

March 7, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
NextEra Energy Seabrook, LLC)	Docket No. 50-443-LR
)	
(Seabrook Station))	
)	
(Operating License Renewal))	ASLBP No. 10-906-02-LR

**NextEra Energy Seabrook, LLC’s Answer to Friends of the Coast and
New England Coalition Motion for Leave to File For Reconsideration of
Memorandum and Order LBP-11-02**

NextEra Energy Seabrook, LLC (“NextEra”) hereby answers and opposes the “Motion for Leave to File for Reconsideration of Memorandum and Order LBP-11-02” (“Motion”) filed by Friends of the Coast and the New England Coalition (“NEC”), dated February 25, 2011. In its Motion, NEC seeks leave of the Board to file a motion for reconsideration of the Board’s Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing). LBP-11-02, 73 NRC __ (February 15, 2011). NEC has not explicitly sought reconsideration of LBP-11-02, only leave to file a motion seeking such relief. Regardless, NEC has failed to show circumstances that would compel the Board to reconsider its decision.

I. BACKGROUND

On September 17, 2010, the Secretary of the Commission granted NEC a 30-day extension of time, until October 20, 2010, to file a request for hearing in the Seabrook

license renewal proceeding.¹ NEC filed its hearing request on October 21, 2010.² On October 22, 2010, NEC filed a retroactive request for extension of time, blaming the NRC's E-Filing System for its untimely filing.³ NextEra and the NRC Staff filed timely answers to NEC's hearing request on November 15, 2010.⁴ Any NEC reply was due on November 22. NEC filed its reply on November 23, 2010.⁵ Later that day it filed another retroactive request for an extension of time.⁶ At the prehearing conference, in response to criticism from the Board on this point, NEC's representative "pledge[d . . .] to be certain to file a day in advance of the deadline" in order to avoid this problem.⁷

On February 15, 2011, the Board issued its ruling in LBP-11-02, admitting several contentions for hearing, but declining to admit NEC Contention 3 and portions of NEC Contention 4. Under NRC rules, any motion for reconsideration of LBP-11-02 was due within ten days of its issuance, or by February 25. 10 C.F.R. § 2.323(e). On Saturday, February 26, NEC filed its Motion and also filed a retroactive request for an extension of time without conferring with the other parties, as is required by 10 C.F.R.

¹ *NextEra Energy Seabrook, LLC* (Seabrook Station) (Sept. 17, 2010) (unpublished order).

² Friends of the Coast and the New England Coalition, Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (Oct. 20 [*sic*], 2010).

³ Friends of the Coast/New England Coalition's Request for Extension of Time (Oct. 22, 2010).

⁴ NextEra Energy Seabrook, LLC's Answer Opposing the Petition to Intervene and Request for Hearing of Friends of the Coast and the New England Coalition (Nov. 15, 2010); NRC Staff's Answer to Petitions to Intervene and Requests for Hearing Filed By (1) Friends of the Coast and New England Coalition and (2) Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club (Nov. 15, 2010).

⁵ Friends of the Coast and New England Coalition Reply to NextEra and NRC Staff Answers (Nov. 22, [*sic*] 2010).

⁶ Friends of the Coast/New England Coalition's Request for Extension of Time (Nov. 22, 2010).

⁷ Transcript of Proceedings; NextEra Energy Seabrook, Seabrook Station, Unit 1; Oral Argument, at 61.

§ 2.323(b).⁸ NEC conferred with the other parties on Monday, February 28 and supplemented its extension request with a certification to that effect.⁹

II. RECONSIDERATION REQUIRES COMPELLING CIRCUMSTANCES

Under the NRC's Rules of Practice,

Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, 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.

10 C.F.R. § 2.323(e).

The Commission's Statements of Consideration for its 2004 rulemaking that amended the adjudicatory provisions in Part 2 described the "compelling circumstances" standard as "intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier." Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). It went on to state that "reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier." *Id.* See also *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC __ (Mar. 11, 2010) (slip op. at 4).

⁸ Friends of the Coast and New England Coalition, Inc. Request for Extension of Time-Post-Facto (Feb. 26, 2011).

⁹ Friends of the Coast and New England Coalition, Inc. Request for Extension of Time, Addenda, Certificate of Counsel (Feb. 28, 2011).

