LBP-12-27

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

In the Matter of: FirstEnergy NUCLEAR OPERATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	Docket No. 50-346-LR ASLBP No. 11-907-01-LR-BD01 December 28, 2012

MEMORANDUM AND ORDER

(Denying Motions to Admit, to Amend, and to Supplement Proposed Contention 5)

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Before this Board is a motion from Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, Intervenors) seeking admission of a newly proposed contention regarding the cracking of the shield building at the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse).[1] Also before the Board are Intervenors' five motions to amend or supplement the proposed cracking contention.[2]

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

[2] See Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5' (Feb. 27, 2012) [hereinafter First Motion to Amend]; Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 4, 2012) [hereinafter Second Motion to Amend]; Intervenors' Third Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 16, 2012) [hereinafter Third Motion to Amend]; Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (July 23, 2012) [hereinafter Fourth Motion to Amend]; Intervenors' Fifth Motion To Amend and/or

Applicant, FirstEnergy Nuclear Operating Company (FENOC), opposes the Motion to Admit and its five amendments. FENOC contends that all Intervenors' motions are untimely and fail to meet the standards in 10 C.F.R. § 2.309(f)(1). The NRC Staff also opposes Intervenors' Motion to Admit and its five amendments. NRC Staff argues generally that the motions do not meet the 10 C.F.R. § 2.309(f)(1) admissibility requirements, as they raise issues that are outside the scope of this license renewal proceeding, are unsupported, and/or are immaterial.

For the reasons discussed in detail below, Intervenors' motion to admit Contention 5 and the five subsequent motions to amend and/or supplement proposed Contention 5 are DENIED.

I. Procedural Background

On August 27, 2010, FENOC submitted a License Renewal Application (LRA), requesting that the Davis-Besse operating license be renewed for an additional 20 years, i.e. until April 22, 2037.[3] The LRA was accepted for docketing and the NRC published a Notice of Opportunity for Hearing in the Federal Register on October 25, 2010.[4]

On December 27, 2010, Intervenors filed a timely Request for Public Hearing and Petition for Leave to Intervene.[5] Intervenors proposed four contentions. By Memorandum and Order issued April 26, 2011, this Board found that Intervenors had demonstrated standing, admitted three "alternative energy" contentions (as reformulated and combined into one

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Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012) [hereinafter Fifth Motion to Amend].

[3] License Renewal Application; Davis-Besse Nuclear Power Station 1.0-1, 1.1-1 (Aug. 2010) (ADAMS Accession Nos. ML102450567, ML102450563) [hereinafter Application]. The application also seeks renewal of the associated source material, special nuclear material, and by-product material licenses under 10 C.F.R. Parts 30, 40, and 70. Id. at 1.0-1.

[4] 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, Unit 1, 75 Fed. Reg. 65,528, 65,529 (Oct. 25, 2010) [hereinafter Hearing Notice].

[5] See Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010) [hereinafter Petition to Intervene].

contention designated Contention 1), and also admitted a limited severe accident mitigation alternatives (SAMA) analysis contention (Contention 4).[6]

FENOC appealed the Board's Order to the Commission.[7] On March 27, 2012, the Commission issued CLI-12-08, reversing our admission of Contention 1 and reversing in part our admission of Contention 4.[8] The Commission permitted that part of Contention 4 that relates to the Modular Accident Analysis Program (MAAP) code to move forward toward an evidentiary hearing.[9]

On January 10, 2012, Intervenors moved to admit proposed Contention 5 concerning recently discovered concrete cracking at the Davis-Besse shield building.[10] Intervenors alleged that FENOC must describe how it will manage the shield building cracking during the license renewal term and that the NRC Staff must consider the implications of the shield building cracking in its Supplemental Environmental Impact Statement (SEIS).[11] On February 6, 2012, FENOC filed an answer opposing admission of proposed Contention 5.[12] The NRC Staff filed an answer that same day, in which it maintained that a revised and substantially limited portion of proposed Contention 5 should be admitted.[13] FENOC sought leave to respond to the NRC

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[6] See LBP-11-13, 73 NRC 534, 588-89 (Apr. 26, 2011).

[7] FirstEnergy's Notice of Appeal of LBP-11-13 (May 6, 2012).

[8] CLI-12-08, 75 NRC __, __ (slip op. at 35) (Mar. 27, 2012).

[9] We address a Motion for Summary Disposition of Contention 4 filed by FENOC in a separate Order issued this day. See LBP-12-26, 76 NRC __, __ (slip op.) (Dec. 28, 2012).

[10] See Motion to Admit.

[11] Id. at 2–6.

[12] See FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 5 on Shield Building Cracking (Feb. 6, 2012) [hereinafter FENOC's Answer to Motion to Admit].

[13] See NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking at 9 (Feb. 6, 2012) [hereinafter NRC Staff's Answer to Motion to Admit].

Staff (and filed such a response) on February 9, 2012, or alternatively, proceed to oral argument on this issue.[14] The Board denied FENOC's request for leave to respond on February 13, 2012, stating, "Rather than begin a flurry of responsive pleadings, the Board believes that oral argument would be helpful in deciding the admissibility of proposed Contention 5," and noting that an oral argument would be scheduled at a later date.[15]

On February 13, 2012 Intervenors filed a combined reply to FENOC's and the NRC Staff's answers.[16] On February 23, 2012, FENOC moved to strike portions of this reply, arguing that Intervenors put forth claims beyond the scope of the initial motion and the answers.[17] FENOC further sought to strike unsupported allegations of fraud against FENOC and the NRC.[18] On February 27, 2012, Intervenors filed an answer opposing the motion to strike, claiming that the arguments in its reply were made legitimately in response to arguments in FENOC's and the NRC Staff's answers.[19] The NRC Staff filed an answer supporting the motion to strike on March 5, 2012.[20] The Board granted in part and denied in part the motion to strike

[14] See FENOC's Unopposed Motion for Leave to Respond to the NRC Staff's Answer to Proposed Contention 5 on Shield Building Cracking (Feb. 9, 2012) at 2.

[15] Licensing Board Order (Denying Unopposed Motion for Leave to Respond to NRC Staff's Answer to Proposed Contention 5 and Setting Proposed Contention 5's Admissibility for Oral Argument) (Feb. 13, 2012) (unpublished).

[16] See Intervenors' Combined Reply in Support of Motion for Admission of Contention No. 5 (Feb. 13, 2012) [hereinafter Intervenors' Reply to Motion to Admit Answers].

[17] FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking (Feb. 23, 2012) [hereinafter Motion to Strike].

[18] Motion to Strike at 1.

[19] Intervenors' Answer to FENOC 'Motion to Strike' at 1 (Feb. 27, 2012).

