

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
FIRSTENERGY NUCLEAR OPERATING COMPANY)	Docket No. 50-346-LR
)	
(Davis-Besse Nuclear Power Station, Unit 1))	January 13, 2012
)	

**FENOC’S MOTION FOR LEAVE TO FILE A MOTION FOR
RECONSIDERATION OF THE BOARD’S JANUARY 10 ORDER**

In accordance with 10 C.F.R. § 2.323(e), FirstEnergy Nuclear Operating Company (“FENOC”) requests leave to file the attached Motion for Reconsideration of the Board’s January 10 Order (“Board Order”), which denied FENOC’s Motion to Dismiss Contention 1 (“Motion to Dismiss”)¹ as not timely.² Section 2.323(e) provides that such motions: “may not be filed except upon leave of the presiding officer[], 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.”

Such compelling circumstances exist here, the Board’s Order is inconsistent with Section B.1 and C of the Initial Scheduling Order (“ISO”),³ and with the treatment of similar dispositive motions by other Atomic Safety and Licensing Boards and the federal courts.⁴ These

¹ FirstEnergy Nuclear Operating Company’s Motion to Dismiss Contention 1 (Dec. 19, 2011).
² Memorandum and Order (Denying Motion to Dismiss Contention 1), at 4 (Jan. 10, 2012) (unpublished). Per Section 2.323(e), this motion for leave and the attached motion for reconsideration are together only 10 pages long, and are filed within 10 days of the Board’s Order.
³ Initial Scheduling Order (June 15, 2011), *available at* ADAMS Accession No. ML111662021.
⁴ As required by 10 C.F.R. § 2.323(b), counsel for FENOC contacted Intervenor’s counsel , in an attempt to narrow the issues. Intervenor’s did not agree to the relief requested. The NRC Staff does not oppose the Motion.

circumstances demonstrate clear and material errors in the Board's Order, which neither FENOC, nor the other parties, reasonably could have anticipated and which, if left unaddressed, materially prejudice the rights of all parties going forward.

Because the Board's sole basis for rejecting the Motion to Strike was because it was "not timely,"⁵ these circumstances render the decision invalid. Accordingly, FENOC's Motion for Reconsideration satisfies Section 2.323(e).

FENOC requests expedited treatment of this motion because its outcome affects the timeliness of filings related to dispositive motion, and amended contentions related to the upcoming Draft Supplemental Environmental Impact Statement ("DSEIS").

Respectfully submitted,

Signed (electronically) by Timothy P. Matthews

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⁵ Board Order at 1.

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(e), FirstEnergy Nuclear Operating Company (“FENOC”) requests that the Board reconsider its January 10, 2012, Order denying FENOC’s Motion to Dismiss Contention 1 (“Motion to Dismiss”)¹ as untimely (“Board Order” or “Order”).² The Board should reconsider its Order in light of Sections B.1 and C of the Initial Scheduling Order (“ISO”).³ Moreover, other Atomic Safety and Licensing Boards and federal courts treat dispositive motions similarly to the approach described in this motion.

II. PROCEDURAL BACKGROUND

On August 27, 2010, FENOC submitted an Application, including an Environmental Report (“Original ER”), to the Nuclear Regulatory Commission (“NRC”) to renew the Davis-Besse operating license.⁴ The Original ER included a discussion of renewable energy

¹ FirstEnergy Nuclear Operating Company’s Motion to Dismiss Contention 1 (Dec. 19, 2011).
² Memorandum and Order (Denying Motion to Dismiss Contention 1), at 4 (Jan. 10, 2012) (unpublished). Per Section 2.323(e), this motion is only 10 pages long and is filed within 10 days of the Board’s Order.
³ Initial Scheduling Order (June 15, 2011), *available at* ADAMS Accession No. ML111662021.
⁴ Notice of Receipt and Availability of Application for a Renewal of Davis[-]Besse Nuclear Power Station, Unit 1, Facility Operating License No. NPF-003 for an Additional 20-Year Period, 75 Fed. Reg. 57299 (Sept. 2010).

alternatives which Intervenor found inadequate. Their “Request for Public Hearing and Petition for Leave to Intervene” (“Petition”), filed on December 27, 2010, proffered three alternative energy contentions. The Board consolidated the three contentions and admitted them as Contention 1, challenging the sufficiency of the ER’s analysis of renewable energy sources and FENOC’s conclusions that the proffered alternatives are not reasonable alternatives.⁵

On September 19, 2011, FENOC docketed revisions to the ER specifically addressing the alleged deficiencies raised in Contention 1 (“Revised ER”).⁶ Counsel for FENOC emailed the Revised ER to counsel for Intervenor on September 21. On October 19, counsel for FENOC consulted with the other parties, as required by 10 C.F.R. § 2.323(b). On October 31, the NRC Staff announced a delay in issuing the DSEIS until January 2012, to consider, among other things, the “in-depth alternatives” presented in FENOC’s revised ER.⁷

ISO Section B.1 allows 60 days for Intervenor to amend contentions upon the availability of new information—making November 22, 2011, the deadline for Intervenor to amend Contention 1. Intervenor did not amend their contention by the deadline.

