

**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 26, 2011

**FIRSTENERGY’S ANSWER TO PETITION FOR
RULEMAKING AND REQUEST TO SUSPEND**

FirstEnergy Nuclear Operating Company (“FirstEnergy”) hereby files this Answer to Intervenor¹’s Petition for Rulemaking.² The Rulemaking Petition seeks relief in this proceeding³ and is captioned as if it were filed on August 11, 2011, before this Atomic Safety and Licensing Board (“Board”) in this proceeding. The Intervenor¹s, however, did not serve this document on the Board or the other parties to this proceeding until September 15, 2011.⁴ Because the Rulemaking Petition is akin to a motion seeking relief from this Board, FirstEnergy files this timely Answer, consistent with 10 C.F.R. § 2.323(c).⁵

¹ The Intervenor¹s are Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio.

² 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) (“Rulemaking Petition”).

³ See Rulemaking Petition at 2 (“This petition is captioned in both the rulemaking docket and the docket for the Davis-Besse, Unit 1 operating licensing renewal proceeding because it seeks relief that is both generic and applicable to the individual proceeding.”).

⁴ See Notice and Certificate of Service of Rulemaking Petition to Rescind the Prohibition Against Consideration of Environmental Impacts of Severe [sic] Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Sept. 15, 2011).

⁵ 10 C.F.R. § 2.323(c) (“Within ten (10) days after service of a written motion . . . a party may file an answer in support of or in opposition to the motion . . .”). Fundamental fairness requires that FirstEnergy be allowed an opportunity to respond to the Rulemaking Petition. See *Hous. Lighting & Power Co.* (Allens

Intervenors apparently transmitted the Rulemaking Petition to the NRC's "Rulemaking Comments" email address on August 11, 2011.⁶ Although Intervenors stated in their August 12 filing (submitting a New Contention) that they attached the Rulemaking Petition to that filing,⁷ it in fact was not attached. Thus, contrary to 10 C.F.R. § 2.302 and the Board's Scheduling Order,⁸ Intervenors at that time neither filed this Rulemaking Petition through the E-Filing system nor did they serve a copy of it on the other parties or the Board.

Over one month later, after FirstEnergy and the NRC Staff filed their Answers to the New Contention and noted the absence of the Rulemaking Petition,⁹ Intervenors filed the Rulemaking Petition with the Board and served it on the other parties to this proceeding. Intervenors gave no explanation for this delay in service and filing of the Rulemaking Petition. Notably, this is not the first time Intervenors have failed to comply with the basic requirements for the service and filing of documents in this proceeding.¹⁰

Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979) ("[T]he cardinal rule, so far as fairness is concerned, is that each side must be heard.").

⁶ See Intervenors' Reply Memorandum [sic] to Staff and Applicant Oppositions to Admission of New Contention at 7; (Sept. 13, 2011); *id.*, attach. (Aug. 11, 2011) (Terry Lodge e-mail).

⁷ See 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 attach. at 4 (Aug. 12, 2011) (Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011)) ("A copy of the rulemaking petition is attached.").

⁸ See 10 C.F.R. § 2.302(a) ("Documents filed in Commission adjudicatory proceedings subject to this part shall be electronically transmitted through the E-Filing system . . ."); *see also* Initial Scheduling Order at 19 (June 15, 2011) ("If a motion of any kind refers to a . . . document of any kind . . . then a copy of that document . . . shall be submitted with and attached to the motion.").

⁹ See FirstEnergy's Answer Opposing Joint Petitioners' Motion to Admit and Proposed Contention Regarding Fukushima Task Force Report at 19 n.85 (Sept. 6, 2011) ("FirstEnergy's Answer") ("The New (Seabrook) Contention purports to attach a rulemaking petition filed by the intervenors in the Seabrook proceeding. That rulemaking petition, however, is not attached to Petitioners' New Contention, so its contents are not before this Board." (citations omitted)); 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 at 3 (Sept. 6, 2011).