[20] See NRC Staff's Answer to FENOC's Motion to Strike Portions of Intervenors' Reply for the Proposed Contention 5 on Shield Building Cracking (Mar. 5, 2012).

on October 11, 2012 and admonished Intervenors for their unsubstantiated charges of fraud against FENOC and the NRC Staff.[21]

On February 27, 2012, Intervenors moved to amend proposed Contention 5, seeking to add as allegations of fact a February 8, 2012 press release from Congressman Dennis Kucinich, and a January 31, 2012 NRC inspection report.[22] FENOC and the NRC Staff each filed answers opposing Intervenors' motion to amend on March 8, 2012.[23]

On March 28, 2012, this Board issued an Order setting the admissibility of proposed Contention 5 for oral argument to be held on May 18, 2012, in Port Clinton, Ohio.[24]

On April 5, 2012, FENOC notified the Board that it had submitted revisions to the LRA.[25] The LRA revisions included, among other things, a new aging management program (AMP) in Section B.2.43, "Shield Building Monitoring Program," that FENOC contends "ensure[s] that the intended functions of the Shield Building are maintained during the period of extended operation."[26] On April 16, 2012, FENOC filed an unopposed motion to supplement its answer, alleging that this new AMP moots both (1) Contention 5's challenges to whether FENOC

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[21] Licensing Board Order (Granting in Part and Denying in Part Motion to Strike) (Oct. 11, 2012) (unpublished).

[22] First Motion to Amend at 1–3.

[23] See FENOC's Answer Opposing Intervenors' Motion to Amend Proposed Contention 5 on Shield Building Cracking (Mar. 8, 2012); NRC Staff's Answer to Intervenors' Motion to Amend 'Motion for Admission of Contention No. 5' (Mar. 8, 2012) [hereinafter NRC Staff's Answer to First Motion to Amend].

[24] Licensing Board Notice and Order (Scheduling Oral Argument) (Mar. 28, 2012) at 3 (unpublished).

[25] Letter from T. Matthews, FENOC Counsel, to the Board, Notification of Filing Related to Proposed Shield Building Cracking Contention (Apr. 5, 2012).

[26] Enclosure L-12-028, Amendment No. 25 to the DBNPS License Renewal Application (Apr. 5, 2012) at 10 (appended to "Attachment L-12-028" of the Board Notification's Enclosure 1, Reply to Request for Additional Information for the Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application (TAC No. ME4640) and License Renewal Application Amendment No. 25 (Apr. 5, 2012)).

addressed aging management of Shield Building cracking, and (2) the revised contention of omission set forth by the NRC Staff in its answer.[27] While Intervenors reserved the right to file a reply as a condition of not opposing FENOC's motion,[28] they never filed such a pleading. The Board subsequently granted FENOC's motion for leave to supplement its answer.[29]

On May 14, 2012, Intervenors filed an unopposed motion to vacate and reschedule the oral argument previously scheduled for May 18, 2012.[30] Intervenors noted that they planned to file a motion to amend the proposed Contention 5 based on the revisions to FENOC's license renewal application explained in FENOC's April 5, 2012 filing.[31] On May 15, 2012, the Board granted Intervenors' request and cancelled the oral argument, noting that another oral argument would be scheduled in the future should the Board deem it necessary.[32]

On June 4, 2012, Intervenors filed a second motion to amend Contention 5.[33] FENOC filed an answer opposing the motion to amend on June 29, 2012.[34] The NRC Staff also filed an answer on that same day, noting that it no longer supported the admission of a limited version of

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[27] FENOC's Unopposed Motion for Leave to Supplement Its Answer to the Proposed Shield Building Cracking Contention (Apr. 16, 2012).

[28] Id. at 2 n.7.

[29] Licensing Board Order (Granting FENOC's Unopposed Motion for Leave to Supplement Its Answer to the Proposed Shield Building Cracking Contention) (Apr. 17, 2012) (unpublished).

[30] See Intervenors' Unopposed Motion to Vacate and Reschedule Oral Argument on Proposed Contention No. 5 (May 14, 2012).

[31] Id. at 2.

[32] Licensing Board Order (Granting Unopposed Motion to Vacate Oral Argument) (May 15, 2012) at 2–3 (unpublished).

[33] See Second Motion to Amend.

[34] FENOC's Answer Opposing Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking) (June 29, 2012).

Contention 5, because FENOC's April 5 filing now adequately addressed its concerns.[35] Intervenors filed a reply on July 6, 2012.[36]

On July 16, 2012, Intervenors filed a third motion to amend Contention 5[37] and on July 23, 2012, Intervenors filed a fourth motion to amend Contention 5.[38] At the instruction of the Board,[39] on August 17, 2012, FENOC[40] and the NRC Staff [41] each filed a combined answer to the third and fourth motions to amend. Intervenors filed a combined reply to the combined answers on August 24, 2012.[42]

On August 16, 2012, Intervenors filed a fifth motion to amend Contention 5.[43] On September 10, 2012, FENOC and the NRC Staff filed answers opposing the fifth motion to

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[35] NRC Staff's Answer to Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking at 2 (June 29, 2010).

[36] Intervenors' Combined Reply to FENOC and NRC Staff Opposition to 'Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking)' (July 6, 2012) [hereinafter NRC Staff's Answer to Second Motion to Amend].

[37] See Third Motion to Amend.

[38] See Fourth Motion to Amend.

[39] Licensing Board Order (Setting Dates for Answers and Reply to Motions to Amend Contention 5) (July 17, 2012) (unpublished).

[40] FENOC's Answer Opposing Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 17, 2012) [hereinafter FENOC's Answer to Third and Fourth Motions to Amend].

[41] NRC Staff's Answer to Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 17, 2012) [hereinafter NRC Staff's Answer to Third and Fourth Motions to Amend].

[42] Intervenors' Combined Reply to NRC and FENOC Answers to Intervenors' Third and Fourth Motions to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 24, 2012) [hereinafter Intervenors' Combined Reply to the Combined Answers].

[43] Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Aug. 16, 2012) [hereinafter Fifth Motion to Amend].

amend.[44] This Board convened an oral argument on the admissibility of Contention 5 and the five motions to supplement or amend on November 5 and 6, 2012, in Toledo, Ohio.[45]

II. Legal Standards[46]

The admissibility of a new or amended contention is governed by three sets of regulations: 10 C.F.R. § 2.309(f)(1)(i)–(vi) sets forth the general admissibility requirements for all contentions, 10 C.F.R. § 2.309(f)(2)(i)–(iii) sets forth the admissibility requirements for new or amended contentions filed after the deadline for receipt of petitions to intervene has passed, and 10 C.F.R. § 2.309(c) sets forth the admissibility requirement for non-timely contentions.

a. General Requirements for Admissibility

10 C.F.R. § 2.309(f)(1) provides the general requirements for admissibility for all contentions.[47] Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) 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 at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a

[44] FENOC's Answer Opposing Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Sept. 10, 2012) [hereinafter FENOC's Answer to Fifth Motion to Amend]; NRC Staff's Answer to Intervenors' Fifth Motion to Amend and/or Supplement Proposed Contention No. 5 (Shield Building Cracking) (Sept. 10, 2012) [hereinafter NRC Staff's Answer to Fifth Motion to Amend].

[45] See Tr. at 275–712.

[46] NRC's "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders" are set forth in 10 C.F.R. Part 2. Some of these regulations were amended on August 3, 2012. Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562 (Aug. 3, 2012). These amendments "govern all obligations and disputes that arise after the effective date of the final rule," September 4, 2012. Id. at 46,562. Because Intervenors filed the Motion to Admit Contention 5 before September 4, 2012, this dispute arose before the effective date of the amendments. Therefore, all citations in this Order are to the regulations as they existed prior to the above amendments.