FENOC filed its Motion to Dismiss Contention 1 on December 19, after expiration of Intervenor’s 60-day deadline to file amended contentions.⁸ Pursuant to ISO Section C, Intervenor and the NRC Staff timely filed their responses on January 9, 2012.⁹ In its January 10

⁵ See *FENOC* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, slip op. at 24, 34 (Apr. 26, 2011).

⁶ See Letter from K. Byrd, 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” (September 19, 2011) (“ER Letter”), available at ADAMS Accession No. ML11266A062.

⁷ See Letter to B. Allen, FENOC, from M. Galloway, NRC, “Schedule Revision for the Environmental and Safety Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application” (October 31, 2011), available at ADAMS Accession No. ML11256A164.

⁸ ISO at 12 (new or amended contentions considered timely if filed within 60 days of availability by any means of new information).

⁹ FENOC’s Motion for Extension of Time, also filed today, seeks additional time to file a Motion to Strike those materials in Intervenor’s January 9 pleading, consistent with the Board’s ruling on the instant Motion.

Order, the Board denied FENOC’s Motion to Dismiss, as well as Intervenor’s and the Staff’s responses on the sole ground that they all were untimely.

II. ANALYSIS¹⁰

In its Order, the Board states that 10 C.F.R. § 2.323(a) requires that motions be filed “no later than ten days after the occurrence or circumstance from which the motion arises,” and that “unless otherwise specified by the Board, a motion, such as a motion to compel, shall be filed” within those ten days.¹¹ The Order (at 1) states that the ISO contains “no expansion or waiver of the ten-day limit imposed by 10 C.F.R. § 2.323(a)” for other kinds of motions, other than a motion to compel. FENOC respectfully draws the Board’s attention to the set of timing deadlines described in ISO Section C applicable to dispositive motions, and notes that the parties independently followed those deadlines in preparing and responding to the Motion to Dismiss.

A. **The ISO Provides Separate Timing Requirements For Dispositive Motions**

ISO Section A.6. (“Disclosure Disputes and Motions to Compel”) states 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 . . .” Emphasis added. This Board “otherwise specified” separate timing requirements for dispositive motions in Section C of the ISO. ISO Section C states that “no dispositive motion shall be filed later than thirty (30) days after the Trigger Date.” The Trigger Date is defined in ISO Section F as the later of the issuance of the Final SEIS or the Final Safety Evaluation Report. ISO Section C places no other timing restrictions on filing of dispositive motions. Since section C of the ISO defines “a motion to dismiss a contention as moot” as a type

¹⁰ The legal standard for this Motion for Reconsideration is presented in the accompanying Motion for Leave and is, therefore, not repeated here.

¹¹ Board Order (citing ISO at 11).

of dispositive motion¹², and since the Staff’s then most recent Schedule showed the FSEIS issuance in July 2012¹³, FENOC was free to file its Motion to Dismiss as late as August 2012.

Moreover, the Board fashioned ISO Section C from the summary disposition timing rules in Section 2.1205.¹⁴ Section 2.1205(a) allows motions for summary disposition to be filed up to 45 days before the hearing; it does not set other timeliness requirement for these motions. The Commission’s rules treat motions for summary disposition similar to the way federal courts treat motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure,¹⁵ in that they specify only a date *by which* such motions must be filed, not a series of earlier trigger dates *from which* they must be filed.¹⁶ Accordingly, the timing requirements for dispositive motions in this proceeding have only a date *by which* such motions must be filed, not a date *from which* they must be filed.¹⁷

B. Other Atomic Safety and Licensing Boards Have Not Applied Section 2.323(a)’s Timing Requirement to Motions to Dismiss a Contention

Other Atomic Safety and Licensing Boards have not applied Section 2.323(a)’s 10-day

¹² ISO, Section C, at 13 (“adjudicating a motion for summary disposition, *motion to dismiss a contention as moot*, or other dispositive motion ...”). Emphasis added.

¹³ See n.7, *infra*.

¹⁴ Transcript of Pre-Hearing Conference at 262-63 (May 19, 2011).

¹⁵ FRCP 56(b) (“Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.”). The summary disposition rule for Part 2, SubPart G proceedings, also has similar timing requirements. See 10 C.F.R. 2.710(a) (“Summary disposition motions must be filed no later than twenty (20) days after the close of discovery.”); see also *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 NRC 131, 168 n. 48 (2007) (rev’d in part on other grounds).

