UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	Docket No. 50-346-LR
FirstEnergy Nuclear Operating Company Davis-Besse Nuclear Power Station, Unit 1	)	May 23, 2014
	)	
	)	

REPLY IN SUPPORT OF MOTION FOR ADMISSION OF CONTENTION NO. 6 ON SHIELD BUILDING CONCRETE VOID, CRACKING AND BROKEN REBAR PROBLEMS

Now come Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario (CEA), Don't Waste Michigan, and the Green Party of Ohio (collectively, Intervenors), by and through counsel, and reply in support of their "Motion for Admission of Contention No. 6." Intervenors are replying in opposition to the "NRC Staff's Answer to Motion for Admission of Contention No. 6" ("Staff Answer") and the FirstEnergy Nuclear Operating Company's filing, "FENOC's Answer Opposing Intervenors' Motion for Admission of Contention No. 6" ("FENOC Motion").

Reply to assertion that Intervenors are pursuing a motion for reconsideration of dismissal of Contention No. 5

The Staff goes to extraordinary lengths to argue (Staff Motion pp. 4-26, *inter alia*) that Intervenors are making an "untimely request for reconsideration" of the dismissed proposed Contention 5. This is incorrect on the face of the April 21 Motion. Intervenors properly relied for their Contention 6 filing in part on the growing and disturbing history of cracking, meticulously documented through 2012 by their (6) filings totaling hundreds of pages following the

observation of cracking in the shield building concrete in 2011 during the reactor head replacement project at Davis-Besse. Their documented concerns showed that the proliferation of different types of cracks may have commenced in the 1970's before the plant had opened, and that their spreading and frequency of occurrence may be increasing with the passage of time. To that, Intervenors in their April 2014 motion added the 2013 revelations of new cracking discoveries, followed months later by the NRC's regulatory step sending FENOC a formal Request for Additional Information ("RAI") dated April 15, 2014 (ADAMS No. ML14097A454, Exhibit 7 hereto).

But the NRC Staff pillories Intervenors for making "general claims that the AMPs are inadequate," (Staff Answer at 31, 38/60 of .pdf), pointing out (*id*. fn. 157) that the "last changes to the Shield Building Monitoring and Structures Monitoring AMPs were made in FENOC's responses and LRA amendments dated November 20, 2012 and February 12, 2013, respectively." The February 12, 2013 RAI negotiation with FENOC exemplifies the gross inadequacies of the shield building AMPs. In that letter, also referred to as L-13-037, the Staff executed this climbdown from a somewhat tough regulatory posture:

> Following discussions, NRC Staff stated that, *instead of addressing RAI B.2.43-2a as written, FENOC should respond to the RAI by providing summaries of the laboratory (i.e., university) testing performed and the results of the testing.* The summary should address the Shield Building reinforcing bar-concrete bond strength, the assumptions made in the structural operability calculations regarding bond strength, and how the testing performed supports those assumptions. *A copy of laboratory reports is not needed by the NRC Staff.*

(Emphasis added). In one stunning retrenchment, the Staff eschewed receipt of copies of lab reports on cracking and signaled that it would accept "summaries" from FENOC. *Id.* at p 4/13 of .pdf. The upshot of such self-de-regulation means that the laboratory results remain in the

proprietary control of the utility company and that the NRC Staff is utterly dependent on the interpretations and possible "spin" in the quest to learn the true cause(s) of the cracking phenomena.

The letter contains several additional facts which expose how averse to regulating shield building crack and structural problems the Staff truly is. On the very next page (p. 5/13 of .pdf), the Staff proceeds to recount what FENOC tells the NRC about the laboratory testing the agency doesn't want to have available to the public. Without conducting independent scrutiny of the information, and accepting apparently-oral summaries of testing, the NRC reverts to the classic regulatory stance of "leak before break" - that the shield building can be expected to demonstrate classic deflection and surface cracking indications prior to complete structural failure. This unverified naivete contrasts with the engineering uncertainties of the building which were postulated in 2011 by the NRC's own engineers, and documented in depth forward from the early 1970's by Intervenors, who submitted their FOIA'ed information to the ASLB. This naivete is epitomized in the Staff's statement, also on p. 5/13 of the .pdf: "The robust design and construction of the Shield Building allow the building to retain significant margin against design loads even with laminar cracking." This conclusion derogates the proofs of shield building cracking over decades, caused by weathering and watering of the structure pre-emplacement of the dome, and before the sealing of the Initial Construction Opening on the side wall, from the water flow from the top of the SB wall pre-dome, and notation of cracking as early as 1976, before plant operations.

