

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

January 30, 2012

ORDER

(Denying Motion for Leave to File a Motion for Reconsideration)

Before this Board is a motion filed on January 13, 2012 by FirstEnergy Nuclear Operating Company (FENOC) seeking leave to file a motion for reconsideration.¹ Accompanying the motion for leave is FENOC's motion for reconsideration² requesting that the Board reconsider its January 10, 2012 denial³ of FENOC's earlier motion to dismiss Intervenor's Contention 1.⁴ The Board denied FENOC's motion to dismiss finding that it was untimely,⁵ but noting that FENOC could file essentially the same motion when the NRC Staff publishes its Draft Supplemental Environmental Impact Statement (DSEIS), which at that time was scheduled to

¹ FENOC's Motion for Leave to File a Motion for Reconsideration of the Board's January 10 Order (Jan. 13, 2012) [hereinafter Motion for Leave].

² FENOC's Motion for Reconsideration of the Board's January 10 Order (Jan. 13, 2012).

³ Memorandum and Order (Denying Motion to Dismiss Contention 1) (Jan. 10, 2012) at 4 (unpublished) [hereinafter Order].

⁴ FirstEnergy Nuclear Operating Company's Motion to Dismiss Contention 1 (Dec. 19, 2011).

⁵ Order at 1.

be filed by the end of January 2012.⁶ The Joint Intervenor's oppose FENOC's motions.⁷ The NRC Staff does not oppose FENOC's motions.⁸

Because FENOC has not met the requirements set forth in § 2.323(e) for motions for reconsideration, its motion for leave to file a motion for reconsideration is denied. Its reconsideration motion does not show compelling circumstances, does not identify a clear and material error which could not have been reasonably anticipated, and does not indicate how the order materially prejudices the rights of all parties going forward.⁹

FENOC's Reconsideration Motion

The Commission's regulations require that motions for reconsideration "may not be filed except upon leave of the presiding officer."¹⁰ Such leave may be granted only "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid."¹¹ The compelling circumstances alleged by FENOC are that the Board's Order

⁶ The NRC Staff has since announced that "at this time, the Staff is unable to project when the DSEIS or the FSEIS will be issued. Depending on the timing of the applicant's supplement of its SAMA analysis, the Staff anticipates being able to project a date for issuing the DSEIS and FSEIS in April 2012." Letter from Brian G. Harris, Counsel for the NRC Staff to Administrative Judges (Jan. 25, 2012) (ADAMS Accession No. ML12025A007) [hereinafter NRC Staff Letter].

⁷ Intervenor's Memorandum in Opposition to 'FENOC's Motion for Reconsideration of the Board's January 10 Order' (Jan. 16, 2012) and Refiled Intervenor's Memorandum in Opposition to 'FENOC's Motion for Reconsideration of the Board's January 10 Order' (Jan. 16, 2012).

⁸ NRC Staff's Response in Support of First Energy's Motion for Reconsideration of the Board's Order Denying Motion to Dismiss Contention 1 (Jan. 23, 2012).

⁹ The standards for reconsideration are strictly applied, and such motions should not be granted lightly. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006); see also Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004) (standards are "intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration").

¹⁰ 10 C.F.R. § 2.323(e).

¹¹ Id.

Denying FENOC's Motion to Dismiss is somehow inconsistent with Sections B.1 and C of the Initial Scheduling Order (ISO).¹² FENOC further argues that the Board's Order is "inconsistent with the treatment of similar dispositive motions by other Atomic Safety and Licensing Boards and the federal courts and . . . materially prejudice[s] the rights of all parties going forward."¹³

In support of its claim that the Board has made a clear and material error, FENOC argues that 10 C.F.R. § 2.323(a), which states, "All motions ... must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises" does not apply to its motion to dismiss because paragraphs B.1 and C of the Board's ISO set a different time period for motions to dismiss.¹⁴ This was not our intent. Any reasonable reading of our ISO shows that the Board left standing the time limit of Section 2.323(a). Section 2.323(a) is remarkably clear for a Commission regulation. It states all motions must be made no later than ten (10) days after the occurrence or circumstances from which the motion arises.¹⁵ It does not provide for a 90-day exception for FENOC or for its motion to dismiss. It sets a short, but clear deadline for the filing of "all" motions.

Contrary to FENOC's assertions, there is no ambiguity in the Board's ISO and no clear and material error in the Board's January 10 Order. Section B.1 of the ISO says nothing about expanding the 10-day rule of Section 2.323(a) to 90 days for FENOC to file dispositive motions. Section B.1 refers solely to the limits for new or amended contentions. It states that new or amended contentions must be filed within 60 days of the availability of new

¹² Initial Scheduling Order (June 15, 2011) at 11 (unpublished) [hereinafter ISO].

¹³ Motion for Leave at 2.

¹⁴ See ISO at 12-13.

