

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

FIRSTENERGY NUCLEAR OPERATING COMPANY)

(Davis-Besse Nuclear Power Station, Unit 1))

Docket No. 50-346-LR

September 20, 2011

**FIRSTENERGY’S UNOPPOSED MOTION FOR LEAVE TO FILE A SURREPLY TO
INTERVENORS’ REPLY TO APPLICANT AND NRC STAFF ANSWERS**

In accordance with 10 C.F.R. § 2.319, FirstEnergy Nuclear Operating Company (“FirstEnergy”) respectfully seeks leave from the Atomic Safety and Licensing Board to file the attached surreply to the “Intervenors Reply to Staff and Applicant Oppositions to Admission of New Contention” (“Reply”) and associated Reply Memorandum filed on September 13, 2011.¹ Intervenors do not object to this Motion.² In support of this request, FirstEnergy respectfully states as follows:

1. On August 11 and 12, 2011, Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (“Intervenors”) filed

¹ See Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011) (“Reply Memorandum”).

² In their Reply (at 2 n.2), Intervenors explicitly stated that they would not object: “Because the applicant and the NRC Staff have not had an opportunity to address the effect of CLI-11-05 on the timeliness and admissibility of Intervenors’ . . . contention, Intervenors . . . would not object to a response by the applicant and the Staff to their arguments regarding the relevance of CLI-11-05 to their contention.”

a Motion to admit a proposed New Contention³ in this proceeding purportedly based on new and significant information presented by the NRC in its Fukushima Task Force Report.⁴

2. On September 6, 2011, FirstEnergy and the NRC Staff each filed Answers opposing the admission of the New Contention on the grounds that it does not meet the NRC's contention timeliness and admissibility criteria in 10 C.F.R. § 2.309.⁵

3. Three days later, on September 9, 2011, the Commission issued a Memorandum and Order (CLI-11-05), in which it ruled on a series of petitions filed in numerous proceedings to suspend adjudicatory, licensing, and rulemaking activities, and requesting additional related relief, in light of the March 2011 accident at Fukushima.⁶ CLI-11-05 indicates that Intervenors' Emergency Petition to suspend this proceeding was among the many filings underlying the Commission's ruling.⁷

4. Shortly thereafter, on September 13, 2011, the Intervenors filed their Reply and Reply Memorandum in response to the Answers of FirstEnergy and the NRC Staff. In the Combined Reply and Reply Memorandum, Intervenors discuss the "relevance" and "effect" of

³ Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) ("Motion"); Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 12, 2011) ("New Contention").

⁴ Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) ("Task Force Report"), *available at* ADAMS Accession No. ML112510271.

⁵ *See* FirstEnergy's Answer Opposing Joint Petitioners' Motion to Admit and Proposed Contention Regarding Fukushima Task Force Report (Sept. 6, 2011); NRC Staff's Answer in Opposition to Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) ("NRC Staff's Answer").

⁶ *See Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___, slip op. (Sept. 9, 2011).

⁷ *See id.*, Appendix at 2, 18 (*citing* Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 14, 2011); Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents And Request to Suspend Licensing Decision (Aug. 11, 2011)).

CLI-11-05 with respect to their New Contention, suggesting that it supports admission of the contention.⁸

5. Due to the timing of the issuance of CLI-11-05 , FirstEnergy did not have an opportunity to address the implications of this decision on the admissibility of the proposed New Contention. A portion of the Commission’s decision addresses Intervenor’s claims that the Task Force Report evaluation of the Fukushima accident constitutes “new and significant information” under NEPA that must be analyzed as part of the environmental review for new reactor and license renewal decisions.⁹ FirstEnergy’s inability to address the significance of CLI-11-05 in its Answer is due solely to the timing of that decision, which constitutes good cause for the filing of a brief surreply to address the relevance of CLI-11-05 to the proposed new contention.¹⁰ Indeed, the Reply recognizes as much, stating that the Intervenor’s “would not object to a response by the applicant and the Staff to their arguments regarding the relevance of CLI-11-05 to their contention.”¹¹

6. In accordance with 10 C.F.R. § 2.323(b), Counsel for FirstEnergy has contacted Counsel for the NRC Staff, who stated that they do not oppose FirstEnergy’s Motion for Leave to file a surreply. As stated above, Intervenor’s noted their lack of objection in their Reply.

⁸ Reply at 2; Reply Memorandum at 1-4.

⁹ See CLI-11-05, slip op. at 30-31.

¹⁰ Notably, two other Licensing Boards today issued Orders granting similar motions for leave to file surreplies filed by applicants in two other proceedings involving proposed Fukushima-related contentions. See *Tenn. Valley Auth.* (Watts Bar Nuclear Plant Unit 2), Licensing Board Order (Granting TVA’s Request to File a Surreply) at 1-2 (Sept. 20, 2011) (unpublished) (finding “compelling circumstances” because “TVA has not had an opportunity to address CLI-11-05’s relevance here because it was issued after TVA filed its opposition on September 6”); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order at 1 (Granting Entergy’s Motion to File Surreply) (Sept. 20, 2011) (unpublished) (“Given that Entergy’s Motion is unopposed and that Entergy has not yet had an opportunity to comment on the implications of CLI-11-05 upon Intervenor’s new contentions, we grant Entergy’s Motion.”).

¹¹ Reply at 2 n.2.

WHEREFORE, FirstEnergy respectfully requests that the Board grant its Motion for Leave to file the attached surreply to Intervenor's Reply and Reply Memorandum.

Respectfully submitted,

Signed (electronically) by Alex S. Polonsky

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COUNSEL FOR FIRSTENERGY

Dated in Washington, D.C.
this 20th day of September 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FirstEnergy’s Motion for Leave to File a Surreply to Intervenor’s Reply to Applicant and NRC Staff Answers” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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