III. NEC'S MOTION DOES NOT SHOW COMPELLING CIRCUMSTANCES

As a threshold matter, NEC's motion should be denied because it was not timely filed. 10 C.F.R. § 2.323(e). NEC correctly reported in the addendum to its retroactive request for an extension of time that NextEra takes no position on the filing of its extension request, but unless and until such relief is granted, NEC's Motion is late and should not be entertained.¹⁰ NEC's continued lack of respect for the Commission's pleading deadlines should not be encouraged.¹¹

However, even if the Board were to review the substance of NEC's Motion, it falls far short of the Commission's stringent standard for reconsideration set forth in 10 C.F.R. § 2.323(e). Indeed, it makes no effort to show compelling circumstances that could not have been anticipated and instead mischaracterizes the Board's decision and improperly reargues facts and rationales that it raised earlier (or should have). *See* 69 Fed. Reg. at 2,207.

First, NEC claims that the Board declared moot a portion of its Contention 4 that deals with wind borne radiation dose, based upon NextEra's post-Answer submittal of its response to an NRC Staff Request for Additional Information on the effect of the sea breeze on the calculated radiation dose in its Severe Accident Mitigation Alternatives ("SAMA") analysis. *Motion* at 2. NEC provides no citation to LBP-11-02 to support its assertion that the Board found this claim to be moot. *See id.* In fact, the Board expressly

¹⁰ NEC's post-motion correspondence does not meet the intent of 10 C.F.R. § 2.323(b), which requires a movant to certify that it "has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion," so that Boards need only address issues that the parties cannot resolve themselves. Filing a motion and then asking the other parties if they object to the filing of the motion does not achieve this purpose.

¹¹ It should be noted that the Commission "disfavor[s] motions for extensions of time that are themselves filed out-of-time" and "expect[s] parties to file motions for extensions of time so that they are 'received by the [NRC] well before the time specified expires.'" *Tennessee Valley Authority* (Bellefonte Nuclear Plant Units 1 and 2), CLI-10-26, 72 NRC __, __ (2010) (slip op. at 2)(citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981)).

declined to consider NextEra's January 14, 2011 submittal and admitted the portion of NEC Contention 4 addressing this issue. LBP-11-02 (slip op. at 19, 50). Obviously, NEC's misstatement of the Board's ruling cannot provide compelling circumstances to reconsider the decision.

Second, NEC seeks reconsideration of the Board's decision to deny admission of its Contention 3, related to aging management of buried pipes. Motion at 2-5. In its ruling, the Board found Contention 3 inadmissible for two reasons: it (1) "presents an issue that is not within the scope of the proceeding" (10 C.F.R. § 2.309(f)(1)(ii)); and (2) "is not supported by adequate factual allegations" (§ 2.309(f)(1)(v)). LBP-11-02 (slip op. at 38). In reaching this determination, the Board relied on the Commission's finding in the *Pilgrim* proceeding that the license renewal intended function for buried piping does not include the prevention of radioactive leaks. *Id.* at 36-37 (citing *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) CLI-10-14, 71 NRC __ (2010) (slip op. at 15) (Pilgrim II)).

In its Motion, NEC challenges this determination, arguing with no citation or support of any kind that the "Board must recognize the accident mitigation performance of numerous buried SSCs is to move radioactive water to collection points, sumps, treatment, and storage; thus mitigating or preventing its escape to the human environment." Motion at 3. This argument basically restates NEC's position from its initial petition – that buried pipes within the scope of license renewal contain radioactive water and leaks from these pipes could endanger the public. *See* NEC Petition at 24. But reconsideration is not an opportunity to reargue claims made earlier. To the extent NEC now attempts to tie the prevention of leaks of radioactive water to accident mitigation

under 10 C.F.R. § 54.4(a)(1)(iii), it makes a new argument that was not, but should have been, presented in its petition. *See generally*, NEC Petition at 22-33. In any event, NEC's Motion provides no support for the assertions that buried pipes within the scope of license renewal contain radioactive water and would be relied upon to mitigate or prevent the consequences of an accident. *See* Motion at 4-5.