¹⁵ "The Commission has decided that expeditious management of a hearing requires that motions be filed reasonably promptly after the underlying circumstances occur which engender a motion. Accordingly a ten (10) day limit for filing motions is included in the final version of § 2.323(a)." 69 Fed. Reg. 2,207 (Jan. 14, 2004).

information.¹⁶ Section C of the ISO also does nothing to advance FENOC's argument. While it does speak to dispositive motions, it states that motions for summary disposition can be filed no later than 45 days before a hearing. It also requires that no dispositive motion shall be filed later than thirty days after the Trigger Date as defined in section F.1 of the ISO.¹⁷ These references to dispositive motions in the ISO set forth the last date when the Board will consider a motion for summary disposition or other dispositive motion. This "ultimate deadline" was never intended to expand the "promptness deadline" contained in Section 2.323(a).¹⁸

As noted above, a party seeking reconsideration must demonstrate that a manifest injustice would occur in the absence of reconsideration. FENOC has not met this burden. In this case, it was FENOC, who on September 19, 2011 submitted to the NRC revisions to its ER¹⁹ that it claims "significantly expand the discussion of renewable energy alternatives."²⁰ This is the type of event contemplated by Section 2.323(a). The timing of this submission is entirely within FENOC's control, so filing a motion to dismiss within 10 days based on an action which the moving party has set in motion, is both reasonable and contemplated by the ISO. Having the other parties to the case respond within 10 days for any motion (or 20 days

¹⁶ ISO at 12. The 60-day limit was selected by the Board after a teleconference with the parties whereat the NRC Staff and FENOC requested a 30-day time limit for new or amended contentions and the Joint Intervenors requested a 90-day limit. Tr. at 250-52.

¹⁷ The "Trigger Dates" specified in Section F of the ISO refer to the issuance of the Final SEIS and the Final Safety Evaluation Report.

¹⁸ This "dual deadline" structure is not unique to this Board. See, e.g., Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP 09-22, 70 NRC 640, 652-53 (2009) (The Board provided two deadlines for dispositive motions – one based on time elapsed from the event giving rise to the motion, and one based on time elapsed after the filing of the FEIS.).

¹⁹ See Letter from Kendall Byrd, Director, Site Performance Improvement, FENOC, to NRC, "License Renewal Application Amendment 16 for the Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application Environmental Report," Enclosure A (Sept. 19, 2011) (ADAMS Accession No. ML11266A062).

²⁰ Motion to Dismiss at 4.

for a motion for summary disposition) is fair and reasonable. This is the timetable which is mandated by the Commission's rules and is practiced routinely -- especially when a party who controls the timing of the filing of new information makes such a filing and then moves to dismiss a contention based on that new information.²¹ Therefore, there is no "manifest injustice" in requiring an applicant to file a motion to dismiss a contention as moot within ten days of the filing of its own document which allegedly renders that contention moot.

Nor does the Board's January 10 Order materially prejudice the rights of all parties going forward, as FENOC alleges. Indeed, FENOC has not pointed to any right that is irretrievably lost by any party as a result of our January 10 Order. In particular, FENOC cannot allege that it itself has been materially prejudiced. As stated in the January 10 Order, FENOC will be able to refile its "motion to dismiss" within 10 days of the release of the DSEIS.²² Accordingly, there is no "manifest injustice" in our denial of FENOC's motion to dismiss.

To summarize and clarify: All motions in this proceeding, including motions for summary disposition and motions to dismiss, are subject to the promptness deadline specified in 10 C.F.R. § 2.323(a) and must be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." An answer to a motion for summary disposition must be filed within 20 days.²³ Answers to all other motions must be filed within 10 days.²⁴

²¹ See, e.g., Luminant Generation Company, LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-10-10, 71 NRC 529, 538 n.4 (2010) (Applicant filed revisions to its Environmental Report on December 7, 2009 and January 19, 2010, and subsequently filed motions to dismiss the related contentions as moot on December 14, 2009, and January 25, 2009, respectively.); Pa'Ina Hawaii, LLC (Material License Application) (Jan. 25, 2007) at 1 (unpublished) (Applicant filed a report on December 31, 2006 and a motion to dismiss as moot the related contention on January 8, 2007.).

²² See NRC Staff Letter.

²³ 10 C.F.R. § 2.1205(b); ISO at 13.

²⁴ 10 C.F.R. § 2.323(c).

For the reasons stated above, FENOC's motion for leave to file a motion for reconsideration of the Board's January 10 Order and the relief requested in FENOC's motion for reconsideration are denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁵

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. William E. Kastenbergl
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 30, 2012

²⁵ The Board has compiled a chart, attached to this Order, which may help the parties better understand the Board's intentions regarding the timing and deadlines of upcoming events in this docket.

Attachment A²⁶

This chart clarifies the promptness deadlines for upcoming filings in this proceeding.

Action	Promptness Deadline
Any motion seeking to dispose of a contention based on the contents of the DSEIS.	10 days after the DSEIS becomes available. ²⁷
Answer to any motion.	10 days after the filing of the motion ²⁸ (20 days if motion is filed pursuant to 10 C.F.R. § 2.1205). ²⁹
Motion to admit new contention(s) or amend existing contention(s) based on the contents of the DSEIS.	60 days after the DSEIS becomes available. ³⁰
Answer to motion to admit new contention(s).	25 days after filing of the motion to admit new contention(s). ³¹
Reply to answer to motion to admit new contention(s).	7 days after filing of answer. ³²

²⁶ This chart was prepared by the Board to assist the parties to this case to prepare for a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay, and the maintain order. The Board has set a reasonable schedule for the conduct of this proceeding consistent with its responsibilities under 10 C.F.R. § 2.319.

²⁷ 10 C.F.R. § 2.323(a).

²⁸ 10 C.F.R. § 2.323(c).

²⁹ 10 C.F.R. § 2.1205(b); ISO at 13.

³⁰ ISO at 12; see also 10 C.F.R. § 2.309(f)(2).

³¹ 10 C.F.R. § 2.309(h)(1); ISO at 13.

³² 10 C.F.R. § 2.309(h)(2); ISO at 13.

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NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Denying Motion for Leave to File a Motion for Reconsideration) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of January 2012