPR) and the effects of the EPA's recently released MACT proposal to establish certain mercury and other emission standards for electric generating units, the uncertainty of the timing and amounts of the capital expenditures that may arise in connection with any NSR litigation or potential regulatory initiatives or rulemakings (including that such expenditures could result in our decision to shut down or idle certain generating units), adverse regulatory or legal decisions and outcomes with respect to our nuclear operations (including, but not limited to, the revocation or non-renewal of necessary licenses, approvals or operating permits by the NRC, including as a result of the incident at Japan's Fukushima Daiichi Nuclear Plant), issues that could delay the current outage at Davis-Besse for the installation of the new reactor vessel head, including indications of cracking in the plant’s shield building currently under investigation, adverse legal decisions and outcomes related to Met-Ed's and Penelec's ability to recover certain transmission costs through their transmission service charge riders, the continuing availability of generating units and changes in their ability to operate at or near full capacity, replacement power costs being higher than anticipated or inadequately hedged, the ability to comply with applicable state and federal reliability standards and energy efficiency mandates, changes in customers' demand for power, including but not limited to, changes resulting from the implementation of state and federal energy efficiency mandates, the ability to accomplish or realize anticipated benefits from strategic goals, efforts, and our ability, to improve electric commodity margins and the impact of, among other factors, the increased cost of coal and coal transportation on such margins, the ability to experience growth in the distribution business, the changing market conditions that could affect the value of assets held in FirstEnergy's nuclear decommissioning trusts, pension trusts and other trust funds, and cause FirstEnergy to make additional contributions sooner, or in amounts that are larger than currently anticipated, the ability to access the public securities and other capital and credit markets in accordance with FirstEnergy's financing plan, the cost of such capital and overall condition of the capital and credit markets affecting FirstEnergy and its subsidiaries, changes in general economic conditions affecting FirstEnergy and its subsidiaries, interest rates and any actions taken by credit rating agencies that could negatively affect FirstEnergy's and its subsidiaries' access to financing or their costs and increase requirements to post additional collateral to support outstanding commodity positions, LOCs and other financial guarantees, the continuing uncertainty of the national and regional economy and its impact on the major industrial and commercial customers of FirstEnergy's subsidiaries, issues concerning the soundness of financial institutions and counterparties with which FirstEnergy and its subsidiaries do business, issues arising from the recently completed merger of FirstEnergy and Allegheny Energy, Inc. and the ongoing coordination of their combined operations including FirstEnergy's ability to maintain relationships with customers, employees or suppliers, as well as the ability to successfully integrate the businesses and realize cost savings and any other synergies and the risk that the credit ratings of the combined company or its subsidiaries may be different from what the companies expect, the risks and other factors discussed from time to time in FirstEnergy's and its applicable subsidiaries' SEC filings, and other similar factors. The foregoing review of factors should not be construed as exhaustive. New factors emerge from time to time, and it is not possible for management to predict all such factors, nor assess the impact of any such factor on FirstEnergy's business or the extent to which any factor, or combination of factors, may cause results to differ materially from those contained in any forward-looking statements. FirstEnergy expressly disclaims any current intention to update any forward-looking statements contained herein as a result of new information, future events or otherwise.

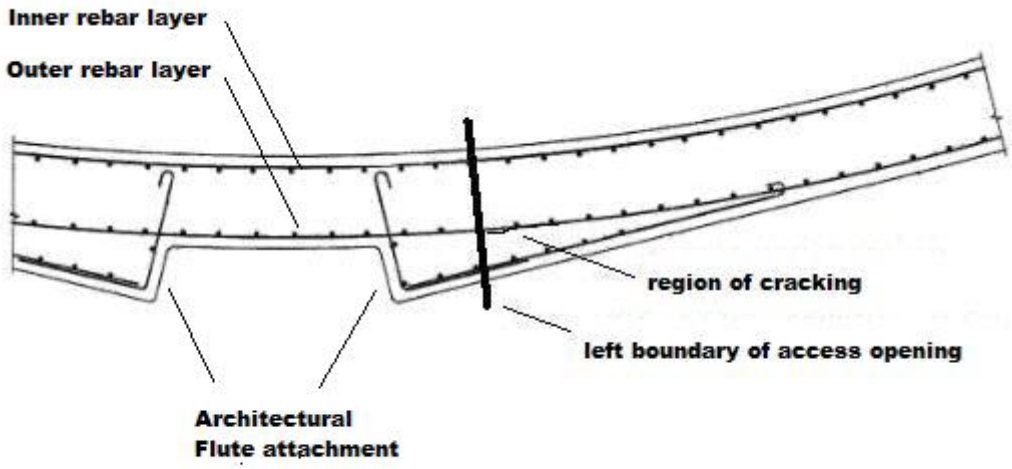


Figure 1 - Section of a Typical Architectural Flute Detail

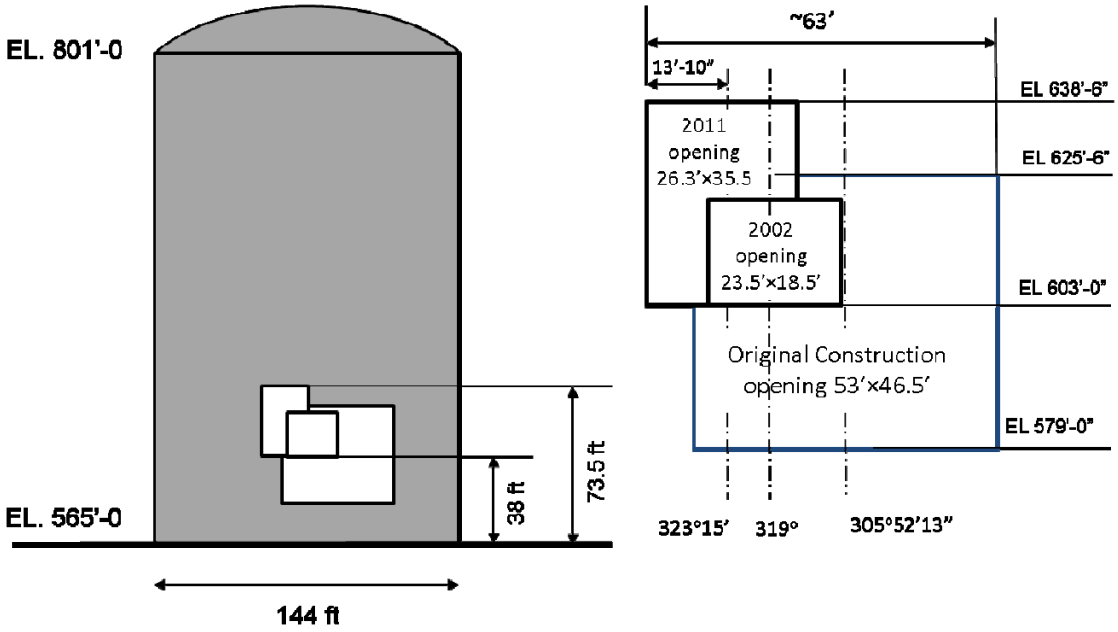


Figure 2 - Shield Building Openings

FENOC Attachment 2

FENOC™

Davis-Besse Nuclear Power Station

Nuclear Regulatory Commission
Public Meeting
January 5, 2012

Agenda

- **Introduction**
  - ***Barry Allen***, Site Vice President – Davis-Besse
- **17th Mid-Cycle Outage Summary**
  - ***Brian Boles***, Director – Site Operations
- **Shield Building Condition Evaluation**
  - ***Ken Byrd***, Director – Site Engineering
- **Closing Comments**
  - ***Barry Allen***, Site Vice President – Davis-Besse

Desired Outcomes

- **Demonstrate FENOC's overriding priority and commitment to ensure the safe and reliable operation of Davis-Besse**
- **Recap 17 Mid-Cycle Outage Activities**
- **Describe the discovery and investigation of the Shield Building concrete cracking**
- **Describe the evaluations performed to verify Shield Building capability for operating conditions**
- **Provide summary of actions going forward**