[47] The August 3, 2012 amendments to the Part 2 regulations did not change the six basic requirements of 10 C.F.R. § 2.309(f)(1)(i)–(vi).

material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[48] In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding."[49] Failure to comply with any of these requirements is grounds for not admitting a contention.[50] The Commission has explained that its "strict contention rule is designed to avoid resource-intensive hearings where petitioners have not provided sufficient support for their technical claims, and do not demonstrate a potential to meaningfully participate and inform a hearing."[51]

b. Timeliness of New or Amended Contentions

In addition to satisfying 10 C.F.R. § 2.309(f)(1), Intervenors must also satisfy the timeliness requirements of § 2.309(f)(2) or § 2.309(c).

If a contention is submitted after the initial filing period for receipt of petitions to intervene – in this case the initial filing deadline was December 27, 2010[52] – Intervenors must satisfy § 2.309(f)(2). To file an admissible contention under § 2.309(f)(2), with leave of the Board, Intervenors must show that:

(i) The information upon which the amended or new contention is based was not previously available;

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[48] See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), (vi).

[49] Id. § 2.309(f)(1)(iii), (iv).

[50] See South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 & n.33 (2010).

[51] CLI-12-08, 75 NRC at __ (slip op. at 31).

[52] Hearing Notice, 75 Fed. Reg. at 65,528–529.

(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.[53]

In this case, a contention or an amendment or supplement to a contention is considered timely under section 2.309(f)(2)(iii) if the contention, amendment, or supplement is filed "within sixty (60) days of the date when the material information on which it is based first becomes available to the moving party through service, publication, or any other means. If filed thereafter, the motion and proposed contention shall be deemed non-timely under 10 C.F.R. § 2.309(c)."[54]

A contention that does not meet the timeliness requirements of 10 C.F.R. § 2.309(f)(2)(i) –(iii) might be admissible as a non-timely contention under 10 C.F.R. § 2.309(c).[55] Section 2.309(c) sets out an eight-factor balancing test to determine whether the non-timely contention should be admitted.[56] Of the eight factors, the first factor — good cause for the failure to file on

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[53] 10 C.F.R. § 2.309(f)(2)(i)–(iii)

[54] Initial Scheduling Order (June 15, 2011) at 12 (unpublished) [hereinafter ISO].

[55] A petitioner can justify filing a petition after the initial deadline has expired in one of two ways. First, the petitioner can show that the contention is based on new information (i.e., material information that was not previously available) and that the petition was filed promptly after the new information became available. See 10 C.F.R. § 2.309(c)(1)(i)–(iii); 77 Fed. Reg. at 46,591. Alternatively, the petitioner can justify missing the filing deadline by showing that the delay was caused by factors such as a weather event or unexpected health issues. See 10 C.F.R. §§ 2.309(c)(2), 2.307; 77 Fed. Reg. at 46,571, 46,591.

[56] The eight-factor test provided in § 2.309(c) is as follows:

(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;

time — is afforded the most weight.[57] The burden is on the Intervenor to demonstrate "that a balancing of the factors weighs in favor of granting the petition."[58]

c. NRC Case Law

i. Scope of License Renewal Proceedings

NRC regulations limit the scope of a license renewal proceeding to the specific matters that must be considered for the license renewal application to be granted.[59] All contentions must be within the scope of the proceeding as defined by the Commission in its initial Notice and Order referring the proceeding to the Licensing Board.[60] Any contention that falls outside the specified scope of the proceeding must be rejected.[61]

(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.

10 C.F.R. § 2.309(c)(1).

[57] See, e.g., 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.").

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

[59] See Final Rule: "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461 (May 8, 1995); Final Rule: "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943 (Dec. 13, 1991).

[60] See 10 C.F.R. § 2.309(f)(1)(iii); Florida Power & Light Co. (Turkey Point Nuclear Generating Plants, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790–91 (1985).

[61] See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-12, 74 NRC __, __ (slip op. at 11) (Oct. 12, 2011).

ii. Materiality

To be admissible, the regulations require that all contentions proffer an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application.[62] This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment.[63]

iii. Must Raise a Genuine Dispute

A properly formulated contention must focus on the license application in question, challenging either specific portions of, or alleged omissions from, the application (including the safety analysis report/technical report and the ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact.[64] Any contention that fails to directly controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed.[65]

iv. Need for Adequate Factual Information or Expert Opinion

To trigger a full adjudicatory hearing, petitioners must be able to "proffer at least some

[62] See 10 C.F.R. § 2.309(f)(1)(iv).

[63] See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996); see also Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439–41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

[64] See 10 C.F.R. § 2.309(f)(1)(vi).

[65] See Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 557 (2009); USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 462–63 (2006).

minimal factual and legal foundation in support of their contentions."[66] It is the petitioner's obligation to present factual allegations and/or expert opinion necessary to support its contention.[67] While a board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected.[68] Neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention.[69] If a petitioner neglects to provide the requisite support for its contentions, it is not within the board's power to make assumptions or draw inferences that favor the petitioner, nor may the board supply information that is lacking.[70] Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.[71]

III. Analysis and Ruling

Intervenors filed proposed Contention 5 on January 10, 2012. The wording of the contention has not changed in any of the subsequent motions to amend or supplement. The proposed contention reads as follows:

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[66] Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[67] See 10 C.F.R. § 2.309(f)(1)(v); American Centrifuge Plant, CLI-06-10, 63 NRC at 457.

[68] See Arizona Pub. Serv. Co. (Palo Verde Nuclear Stations, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155 (1991).

[69] See American Centrifuge Plant, CLI-06-10, 63 NRC at 472; Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[70] See North Trend Expansion Project, CLI-09-12, 69 NRC at 553; Palo Verde, CLI-91-12, 34 NRC at 155.

[71] See Fansteel, CLI-03-13, 58 NRC at 204–05.

> 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.[72]

a. Timeliness

FENOC states that "[o]n October 10, 2011, workers identified indications of cracking below the surface of the Shield Building."[73] FENOC further states that on October 10, 2011 it promptly notified the NRC Resident Inspector, placed the issue into the Corrective Action Program, and mobilized a team of experts to conduct an investigation, which included extensive visual inspections, electronic testing, and concrete sampling of the building's walls, and architectural elements.[74] Over the succeeding months, numerous tests, inspections, evaluations, and reports were issued concerning the source, severity and impact of the cracking. On January 5, 2012, in Camp Perry, Ohio, FENOC made a presentation at an NRC public meeting to explain to the community its and the NRC's plans to address the shield building cracking.[75] FENOC was directed to submit a Root Cause Evaluation to the NRC by February 28, 2012.[76]

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[72] Motion to Admit at 11. During oral argument, the Board inquired whether Intervenors wanted the Board to formulate a revised contention based on Intervenors' Motions to Amend and/or Supplement because the wording of the original contention did not change through the course of the Motions. See Tr. at 581. Intervenors declared that there is no change in the wording of the original contention even though they submitted five subsequent Motions to Amend and/or Supplement the Motion to Admit. See Tr. at 581–82.

[73] FENOC's Answer to Motion to Admit at 4.

[74] Id. at 6.

[75] See FENOC's Answer to First Motion to Amend, Att. 2, Davis-Besse Nuclear Power Station, Nuclear Regulatory Commission Public Meeting January 5, 2012.

