

**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 October 19, 2011
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FIRSTENERGY’S ANSWER TO INTERVENORS’ MOTION FOR LEAVE

In accordance with 10 C.F.R. § 2.323(c), FirstEnergy Nuclear Operating Company (“FirstEnergy” or “FENOC”) files this Answer to the Intervenor’s¹ “Motion for Leave,” dated October 7, 2011, apparently filed on that date, but served on the parties via Electronic Information Exchange (“EIE”) on October 12.² This is not the first time that Intervenor have filed documents in an untimely manner with no explanation and no timely request for leave to file out of time. Intervenor continue to burden this Board and the parties by disregarding the basic Rules of Practice in 10 C.F.R. Part 2. As explained below, the Board should deny Intervenor’s Motion for Leave, strike their untimely “Opposition to FENOC and NRC Staff Motions to Strike Portions of Intervenor’s Reply in Support of Admitting Contention Concerning

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

² Motion for Leave for Intervenor’s Opposition to FENOC and NRC Staff Motions to Strike Portions of Intervenor’s Reply in Support of Admitting Contention Concerning Fukushima Dai-ichi Accident to Be Deemed Filed *Instantly* (dated and filed Oct. 7, 2011, served Oct. 12, 2011). The reason for the delay in EIE service of Intervenor’s Motion for Leave is unclear, but Intervenor assert in their “refiled” motion that their October 7 filing was in “WordPerfect X4 format,” rather than in standard .pdf format. See Refiled Motion for Leave for Intervenor’s Opposition to FENOC and NRC Staff Motions to Strike Portions of Intervenor’s Reply in Support of Admitting Contention Concerning Fukushima Dai-ichi Accident to Be Deemed Filed *Instantly* at 1 n.1 (Oct. 12, 2011). All citations in this Answer are to the original Motion for Leave, dated October 7, 2011.

Fukushima Dai-ichi Accident,”³ and direct Intervenors that all future filings must strictly comply with the Rules of Practice and the Board’s Scheduling Order⁴ or be subject to summary dismissal by the Board.⁵

On Thursday night, October 6, 2011, the Intervenors filed their Opposition, responding to FirstEnergy⁶ and the NRC Staff’s⁷ Motions to Strike portions of Intervenors’ Reply related to a newly-proffered Fukushima-related contention. However, FirstEnergy and the NRC Staff filed their underlying motions on September 23, 2011. Under 10 C.F.R. § 2.323(c), Intervenors’ responsive pleading was due 10 days later, or Monday, October 3, 2011. Intervenors filed their Opposition three days after the due date, on October 6, 2011. On October 7, counsel for FirstEnergy contacted counsel for Intervenors regarding the tardiness of Intervenors’ Opposition. In response, on October 7, Intervenors filed their Motion for Leave. The Motion for Leave recites a litany of excuses for Intervenors’ failure to file their Opposition on time.⁸

Ultimately, Intervenors claim that they simply did not make themselves aware of the rules and were too busy to comply with the Commission’s and Board’s standards. The Commission itself has held that such excuses do not provide good cause for late filing.⁹ Similarly, resource constraints or other obligations do not provide justification for delay.¹⁰ Nor

³ Oct. 6, 2011 (“Opposition”).

⁴ Licensing Board Initial Scheduling Order (June 15, 2011) (“Scheduling Order”).

⁵ *Cf. Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-08-29, 68 NRC 899, 903 (1980) (directing the Office of the Secretary to screen all future filings with counsels’ signatures and to summarily reject and not docket any future filings that do not meet all procedural requirements).

⁶ FirstEnergy’s Motion to Strike Portions of Intervenors’ Reply (Sept. 23, 2011).

⁷ Corrected NRC Staff’s Motion to Strike Portions of Intervenors’ Reply Memorandum to Staff and Applicant Oppositions to Admission of New Contention (Sept. 23, 2011).

⁸ *See generally* Motion for Leave.

⁹ *Fla. Power & Light Co.* (Calvert Cliffs Nuclear Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 33 (2006) (“[w]e cannot agree that [the petitioner’s] failure to read carefully the governing procedural regulations constitutes good cause for accepting its late-filed petition”).

¹⁰ *See, e.g., Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) (“While a board should endeavor to conduct the proceeding in a manner that takes account of the special

do they provide good cause for Intervenors' failure to seek leave to file their untimely pleading, and only filing their Motion for Leave post-hoc.¹¹ The Motion for Leave claims that counsel made an "honest mistake" in thinking that the Opposition was due 14 days after FirstEnergy and the NRC Staff's Motion.¹² Counsel for Intervenors, however, has been involved in numerous NRC proceedings,¹³ and the Intervenors themselves have previously filed a response to a motion in this proceeding within the requisite ten days.¹⁴ Given that Intervenors are represented by experienced counsel and are themselves well-versed in NRC proceedings, the claim of an honest mistake does not transform an untimely filing into a timely one.¹⁵

Intervenors also assert that they "do not have a record of delaying these proceedings and have repeatedly met the time constraints imposed by NRC regulations and procedure."¹⁶

FirstEnergy disagrees. Specifically:

1. The Intervenors did not file their initial Petition¹⁷ in a timely manner. Although the Board found good cause and did not strike the Petition to Intervene, it noted that "[i]n the future Joint Petitioners are strongly advised to prepare their pleadings well in advance of

circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations.").