17th Mid-Cycle Outage Summary

Brian Boles – Director, Site Operations

Davis-Besse Plant Status

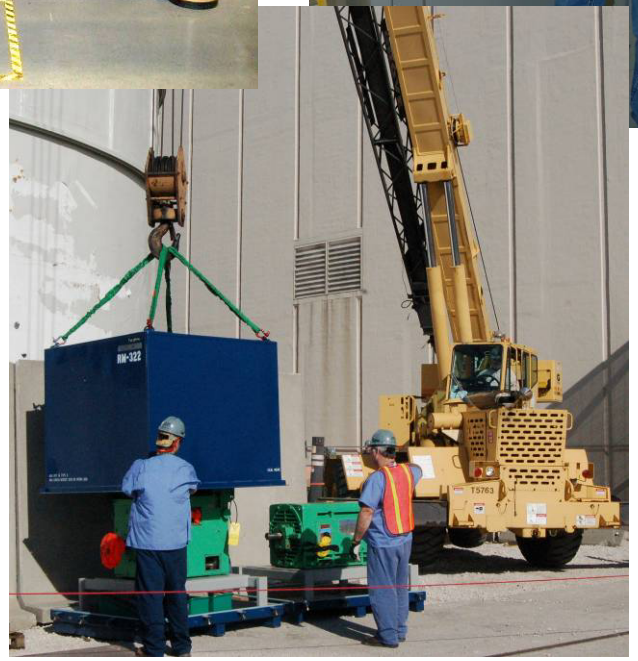
- **Currently Operating at 100% Reactor Power**
  - 950 Megawatts
- **31 Days On-Line**
- **122 Days Until 17th Refueling Outage**
- **Reactor, Primary and Secondary systems operating as designed**

Davis-Besse Mid-Cycle Outage Summary

- **Safety Upgrades**
  - Replaced Reactor Head
  - Replaced Integrated Control System

Davis-Besse Outage Summary

- **Reliability Improvements**
  - Replaced Station Battery Chargers
  - Installed new style Power Operated Relief Valve
  - Replaced power cables
  - Replaced Core Cooling Motors
  - Performed Motor Operated and Air Operated Valve maintenance

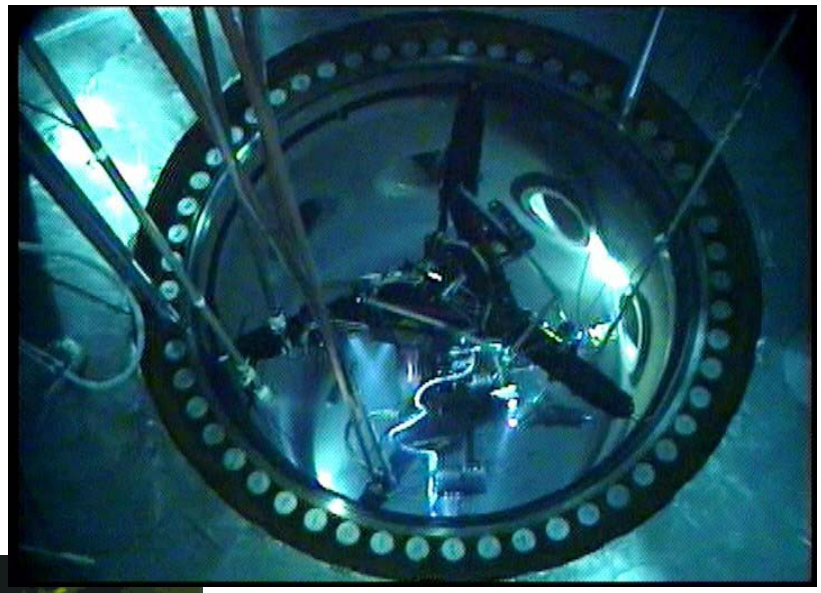


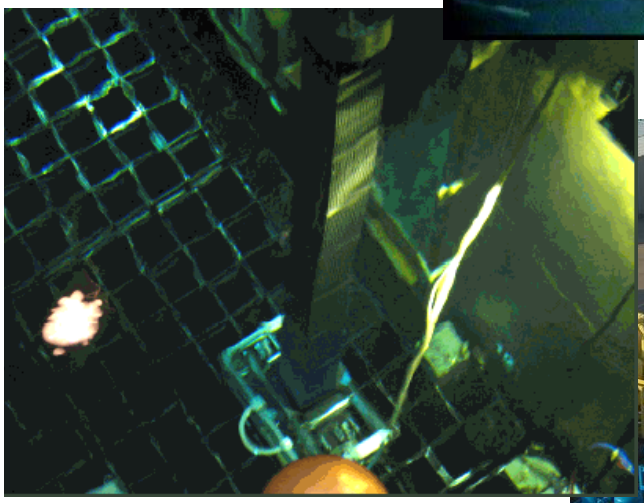
Davis-Besse Outage Summary

- **Operating Margin Improvements**
  - Replaced selected Service Water Piping
  - Drained and cleaned Turbine Plant Cooling Water System
  - Performed Cooling Tower maintenance

Davis-Besse Outage Summary

- **Inspection Requirements**
  - Completed 10 year Inservice inspection
  - Inspected all fuel assemblies
  - Performed Integrated Leak Rate Test of Containment





Outage Conclusions

- **Mid-Cycle Outage conducted in a safe manner**
- **FENOC continues to invest in safety and reliability improvements**
- **As a result of work performed during the Mid-Cycle Outage, Davis-Besse is operating safely and efficiently with improved margins to safety.**

Shield Building Condition Evaluation

Ken Byrd – Director Site Engineering

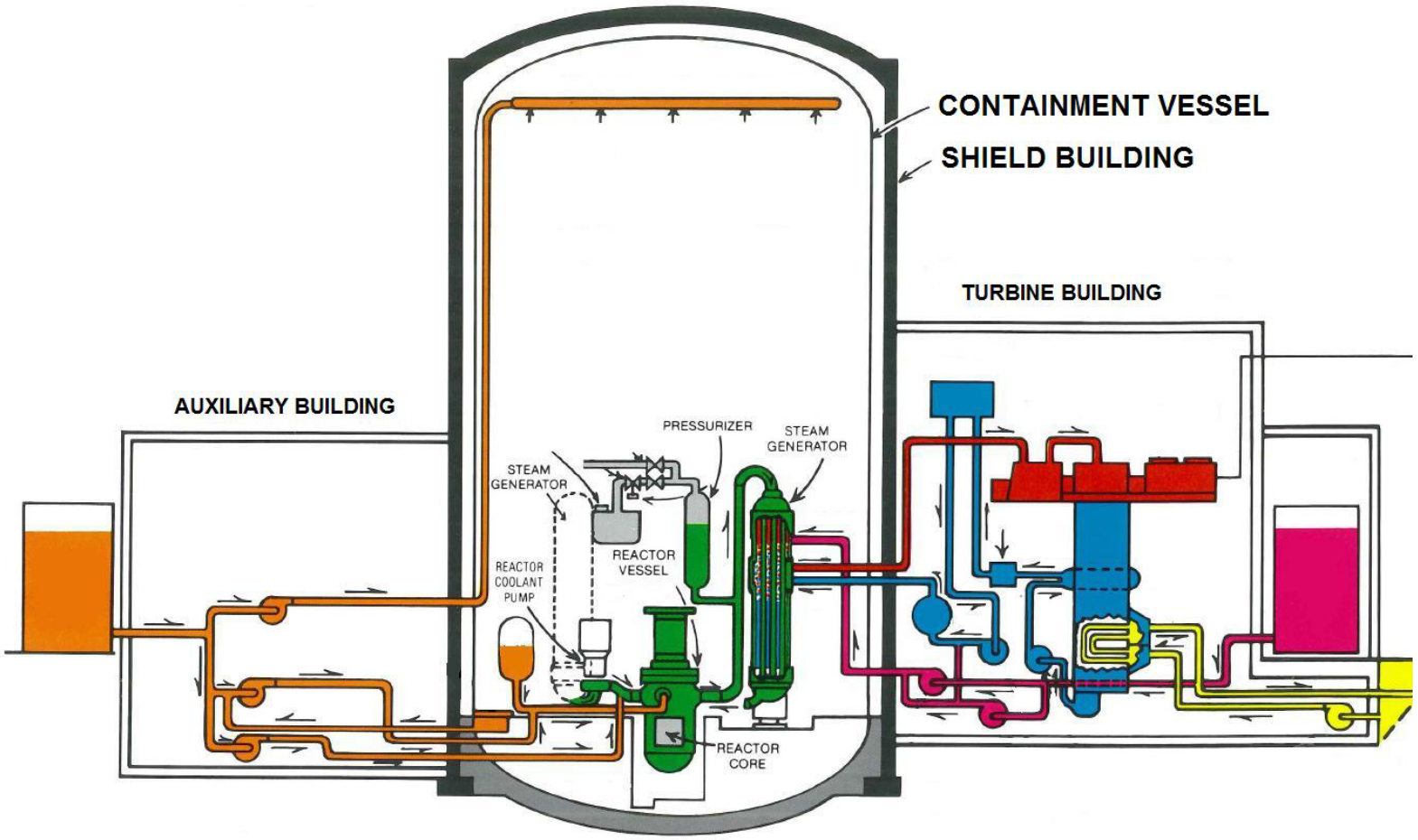
Background

- **Mid-cycle outage to replace Reactor Pressure Vessel Head**
- **Access opening required in concrete Shield Building**
- **Opening dimensions 26.5’ w X 35.5’ h**
- **Hydro-demolition method employed**
- **Previous opening in 2002 used similar method**
- **Size and orientation was different**