¹⁶ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

¹⁷ This also is consistent with treatment of dispositive motions in federal courts, which often proscribe rules specific to dispositive motions as distinguished from generic motions. See *e.g.*, *Retamal v. U. S. Customs and Border Prot., Dep’t of Homeland Sec.*, 439 F.3d 1372, 1377 (Fed. Cir. 2006) (citing to Court of International Trade rules specific to dispositive motions, including thirty-day time limit for responding to dispositive motions distinguished from to ten-day limit for non-dispositive motions); *Smith v. United Parcel Serv.*, No. 2:08-cv001313-RCJ-RJJ, 2011 WL 6101939, slip op. at *2 (D. Nev. Dec. 7, 2011) (referring to “time limit for dispositive motions under the original scheduling order”); *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 719 (W.D. Tex. 2010) (referencing scheduling order deadline for filing dispositive motions).

trigger to motions to dismiss. For example:¹⁸

- in the Oyster Creek license renewal proceeding, the Applicant filed a Motion to Dismiss a contention as moot, 22 days after the occurrence from which the motion arose;¹⁹
- in the North Anna new reactor proceeding, the applicant filed a Motion to Dismiss a contention as moot 13 days after the occurrence from which the motion arose;²⁰
- in the Pa’ina Hawaii food irradiator licensing proceeding, the Applicant filed a Motion to Dismiss two contentions as moot, 19 and 41 days after the occurrences from which the motion arose.²¹

Had these boards believed that the 10-day requirement in Section 2.323(a) applied, they would have rejected the motions as not timely. Yet in each of these cases, the Boards entertained and granted the motions.²² The fact that FENOC filed its Motion to Dismiss later than in these examples is not material; either the 10-day requirement in Section 2.323(a) applies or it does not.²³ In this case, ISO Section C makes clear that it does not, and that interpretation is

¹⁸ These examples include only motions to dismiss contentions as moot.

¹⁹ AmerGen’s Motions to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures, at 2, AmerGen Energy Co. (Oyster Creek Nuclear Generating Station) (Apr. 25, 2006) (unpublished) (filing motion on April 26 based on April 4 docketed commitment to perform ultrasonic thickness measurements). The scheduling order in that proceeding does not address timing requirements for dispositive motions. Memorandum and Order (Prehearing Conference Call Summary, Initial Scheduling Order, and Administrative Directives), AmerGen Energy Co. (Oyster Creek Nuclear Generating Station) (Apr. 19, 2006) (unpublished).

²⁰ Dominion’s Motion to Dismiss BREDL’s Contention 10 as Moot, at 3, Dominion Virginia Power (North Anna Power Station, Unit 3) (July 12, 2010) (unpublished) (filing motion on July 12 based on June 29 docketed COLA amendment). This proceeding’s scheduling order does not mention dispositive motions other than summary disposition motions, and merely noted that all other filings should comply with “the applicable model milestones for hearings conducted under . . . Subpart L. Order (Establishing Schedule to Govern Further Proceedings, Dominion Virginia Power (North Anna Power Station,, Unit 3) (Sept. 10, 2008) (unpublished).

²¹ Applicant Pa’ina Hawaii, LLC’s Motion to Dismiss Safety Contentions #4 and #6, at 3, Pa’ina Hawaii (Materials License Application) (Apr. 19, 2006) (unpublished) (filing motion on April 19 based on March 9 and March 31 filings of outline of emergency procedures). The Scheduling Order contains no discussion of dispositive motions. Order, Pa’ina Hawaii (Materials License Application) (May 1, 2006) (unpublished).

²² The *Oyster Creek* and *North Anna* Boards granted the motions even though the applicants in those proceedings mentioned Section 2.323 or 2.323(a) in the first sentence of the motion (see supra note 23 and 24), which is how FENOC began its Motion to Strike. That is because Section 2.323 and 2.323(a) contain provisions applicable to motions other than timing, such as captioning for the Board and service on the parties. FENOC believed that the requirements of Section C were self-evident because it was filing a dispositive motion.

²³ FENOC waited in this case to see whether Intervenors would timely amend their contention based on the September 2011 Revised ER, and so that the responses of the parties would not come due during the holidays.

consistent with the parties' actions in this case, and with the actions of other Boards' reviewing similar motions.²⁴

C. ISO Section C and Section 2.323 Are Incompatible

The incompatibility of the timing requirements of ISO Section C and 10 C.F.R. 2.323 further demonstrates clear and material error. The Order (at 3 and 4) states that the ISO did not expand or waive either the 10-day limit, or the 10-day response time contained in Sections 2.323(a) and (c). However, ISO Section C allows parties to file Answers to dispositive motions within 20 days -- that provision conflicts with the Board's Order (at 4), which sets the time to file Answers at 10 days as specified in Section 2.323(c). Clearly, ISO Section C also modified the timing of responses to dispositive motions. Similarly, the requirement in ISO Section C to file answers to dispositive motions within 20 days would *exceed* the time to prepare a dispositive motion under the Board's Order (at 4), because the Order applies the 10 day trigger in Section 2.323(a) established for general motions, to dispositive motions. It would be inequitable to allow a party twice as long to respond to a motion compared to the amount of time given to prepare such a motion.²⁵ The January 10 Order confuses these timing requirements going forward.