¹¹ See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC ___, slip op. at 8 (Apr. 26, 2011) ("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") (emphasis added).

¹² Motion for Leave at 1.

¹³ Counsel for Intervenors is also representing the intervenors in the Fermi Unit 3 COL proceeding, and has appeared in other NRC proceedings, including the Fermi Independent Spent Fuel Storage Installation ("ISFSI") proceeding, the Palisades license renewal proceeding, and the Big Rock Point ISFSI proceeding. Similarly, a number of the Intervenors are also participating or have participated in other NRC proceedings. For example, Beyond Nuclear is also participating in the Fermi Unit 3 and Calvert Cliffs Unit 3 COL proceedings, and the Seabrook license renewal proceeding.

¹⁴ See, e.g., Joint Intervenors' Combined Reply in Opposition to FENOC's 'Motion to Strike' (Feb. 17, 2011) (filed ten days after FirstEnergy's February 7, 2011 Motion).

¹⁵ See *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576-77 (1975) (observing that the Commission has given licensing boards "leeway" in evaluating intervention petitions drafted by pro se petitioners or "counsel new to the field," but declining to do so because the "petition bears the imprimatur of experienced counsel" who could be expected to file a petition "with the clarity and specificity demanded by the Commission's regulations").

¹⁶ Motion for Leave at 3.

¹⁷ Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010).

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.*¹⁸

2. Their Reply brief sought to introduce new bases and supporting material for their contentions without addressing the late-filing requirements in 10 C.F.R. §§ 2.309(c) and (f)(2), and the Board struck the new material.¹⁹
3. Intervenor filed and served their Rulemaking Petition²⁰ on the other parties to this proceeding over one month after the date of the document, with no explanation or motion for leave. They only did so *after* FirstEnergy and the NRC Staff noted the absence of the Rulemaking Petition in responding to Intervenor's late-filed contention.²¹

Thus, contrary to their representations, Intervenor has repeatedly flouted the timeliness rules and the Board's explicit directions regarding timeliness. The Opposition and the Motion for Leave are just the latest examples.

The Motion for Leave also incorrectly suggests that FirstEnergy must show prejudice from the three-day delay in Intervenor's Opposition.²² Intervenor cites no regulation or case law for such a standard requiring a showing of prejudice. On the contrary, good cause is the most important factor for evaluating late filings,²³ and prejudice is not one of the remaining factors.²⁴ Intervenor bears the burden of making a compelling showing that the other factors outweigh the lack of good cause,²⁵ but they have not even attempted to make such a showing.

¹⁸ *Davis-Besse*, LBP-11-13, slip op. at 8 (emphasis added).

¹⁹ *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), Licensing Board Memorandum and Order (Granting Motion to Strike and Requiring Re-filing of Reply) at 3-4 (unpublished) (Feb. 18, 2011).

²⁰ 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").

²¹ *See FirstEnergy's Answer to Petition for Rulemaking and Request to Suspend* (Sept. 26, 2011).

²² *See Motion for Leave* at 2.

²³ *See Davis-Besse*, LBP-11-13, slip op. at 6.

²⁴ *See* 10 C.F.R. § 2.309(c)(1)(ii)-(vii).

²⁵ *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC ___, slip op. at 5 (March 10, 2011) (proponent of a late filing bears the burden of addressing the stringent late-filing criteria); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

In sum, the Board should exercise its authority to control and maintain order in this proceeding.²⁶ FirstEnergy urges the Board to deny Intervenors' post-hoc Motion for Leave and to strike the late-filed Opposition.

Respectfully submitted,

Signed (electronically) by Martin J. O'Neill

Kathryn M. Sutton
Alex S. Polonsky
Martin J. O'Neill
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: 202-739-5830
Fax: 202-739-3001
E-mail: apolonsky@morganlewis.com

David W. Jenkins
Senior Corporate Counsel
FirstEnergy Service Company
Mailstop: A-GO-15
76 South Main Street
Akron, OH 44308
Phone: 330-384-5037
E-mail: djenkins@firstenergycorp.com

COUNSEL FOR FIRSTENERGY

Dated in Washington, D.C.
this 19th day of October 2011

²⁶ See 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”).

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October 19, 2011

CERTIFICATE OF SERVICE

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

Administrative Judge
William J. Froehlich, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wjfl@nrc.gov

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: nicholas.trikouros@nrc.gov

Administrative Judge
Dr. William E. Kastenber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wek1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Brian G. Harris
Megan Wright
Emily L. Monteith
E-mail: Brian.Harris@nrc.gov;
Megan.Wright@nrc.gov;
Emily.Monteith@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Michael Keegan
Don't Waste Michigan
811 Harrison Street
Monroe, MI 48161
E-mail: mkeeganj@comcast.net

Kevin Kamps
Paul Gunter
Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
E-mail: kevin@beyondnuclear.org;
paul@beyondnuclear.org

Terry J. Lodge
316 N. Michigan St., Ste. 520
Toledo, OH 43604
E-mail: tjlodge50@yahoo.com

Signed (electronically) by Martin J. O'Neill

Kathryn M. Sutton
Alex S. Polonsky
Martin J. O'Neill
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: apolonsky@morganlewis.com

COUNSEL FOR FIRSTENERGY