Shield Building

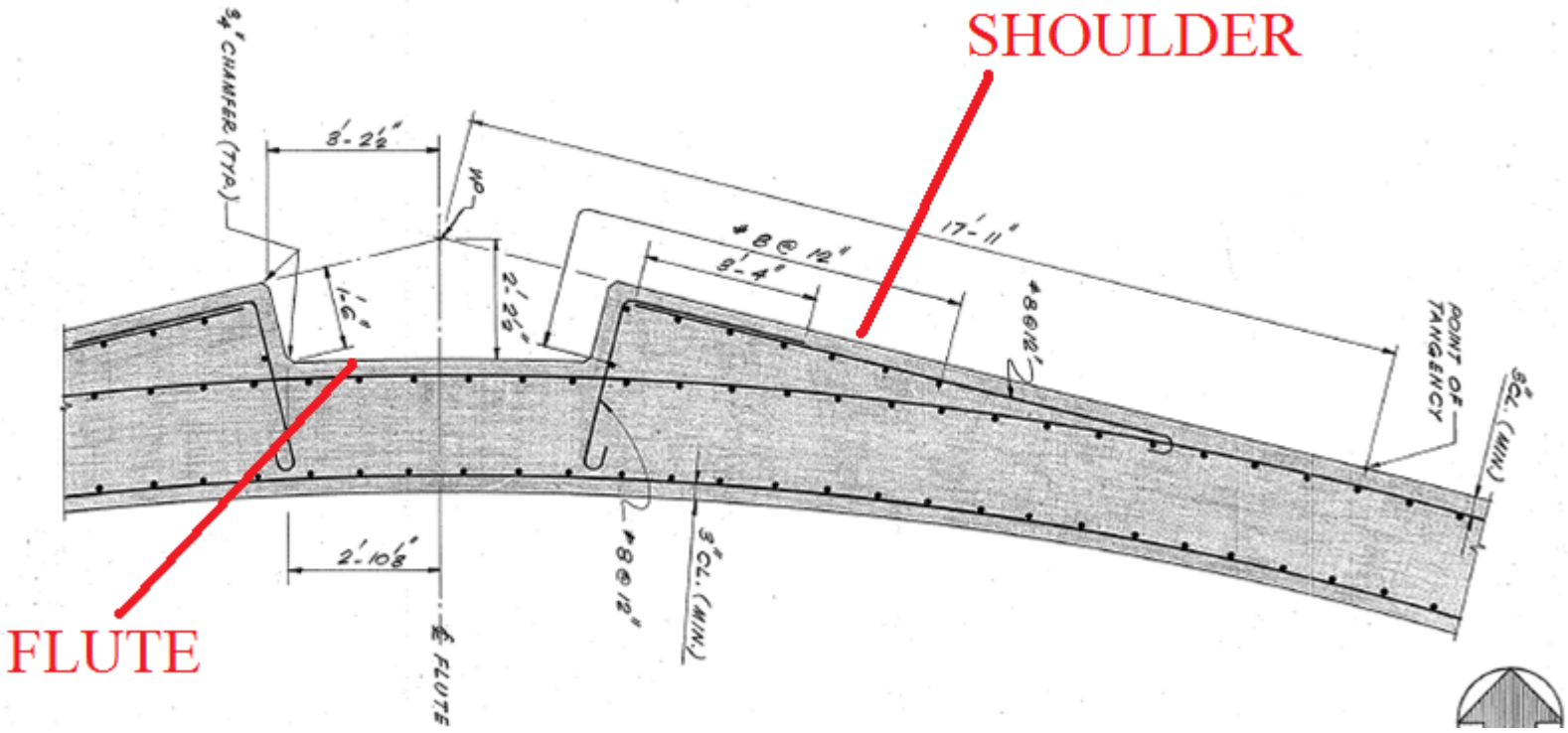
- **Purpose of Shield Building**
  - Biological Shielding
  - Environmental protection for containment vessel
  - Controlled release of annulus atmosphere under accident conditions