[76] Letter from Cynthia D. Pederson, Acting Regional Administrator, US NRC, to Barry Allen, Site Vice President, FENOC, Confirmatory Action Letter – Davis-Besse Nuclear Power Station (Dec. 2, 2011) (ADAMS Accession No. ML11336A355) [hereinafter CAL].[76]

There has been extensive debate among the parties in their pleadings[77] and at oral argument[78] about whether Intervenors' motion to admit was timely filed within 60 days of the date when the information upon which the motion is based first became available through service, publication, or any other means.

Intervenors state that Contention 5 is timely under § 2.309(f)(2),[79] but do not explain how their pleading meets the standards in § 2.309(f)(2).[80] The Initial Scheduling Order (ISO) in this case instructs that if there is any uncertainty whether a new or amended contention was timely, Intervenors could argue timeliness under § 2.309(f)(2) or § 2.309(c).[81] Intervenors did not address either of these sections.

In their motion, Intervenors argue that Contention 5 is "based on structural damage — cracks — which were noticed by FENOC's contractors or employees in September 2011 and soon reported to the NRC."[82] Intervenors contend that initially FENOC described the cracks to be "superficial, cosmetic, [and] non-structural."[83] Intervenors argue that they only discovered

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[77] See Motion to Admit at 6–10; Staff's Answer to Motion to Amend at 9-14; FENOC's Answer to Motion to Admit at 12–16; Intervenors' Reply to Motion to Admit Answers at 1–7;

[78] See generally Tr. at 425–500.

[79] Intervenors' Reply to Answers to Motion to Admit at 6–7 (arguing that their Motion is based on Congressman's Kucinich's December 7, 2011 press release and the Motion was filed 34 days after learning of the facts in the press release).

[80] See Motion to Admit at 6–9. 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 in this case." Id. at 7 (citing Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 166 n.11 (2007)).

[81] See ISO at B.1.

[82] Motion to Admit at 8. The Staff contends that the cracks were actually noticed on October 2011. See NRC Staff's Answer to Motion to Admit at 3 n.10 (citing CAL).

[83] Motion to Admit at 19.

that the cracks were not limited to architecturally "decorative" elements of the building during a January 5, 2012 public NRC meeting.[84]

Intervenors also contend that their motion is based on a December 7, 2011 press release and information from the January 5, 2012 public NRC meeting. However, throughout their motion, Intervenors cite earlier materials. For instance, Intervenors cite to an October 31, 2011 letter FENOC sent to its investors that referred to "sub-surface hairline cracks in most of the building's architectural elements."[85] Intervenors also refer to a November 1, 2011 Toledo Blade article discussing the letter to investors.[86] Intervenors cite a November 20, 2011 Toledo Blade article that states "[t]he areas where most of the cracks have appears have structural significance, and are not merely 'architectural elements.'"[87]

While the above is only a sampling of the various materials referenced throughout the parties' filings and oral argument regarding the timeliness of this motion, the NRC Staff and FENOC argue that Intervenors were untimely in filing their motion to admit because information about the shield building cracks was available as early as November 1, 2011[88] and Intervenors' motion was not filed until January 10, 2012, more than 70 days later.[89]

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[84] Id. at 8.

[85] As a note, at oral argument, Judge Froehlich asked FENOC how widely the letter to investors was distributed. See Tr. at 498. Counsel for FENOC indicated that the letter was sent to news outlets and financial media. See id.

[86] Motion to Admit at 18–19.

[87] Id. at 24.

[88] FENOC argues that information about the cracking was available as early as October 12, 2011. See FENOC's Answer to Motion to Admit at 12 (citing Motion to Admit at 19).

[89] See NRC Staff's Answer to Motion to Admit at 12.

The NRC Staff maintains the contention was untimely under 10 C.F.R. § 2.309(f)(2) and notes that Intervenors failed to address the timeliness standards in 10 C.F.R. § 2.309(c).[90] NRC Staff argues, nonetheless, "that [the] Intervenors' Motion demonstrates good cause, as well as meets the other § 2.309(c) factors."[91] The NRC Staff states that by their calculation, the filing was only ten days late and the 60-day period contained several holidays. In addition, the NRC Staff argues that while Intervenors did not plead the § 2.309(c) factors, Intervenors meet the factors: Intervenors are a party to the proceeding and a have a significant interest in their proceeding, Intervenors' participation will not broaden the issues or delay the proceeding because their concerns mirror the NRC's inquiries outlined in the December 27, 2011 Requests for Additional Information, and were Intervenors to obtain experts on this issue it would assist in developing the record.[92]

In FENOC's February 6, 2012 answer opposing Intervenors' motion for admission of Contention 5 FENOC charges that Intervenors' motion is either too late (filed more than 60 days from when the cracking was first discovered) or too early (because it was filed before a Root Causes Report was prepared).[93] FENOC also argues the contention is untimely because it was filed more than 60 days after the first discovery of cracks in the shield building and more than 60 days after FENOC's disclosure and letter to investors dated October 31, 2012.[94] FENOC further argues that Intervenors' motion to admit should be denied on multiple grounds: (1) the motion is untimely under 10 C.F.R. § 2.309(f)(2);[95] (2) the motion does not satisfy the late-filed

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[90] Id. at 12–13.

[91] Id. at 13.

[92] Id. at 13–14.

[93] FENOC's Answer to Motion to Admit at 2–3.

[94] Id. at 14.

[95] Id. at 12–16.

requirements of 10 C.F.R. § 2.309(c)(1)[96] because Intervenors have not shown good cause for failing to file on time[97] and (3) Intervenors have not made a compelling showing on the remaining factors.[98] Additionally, FENOC states, that the motion's reference to future documents is premature and does not cure its untimeliness.[99]

Clearly, this contention was filed more than 60 days after the cracking was first discovered and reported by FENOC. It is also clear that it was filed more than 60 days after Intervenors first learned that there were cracks discovered in the shield building. It is less clear that the contention was filed more than 60 days after the extent of the cracking was first known or the cause of the cracking was understood by FENOC, the NRC, or Intervenors.

From the myriad of dates bandied about by the parties, it is apparent to this Board that there were fast-emerging developments following the initial discovery of the cracks. The issuance of the FENOC letter to its investors and the wording of the letter clearly were insufficient to alert members of the public as to the significance of the cracking. In fact, the full scope of the nature and severity of the cracks did not become known until the study and testing of those cracks were conducted which was sometime after the initial discovery of the cracking. It thus is difficult to peg the exact date when Intervenors would have had enough information to prepare their contention.

That being said, we find the analysis advanced by the NRC Staff on the issue of

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[96] Id. at 16–17.

[97] Id. at 17–18.

[98] Id. at 18–20.