Appearing to acknowledge that the prevention of leaks is not the intended function of buried pipes, NEC also argues that:

NRC cannot provide adequate assurance of public health and safety; nor can it provide adequate assurance of environmental protection of the biotic community through its ongoing reactor oversight program [process] either in the present or during the proposed period of extended operation because it relies on licensee conducted inspections, which, in many SSCs, inspect primarily for external corrosion and are monitoring to detect leaks only after they have occurred. These failings are at the core of Friends/NEC's arguments. . . . Friends/NEC is at a loss to understand how the adequacy, in terms of protecting the public health and welfare, of anything that is treated in the license renewal application is not within the scope of a proceeding that is convened to settle disputes about the contents of the license renewal application.

Motion at 4.

The Commission rejected this argument in *Pilgrim II*, explaining that 10 C.F.R. § 54.21 “does not require each structure and component within the scope of license renewal to be the subject of a far-reaching evaluation encompassing all aspects of the [current licensing basis (CLB)],” but instead requires “a demonstration that the effects of aging will be adequately managed ‘so that the intended function(s) will be maintained consistent with the CLB.’” CLI-10-14, (slip op. at 16). The Board's faithful application of Commission precedent certainly does not warrant reconsideration.

Third, NEC asks the Board to reconsider its decision to separately consider each of Contention 4's various subparts. Motion at 5-6, 8. NEC appears to assert that all of the issues it raised in Contention 4 (with the possible exception of its terrorism-related claim, *see* Motion at 6, n.2) must be considered as a whole. But NEC has failed to offer any compelling circumstances that would justify reconsideration of the Board's decision denying admission of portions of Contention 4. The Board in LBP-11-02 dismissed specific subparts of the contention because it found that those portions were beyond the scope of this proceeding (slip op. at 41, 44), were not adequately supported (*id.* at 59, 60), or were immaterial (*id.* at 61). The Commission recently approved a Board's consideration of a multi-part contention in this manner, analyzing each subpart and finding that some were admissible while others were not. *Progress Energy Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC __, __ (2010)(slip op. at 4, 7, 10). Regardless of whether the Board considered Contention 4 as a single contention or as several distinct sub-contentions, individual claims that do not meet the Commission's contention admissibility requirements are inadmissible.

NEC only identifies one aspect of Contention 4 the Board declined to admit – its challenge to the use of probabilistic modeling in Contention 4A. Motion at 6. The Board clearly explained in LBP-11-02 that the Commission has stated that the purpose of a SAMA analysis is to assess the probability-weighted consequences of a severe accident. LBP-11-02 (slip op. at 41) (citing *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) CLI-10-11, 71 NRC __ (2010) (slip op. at 13) (Pilgrim I)). The correct application of Commission caselaw is hardly a “manifest injustice” worthy of reconsideration.

NEC now asserts that it did not raise a challenge to the use of probabilistic modeling *per se*, but instead presented a challenge to how NextEra used probabilistic modeling. Motion at 6. But nowhere in its Motion does NEC identify its allegedly particularized dispute with the way NextEra employed probabilistic modeling. *See* Motion at 7-8. Nor did its petition raise anything other than a general challenge to the use of probabilistic modeling. *See* Pet. at 38-40. NEC's attempt to recast its general claim as a particularized challenge to NextEra's use of probabilistic modeling is both late and factually incorrect.¹²

In short, NEC has shown no compelling circumstances that would justify reconsideration of any of the Board's decisions denying the admission of its proposed contentions in this proceeding.

¹² NEC also disputes the Board's discussion of SAMAs deemed cost-beneficial in other license renewal proceedings in rejecting NEC's claim that the use of probabilistic modeling could "reduce the consequences so low as to 'reject all possible mitigation as too costly.'" LBP-11-02 (slip op. at 41)(citing Pet. at 39). As this discussion immediately followed the Board's separate determination that NEC's challenge to probabilistic modeling is beyond the scope of this proceeding, it cannot provide compelling circumstances for reconsideration. *See id.* at 41. The Board could also have cited NextEra's own application, which identifies two potentially cost-effective SAMAs, in order to demonstrate the baselessness of NEC's claim. *See* Environmental Report at F-187. Regardless, this discussion does not affect the Board's determination that a challenge to probabilistic modeling is beyond the scope of this proceeding.

IV. CONCLUSION

For all of the foregoing reasons, the Motion should be denied.

Respectfully Submitted,

Signed (electronically) by Steven C. Hamrick

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “NextEra Energy Seabrook, LLC’s Answer to Friends of the Coast and New England Coalition Motion for Leave to File For Reconsideration of Memorandum and Order LBP-11-02,” were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 7th day of March, 2011.

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