Shield Building



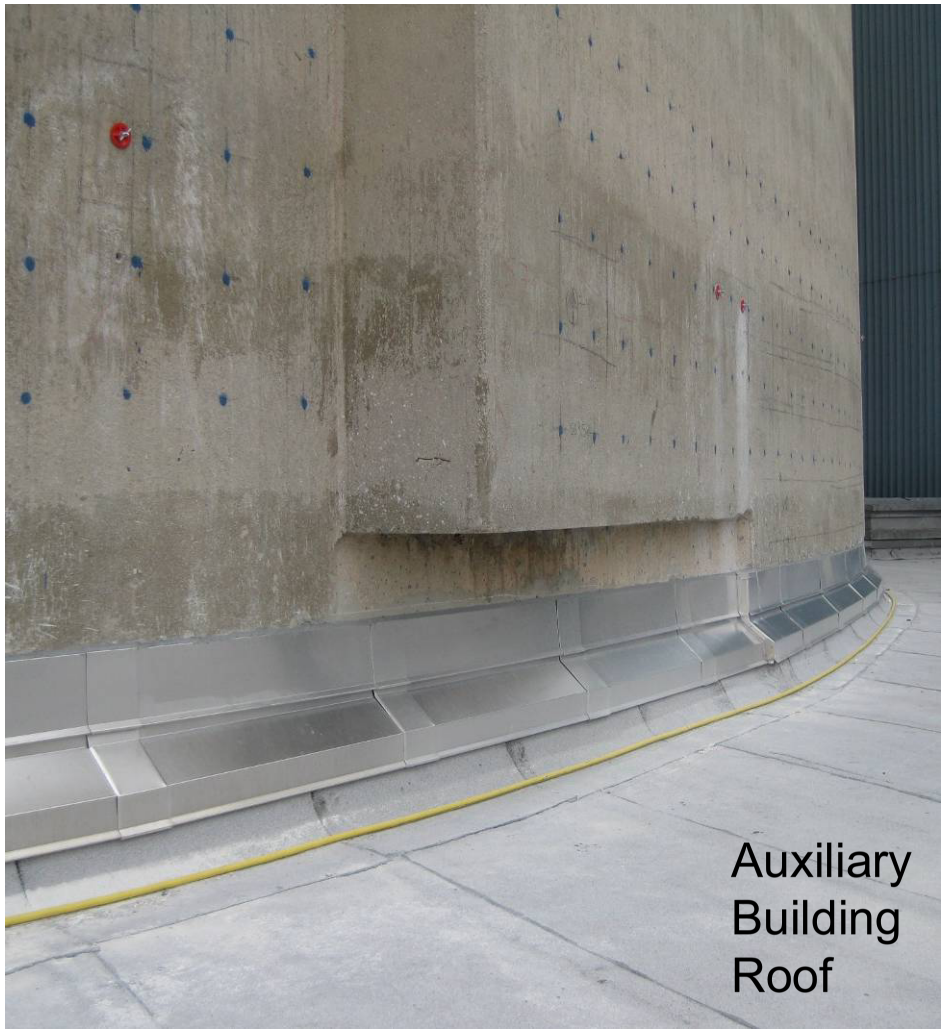
Shield Building

Shield Building Flutes

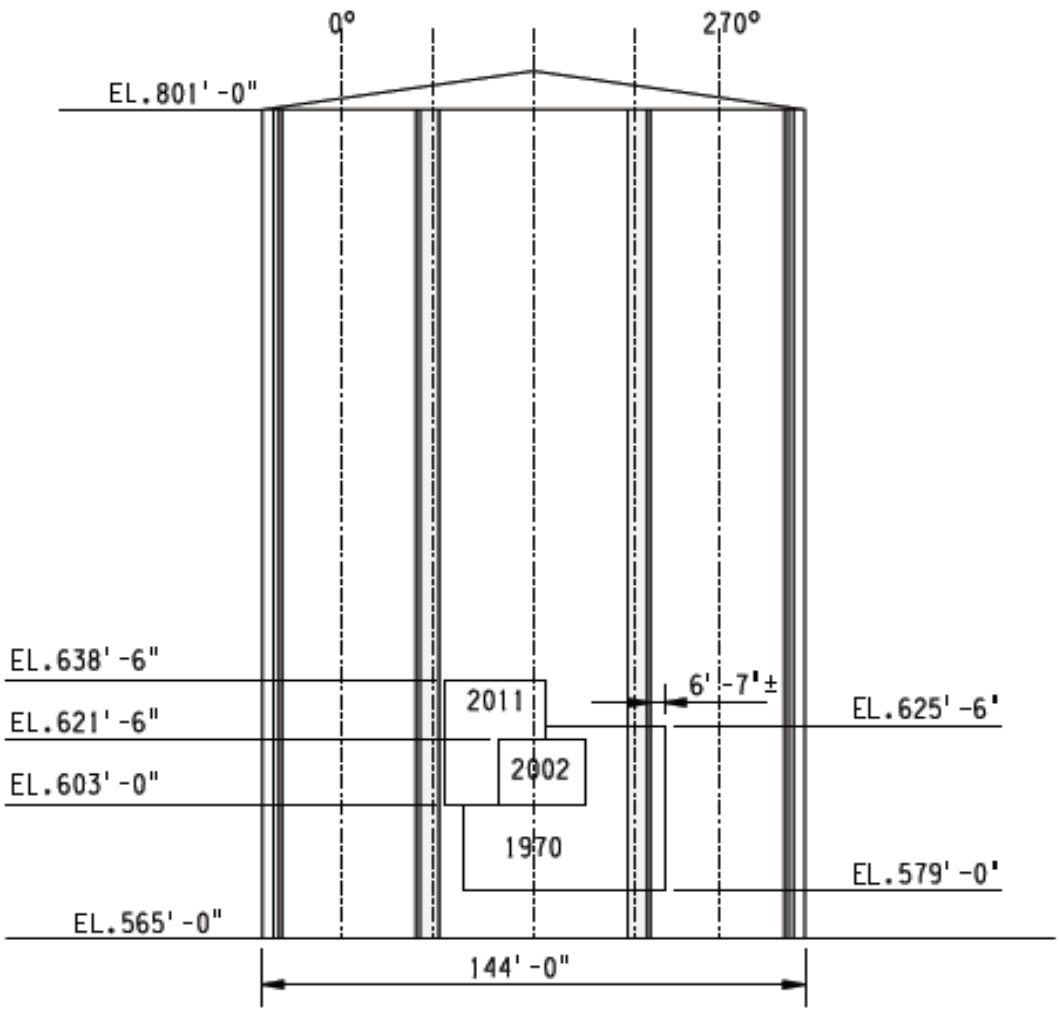


Shield Building Flutes

- **Architectural Feature**
  - The flute shoulders are part of the Shield Building. Concrete for shoulders and building shell was placed concurrently.
  - Evaluation of structural capacity of Shield Building does not credit flute shoulders.
  - Evaluated as a dead load in structural analysis.



Shield Building



2011 OPENING 26'-3" X 35'-6"
2002 OPENING 23'-6" X 18'-6"
1970 OPENING 53'-0" X 46'-6"

Discovery

- **Cracking found on October 10 during hydro-demolition**
- **Indications reported**
  - Full length of left side of opening
  - Top and bottom of opening on left side
  - Indications appeared to be near the first (outer) rebar mat

Initial Response

- **NRC Resident Inspector notified**
- **Condition Report written**
- **Restraint on restart established**
- **Mobilized team of experts to investigate issue**

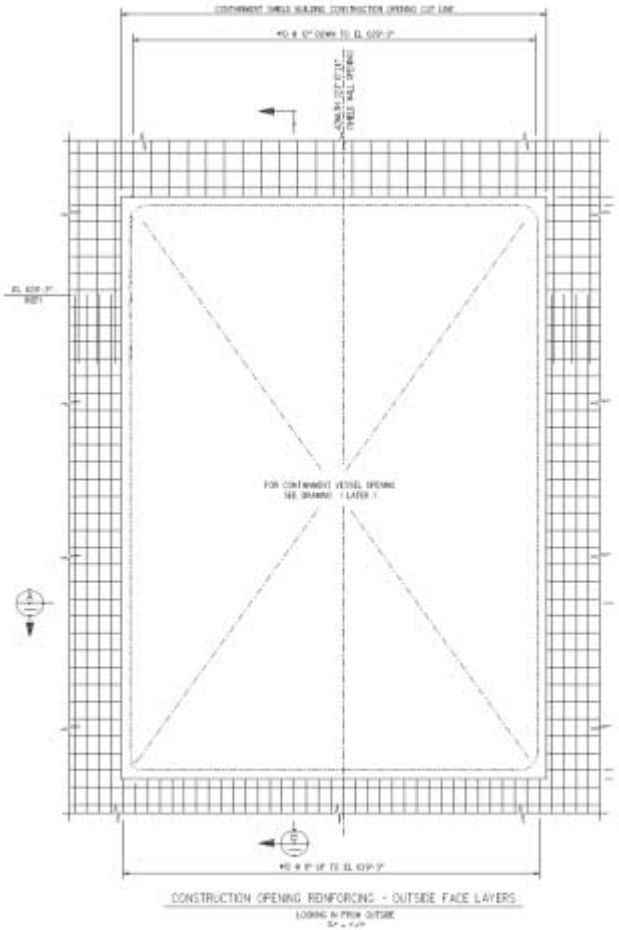
Initial Investigation

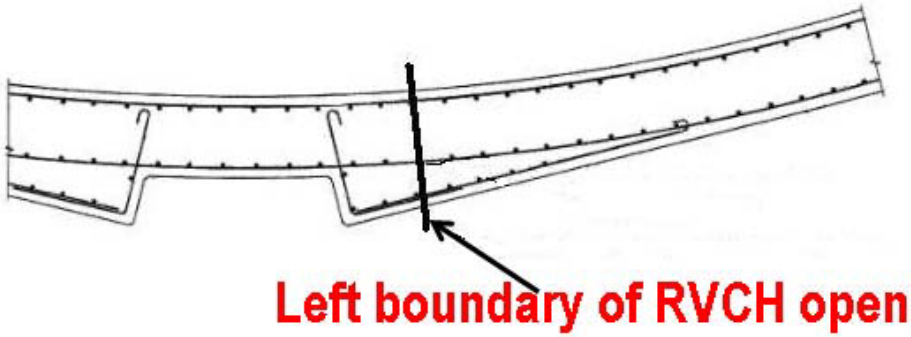
- **Decision made to “chip back” concrete to observe indication**
- **No indications remained on bottom or left side of opening after chipping**
- **Chipping at top of opening revealed the crack extended beyond the construction opening**

Upper Opening Indication Investigation

- **Construction Technology Laboratory (CTL) Impulse Response (IR) testing methodology used to investigate extent of crack**
- **IR was employed as a tool to provide a non-destructive means to identify regions of interest for further investigation**
- **Core bores were taken to confirm the boundary of cracking based on IR results**

