

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 10, 2012

MEMORANDUM AND ORDER
(Denying Motion to Dismiss Contention 1)

Before this Board is a motion by FirstEnergy Nuclear Operating Company (FENOC) to dismiss Contention 1, which challenges the adequacy of FENOC's consideration of renewable energy alternatives.¹ FENOC argues that its recent revision of its Environmental Report (ER) has cured any alleged defect, and that Contention 1 is now moot.² Pursuant to 10 C.F.R. § 2.323(a), we find that the Motion is not timely and we therefore deny it without addressing its merits.

I. Background

On August 27, 2010, FENOC submitted a license renewal application (LRA) to the Nuclear Regulatory Commission (NRC) to extend its operating license for the Davis-Besse

¹ FirstEnergy Nuclear Operating Company's Motion to Dismiss Contention 1 (Dec. 19, 2011) at 1 [hereinafter Motion].

² Id.

Nuclear Power Station, Unit 1 (Davis-Besse) for an additional twenty-year period beyond its current expiration date of April 22, 2017.³ On April 26, 2011, we granted the petition to intervene of Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio (collectively, Joint Intervenors) and admitted two contentions, including Contention 1.⁴ As limited and reworded by the Board, Contention 1 reads as follows:

The FirstEnergy Nuclear Operating Company's Environmental Report fails to adequately evaluate the full potential for renewable energy sources, specifically wind power in the form of interconnected wind farms and/or solar photovoltaic power, in combination with compressed air energy storage, to offset the loss of energy production from Davis-Besse, and to make the requested license renewal action unnecessary. The FENOC Environmental Report (§ 7.2) treats all of the alternatives to license renewal except for natural gas and coal plants as unreasonable and does not provide a substantial analysis of the potential for significant alternatives in the Region of Interest.⁵

On September 19, 2011, FENOC submitted to the NRC revisions to its ER⁶ which FENOC claims "significantly expand the discussion of renewable energy alternatives."⁷ However, FENOC did not file the instant motion until December 19, 2011.⁸ Neither the NRC Staff nor the Joint Intervenors filed an answer by December 29, 2011.⁹

³ See License Renewal Application: Davis-Besse Nuclear Power Station (August 2010), available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-lra.pdf>.

⁴ LBP-11-13, 73 NRC __, __ (slip op. at 64-65) (Apr. 26, 2011).

⁵ Id. at __ (slip op. at 64).

⁶ 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) [hereinafter Amendment 16].

⁷ Motion at 4.

⁸ Id. at 1.

⁹ See 10 C.F.R. § 2.323(c).

II. Relevant Legal Standards

10 C.F.R. § 2.323 governs the filing of motions in NRC adjudicatory proceedings, including proceedings before this Board. Section 2.323(a) states that “[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”¹⁰ The Board addressed this regulation in its Initial Scheduling Order, noting that “[t]he regulations require that, unless otherwise specified by the Board, a motion, such as a motion to compel, shall be filed within ten (10) days after the occurrence or circumstance from which the motion arises and that the movant certify his or her sincere effort to contact the other parties and resolve the issues raised in the motion.”¹¹ The Board went on to explain that this strict ten-day time limit would be expanded for a narrow set of disputes concerning mandatory disclosures.¹² The Board did not provide in its Initial Scheduling Order for any other expansion or waiver of the ten-day limit imposed by 10 C.F.R. § 2.323(a).

III. Discussion and Analysis

As noted above, generally a party may file a motion no later than ten days after the event triggering the motion.¹³ In addition, the movant must make a sincere effort to contact the other parties to the proceeding and resolve the dispute raised in the motion within those ten days.¹⁴ Here, the event triggering the motion is FENOC’s September 19, 2011 filing of Amendment 16 to the ER, which FENOC claims cures the defects in the ER alleged in

¹⁰ 10 C.F.R. § 2.323(a).

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

¹² Id. at 11-12.

¹³ 10 C.F.R. § 2.323(a).

¹⁴ See ISO at 11.

Contention 1.¹⁵ FENOC states, “Now that FENOC has revised the ER to include the information that the Intervenor alleged to be missing, the Board should dismiss Contention 1 now as moot.”¹⁶ To comply with the Board’s order and NRC regulations, FENOC should have consulted with Joint Intervenor and the NRC Staff and filed the instant motion within ten days, or by September 29, 2011.

By its own admission, though, FENOC did not contact Joint Intervenor until October 19, 2011, or 30 days after it filed Amendment 16 to the ER.¹⁷ Then, FENOC filed the instant motion on December 19, 2011, or 60 days after contacting Joint Intervenor, and 90 days after filing Amendment 16, upon which the Motion is based.¹⁸ In other words, FENOC filed the instant motion 80 days late.¹⁹ FENOC has made no attempt to explain this delay in filing.

On January 9, 2012, the NRC Staff filed a response stating it does not oppose the Motion.²⁰ The response is not timely. Answers to motions are governed by Section 2.323(c) of our regulations which provide for ten (10) days to respond to a motion. A timely response to FENOC’s Motion to Dismiss would have been due December 29, 2011. The Joint Intervenor filed an answer in opposition to the Motion on January 9, 2012.²¹ It too is nontimely, but it

¹⁵ Motion at 4-5.