[99] Id. at 20–22. FENOC argues that Intervenors' reference to future documents, such as the Draft Supplemental Environmental Impact Statement (DEIS), does not cure the untimeliness of the Motion to Admit. See id. at 20–21 (quoting Motion to Admit at 8–9) (asserting that the DEIS "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.").

timeliness helpful. Adopting the NRC Staff's pragmatic application of § 2.309(c) standards the Board concludes that even assuming the contention does not meet the strict 60-day deadline in our ISO, the contention would meet the non-timely requirements of § 2.309(c). The contention was submitted in a reasonable timeframe from when facts solely in the Applicant's possession became known to the NRC and interested members of the public. Intervenors found themselves in a position in which they had to assemble bits and pieces of information that became publicly available in the weeks following the first discovery of the cracking. Although the cracks were discovered on October 10, 2011, the extent of the cracking, the cause of the cracking and the options for addressing the cracks were not known until weeks later. Because our ISO requires that Intervenors file a new contention within 60 days of when the information on which it is based first becomes known, we certainly cannot fault the Intervenors for their filing on January 10, 2012 that was based on a December 7, 2011 press release by Congressman Dennis Kucinich, the Staff's December 27, 2011 Request for Additional Information, and the January 5, 2011 public meeting. Using any of these dates, the Motion was filed within 60 days of the information becoming available pursuant to § 2.309(f)(2)(iii).[100]

Intervenors also argue that the information in these sources is new and materially different from information previously available; thus, satisfying §§ 2.309(f)(2)(i) and (ii).[101] We agree and therefore find that Intervenors' contention filed on January 10, 2012 is not time-barred for consideration in this proceeding. It is simply not reasonable to expect an intervenor to craft a contention that meets the high standards in § 2.309(f)(1) on the mere announcement by a licensee that cracks were discovered during a scheduled outage. In this case, the contention was filed promptly after the January 5, 2012 NRC/FENOC public meeting during which it became clear that cracking was not limited to architecturally "decorative" elements of the

[100] See Reply to Motion to Admit Answers at 6–7; see also Motion to Admit at 55.

[101] See id.

building, as was originally believed. This is well within the 60 days required by our ISO.[102] The timing of the filing of this contention thus meets the requirement of 10 C.F.R. § 2.309(f)(2). Moreover, even if it were to be considered non-timely and putting aside that Intervenors did not seek leave from the presiding officer, they have met the requirements of 10 C.F.R. § 2.309(f)(2)(i) –(iii).[103]

b. Admissibility

Before we turn to the admissibility of Contention 5, we address Intervenors' five motions to supplement and/or amend Contention 5. After all, we cannot determine if a contention is admissible until we understand the scope of that contention.

1. Motions to Amend

As a preliminary matter, we note that none of Intervenors' motions to amend seeks to change the statement of the contention as originally proposed. These motions do not seek to admit new or amended versions of Contention 5. Rather, Intervenors' apparent intention in submitting these motions was simply to provide additional supporting factual information.[104]

In addition, we reiterate that motions to amend a contention are subject to the requirements of 10 C.F.R. § 2.309(f)(2). Such motions must be based on new information

[102] FENOC notes in its Answer to the First Motion to Amend that this Board has strictly interpreted timeliness requirements that are based on information availability. While that is correct, it is important to note that in this instance, the information necessary for a petitioner to form a contention was in the possession of the applicant and its consultants. For the purpose of determining timeliness this is distinguishable from the situation where the actions of the moving party are based entirely on matters within that moving party's sole control. See FENOC's Answer to First Motion to Amend at 8 n.39.

[103] The revised rules no longer require leave from the presiding officer. Compare § 2.309(f)(2) (2012) with § 2.309(f)(2) (2013).

[104] A more efficient course might have been to present these "facts" at an evidentiary hearing rather than filing multiple motions to supplement the contention.

that is materially different from information previously available.[105] In addition, such motions must be submitted in a timely fashion.[106]

a. First Motion to Amend

In their first motion to amend, Intervenors seek to supplement Contention 5 with two pieces of information: a press release from Congressman Dennis Kucinich entitled, "Why Won't FirstEnergy Tell the Truth About Davis-Besse?", and a January 31, 2012 Davis-Besse inspection report.[107]

We deny this motion for multiple reasons. First, Intervenors did not certify that they consulted with the other parties prior to submitting this motion. NRC regulations make clear that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."[108] In addition, our ISO reiterated this requirement: "[M]otions will be summarily rejected if they do not include the certification specified in 10 C.F.R. § 2.323(b) that a sincere attempt to resolve the issues has been made."[109]

While Intervenors seemed to suggest at oral argument that the consultation and certification requirement is unnecessary,[110] the value of that regulation is not an issue on which

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[105] 10 C.F.R. § 2.309(f)(2)(i), (ii).

[106] Id. § 2.309(f)(2)(iii).

[107] First Motion to Amend at 2–3.

[108] 10 C.F.R. § 2.323(b).

[109] ISO at 18.

[110] See Tr. at 629 (Intervenors' counsel asked, rhetorically, "[A]fter we filed the initial January 10th motion, what would the genuine, substantive meaning of consultation really have been after that?"). While counsel may perceive that there is little likelihood that other parties to the proceeding will accede to the relief sought in the motion, that does not excuse him from making a good faith attempt to reach a resolution before bringing the matter to the Board.

this Board may rule. And even if we could, it should be apparent from our reiteration of this requirement in our ISO that we consider it to have great value and desire that it be followed by the parties.

In addition, Intervenors do not articulate how the information in these sources is new or materially different.[111] For example, as noted by both the NRC Staff and FENOC, Intervenors cite to the January 31 inspection report that they previously referred to in their Reply to the Answers to the original Motion to Admit.[112]

Moreover, the February 8, 2012 Kucinich press release appears to contain information that Intervenors already pled in their January 10, 2012 Motion to Admit. For instance, the February 8, 2012 press release speaks about the shield building cracks not only being "architectural" or "decorative" elements of the shield building wall.[113] Intervenors stated this same information in their Motion to Admit.[114] Intervenors cannot simply point to "documents merely summarizing earlier documents or compiling preexisting, publicly available information into a single source…[as doing so]… do[es] not render 'new' the summarized or compiled information."[115]

For these multiple reasons, Intervenors' first motion to amend Contention 5 is DENIED.

b. Second Motion to Amend

Intervenors state that their purpose in filing their second motion to amend is to "expos[e] discrepancies between FENOC's February 27, 2012 "Root Cause Analysis Report" and

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[111] See generally First Motion to Amend.

[112] See Intervenors' Reply to Motion to Admit Answers at 3.

[113] First Motion to Amend at 12.

[114] Motion to Admit at 8.

[115] Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 344 (2011).

[FENOC's Aging Management Plan]."[116] Once again, Intervenors failed to provide the required certification that it had consulted in good faith with the other parties prior to filing this motion. For this reason alone, Intervenors' second motion could be denied.

Intervenors' second Motion to Amend highlights the differences between the February Root Cause Report and the Shield Building AMP.[117] There is no showing as to the significance of any of the "differences" highlighted. Intervenors' challenge to the AMP must consist of more than allegations that the AMP is deficient.[118] Intervenors must point to specific ways the AMP is inadequate or wrong.[119] Indeed, at the time the second motion to amend was filed, Intervenors had the opportunity to timely connect their AMP deficiency arguments to the License Renewal Application. They did not do so. They have simply stated that the testing of the shield building under the AMP is too infrequent.[120] There is nothing in Intervenors' pleadings as to what the inspection frequency should be or why the frequency selected by the Applicant is inadequate. In addition, Intervenors' second motion to amend challenges issues that are outside the scope of the license renewal application process, such as the safety culture at Davis-Besse.[121]

For all these reasons, Intervenors' second motion to amend Contention 5 is DENIED.

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[116] Second Motion to Amend at 2.

[117] See generally id.

[118] See Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010).