Then, at p. 7/13 of the .pdf, the NRC Staff retreated even further, assuring FENOC that "instead of addressing RAI B.2.43-3a as written, FENOC should respond to the following re-

quests . . . 1. For Request #1, NRC Staff stated that the discussion is not about aging mechanisms."

And more than a year later, on April 15, 2014, after the revelations of shield building rebar damage, "discovery" of a large concrete void which as discussed *infra* is the product of a deliberate series of acts, and borescope results suggesting new cracking, the NRC Staff is moved to undertake additional regulatory investigation. Coincidentally, the April 15 NRC RAI letter (dated the day before what the NRC and FENOC claim was Intervenors' 60th day to move for Contention 6, on the revelation of the wall gap and rebar damage) asks FENOC what, if any, changes to the AMP must happen, given these latest revelations.

In that letter, the NRC Staff noted that "during a subsequent routine baseline inspection in August/September 2013, FENOC discovered several (about 15) cracks on the Davis-Besse shield building that were not identified previously." And the Staff, though not demanding borescope testing results, and without the 2012-13 laboratory testing, cited the rebar separation problem, notes that FENOC has taken additional core samples of shield building concrete and is performing evaluations and testing to determine the root cause of the cracks and their apparent progression. The anticipated 2014 root cause analysis sought by the NRC will be the historically ***third*** root cause analysis of the seemingly-unstoppable, continuing cracking phenomenon.

Presumably, the NRC Staff does not undertake RAI inquiries as a vain act, but instead, as a deliberate investigatory step aimed at reviewing and revamping the existing regulatory regime - in this case, the Shield Building Monitoring Program and the Structures Monitoring Program Aging Management Plans ("AMPS") credited for the shield building in the Davis-Besse License Renewal Application ("LRA"). While as the Staff argues, "such questioning does not automat-

ically give rise to an admissible contention," some surprising admissions against interest by both FENOC and the NRC Staff in their respective Answers support the conclusion that Intervenors are headed in the right direction.

In their April 21 Motion, Intervenors alleged considerable new, material information which now has been placed beyond debate by the Staff and FENOC. Specifically, Intervenors bring the following concessions of FENOC and the Staff to the notice of the ASLB, because they bolster the case for admitting Contention 6 for adjudication:

A) FENOC's admission (p. 15 of their Answer, p. 17/69 of .pdf) and in the accompanying Hook Affidavit at ¶ 5) that "The [concrete] void was not discovered by visual inspections until February 2014 as it had been *covered by formwork intentionally left in-place following the 2011 concrete fill*, to act as a blast shield during the anticipated 2014 hydrodemolition process." FENOC thus tries to explain away a serious divergence from the continuing licensing basis of Davis-Besse by rationalizing it as a conscious, premeditated, and potentially criminal or civilly-punishable move by FENOC or its contractor. An allowable inference from this admission is that despite the very high media visibility of the cracking discovered in 2011, targeted by Beyond Nuclear's prompt FOIA request, and amplified by ongoing releases of nonpublic cracking-related information directly from a U.S. Congressman, the Nuclear Regulatory Commission not only botched the oversight of the critical re-sealing of the shield building, but neither the NRC nor FENOC were motivated to bestir themselves in the ensuing 2.4 years to ascertain the full dimensions of the concrete void and its implications, and associated rebar compromises.