Initial Investigation Around Construction Opening



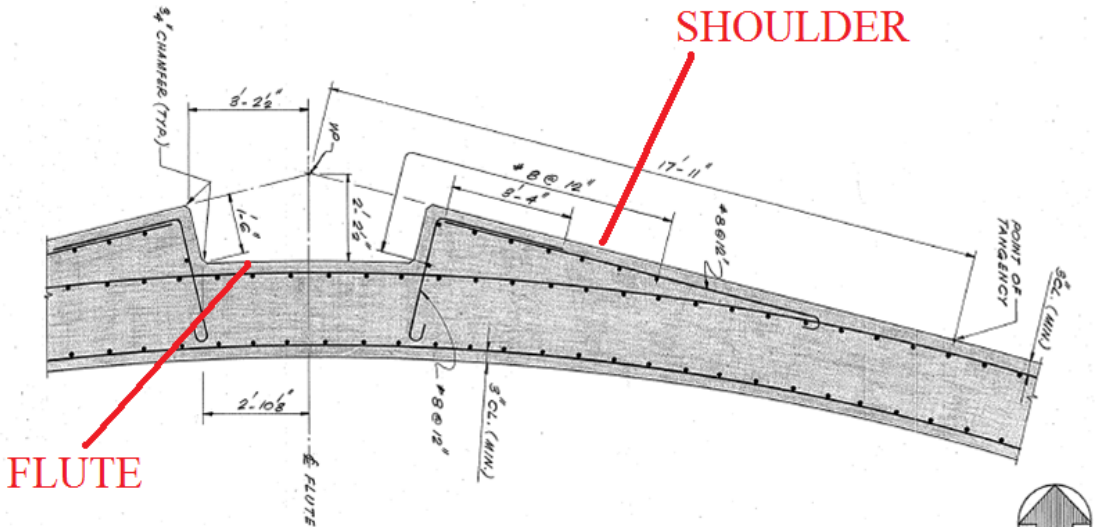


Investigation of Extent of Condition

- **Extent of Cracking Condition was investigated using IR testing and Core Bores.**
- **The results of the investigation were documented in the Corrective Action Process as follows:**
  - October 10, Initiated CR and notified NRC – Unexpected concrete crack within Shield Building temporary opening
  - October 24, Initiated CR and notified NRC – Additional crack identified in Shield Building architectural flute shoulder area
  - October 26, Initiated CR and notified NRC – Cracking identified in Shield Building at Main Steam Line Penetration region
  - October 31, Initiated CR and notified NRC – Shield Building IR indications above Elevation 780

Impulse Response Inspection

- **IR Testing Performed:**
  - 15 of 16 flute shoulders
  - 6 of 8 flutes
  - 8 of 8 shell regions between flute shoulders
  - Main Steam Line Rooms and Fan Equipment room
  - Vertically to the top of Shield Building wall



Shield Building Core Bores

- **70 core bores performed**
- **Core bore pairs were used to validate the IR results**
- **Measured cracks were adjacent to the Shield Building outer rebar mat**

Shield Building Core Bores

- **All measured cracks were very tight**
- **Eight deep core bores were taken that reached the interior reinforcing steel mat. Confirmed cracking only in outer rebar mat.**
  - 2 in flute shoulders
  - 4 in flutes
  - 2 in Main Shell Region

Shield Building Visual Examinations

- **Surface examinations of all areas investigated for spalled concrete, corrosion/staining, surface bulging and loose concrete**
  - Surface examination results revealed no indications of concrete surface distress impacting the structural integrity of the Shield Building
  - Condition Report initiated to document a case of exposed reinforcement and spalling in the corner of a shoulder.
- **Rebar inspected at the construction opening in good condition**

Laboratory Evaluation of Shield Building Concrete

- **Initial Laboratory evaluation of two core bores performed by CTL Group**
- **Results of tests indicate**
  - Concrete is in good condition with no apparent deficiencies that would affect its continued service
  - Carbonation is at a depth consistent with the age of the concrete

Summary of Shield Building Condition

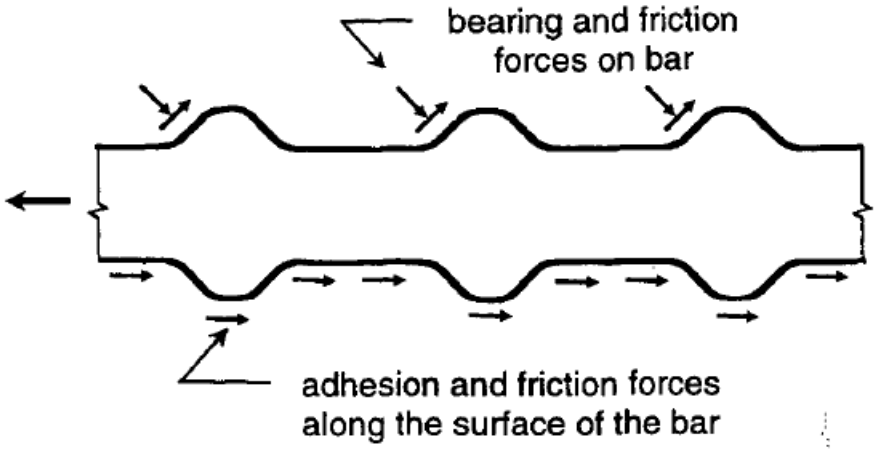
- **Cracking is generic to flute shoulder regions and can be assumed to be present at any elevation in the flute shoulders. Cracking observed to be more prevalent on the south side of the building.**
- **Cracking exists at the top 20 feet of the Shield Building wall outside the flute shoulder region.**
- **Two small regions adjacent to the Main Steam Line penetrations have similar cracks. The extent of these regions is localized and unique to these particular penetrations.**
- **Cracks are located near the outer reinforcing mat. No cracking observed in interior reinforcing mat.**
- **Cracks are very tight.**

Structural Evaluation

- **Shield Building Design**
  - Building designed and constructed with significant reinforcement
  - Significant Margin under design basis loads
  - Design Basis
    - Earthquake 6 – 6.5 on Richter magnitude scale
    - Tornado winds of 300 miles per hour
    - Tornado wind-driven debris
    - Tornado depressurization
- **Impact of laminar cracks on design**
  - Potentially reduce the bond strength between concrete and reinforcing steel

Bond Strength

- **Force transfer between reinforcement and concrete**
  - Adhesion (small contribution)
  - Friction (moderate contribution)
  - Mechanical bearing of lugs (most contribution)



Bond Strength

- **Bond stress about 50% of capacity under Design Basis Load**
- **Concrete much stronger than specified (>6000 psi vs specified 4000 psi)**
- **Test results indicate a margin of at least 50% after initiation of a splitting crack.**

Bounding Building Analysis

- **Bond strength with adjacent cracks can not be quantified and is conservatively treated as non-existent in analysis.**
- **Calculations performed to provide a bounding evaluation of the effect of cracking.**
  - Vertical and horizontal reinforcement ineffective for strength in flute shoulders, two steam line penetration areas and in regions at top of shield building.
- **Any bond between reinforcement and concrete in crack regions provides additional margin.**

Bounding Building Analysis

- **Calculations are consistent with the original design and methodology.**
- **Calculations were performed by highly qualified and experienced Bechtel engineering team.**
- **FENOC Engineering staff performed detailed owner's acceptance review.**
- **Independent third party engineering review was performed by Sargent & Lundy.**

Root Cause

- **Root Cause determination in progress**
  - Director Fleet Performance Improvement
  - Davis-Besse Root Cause Evaluator
  - MPR Associates, Inc.
  - Performance Improvement International

Root Cause

- **Root Cause Team Activities**
  - Visual Inspections
  - Review of IR and Core Bore Inspection Results
  - Review of Construction Records
  - Analysis of Core/Rebar Samples
  - Detailed Modeling of Shield Building
- **Expected Results of Root Cause**
  - How, Why and When Cracking Occurred
  - Long Term Monitoring Program

Summary of Evaluation Results

- **Shield Building meets strength requirements.**
- **Meets serviceability as demonstrated by the structure's past performance.**
- **Any bond between the concrete and reinforcement in cracked regions would be an additional margin of safety.**
- **Shield Building is capable of performing its safety functions.**

Closing Comments

Barry Allen – Site Vice President

Summary of Actions Going Forward

FENOC has committed to the following ongoing actions:

- **Determine Root Cause of cracks in the Shield Building**
- **Perform interim monitoring of the Shield Building during this run cycle**
- **Perform additional monitoring of the Shield Building during the 2012 refueling outage**
- **Develop Long-Term Monitoring Requirements**

Conclusions

- **The Shield Building condition has been extensively investigated to establish a thorough understanding of the extent of cracking.**
- **Conservative calculations demonstrate the Shield Building meets strength requirements.**
- **The Shield Building is structurally sound, and is fully capable of performing its safety function.**
- **Davis-Besse is being operated safely.**

FENOC Attachment 3

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

NRC Public Meeting

Davis Besse Shield Building Cracks

January 5, 2012

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Welcome

Cynthia Pederson
Acting Regional Administrator
NRC Region III

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

NRC Safety Mission

- **The Nuclear Regulatory Commission (NRC) is an independent federal agency created by U.S. Congress.**
- **The mission of the NRC is to license and regulate the Nation's civilian use of nuclear materials in order to protect public health and safety, promote the common defense and security, and protect the environment.**

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Protecting People and the Environment

Safety Issue

- On October 10, 2011, the NRC was informed by the licensee promptly upon their identification of cracking in the Davis Besse shield building.
- NRC determined there was no immediate safety concern. The plant was shut down at the time.
- NRC immediately responded with an onsite senior structural inspector.