¹⁶ Id. at 5.

¹⁷ Motion at 1, n.1.

¹⁸ Motion at 1.

¹⁹ Given that FENOC undertook these actions in neat 30-day intervals, it appears as if FENOC was operating under the impression the NRC regulations or our ISO established these dates. However, 10 C.F.R. § 2.323(a) is unequivocal, and nothing in our ISO should lead any party to believe that the ten-day limit would be extended in cases not involving disclosure disputes.

²⁰ NRC Staff Response to FirstEnergy Nuclear Operating Company’s Motion to Dismiss Contention 1 (Jan. 9, 2012).

²¹ [Joint] Intervenor’s Memorandum in Opposition to ‘Motion to Dismiss’ (Opposition to Summary Disposition of Contention 1) (Jan. 9, 2012).

postulates that “the Applicant’s motion is one seeking summary disposition of a pending contention on the ground of mootness.”²²

Although the Commission’s rules of practice do not explicitly provide for the filing of motions to dismiss, and do not have a separate regulation which applies specifically to motions to dismiss, a Licensing Board must fashion a fair procedure for dealing with them.²³ We hold that motions to dismiss are governed by Section 2.323 of the regulations. The parties to Licensing Board proceedings often remind us that the Commission’s regulations, when applied to petitions to intervene or requests for hearing, are strict by design²⁴ and must be applied rigorously.²⁵ We believe the same strictness and rigor should apply to motions to dismiss and responses to motions to dismiss. We therefore deny the motion to dismiss Contention 1 as it was not timely filed.²⁶

We note that the NRC Staff has informed the Board that its Draft Supplemental Environmental Impact Statement (DSEIS) is scheduled to be issued this month.²⁷ The DSEIS is

²² Id. at 1.

²³ Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

²⁴ FENOC Answer Opposing Request for Public Hearing and Petition for Leave to Intervene, (Jan. 21, 2011) at 14; NRC Staff’s Answer to Joint Petitioners Request for a Hearing and Petition for Leave to Intervene, (Jan. 21, 2011) at 8.

²⁵ FENOC Answer Opposing Request for Public Hearing and Petition for Leave to Intervene, (Jan. 21, 2011) at 11-13; NRC Staff’s Answer to Joint Petitioners Request for a Hearing and Petition for Leave to Intervene, (Jan. 21, 2011) at 10.

²⁶ The Motion would also be denied if it were considered a motion for summary disposition as our regulations require motions for summary disposition to include affidavits to support statements of fact. 10 C.F.R. § 2.1205. The Motion does not contain any affidavits.

²⁷ NRC Staff Projections for the Draft Supplemental Environmental Impact Statement and Final Supplemental Environmental Impact Statement in the Matter of First Energy Nuclear Operating Co. (Davis-Bess Nuclear Power Station, Unit 1) (Nov. 15, 2011) at 1.

likely to address the issues raised by Contention 1.²⁸ FENOC will, therefore, have an opportunity to file a (or refile this) motion to dismiss²⁹ or a motion for summary disposition³⁰ within 10 days of the issuance of the DSEIS.³¹ Similarly, the Joint Intervenors will have the opportunity to file motions to admit new contentions and any proposed new contentions “within sixty (60) days of the date when the material information on which it is based first becomes available.”³² If filed thereafter, the motion and proposed new contention shall be deemed nontimely under 10 C.F.R. 2.309(c). This Board has already reminded the parties that pleadings in this docket shall be proof-read, cite-checked, and filed in strict conformance with 10 C.F.R. § 2.323.³³

²⁸ FENOC states, “The NRC Staff has shifted the date for issuing the Draft Supplemental Environmental Impact Statement (‘DSEIS’) for the Davis-Besse license renewal from October 2011, to January 2012, to consider, among other things, the ‘in-depth alternatives’ presented in FENOC’s revised ER.” Motion at 4. See Letter from M. Galloway, NRC, to B. Allen, FENOC, “Schedule Revision for the Environmental and Safety Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application” (October 31, 2011) (ADAMS Accession No. ML11256A164).

²⁹ 10 C.F.R. § 2.323(a).

³⁰ Id. § 2.1205.

³¹ The parties have thirty (30) days after the “Trigger Date” to file dispositive motions. The Trigger Date is defined as the latter of the issuance of the FSEIS or the FSER. ISO Section F.1.

³² ISO Section B.1. We note also that the Joint Intervenors will not be required to refile Contention 1 in order to challenge the NRC Staff’s treatment of the same issues in the DSEIS. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (“[A] contention ‘initially framed as a challenge to the substance of an applicant’s ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff’s DEIS (or final environmental impact statement) analysis of the same matter.’”).

³³ Board Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) at 4 (unpublished).

III. Order

For the reasons stated above, FENOC's Motion to Dismiss Contention 1 is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 10, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Denying Motion to Dismiss Contention 1) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
this 10th day of January 2012