B) FENOC's admission (at p. 15 of their Answer (17/69 of .pdf), and in the accompanying Hook Affidavit at ¶ 6) that the company

> . . . completed an Apparent Cause Evaluation on April 14, 2014, for the concrete void. The apparent cause of the void was the lack of flowable concrete. *In addition, the apparent cause of not having earlier identified the full extent of the void (notwithstanding identification of voiding on the exterior of the Shield Building) was weakness in the organization's questioning attitude and decisionmaking.*[1]

(Emphasis added).

By this admission, FENOC confirms its long-standing institutional repudiation of tough questioning and dissenting professional opinions, its continuing acceptance of bad management decisions, and a willingness to knowingly depart from CLB specifications and obfuscate its regulatory and legal violations for more than two (2) years. Certainly all post-concrete void assurances that there was no compromise of safety or functioning are now suspect, if they weren't prior to the May 16, 2014 filing of FENOC's Answer.

C) FENOC's October 2013 letter to the Advisory Committee on Reactor Safeguards, attached to this memorandum, requesting that the Advisory Committee on Reactor Safeguards (ACRS) subcommittee meeting scheduled for October 2013 and the ACRS full committee meeting scheduled for December 2013 be rescheduled to "late May 2014" - *after* the spring 2014 steam generator replacement at Davis-Besse and associated cut through the shield building. The stated reason, that "follow-up inspections of core bores in the Shield Building identified the need for an expanded core bore inspection scope" and "the evaluation of the inspection results will not be complete in time to support the current schedule" are of even greater interest in light of the Staff's admissions below.

D) The NRC Staff's admission, referencing the 2013 cracking discovery (Staff Answer p. 17, p. 24/60 of .pdf), that

[1]This sheds more light on the malefactor issue *vis-a-vis* the concrete void episode.

> While some of the previously unidentified crack locations can be explained as pre-existing cracks that were not originally identified due to limitations with the borescope originally used, *the remainder of the previously unidentified crack locations cannot be explained at this time. FENOC has contracted with PII to conduct testing and further evaluation to determine the cause and apparent progression of the unexplained cracks, the results of which are expected in June 2014.* FENOC drilled additional new core bores in 2013 that were sent off for laboratory testing to assist in determining the age and cause of these previously unidentified crack indications. The Staff issued an RAI on April 15, 2014 requesting FENOC to describe and justify modifications or enhancements, if any, that may be potentially required to the AMPs credited for the shield building for license renewal, considering this recent plant-specific operating experience.

(Emphasis added).

E) This further Staff assertion (Staff Answer at p. 30 (p. 37/60 of .pdf), fn. 149):

> FENOC's Shield Building Monitoring Program inspects existing core bore holes to manage the effects of aging on the 2011 laminar cracking. Thus, for example, if the laminar micro-cracking were to grow, the Shield Building Monitoring AMP should identify the growth.

This comprises the Staff's acknowledgment that worsening cracking will warrant an enhanced AMP.

Axiomatically, a motion for reconsideration may not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-84-10, 19 NRC 509, 517-18 (1984). It was the judgment of the Intervenors, in light of the Board's December 28, 2012 order (LBP-12-27) denying their enormous efforts to admit Contention 5 that the September 2013 cracking discoveries did not have significance so long as they were presumably encompassed within the Aging Management Plans (AMPs) for the shield building. What altered Intervenors' perception of the importance of the September 2013 cracking announcement, however, was the subsequent evidence of other difficulties with the structural status of the shield building, coupled with the new knowledge (as

the Staff has admitted in its Answer) that a different technological detection method is driving the Staff to reconsider the AMPs for the shield building. The Staff contends a falsehood: that Intervenors' Motion for Admission of Contention 6 attempts merely to relitigate issues already decided as to proposed Contention 5. What Intervenors actually maintain is that there is significant new information which, in light of the previous history of cracking documented from the early 1970's through 2014, requires adjudication.