¹⁰ *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC ___, slip op. at 8 (Apr. 26, 2011) ("In the future Joint Petitioners are strongly advised to prepare their pleadings

To the extent the Rulemaking Petition seeks relief from the Board, the Board must summarily deny it. First, the Rulemaking Petition requests that the Commission initiate a rulemaking proceeding.¹¹ The Board, however, has no jurisdiction over such a request.¹² In fact, the Commission, acting in its authority, has already referred these issues to the NRC Staff for consideration.¹³

Second, the Rulemaking Petition includes a request to suspend this license renewal proceeding.¹⁴ Under 10 C.F.R. § 2.802(d), the Commission has responsibility for considering such requests for suspension, not the Board.¹⁵ And in this case, the Commission has already denied that request. On September 9, 2011, the Commission disposed of the multiple identical suspension requests on the Fukushima accident filed both in this proceeding and on other dockets.¹⁶ The Commission stated:

[W]e find no imminent risk to public health and safety if we allow our regulatory processes to continue. Instead of finding obstacles to fair and efficient decision-making, we see benefits from

well in advance of any deadlines, and if any portion of a filing is untimely tendered, it must be accompanied by a motion pursuant to 10 C.F.R. §§ 2.309(c)(1) and 2.323.”).

¹¹ Rulemaking Petition at 1 (“[Intervenors] petition the U.S. Nuclear Regulatory Commission (“NRC”) to rescind regulations in 10 C.F.R. Part 51 . . .”).

¹² 10 C.F.R. § 2.802 delegates various responsibilities for handling rulemaking petitions to the Chief, Rulemaking, Directives, and Editing Branch (§ 2.802(b)), the Director, Division of Administrative Services (§ 2.802(e) and (g)), and the Executive Director for Operations (§ 2.802(f)), but does not delegate any responsibilities with respect to such petitions to Presiding Officers or Atomic Safety and Licensing Boards.

¹³ *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___, slip op. at 32 (Sept. 9, 2011) (“This request has, in essence, been granted. As explained above, we initiated a comprehensive examination of the implications of the Fukushima accident for U.S. facilities, establishing a Task Force instructed to undertake near-term review and to make recommendations for future actions.”).

¹⁴ See Rulemaking Petition at 1-2 (“This petition also requests the NRC to suspend the above-captioned licensing proceeding while the NRC considers this petition . . .”).

¹⁵ 10 C.F.R. § 2.802(d) (“The petitioner may request *the Commission* to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking.” (emphasis added)).

¹⁶ See *Callaway*, CLI-11-05, slip op. at 41 (denying “petitioners’ request to suspend licensing and standardized design certification decisions pending completion of the NRC Task Force’s evaluation of the implications of the Fukushima accident and issuance of any proposed regulatory decisions and/or environmental analyses”).

allowing our processes to continue so that issues unrelated to the Task Force's review can be resolved. We have well-established processes for imposing any new requirements necessary to protect public health and safety and the common defense and security. Moving forward with our decisions and proceedings will have no effect on the NRC's ability to implement necessary rule or policy changes that might come out of our review of the Fukushima Daiichi events.¹⁷

Thus, the suspension request is already moot. Moreover, Intervenor cannot ask the Board to reconsider the Commission's decision.¹⁸ If the service of the Rulemaking Petition on the parties with a caption "Before the Atomic Safety and Licensing Board" is understood as a request for reconsideration, then that request is filed before the wrong tribunal.¹⁹

For the reasons stated above, FirstEnergy requests that the Board summarily reject the Rulemaking Petition in its entirety. Because the Intervenor once again failed to properly file and serve their pleading on all parties, FirstEnergy also respectfully requests the Board to remind Intervenor of their continuing obligation to follow the regulations and orders that govern the service and filing of documents that they wish to have considered on this adjudicatory docket.

Respectfully submitted,

Signed (electronically) by Alex S. Polonsky

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¹⁷ *Id.* at 29.

¹⁸ *Cf. Fla. Power & Light* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980) (holding that a reconsideration could not be entertained where the Board no longer had jurisdiction).

¹⁹ *See id.* Moreover, Intervenor does not address and does not meet the requirements of a request for reconsideration. Under 10 C.F.R. § 2.345(b), a petition for reconsideration may only be granted if it demonstrates "a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid." *See also* 10 C.F.R. § 2.323(e) (providing a similar standard for a motion for reconsideration). Intervenor does not claim any compelling circumstance, and no such circumstance exists.

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Dated in Washington, D.C.
this 26th day of September 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “FirstEnergy’s Answer to Petition for Rulemaking and Request to Suspend” was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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