[119] Id.

[120] See Tr. at 541–42, 580.

[121] See, e.g., Second Motion to Amend at 17, 18. The Commission has found that these type of "safety culture" arguments are outside the scope of license renewal because the arguments raise issues that are relevant to current plant operation. See Northern States Power Co. (Prairie Island Nuclear Generating Plants, Units 1 and 2), CLI-10-27, 72 NRC 481, 490–92; see also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plants, Units 1 and 2), CLI-11-11, 74 NRC __, __(slip op. at 9–13) (Oct. 12, 2011).

c. Third Motion to Amend

Intervenors claim that the purpose of their third motion to amend is to "address inconsistencies between the Revised Root Cause Analysis ('RRCA') and the Shield Building Monitoring AMP."[122] In this motion, Intervenors discuss eleven alleged discrepancies between the RRCA and the Shield Building AMP.

There are a number of problems with this motion. First, it is not based on new and materially different information, as required by 10 C.F.R. § 2.309(f)(2)(i) and (ii). While Intervenors' motion highlights discrepancies between the RRCA and the Shield Building AMP, as explained above, Intervenors do not explain how the information contained within the RRCA is materially different than information previously available. Even where Intervenors cite to actual revisions to the Root Cause Report, they fail to indicate how that information is materially different from information previously available. Instead, Intervenors offer bare assertions that because words changed between the Root Cause Report and the Revised Root Cause Report, the changes are material. Bare assertions, such as these, are insufficient to support admission of a contention.[123]

Second, it is simply not clear to us what purpose highlighting the inconsistencies between these two documents is meant to serve. Intervenors do not appear to challenge the contents of the Shield Building AMP, or otherwise state how the contents of this motion would support the admissibility of Contention 5.

Third, to the extent Intervenors are challenging the conclusions of the RRCA regarding the root cause of the cracking (and it is unclear to us whether they intend to mount such a

[122] Third Motion to Amend at 3.

[123] See, e.g., Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __, __ n.139 (slip op. at 34 n.139) (Oct. 12, 2011).

challenge), they have not demonstrated how such a challenge is material to the decision the NRC must make regarding FENOC's LRA.

Finally, Intervenors do not identify why the Shield Building AMP is inadequate nor do Intervenors explain how the purported inconsistencies alter the language of the proposed contention.[124] For these reasons, the third motion to amend Contention 5 is DENIED.

d. Fourth Motion to Amend

Intervenors state that the purpose of the fourth motion to amend is to demonstrate inconsistencies between FENOC's February 2012 Root Cause Report and the findings of an April 20, 2012 report, "Root Cause Assessment: Davis-Besse Shield Building Laminar Cracking, Vol. 1," (Revised PII Report)[125] by FENOC's consultant, Performance Improvement International (PII).[126] The fourth motion highlights 27 alleged discrepancies, consisting of revisions made to the PII Report. Intervenors argue that the revisions made to the PII Report were "quite significant."[127]

We also find that Intervenors' fourth Motion to Amend fails for multiple reasons. First, Intervenors do not demonstrate how any of the documents cited to in this motion are both new and materially different from information previously available. While it is clear that the PII Report is "new," Intervenors do not demonstrate how the information contained within that report is new and materially different. Intervenors merely point to differences (or "itemize the divergences")[128] between the Root Cause Report and the Revised PII Report, but do not make any effort to explain how those differences are material.

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[124] See Third Motion to Amend.

[125] Available at ADAMS Accession No. ML12138A037.

[126] Fourth Motion to Amend at 2.

[127] Id. at 3.

[128] Id. at 2.

Once again, Intervenors do not demonstrate how highlighting discrepancies between two documents amounts to a material dispute with FENOC's LRA. Intervenors seem to suggest that PII's responses to certain questions from the NRC were inadequate, and that the NRC's questions themselves demonstrate the inadequacy of the Shield Building Monitoring AMP.[129] However, these claims amount to mere speculation – the fact that the NRC posed questions to PII does not demonstrate that either the RRCA or the AMP is flawed. Asking questions and seeking additional information is an essential part of the NRC's licensing process, and it is clear that such questioning does not automatically give rise to an admissible contention.[130]

The fourth motion to admit also contains claims challenging Davis-Besse's current operations and its "Safety Culture." These issues are beyond the scope of this relicensing proceeding.

For these reasons, the fourth motion to amend Contention 5 is DENIED.

e. Fifth Motion to Amend

Intervenors' fifth motion is based on documents from Appendix B of NRC's June 12, 2012 response to Intervenors' January 26, 2012 Freedom of Information Act (FOIA) request.[131] In an almost 90-page section titled "Issues of Fact and Inconsistencies," Intervenors discuss 43 documents disclosed through their FOIA request and assert that the FOIA documents contain new and materially different information that support their proposed Contention 5.[132]

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[129] Id. at 37.

[130] See, e.g., Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999) ("To satisfy the Commission's contention rule, petitioners must do more than rest on mere existence of [Requests for Additional Information] as a basis for their contention.").

[131] Fifth Motion to Amend at 1.

[132] See id. at 5–91.

The FOIA documents range from NRC's questions for FENOC[133] to presentation slides.[134] For example, several of the documents that Intervenors refer to are internal emails between NRC employees regarding the Davis-Besse restart in December 2011.[135] Intervenors argue that these internal emails demonstrate that the NRC had concerns about the December 2, 2011 restart and the results of the root cause analysis done by FENOC and PII.[136]

This motion likewise is flawed. Intervenors do not demonstrate how the information contained in this motion is new and materially different from information previously available, as required by 10 C.F.R. § 2.309(i) and (ii). While some of this information may be "new," Intervenors fail to show that it is materially different from information previously available. In other words, Intervenors do not establish that the information is different in a material way. For example, Intervenors point to the existence of internal disagreement amongst members of the NRC Staff at some point during the investigation into the shield building cracking as proof that the shield building is more damaged than the NRC is letting on.[137] Such an argument is plainly speculative, and moreover, Intervenors do not demonstrate that such internal communication is material to NRC's ultimate licensing decision.

For failure to demonstrate that it is based on new and materially different information, Intervenors' fifth motion to amend Contention 5 is DENIED.

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[133] See, e.g., id. at 14–16 ("Document B/10 [11/07/11: Davis Besse Shield Building Issue NRC Technical Reviewer Focus Questions. (1 Page)]").

[134] See, e.g., id. at 60–65 ("Document B/41 [12/06/11; Presentation Slides on Davis-Besse Shield Building Crack. (6 pages)]").

[135] See id. at 12-14, 39–41. As a note, Intervenors referred to these same emails in their Fourth Motion to Amend. See Fourth Motion to Amend at 21–24, 36.

[136] See Fifth Motion to Amend at 12-14, 39–41. Intervenors asserted these same arguments in their Fourth Motion to Amend. See Fourth Motion to Amend at 21–24, 36.

[137] See Fifth Motion to Amend at 13–14.

2. Analysis of Admissibility of Contention 5

As noted above, we have found that Contention 5 itself was filed in a timely manner.[138] Therefore, for Contention 5 to be admissible, it must satisfy the requirements of 10 C.F.R. § 2.309(f)(1) enumerated above.[139]

Because we have denied all of Intervenors' five motions to amend or supplement, we review Contention 5 as it appears in Intervenors' initial Motion to Admit. It reads as follows:

> 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.[140]

A close analysis of Intervenors' proposed contention shows it is comprised of three central concerns:

1) There is extensive cracking of unknown origin in the shield building structure,

2) The cracking is an aging-related feature of the plant,[141] and

3) This condition precludes safe operation.