Reply to argument that DSEIS SAMA must not be supplemented

The Staff further argues (Answer p. 49, p. 56/60 of .pdf) that "even assuming that the shield building cracks identified in August/September 2013, the concrete void, or rebar damage had an age-related feature, Intervenors have failed to tie these issues to any specific environmental impact. The Commission has made clear that complex connections not obvious on their face must be supported by qualified experts." Intervenors contend that the connection between shield building failure on a catastrophic level, and the environment should be obvious on its face. Instead of recognizing the Commission policy as "either-or," the Staff portrays it as a requirement to produce an expert witness, or else nothing. But it is increasingly apparent to Intervenors, even if not to FENOC with its economic self-interest, or the Staff, with its fawning denial, that the shield building cracking, as an ongoing, still-misdiagnosed and misunderstood process, should be treated as a potentially catastrophic flaw. With poorly-understood continuing cracking, there is a point at which a common sense of concrete cracking and rusting rebar in the shield building suggests its failure is approaching, when it structurally can no longer stop objects hurled at enormous velocity, nor withstand a mild earthquake, nor absorb a serious overheating event within the reactor, or not incur compromising damage from a major natural disaster such as the

1998 tornado which blasted across the Davis-Besse compound.

The Staff says (Answer p. 49, p. 56/60 of .pdf) that "Intervenors once again make vague unsupported claims that the SAMA analysis is deficient." Despite ongoing, seemingly inevitable, plant-specific, unique structural damage and deterioration, coupled with FENOC's organizational deafness on the subject of the shield building, the NRC insists (Answer p. 51, p. 58/60 of .pdf) that it can exclude the shield building from SAMA analysis within the Supplement Draft Environmental Impact Statement at its whim: "The shield building is not credited for mitigating a release in a severe accident and the SAMA analysis does not model the shield building."

FENOC omitted to include within its SAMA analyses any information about the Davis-Besse shield building cracking or the corroding steel barrier shell contained within it. There is zero analysis of the changed physical properties of those facilities, nor any discussion of the implications of those changed physical properties on the capacity of the shield building or the steel containment structure to contain radioactive materials in the event of an accident. FENOC made the optimistic, self-serving assumption in its SAMA analysis that the shield building, as well as steel containment vessel, are as good as new.

Although an agency does not need to formally supplement an EIS whenever new information about a project comes to light, it must be reasonable in addressing new information, and consider its environmental significance and likely accuracy. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017,1025 (9th Cir. 1980). NEPA imposes continuing obligations on the NRC, even after completion of an environmental analysis. An agency that receives new and significant information casting doubt upon a previous environmental analysis must re-evaluate

the prior analysis. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). This requirement is codified in NRC regulations at 10 C.F.R. §51.92(a). This obligation extends to new and significant information even when such information pertains to a Category 1 issue. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 290 (2002).

The principal factor an agency should consider in exercising its discretion whether to supplement an existing EIS because of new information is the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS. The issue is whether the subsequent information raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary. When the new information provides a seriously different picture of the environmental landscape such that another NEPA "hard look" is necessary, supplementation must take place. *State of Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

With the shift in knowledge about the shield building from the supposed controllable nature of the cracking damage to a potentially open-ended scenario of further deterioration, and recognition of the realistic prospect that the shield building is hopelessly compromised and incapable of serving its design functions, the SAMA candidate accidents and the physical project improvements necessary for mitigation, while seemingly audacious, are in fact merely obvious. The new information articulated by Intervenors requires EIS supplementation of the SAMA contention.

Reply that the contention filing is untimely

Both the NRC Staff and FENOC maintain that Contention 6 cannot be admitted because Intervenors did not timely bring their motion within 60 days after Toledo Blade newspaper coverage of the concrete void and rebar damage (*viz.*, by April 16, 2014 instead of on April 21 2014, which was within 60 days after formal public notice of the concrete void was published by the NRC).