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Protecting People and the Environment

Meeting Purpose

- Inform the public about the safety of the Davis Besse shield building through:
  - A presentation by the licensee on the results of their tests and analysis.
  - A presentation by the NRC on the NRC's inspection of the shield building and actions taken to ensure safety.

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Protecting People and the Environment

Meeting Information

Kenneth O'Brien

Deputy Director, Division of Reactor Safety

NRC Region III

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Meeting Agenda

- Introductions
- Background
- Licensee Presentation
- NRC Inspection & Conclusion
- Additional NRC Safety Actions
- Summary
- Public Questions and Comments

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UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Introductions - NRC

- Cynthia Pederson, Acting Regional Administrator, Region III
- Kenneth O'Brien, Deputy Director, Division of Reactor Safety
- Patrick Hiland, Director, Division of Engineering, Office of Nuclear Reactor Regulation
- David Hills, Chief, Engineering Branch 1
- Jamnes Cameron, Chief, Reactor Projects Branch 6
- Daniel Kimble, Senior Resident Inspector
- Adam Wilson, Resident Inspector
- Jared Heck, Meeting Facilitator

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Meeting Contacts

- **Followup Questions - Contact the NRC Region III Office of Public Affairs / Viktoria Mitlyng / Prema Chandrathil 630-829-9500**

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First Energy Nuclear Operating Company (FENOC) Introductions and Presentation

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Protecting People and the Environment

NRC Inspection & Conclusions

David Hills
Engineering Branch Chief
NRC Region III

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NRC Safety Focused Inspection

- At discovery of cracking, NRC inspectors already onsite inspecting reactor pressure vessel closure head replacement.
- Added extra NRC structural expertise.
- Approximately 10 NRC engineers involved during the almost 8 week time period.

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NRC Safety Focused Inspection

- NRC inspectors onsite independently observed and evaluated licensee's activities to determine the extent of cracking.
- NRC structural engineers performed extensive, independent, & rigorous review of the licensee's analysis including structural calculations.

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NRC Safety Focused Inspection

- **The NRC team engaged the licensee's engineers and consultants in intense discussions while evaluating the licensee's actions and analysis.**
- **Numerous technical questions were posed and answered – some in writing/many verbally.**

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NRC Safety Focused Inspection

- **NRC questions resulted in additional licensee actions to determine the extent of cracking and the generation of more extensive/detailed structural calculations.**

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NRC Conclusion Basis

- The licensee performed impulse response mapping and confirmatory core bores to characterize the extent of cracking.
- Structural calculations reflected extent of cracking that was verified through testing.

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NRC Conclusion Basis

- Licensee calculation assumptions and engineering judgments were appropriate.
- Calculation modeling adequately reflected the building condition including structural load path.

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NRC Conclusion Basis

- The licensee evaluated the shield building's ability to withstand the design basis earthquake, tornado, & tornado driven missiles.
- The licensee's calculations confirmed that building stresses remained within limits set in the original licensing basis.

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NRC Safety Conclusion

Shield building remains capable of performing its safety function despite the cracking and therefore licensee could safely restart plant.

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NRC Safety Conclusion

- NRC structural engineers continue in their evaluation of whether the shield building meets licensing commitments. If NRC concludes commitments are not met, then licensee will need to correct.
- NRC inspection team is evaluating licensee's ongoing root cause activities and determination of longer term corrective actions.

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Protecting People and the Environment

Additional NRC Safety Actions

Jamnes Cameron
Chief, Reactor Projects Branch 6
NRC Region III

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Additional NRC Actions to Ensure Continued Safety of the Shield Building

Confirmatory Action Letter issued on December 2, 2011 –

- **Licensee to complete a root cause evaluation, develop and implement corrective actions, including a long-term monitoring program.**
- **Licensee to implement a short-term monitoring program.**

NRC will conduct a followup inspection of root cause evaluation and proposed corrective actions.

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Protecting People and the Environment

Summary

Cynthia Pederson
Acting Regional Administrator
NRC Region III

U.S.NRC
UNITED STATES NUCLEAR REGULATORY COMMISSION
Protecting People and the Environment

Summary

- NRC structural engineers conducted an extensive, independent, and rigorous evaluation.
- NRC concluded that the shield building remains capable of performing its safety function.
- NRC determined that plant safety was not compromised. NRC has taken actions to ensure the plant remains safe going forward.
- NRC has continued to communicate to the media, public officials, and members of the public.

FENOC Attachment 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION III
2443 WARRENVILLE ROAD, SUITE 210
LISLE, IL 60532-4352

December 2, 2011

CAL No. 3-11-001

Mr. Barry Allen
Site Vice President
FirstEnergy Nuclear Operating Company
Davis-Besse Nuclear Power Station
5501 North State Route 2, Mail Stop A-DB-3080
Oak Harbor, OH 43449-9760

SUBJECT: CONFIRMATORY ACTION LETTER - DAVIS-BESSE NUCLEAR POWER STATION

Dear Mr. Allen:

This letter confirms commitments by FirstEnergy Nuclear Operating Company (FENOC) regarding the identification of cracks in the reinforced concrete shield building at the Davis-Besse Nuclear Power Station. During the recent mid-cycle outage to replace the reactor vessel closure head, which began on October 1, 2011, FENOC discovered laminar cracking in the safety-related shield building of the containment system while performing hydrodemolition operations. Based on an evaluation of FENOC's extent of condition and technical analysis of the Davis-Besse shield building laminar cracking, the NRC staff concluded that FENOC provided reasonable assurance that the shield building is capable of performing its safety functions. In order to provide continued long-term confidence, FENOC has agreed in telephone conversations between you, Steven West, and Steven Reynolds, on November 21, 2011; a followup telephone conversation between you and Jamnes Cameron on November 22, 2011; in a FENOC commitment letter dated November 23, 2011 (ML11329A033); and a telephone conversation between you and Steven Reynolds on December 2, 2011, to the following actions (both completed and planned):

1. 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.

2. FENOC will identify four shield building locations, which were core bored during this evaluation, for examination. These uncracked locations will be directly adjacent to locations that have been confirmed to be cracked. The four uncracked locations, as designated on FENOC drawing C-111A, are:

    a. adjacent to a flute shoulder [S9-666.0-12];
    b. in a flute area [F4-1-666.0-3];
    c. adjacent to Main Steam Line penetration 39 [S7-652.0-6.5]; and
    d. adjacent to Main Steam Line penetration 40 [S9-650.0-9].

3. FENOC will examine the four core bore locations from Commitment 2 above with a borescope to verify cracking has not migrated to these core bores located in solid (i.e., uncracked) concrete, within 90 days following plant restart (Mode 2) from the 2011 mid-cycle outage.

4. FENOC will examine the crack interface to identify any changes by performing a core bore in a known crack area within the Main Steam Line Room, within 90 days following plant restart (Mode 2) from the October 2011 mid-cycle outage.

5. FENOC will identify two additional shield building locations, which were core bored during this evaluation, for examination. These uncracked locations will be directly adjacent to locations that have been confirmed to be cracked. The two uncracked locations, as designated on FENOC drawing C-111A, are:

    a. in a flute area [F5-777.0-4]; and
    b. adjacent to a flute shoulder [S2-783.5-4.0].