These three elements of the contention have been addressed by FENOC and the NRC Staff. Regarding Point 1, FENOC has conducted numerous tests to determine the origin and the extent of the cracks. Specifically, based on a Root Cause Report, a Revised Root Cause Report, and a report by PII, FENOC concluded that a 1978 blizzard was the root cause of the

[138] See supra at 20.

[139] See supra at 8-9.

[140] Motion to Admit at 11.

[141] Intervenors' contention seems to imply that there is no plan to deal with the alleged age-related cracking. This is because the contention was lodged before FENOC filed its shield building aging management plan. As noted, see supra note 72, the wording of the proposed contention has not been changed in any of the subsequent motions to amend or supplement.

cracking. This root cause investigation was conducted to determine "how," "when," and "why" the concrete laminar cracking occurred in the shield building wall.[142] FENOC concludes that:

> the laminar cracking occurred due to the combination of three factors: the design configuration of the architectural shoulders; high moisture intrusion into the Shield Building concrete followed by a severe temperature drop; and, lack of moisture prevention on the exterior of the building. The root cause of the Shield Building laminar cracks was attributed to the design specification for construction of the Shield Building, which did not specify the application of an external sealant [for protection] from moisture. The design configuration of the architectural shoulders coupled with a rare combination of severe environmental factors associated with the blizzard of 1978 caused the laminar cracking. The design configuration did not include an external protective sealant on the Shield Building.[143]

Further, the NRC Staff has independently conducted a number of detailed inspections regarding the cracking.[144] The NRC's June 21, 2012 Inspection Report found that FENOC's Root Cause Report established a sufficient basis for the causes of the shield building laminar cracking.[145]

The record in this proceeding thus contains extensive studies about the extent and origins of the cracking. For their part, Intervenors state they do not agree with FENOC's studies, but have neither proffered supporting facts or expert opinion to demonstrate that FENOC's conclusion is incorrect nor provided an alternative explanation for the cracking.

Regarding Point 2, even though FENOC concludes the cracking is not age-related,[146] its LRA has been amended to include (1) a discussion of the shield building cracking and (2) a new AMP specific to monitoring the shield building cracking. The Shield Building Monitoring AMP provides specific details on the inspections, tests, and monitoring that will be performed. The

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[142] Revised Root Causes Report at 8.

[143] RAI Response B.2.39-13, Attachment at 3 of 8

[144] See May 7, 2012 NRC Inspection Report and June 21, 2012 NRC Inspection Report.

[145] See Letter from Steven A. Reynolds, Director, NRC Division of Reactor Safety, to Barry Allen, Site Vice President, FENOC (June 21, 2012) at 1 (ADAMS Accession No. ML12173A023).

[146] Tr. at 449.

Shield Building Monitoring AMP states FENOC will "periodically inspect the structure to confirm that there are no changes in the nature of the identified laminar cracks."[147] In terms of testing, the Shield Building Monitoring AMP includes "inspections or testing to monitor the condition of the sealant or coating that is planned to be applied to the Shield Building . . . and that the current Davis-Besse procedures for the evaluation of structures . . . is being revised to incorporate a section specifically for the long term monitoring of the Shield Building laminar cracks."[148] The Shield Building Monitoring AMP also provides specific details on the inspections, tests, and monitoring that will be performed.

Given these circumstances, Intervenors must point to the specific ways in which the Shield Building Monitoring AMP is wrong or inadequate to raise a genuine dispute with FENOC's LRA.[149] This they have failed to do. Intervenors have provided no support for their argument that the cracking (1) is aging-related, and (2) prevents safe operation of the plant. These claims amount to bare assertions, which the Commission has made clear "are insufficient to support a contention."[150] We do not intend to imply that Intervenors must prove their case at this stage, as the Commission has made clear that petitioners bear no such burden.[151] However, a petitioner "'must present sufficient information to show a genuine dispute' and reasonably 'indicating that a further inquiry is appropriate.'"[152]

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[147] FENOC's April 5, 2012 Submittal, at page 5, item 3 (citing RAI Request #4) for more information).

[148] FENOC's April 5, 2012 Submittal, at page 6.

[149] Progress Energy Carolinas, Inc., (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245, 270 (2010).

[150] Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __, __ n.139 (slip op. at 34 n.139) (Oct. 12, 2011).

[151] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996).

[152] Id. (citations omitted).

Finally, regarding Point 3, Intervenors claim that the cracking precludes safe operation. This allegation is unsupported. Intervenors have articulated a vague and generic concern that the cracking in the Davis-Besse Shield Building will create some sort of safety and/or environmental issues over the course of the relicensing term,[153] but they have not "connected the dots," as it were, and articulated a dispute with FENOC's renewal application.[154] Further, by this claim Intervenors seem to advance a current safety issue. Indeed, much of the material submitted by Intervenors challenges the NRC's decision to restart the Davis-Besse plant in January 2012. This decision is totally unrelated to the operation of Davis-Besse during the license renewal term, which would begin in April 2017, if FENOC's operating license for Davis-Besse is renewed. Current safety issues are beyond the scope of a license renewal proceeding.[155]

[153] Intervenors are concerned not only about the license renewal term, but about ongoing facility operation up through the time the extended term of operation would begin under the renewed license which seemingly implies the entire contention is related to a current licensing issue and thus outside the scope of license renewal. See Motion to Admit at 25-26.

[154] For instance, although Intervenors raise numerous challenges to FENOC's "safety culture," Motion to Admit at 17, 18, the Commission has made clear that such issues are outside the scope of license renewal and inadmissible, see Northern States Power Co., (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 491 (2010) (stating that "broad-based issues akin to safety culture such as operational history, quality assurance, quality control, management competence, and human factors . . . [are] beyond the bounds of a license renewal proceeding). And pure speculation clearly forms the basis for Intervenors' assertion that "there is a likelihood that the risks presented by the current cracks will only increase in the next few years," as well as their claim that a planned 2014 steam generator replacement at the facility, as well as an additional steam generator replacement after that, supports a finding of increased risk. Motion to Admit at 11, 13. As the Commission has made apparent, speculation cannot be the basis for an admissible contention. See, e.g., Union Elec. Co. d/b/a Ameren Missouri, et al. (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 169 (2011).

[155] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8–10 (2001).