To decide this issue, Intervenors suggest that the ASLB review its ruling in LBP-12-27, the December 28, 2012 decision dismissing Contention 5, where timeliness was also the object of considerable argument. From pp. 16-19, the ASLB discusses the myriad developments and staggered dates at which various new things were learned about the 2011 cracks in the shield building, from multiple sources. Then on pp. 18-20, the Board analyzed this potpourri of milestones from which the parties launched their positions:

> 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.
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> 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.
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> It thus is difficult to peg the exact date when Intervenors would have had enough information to prepare their contention.
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> That being said, we find the analysis advanced by the NRC Staff on the issue of 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).
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> 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). 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 building, as was originally believed. This is well within the 60 days required by our ISO. The timing of the filing of this contention thus meets the requirement of 10 C.F.R. § 2.309(f)(2).*
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> *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).*

(Emphasis supplied).

Intervenors submit that a very similar circumstance pertains here, where there has been an announcement of new, unexpected structural flaws in the shield building, where the agency is attempting to obtain a nuanced grasp which may or may not include the interplay of concrete void, cracking, aging management and rebar damage. Intervenors moved quickly in a field of changing events and interpretations. They filed within 60 days of several milestone events. Contention 6 is at worst being raised early - before the third root cause analysis becomes public in 6 weeks or more. Intervenors' motion was timely filed.

Response to FENOC's ersatz motion to strike and allegations of insufficient decorum

Intervenors oppose the motion to strike which FENOC deigned not to characterize as a motion to strike. FENOC includes a section at p. 50 of its Answer (p. 52/69 of .pdf) entitled "Intervenors' Baseless Accusations Should Be Stricken," which clearly is a motion for an order. FENOC contends, as precedent for striking, that it filed an actual motion to strike earlier in this case, which was denominated as such. In that motion, FENOC's counsel verified that he had prior to filing of that motion, engaged in a meet-and-confer consultation as required by 10 C.F.R. § 2.323(b).[2] The section of FENOC's Answer before the ASLB closes with a prayer that "FENOC respectfully requests that the Board strike these arguments and take other appropriate action to ensure that such conduct does not degrade this proceeding." Nowhere in the Answer is there any mention of the convening or conclusion of a consultation as required by rule.

Intervenors are conditionally responding to this section of FENOC's Answer and reserve the right to respond more fully if the ASLB determines that it will consider it as a legitimately-filed motion. However, Intervenors submit that it is not. Counsel for FENOC well understands the consultation requirement of the rule. Moreover, the Licensing Board has affirmed the mandatory nature of the consultation requirement, and its expectations that the parties will abide by it for practical reaons, earlier in this case, in LBP-12-27. The Board applied § 2.323(b) to exclude certain of Intervenors' filings in support of proffered Contention 5 from consideration on the substance of their motion to admit the contention:

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[2]Which states, in part, 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."

> 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." 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."
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> While Intervenors seemed to suggest at oral argument that the consultation and certification requirement is unnecessary, the value of that regulation is not an issue on which -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.

."Memorandum and Order (Denying Motions to Admit, to Amend, and to Supplement Proposed Contention 5)," LBP-12-27 at 21-22. At footnote 110 related to the cited passage, the ASLB continued, "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." *Id.*

.Obviously, fairness and consistency of application of the rule is warranted here, and should cause the speedy dispatch of this non-motion motion. It should be denied and dismissed.

If, however, the ASLB is inclined to decide this non-motion motion on its merits, then Intervenors maintain both that the statements they have made in argument are fair commentaries upon the evidence, are legitimate argument and properly zealous advocacy, and uphold the decorum of this licensing proceeding. Intervenors take the cited examples mentioned by FENOC serially:

"FENOC may be incapable of managing Davis-Besse safely and successfully" (Motion at 2). It is ironic that in the very memorandum in which FENOC's expert is quoted as stating that the concrete void was "intentionally" caused by FENOC or presumably, its contractor, and that

"the apparent cause of not having earlier identified the full extent of the void (notwithstanding identification of voiding on the exterior of the Shield Building) was weakness in the organization's questioning attitude and decisionmaking," that the utility would be looking for sanctions for Intervenors' temerity in arguing that FENOC "may be incapable of managing Davis-Besse safely and successfully." *See* FENOC's Hook Affidavit at ¶ ¶ 5, 6. Given an admission of intentional concealment such as FENOC's, coupled with the NRC's very suspect handling of regulatory oversight of the sealing up of the Davis-Besse shield building in 2011, the characterization of the two entities as "malefactors" is justified.