6. FENOC will examine the four core bore locations from Commitment 2 along with the two core bore locations from Commitment 5 with a borescope to verify cracking has not migrated to these core bores located in solid (i.e., uncracked) concrete, during the seventeenth refueling outage currently scheduled to commence in 2012.

7. FENOC will examine the crack interface to identify any changes by examining either existing core bore locations with known cracks, or by performing a core bore in a similar area:

    a. adjacent to a flute shoulder [S9-666.0-11];
    b. near the top of the shield building [S9-785-22.5]; and
    c. adjacent to Main Steam Line penetration [core bore from Commitment 4].

    during the seventeenth refueling outage currently scheduled to commence in 2012.

Pursuant to Section 182 of the Atomic Energy Act, 42 U.S.C. 2232, you are required to:

1) Notify me immediately if your understanding differs from that set forth above;

2) Notify me if for any reason you cannot complete the actions and commitments within the specified schedule and advise me in writing of your modified schedule in advance of the change; and

3) Notify me in writing when you have completed the actions and commitments addressed in this Confirmatory Action Letter.

Issuance of this Confirmatory Action Letter does not preclude issuance of an Order formalizing the above commitments or requiring other actions on the part of FENOC, nor does it

preclude the NRC from taking enforcement action for violations of NRC requirements that may have prompted the issuance of this letter. Failure to meet the commitments in this Confirmatory Action Letter may result in an Order if FENOC's performance, as demonstrated by the failure to meet any Confirmatory Action Letter commitments, does not provide reasonable assurance that the NRC can rely on FENOC to meet the NRC's requirements and protect public health and safety or the common defense and security.

You should also be aware that while the NRC staff concluded that FENOC provided reasonable assurance that the shield building remains capable of performing its safety functions, NRC staff continues to evaluate whether the shield building (in its current condition) conforms to the design code requirements identified in the plant's licensing basis.

In accordance with 10 CFR 2.390 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response (if any), will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records System (PARS) component of NRC's Agencywide Documents Access and Management System (ADAMS), accessible from the NRC Web site at http://www.nrc.gov/reading-rm/adams.html (the Public Electronic Reading Room).

To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

Sincerely,

Cynthia D. Pederson
Acting Regional Administrator

Docket No. 50-346
License No. NPF-3

cc: Distribution via ListServ ™

FENOC Attachment 5

GPU INC /PA/ (FE)

8-K
Current report filing
Filed on 10/31/2011
Filed Period 10/30/2011

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

FORM 8-K

CURRENT REPORT

PURSUANT TO SECTION 13 OR 15(d) OF THE
SECURITIES EXCHANGE ACT OF 1934

Date of Report (Date of earliest event reported) October 31, 2011

Commission File Number	Registrant; State of Incorporation; Address; and Telephone Number	I.R.S. Employer Identification No.
333-21011	**FIRSTENERGY CORP.** (An Ohio Corporation) 76 South Main Street Akron, OH 44308 Telephone (800)736-3402	34-1843785
000-53742	**FIRSTENERGY SOLUTIONS CORP.** (An Ohio Corporation) c/o FirstEnergy Corp. 76 South Main Street Akron, OH 44308 Telephone (800)736-3402	31-1560186

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2.):

[ ] Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
[ ] Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
[ ] Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
[ ] Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 7.01 Regulation FD Disclosure.

On October 31, 2011, FirstEnergy Corp. (FirstEnergy) issued a Letter to the Investment Community, attached hereto as Exhibit 99.1, regarding the current status of its investigation into the indications of cracking that were observed in the shield building at the Davis-Besse Nuclear Power Station during the planned outage to install a new reactor vessel head. FirstEnergy has also posted related information regarding this issue to its website at www.firstenergycorp.com/ir. The information on its website, the Letter to the Investment Community and the information contained herein, including Exhibit 99.1, shall not be deemed filed for purposes of the Securities Exchange Act of 1934, nor shall such information and Exhibit 99.1 be deemed incorporated by reference in any filing under the Securities Act of 1933, except as shall be expressly set forth by specific reference in such a filing.

Item 9.01 Financial Statements and Exhibits

(d) Exhibits

Exhibit No.	Description
99.1	Letter to the Financial Community, dated October 31, 2011

Forward-Looking Statements: This Form 8-K includes forward-looking statements based on information currently available to management. Such statements are subject to certain risks and uncertainties. These statements include declarations regarding management's intents, beliefs and current expectations. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "believe," "estimate" and similar words. Forward-looking statements involve estimates, assumptions, known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. Actual results may differ materially due to: the speed and nature of increased competition in the electric utility industry, the impact of the regulatory process on the pending matters in the various states in which we do business including, but not limited to, matters related to rates, the status of the PATH project in light of PJM's direction to suspend work on the project pending review of its planning process, its re-evaluation of the need for the project and the uncertainty of the timing and amounts of any related capital expenditures, business and regulatory impacts from ATSI's realignment into PJM Interconnection, L.L.C., economic or weather conditions affecting future sales and margins, changes in markets for energy services, changing energy and commodity market prices and availability, financial derivative reforms that could increase our liquidity needs and collateral costs, the continued ability of FirstEnergy's regulated utilities to collect transition and other costs, operation and maintenance costs being higher than anticipated, other legislative and regulatory changes, and revised environmental requirements, including possible GHG emission, water intake and coal combustion residual regulations, the potential impacts of any laws, rules or regulations that ultimately replace CAIR including the Cross-State Air Pollution Rule (CSAPR) and the effects of the EPA's recently released MACT proposal to establish certain mercury and other emission standards for electric generating units, the uncertainty of the timing and amounts of the capital expenditures that may arise in connection with any NSR litigation or potential regulatory initiatives or rulemakings (including that such expenditures could result in our decision to shut down or idle certain generating units), adverse regulatory or legal decisions and outcomes with respect to our nuclear operations (including, but not limited to, the revocation or non-renewal of necessary licenses, approvals or operating permits by the NRC, including as a result of the incident at Japan's Fukushima Daiichi Nuclear Plant), issues that could delay the current outage at Davis-Besse for the installation of the new reactor vessel head, including indications of cracking in the plant’s shield building currently under investigation, adverse legal decisions and outcomes related to Met-Ed's and Penelec's ability to recover certain transmission costs through their transmission service charge riders, the continuing availability of generating units and changes in their ability to operate at or near full capacity, replacement power costs being higher than anticipated or inadequately hedged, the ability to comply with applicable state and federal reliability standards and energy efficiency mandates, changes in customers' demand for power, including but not limited to, changes resulting from the implementation of state and federal energy efficiency mandates, the ability to accomplish or realize anticipated benefits from strategic goals and our ability to improve electric commodity margins and the impact of, among other factors, the increased cost of coal and coal transportation on such margins, the ability to experience growth in the distribution business, the changing market conditions that could affect the value of assets held in FirstEnergy's nuclear decommissioning trusts, pension trusts and other trust funds, and cause FirstEnergy to make additional contributions sooner, or in amounts that are larger than currently anticipated, the ability to access the public securities and other capital and credit markets in accordance with FirstEnergy's financing plan, the cost of such capital and overall condition of the capital and credit markets affecting FirstEnergy and its subsidiaries, changes in general economic conditions affecting FirstEnergy and its subsidiaries, interest rates and any actions taken by credit rating agencies that could negatively affect FirstEnergy's and its subsidiaries' access to financing or their costs and increase requirements to post additional collateral to support outstanding commodity positions, LOCs and other financial guarantees, the continuing uncertainty of the national and regional economy and its impact on the major industrial and commercial customers of FirstEnergy's subsidiaries, issues concerning the soundness of financial institutions and counterparties with which FirstEnergy and its subsidiaries do business, issues arising from the recently completed merger of FirstEnergy and Allegheny Energy, Inc. and the ongoing coordination of their combined operations including FirstEnergy's ability to maintain relationships with customers, employees or suppliers, as well as the ability to successfully integrate the businesses and realize cost savings and any other synergies and the risk that the credit ratings of the combined company or its subsidiaries may be different from what the companies expect, the risks and other factors discussed from time to time in FirstEnergy's and its applicable subsidiaries' SEC filings, and other similar factors. The foregoing review of factors should not be construed as exhaustive. New factors emerge from time to time, and it is not possible for management to predict all such factors, nor assess the impact of any such factor on FirstEnergy's business or the extent to which any factor, or combination of factors, may cause results to differ materially from those contained in any forward-looking statements. The Registrants expressly disclaim any current intention to update any forward-looking statements contained herein as a result of new information, future events or otherwise.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrants have duly caused this report to be signed on their behalf by the undersigned thereunto authorized.