While we hold that Contention 5, as originally proposed, is inadmissible, we note that the NRC Staff initially proposed a revised version of Contention 5 that it deemed admissible.[156] The NRC Staff proposed that Contention 5 be narrowed and admitted as follows:

> Is the Structures AMP adequate to address any aging effects for the shield building that are related to the cracks identified by FENOC during the October 10, 2011 reactor head replacement and subject to a root cause evaluation to be provided by FENOC on February 28, 2012 such that the shield building would be unable to perform its intended functions of 1) protecting the steel containment from environmental effects, including wind, tornado, and external missiles, 2) providing biological shielding, 3) providing controlled release to the annulus during an accident, and 4) providing a means for collection and filtration of fission product leakage from the Containment Vessel following a hypothetical accident?[157]

The NRC Staff claimed that this reformulated contention would be a "contention of omission," as it "identifies FENOC's failure to describe how the Structures AMP will account for the shield building cracks during the period of extended operation."[158] However, after FENOC submitted its Shield Building Monitoring AMP, the NRC Staff argued that Contention 5, as it had revised it, had been mooted.[159] Because "the LRA now includes a discussion of the recently identified shield building cracking and an AMP to address any possible aging effects associated with the cracking," the NRC Staff argued that the omission on which their proposed version of Contention 5 was based had been cured.[160]

We agree with the NRC Staff on both accounts. First, we agree that although Contention 5 as originally proposed, was (and still is) largely inadmissible for the reasons discussed above, it nonetheless initially contained an admissible contention of omission

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[156] See NRC Staff Answer at 16.

[157] Id.

[158] Id.

[159] See NRC Staff's Answer to Second Motion to Amend at 21.

[160] Id. at 22.

challenging FENOC's failure to provide a plan to monitor and/or address the shield building cracking in its LRA. We will discuss why the remainder of Contention 5 is inadmissible below. Second, we agree that FENOC's submittal of a Shield Building Monitoring AMP mooted this small admissible portion of Contention 5.

The contention, as reformulated by the NRC Staff, met the admissibility requirements of 10 C.F.R. § 2.309(f)(1). It contained a "specific statement of the issue of law or fact"[161] — namely, that FENOC's LRA failed to account for the shield building cracking. Intervenors' discussion of the history of the cracking and the LRA's failure to address that cracking was sufficient to constitute a "brief explanation of the basis of the contention."[162] The reformulated contention was within the scope of the proceeding,[163] was "material to the findings the NRC must make,"[164] and raised a "genuine dispute . . . on a material issue of law or fact"[165] because it raised an aging-related challenge to the LRA regarding the performance of a structure within the scope of license renewal.[166] Finally, while Intervenors did not provide much factual support throughout their motion, they did demonstrate that the cracks do indeed exist, and that FENOC had not provided a plan to address any aging-related effects of these cracks during the relicensing period. This, we believe, was sufficient to satisfy the requirement that Intervenors "provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position."[167]

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[161] 10 C.F.R. § 2.309(f)(1)(i).

[162] Id. § 2.309(f)(1)(ii).

[163] Id. § 2.309(f)(1)(iii).

[164] Id. § 2.309(f)(1)(iv).

[165] Id. § 2.309(f)(1)(vi).

[166] See id. § 54.4.

[167] Id. § 2.309(f)(1)(v).

Therefore, Contention 5, as modified by the NRC Staff, would have been admissible. However, as the NRC Staff argued, this contention of omission was mooted when FENOC addressed these concerns in its Shield Building Monitoring AMP. The Commission has stated that "where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot."[168] While the matter of the contention's admissibility was pending before us FENOC provided the exact information that Contention 5 claimed was missing — that is, a discussion of how FENOC will address the shield building cracking throughout the relicensing term. Intervenors had, but did not avail themselves of, the opportunity to present a material challenge to the adequacy of the AMP. Therefore, because Contention 5, as proposed by the NRC Staff, is now moot, there is no admissible contention.

We now turn to the balance of miscellaneous issues raised by Contention 5 as pled by Intervenors. These pieces of Contention 5 are inadmissible for a number of reasons. First, large portions of the contention are simply outside the scope of license renewal.[169] For example, Intervenors raise numerous challenges to FENOC's "safety culture."[170] The Commission has made clear that such issues are outside the scope of license renewal and inadmissible.[171]

Second, Contention 5 is based, in large part, on pure speculation. For example, Intervenors state that "there is a likelihood that the risks presented by the current cracks will

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[168] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[169] See 10 C.F.R. § 2.309(f)(1)(iii).

[170] See Motion to Admit at 17–18.

[171] See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 491 (2010) (stating that "broad-based issues akin to safety culture — such as operational history, quality assurance, quality control, management competence, and human factors — [are] beyond the bounds of a license renewal proceeding").

only increase in the next few years."[172] Intervenors note that Davis-Besse will undergo a steam generator replacement in 2014, and argue that this fact supports their claim regarding increased risk.[173] Intervenors provide no support for their argument that the 2014 steam generator replacement will increase the risk of cracking, and as such, their argument is mere speculation. In addition, Intervenors state that "it is conceivable that FENOC very well may need to replace its steam generators yet again after 2014 . . . risking further contributions to the cracking."[174] Whether FENOC will need to perform another steam generator replacement after 2014 is mere speculation, on top of the mere speculation that such a procedure might contribute to the cracking. The Commission has made abundantly clear that contentions based on pure speculation are not admissible.[175]

IV. Conclusion and Order

For the foregoing reasons, Intervenors' motion to admit Contention 5 and the five subsequent motions to amend and/or supplement Contention 5 are DENIED.[176]

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[172] Motion to Admit at 11.

[173] Id.

[174] Id. at 13 (emphasis in original).

[175] See, e.g., Union Electric Company d/b/a Ameren Missouri, et al. (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 169 (2011).

[176] Although our summary disposition decision this date regarding Intervenors' Contention 4 resolves all admitted contentions in this proceeding, see LBP-12-26, 76 NRC at __ n.121 (slip op. at 28 n.121), and this ruling is dispositive of the proposed Contention 5 and the subsequent five motions to amend and/or supplement Contention 5 this proceeding remains unconcluded at this juncture because another matter is still pending before the Board. On July 9, 2012, Intervenors filed with the Board a motion to admit a new environmental contention that challenges the failure of FENOC's Environmental Report to address the environmental impacts of spent fuel pool leakage and fires, as well as the environmental impacts that may occur if a spent fuel repository does not become available. See Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station (July 9, 2012) [hereinafter New Contention Motion]. The New Contention Motion is based on the United States Court of Appeals for the District of Columbia Circuit's decision in State of New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012) which invalidated the NRC's Waste Confidence Decision Update (75 Fed. Reg. 81,037 (Dec. 23,

While this Order is not subject to appeal to the Commission as a matter of right at this time, Intervenors may petition the Commission for interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. William E. Kastenberg
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 28, 2012

2010)) and the NRC's final rule regarding Consideration of Environmental Impacts of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81,032 (Dec. 23, 2010)). New York v. NRC vacated the generic findings in 10 C.F.R. § 51.23(a) regarding the safety and environmental impacts of spent fuel storage. See New Contention Motion at 2.

On August 7, 2012, the Commission issued CLI-12-16, wherein it found, "[I]n view of the special circumstances of this case, as an exercise of our inherent supervisory authority over adjudications, we direct that these [Waste Confidence] contentions—and any related contentions that may be filed in the near term—be held in abeyance pending our further order." The Commission noted that "should we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply." In an August 8, 2012 Order we held any participant or Board activity concerning this new contention in abeyance pending further Commission directive. See Order (Suspending Procedural Date Related to Proposed Waste Confidence Decision) (Aug. 8, 2012) (unpublished).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **LBP-12-27, MEMORANDUM AND ORDER (Denying Motions to Admit, to Amend, and to Supplement Proposed Contention 5)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Brian Newell]
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Dated at Rockville, Maryland
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