"Malefactors." The context of the use of the term in Intervenors' Motion was in discussing the §2.309(c) factors of "good cause" for a late filing, wherein Intervenors were making the point, respecting the concrete void controversy, that they were the only one of the three parties to this licensing case who could effectively represent Intervenors' interests. Perhaps "alleged malefactors" should have been the choice of terms, and for that, Intervenors' counsel apologizes. But the term is a fair characterization, made the more so by FENOC's judicial admissions in its Answer of intentionally allowing the concrete void to form and then doing nothing to disclose it or characterize it and analyze the realistic dangers or structural implications it might cause, for more than two (2) years.

FENOC and the NRC "placed profits over safety" in 2002 The conclusion comes from a December 2002 NRC Office of Inspector General Report on Davis-Besse's Hole-in-the-Head fiasco, which found that not only did FENOC place profits ahead of safety (earning a record fine from NRC, amounting to $33.5 million altogether), but also that NRC – at the highest levels of the agency – also put FENOC's profits ahead of public safety. A report from the U.S. Nuclear

Regulatory Commission, Office of the Inspector General, "Event Inquiry: NRC's Regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head," Case No. 02-03S, Dec. 30, 2002, found that the NRC's decision to allow the continued operation of Davis-Besse "was driven in large part by a desire to lessen the financial impact on [FirstEnergy Nuclear Operating Company] that would result from an early shutdown." The OIG further concluded that the "NRC appears to have informally established an unreasonably high burden of requiring absolute proof of a safety problem, versus lack of reasonable assurance of maintaining public health and safety, before it will act to shut down a power plant."

The U.S. Government Accountability Office (GAO) — the investigative arm of Congress — also sternly criticized the NRC for its failure to discover the problem at Davis-Besse sooner, finding in a May 2004 report that the NRC's inadequate oversight prevented an earlier shutdown, even though the agency was fully aware of the potential for the problem, which had manifested at other facilities. The GAO further expressed dismay that the NRC lacks formal guidance procedures for deciding whether to shut down a plant. U.S. General Accounting Office, Nuclear Regulation: *NRC Needs to More Aggressively and Comprehensively Resolve Issues Related to the Davis-Besse Nuclear Power Plant's Shutdown*, GAO-04-415, May 2004.

Intervenors engaged in fair comment predicated on facts.

Pejorative reference to "the NRC Staff's and FENOC's 'sheer denial'"

This is yet another example of Intervenors thoughtfully responding with facts, followed by a summary comment in good faith and zealous argument. In an example of use of fair comment, Intervenors ask that "sheer denial" be read in the context meant by Intervenors:

> After Contention 5 was unceremoniously dismissed, FENOC unexpectedly acknowledged in September 2013, as stated in the introductory section of this Motion,

> that there is worsening shield building cracking. And the public now also knows of damage done to rebar in the breach area by hydro-demolition associated with the 2011 re-sealing of that building, and of the 2011 concrete void which may be related in some fashion to causing cracking or other shield building damage. Intervenors submit that it's time to stop accusing them of "mere speculation," and to examine, instead, the repression of public information by the NRC Staff and FENOC. The problem is not so much Intervenors' "mere speculation" as it is the NRC Staff's and FENOC's "sheer denial."

"Repression of information" This statement, too - why isn't the NRC championing its right to be free from a lack of decorum, joining in FENOC's non-motion motion? - is grounded in fact. In fn. 3 at the bottom of page 10 of the Motion, Intervenors point out that "Intervenors' pending 2014 FOIA request filed February 20, 2014 remains thwarted by an unprecedented dispute over Beyond Nuclear being charged for the records, and the public's understanding of the precise current status of the shield building is further confounded by the NRC Staff's opaque verbiage in the RAI of April 15, 2014." These two statements are grounded in facts and are fair comments and zealous advocacy.