²⁴ The result is the same regarding motions for summary disposition, which were filed, and ruled upon, without regard to the timing requirement of 10 C.F.R. § 2.323(a). *See, e.g.*, Applicant's Motion for Summary Disposition of Riverkeeper Technical Contention 2 (Flow-Accelerated Corrosion), Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3) (July 26, 2010) (unpublished), *denied on the merits by* Memorandum and Order (Ruling on Entergy's Motion for Summary Disposition of Riverkeeper TC-2 (Flow-Accelerated Corrosion) (Nov. 4, 2010) (unpublished); AmerGen Energy Company, LLC Motion for Summary Disposition on Citizens' Drywell Contention (Mar. 30, 2007) (unpublished), *denied on the merits by* Memorandum and Order (Denying AmerGen's Motion for Summary Disposition) (June 19, 2007) (unpublished); Entergy's Motion for Summary Disposition of New England Coalition's Contention 3 (Steam Dryer), Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) (Apr. 19, 2007) (unpublished), *granted by* Memorandum and Order (Ruling on Motion for Summary Disposition of NEC Contention 3) (Sept. 11, 2007) (unpublished).

²⁵ It also may be impracticable to file a summary disposition motion, with its requirement for an affidavit and statement of material facts that are not in dispute within ten days of new information. This will particularly be the case when the moving party is not the party preparing the underlying new information.

D. Allowing Intervenors Not to Refile Contention 1 after the DSEIS is Incompatible with ISO Section B.1.

Although not central to the holding on timeliness of the Motion to Dismiss, footnote 32 of the Board Order (at 6) also is incompatible with the ISO. That footnote states that: “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,” and cites to another Board’s order as the sole support.²⁶ However, ISO Section B.1 limits Intervenors to 60 days from the availability of new information to amend a contention.

The NRC Staff has indicated that it intends to consider in the DSEIS the “in-depth alternatives” presented in FENOC’s Revised ER.²⁷ Order footnote 32 anticipates this consideration when it states that there will be “treatment of the same issues in the DSEIS.” Yet, footnote 32 contravenes ISO Section B.1 not only by ignoring the original 60-day deadline, but also by waiving Intervenors obligation to file an amended contention based on “new” information in the DSEIS.²⁸ This is a clear and material error that, because of the plain language of ISO Section B.1, FENOC could not have reasonably anticipated. To not correct this ruling would allow the parties to go to hearing on issues that may be mooted in the DSEIS, resulting in a waste of the parties’ and the Board’s resources.

²⁶ The Board cites to and quotes from *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001). The Board appears to have intended to cite LBP-01-26, 54 N.R.C. 199, 208 (2001).

²⁷ See Letter to B. Allen, FENOC, from M. Galloway, NRC, “Schedule Revision for the Environmental and Safety Review of the Davis-Besse Nuclear Power Station, Unit No. 1, License Renewal Application” (October 31, 2011), available at ADAMS Accession No. ML11256A164.

²⁸ It would be inappropriate convert the issuance of the DSEIS into a second trigger date from which to timely file an amended contention on the same information published months prior in FENOC’s ER Revision.

IV. CONCLUSION

The Board made a clear and material error in its Order declaring that the Motion to Dismiss and responsive filings were not timely. ISO Section C carved out exceptions to the timing requirements in Section 2.323(a) and (c), and the parties relied on those exceptions. The Motion to Dismiss, and the Intervenors and Staff's responses all were filed consistent with FENOC's understanding of the timing requirements related to dispositive motions in ISO Section C. In light of Section C, and well established adjudicatory practice on Motions to Dismiss, FENOC could not have reasonably anticipated that the Board would reject its Motion as not timely, which renders the Order, based solely on timeliness, invalid. Additionally, the Board should clarify the Intervenors' obligation with respect to filing new or amended contentions. Accordingly, the Board should reconsider its Order.

Respectfully submitted,

Signed (electronically) by Timothy P. Matthews

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of:

1. FENOC'S MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION OF THE BOARD'S JANUARY 10 ORDER, and;
2. FENOC'S MOTION FOR RECONSIDERATION OF THE BOARD'S JANUARY 10 ORDER

were filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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