October 31, 2011

FIRSTENERGY CORP.
Registrant

FIRSTENERGY SOLUTIONS CORP.
Registrant

By: /s/ Harvey L. Wagner
Harvey L. Wagner
Vice President, Controller and
Chief Accounting Officer

FirstEnergy

Exhibit 99.1

Ronald E. Seeholzer
Vice President
Investor Relations

FirstEnergy Corp.
76 S. Main Street
Akron, Ohio 44308
(330) 384-5415

October 31, 2011

TO THE INVESTMENT COMMUNITY:[1]

Our Davis-Besse Nuclear Power Station safely shut down on October 1 for a scheduled outage to install a new reactor vessel head and to complete other maintenance activities. This past weekend, the new reactor head was successfully transported into containment.

This Letter provides an update on activities at Davis-Besse, where a sub-surface hairline crack was identified in one of the exterior architectural elements on the Shield Building on October 10 following opening of the building for installation of the new reactor head. These elements serve as architectural features and do not have structural significance.

The Shield Building is a 2½-foot-thick reinforced concrete structure that provides protection from natural phenomena including wind and tornados. This building surrounds the 1½-inch carbon steel containment vessel. The containment vessel is a leak-tight pressure barrier that prevents fission products from leaving the plant. There is a 4 ½-foot air space between the containment vessel and the Shield Building. The architectural elements of the Shield Building protrude up to 18 inches from the main portion of the building.

During investigation of the crack at the Shield Building opening, concrete samples and electronic testing found similar sub-surface hairline cracks in most of the building's architectural elements. The team of industry-recognized structural concrete experts and Davis-Besse engineers evaluating this condition has determined the cracking does not affect the facility's structural integrity or safety.

Our investigation also identified other indications. Included among them were sub-surface hairline cracks in two localized areas of the Shield Building similar to those found in the architectural elements. We have determined these two areas are not associated with the architectural element cracking and are investigating them as a separate issue. Our overall investigation and analysis continues. We currently expect Davis-Besse to return to service around the end of November.

1 Please see the Forward-looking Statements at the end of this letter.

The Nuclear Regulatory Commission's (NRC) inspectors have been on site throughout the outage observing activities, including our assessment of the Shield Building cracks.

A copy of this letter and a diagram and photographs are available on our Investor Information website – *www.firstenergycorp.com/ir*.

Safety is our top priority at Davis-Besse, and we will ensure these issues are appropriately addressed before we restart the facility. As we continue this work, we will keep you informed of our progress and our safe return of Davis-Besse to service.

Upcoming FirstEnergy Investor Events

3rd Quarter, 2011 Earnings Release Conference Call
November 1, 2011

46th Annual EEI Financial Conference
November 6-9, 2011
Lake Buena Vista, FL

BMO Capital Markets 7th Annual Utilities & Pipeline Day
November 29, 2011
New York, NY

If you have any questions concerning the information in this update, please contact me at (330) 384-5415, Irene Prezelj, executive director of Investor Relations, at (330) 384-3859, or Rey Jimenez, manager of Investor Relations, at (330) 761-4239.

Sincerely,

/s/ Ronald E. Seeholzer
Ronald E. Seeholzer
Vice President, Investor Relations

Forward-looking Statements

This Letter to the Investment Community includes forward-looking statements based on information currently available to management. Such statements are subject to certain risks and uncertainties. These statements include declarations regarding management's intents, beliefs and current expectations. These statements typically contain, but are not limited to, the terms "anticipate," "potential," "expect," "believe," "estimate" and similar words. Forward-looking statements involve estimates, assumptions, known and unknown risks, uncertainties and other factors that may cause actual results, performance or achievements to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. Actual results may differ materially due to: the speed and nature of increased competition in the electric utility industry, the impact of the regulatory process on the pending matters in the various states in which we do business including, but not limited to, matters related to rates, the status of the PATH project in light of PJM's direction to suspend work on the project pending review of its planning process, its re-evaluation of the need for the project and the uncertainty of the timing and amounts of any related capital expenditures, business and regulatory impacts from ATSI's realignment into PJM Interconnection, L.L.C., economic or weather conditions affecting future sales and margins, changes in markets for energy services, changing energy and commodity market prices and availability, financial derivative reforms that could increase our liquidity needs and collateral costs, the continued ability of FirstEnergy's regulated utilities to collect transition and other costs, operation and maintenance costs being higher than anticipated, other legislative and regulatory changes, and revised environmental requirements, including possible GHG emission, water intake and coal combustion residual regulations, the potential impacts of any laws, rules or regulations that ultimately replace CAIR including the Cross-State Air Pollution Rule (CSAPR) and the effects of the EPA's recently released MACT proposal to establish certain mercury and other emission standards for electric generating units, the uncertainty of the timing and amounts of the capital expenditures that may arise in connection with any NSR litigation or potential regulatory initiatives or rulemakings (including that such expenditures could result in our decision to shut down or idle certain generating units), adverse regulatory or legal decisions and outcomes with respect to our nuclear operations (including, but not limited to, the revocation or non-renewal of necessary licenses, approvals or operating permits by the NRC, including as a result of the incident at Japan's Fukushima Daiichi Nuclear Plant), issues that could delay the current outage at Davis-Besse for the installation of the new reactor vessel head, including indications of cracking in the plant’s shield building currently under investigation, adverse legal decisions and outcomes related to Met-Ed's and Penelec's ability to recover certain transmission costs through their transmission service charge riders, the continuing availability of generating units and changes in their ability to operate at or near full capacity, replacement power costs being higher than anticipated or inadequately hedged, the ability to comply with applicable state and federal reliability standards and energy efficiency mandates, changes in customers' demand for power, including but not limited to, changes resulting from the implementation of state and federal energy efficiency mandates, the ability to accomplish or realize anticipated benefits from strategic goals, efforts, and our ability, to improve electric commodity margins and the impact of, among other factors, the increased cost of coal and coal transportation on such margins, the ability to experience growth in the distribution business, the changing market conditions that could affect the value of assets held in FirstEnergy's nuclear decommissioning trusts, pension trusts and other trust funds, and cause FirstEnergy to make additional contributions sooner, or in amounts that are larger than currently anticipated, the ability to access the public securities and other capital and credit markets in accordance with FirstEnergy's financing plan, the cost of such capital and overall condition of the capital and credit markets affecting FirstEnergy and its subsidiaries, changes in general economic conditions affecting FirstEnergy and its subsidiaries, interest rates and any actions taken by credit rating agencies that could negatively affect FirstEnergy's and its subsidiaries' access to financing or their costs and increase requirements to post additional collateral to support outstanding commodity positions, LOCs and other financial guarantees, the continuing uncertainty of the national and regional economy and its impact on the major industrial and commercial customers of FirstEnergy's subsidiaries, issues concerning the soundness of financial institutions and counterparties with which FirstEnergy and its subsidiaries do business, issues arising from the recently completed merger of FirstEnergy and Allegheny Energy, Inc. and the ongoing coordination of their combined operations including FirstEnergy's ability to maintain relationships with customers, employees or suppliers, as well as the ability to successfully integrate the businesses and realize cost savings and any other synergies and the risk that the credit ratings of the combined company or its subsidiaries may be different from what the companies expect, the risks and other factors discussed from time to time in FirstEnergy's and its applicable subsidiaries' SEC filings, and other similar factors. The foregoing review of factors should not be construed as exhaustive. New factors emerge from time to time, and it is not possible for management to predict all such factors, nor assess the impact of any such factor on FirstEnergy's business or the extent to which any factor, or combination of factors, may cause results to differ materially from those contained in any forward-looking statements. FirstEnergy expressly disclaims any current intention to update any forward-looking statements contained herein as a result of new information, future events or otherwise.