Unfounded statement that FENOC ordered the "hasty resealing of the shield building" and "the rushed resealing" . This is a ***founded***, not unfounded, statement. On November 17, 2011, the *Toledo Blade* published an article entitled "Davis-Besse to stay shut until probe ends." [http://www.toledoblade.com/Energy/2011/11/17/Davis-Bessetostay-shut-until-probe-ends.html] The article reports: "Until we have confidence that the cracks in the Shield Building don't have any safety implications, the plant won't go back online," Viktoria Mytling, spokesman at the NRC's regional office in Chicago, said… Ms. Young [FENOC spokeswoman] said Wednesday the reactor head replacement had been completed and that the steel removed to create the access hole had been welded back into place and pressure tested. The shield building hole should be patched by week's end, she said. Ms. Mytling said such patching would not affect

the NRC investigation, and no timetable is in place for restarting the plant…"

On November 19, 2011, the *Toledo Blade* reported that the hole cut for the lid transplant would be sealed shut that day, and that FENOC predicted the reactor would be restarted by the end of November:

> A 12-hour concrete pour is scheduled for Saturday at the Davis-Besse nuclear power plant, closing a hole in the reactor's outer shield building cut last month for access to install a new reactor head, a FirstEnergy spokesman said Friday.
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> While declining to set a date when the utility plans to restart the plant, spokesman Jennifer Young said it remains on schedule to resume operation by the end of November, as forecast in a recent letter to FirstEnergy stockholders.
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> By then, Ms. Young said, FirstEnergy also expects to have closed its investigation into hairline cracks discovered in the shield building's reinforced concrete after the access hole was made.
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> FirstEnergy has submitted to the Nuclear Regulatory Commission its finding that the cracks are not a safety hazard, she said, and now is following up by submitting technical reports to the commission in response to its questions about the matter. "The cracks, as they are, do not impact the structural integrity of the building," Ms. Young said Friday. "There's plenty of margin in the building. It's a very, very robust building."
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> Viktoria Mytling, a spokesman at the NRC's regional office in Chicago, said that as matters stand, FirstEnergy is free to restart Davis-Besse when it considers the plant to be ready, since the regulatory agency has made no finding of any safety hazard there. "If the plant does restart while our review isn't done, and we subsequently identify a safety issue, they are legally required to shut the plant down to resolve the safety issue," Ms. Mytling said. "If we are conducting a review and have a specific safety concern the company needs to address, but they tell us they will restart the plant before providing us with answers we need to make sure the plant will operate safely, we can and would order the plant to cease restart activities until they answer our questions."
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> The NRC could also order "compensatory actions" -- essentially, special conditions -- for a restart or continued operation if the agency were to declare a safety issue, Ms. Mytling said.
>
> Ms. Young said FirstEnergy expects the "conversation" with the Nuclear Regulatory Commission to be concluded before the restart.

[http://www.toledoblade.com/local/2011/11/19/Nuclear-plant-to-close-hole-made-forrepairs.html]. Again, characterization of this sequence of events as a "hasty" re-sealing of the shield building is fully warranted.

Motions to strike are not available to remedy hurt feelings, but to deal with impertinence.

It is parabolic that FirstEnergy, which has upbraided Intervenors in the past for failing to adhere to the consultation rule, considers itself immune from its applicability. It is hyperbolic that FENOC undertakes to complain about statements and conclusions made by Intervenors that are grounded in fact, logic, good faith argument and which represent fair comments.

FENOC's ersatz motion should be denied before it is assessed on its suspect merits.

WHEREFORE, Petitioners pray the Atomic Safety and Licensing Board admit Contention 6 for full adjudication.

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	Docket No. 50-346-LR
FirstEnergy Nuclear Operating Company Davis-Besse Nuclear Power Station, Unit 1	)	May 23, 2014
	)	
	)	

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "INTERVENORS' REPLY IN SUPPORT OF MOTION FOR ADMISSION OF CONTENTION NO. 6" was deposited in the NRC's Electronic Information Exchange this 23rd day of May, 2014.

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