UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

FENOC'S ANSWER OPPOSING INTERVENORS' MOTION FOR RECONSIDERATION OF ORDER STRIKING INTERVENORS' ANSWER TO FENOC'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 4

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, FirstEnergy Nuclear Operating Company ("FENOC") submits this Answer opposing "Intervenors' Motion for Reconsideration of ASLB Order Granting FENOC's Motion to Strike 'Intervenors' Reply in Opposition to FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)'" ("Motion for Reconsideration"), dated October 22, 2012. As is apparent from its title, the Motion for Reconsideration requests that the Atomic Safety and Licensing Board ("Board") reconsider its October 11, 2012 Order striking Intervenors' Answer to FENOC's Motion for Summary Disposition of Contention 4.[1] This Answer also addresses Intervenors' "Motion to File 'Intervenors' Motion for Reconsideration of ASLB Order Granting FENOC's Motion to Strike' Nunc Pro Tunc" ("Nunc Pro Tunc Motion"), dated October 30, 2012, which requests the Board allow the late filing of the Motion for Reconsideration through the E-Filing system.

As discussed below, contrary to 10 C.F.R. § 2.323(b), Intervenors once again impermissibly filed their Motion for Reconsideration without consulting FENOC. This

[1] Motion for Reconsideration at 1.

deficiency provides an independent basis for rejecting the Motion for Reconsideration. Intervenors also filed the Motion for Reconsideration late through the E-Filing system without good cause, and did not consult on the Nunc Pro Tunc Motion. Finally, the Motion for Reconsideration fails to satisfy the standard for reconsideration set forth in 10 C.F.R. § 2.323(e), because Intervenors have not shown "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated." Intervenors instead repeat arguments in the Motion for Reconsideration that they already made in earlier pleadings, and which already have been rejected by the Board. Accordingly, Intervenors' Motion for Reconsideration should be denied.

II. BACKGROUND

Contention 4, as admitted by the Board and further limited by the Commission, relates solely to FENOC's use of the Modular Accident Analysis Program ("MAAP") computer code to generate source terms and release fractions for use in FENOC's Severe Accident Mitigation Alternatives ("SAMA") analysis for Davis-Besse license renewal.[2] FENOC timely filed its Motion for Summary Disposition of Contention 4 on July 26, 2012 following a revision to the License Renewal Application.[3] On September 14, 2012, the Nuclear Regulatory Commission ("NRC") Staff filed an answer supporting FENOC's Motion for Summary Disposition,[4] and Intervenors filed an answer opposing.[5]

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2 *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), CLI-12-08, 75 NRC __, slip op. at 20-21 (Mar. 27, 2012); *see also* Order (Granting Motion to Strike), at 6 (Oct. 11, 2012) ("Order Granting Motion to Strike").

3 FENOC Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Term) (July 26, 2012) ("Motion for Summary Disposition").

4 NRC Staff's Answer to FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis Source Terms) (Sept. 14, 2012).

5 Intervenors' Reply in Opposition to 'FirstEnergy's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms)' (Sept. 14, 2012) ("Intervenors' Answer").

On September 24, 2012, FENOC moved to strike Intervenors' Answer to the Motion for Summary Disposition, on the grounds it included exclusively new arguments and information outside the scope of Contention 4.[6] During consultation on FENOC's Motion to Strike, the Staff stated that it would not oppose striking the outside scope arguments.[7] Intervenors filed an answer opposing FENOC's Motion to Strike on October 4, 2012.[8] The Board granted the Motion to Strike on October 11, 2012, ruling that Intervenors' Answer was "irrelevant to FENOC's Motion for Summary Disposition of Contention 4" and "entirely unrelated to and beyond the scope of Contention 4 as admitted by the Board and limited by the Commission."[9] Intervenors attempted to file the instant Motion for Reconsideration on October 22, 2012 and filed a related Nunc Pro Tunc Motion on October 30, 2012.

III. LEGAL STANDARDS

Motions for reconsideration "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."[10] The Commission applies this standard strictly and does not grant motions for reconsideration lightly.[11]

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6 FENOC Motion to Strike Intervenors' Reply in Opposition to FENOC's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms) (Sept. 24, 2012) ("FENOC's Motion to Strike").

7 *Id.* at 1 n.1.

8 Intervenors' Response in Opposition to FENOC's Motion to Strike Intervenors' Reply in Opposition to FENOC's Motion for Summary Disposition of Contention 4 (SAMA Analysis – Source Terms) (Oct. 4, 2012) ("Answer to FENOC's Motion to Strike").

9 Order Granting Motion to Strike at 5.

10 10 C.F.R. § 2.323(e).

11 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006).

As part of its amendments to the NRC Rules of Practice in 2004, the Commission described the "compelling circumstances" standard in the context of motions for reconsideration as follows:

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, *and the claim could not have been raised earlier*. In the Commission's view, 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.[12]

Therefore, reconsideration is appropriate only if the moving party has demonstrated that the presiding officer has committed a "clear" error *and* it is related to a new argument that the party was not able to make previously.[13] Furthermore, a "clear" error is one that is "not even plausible in light of the record viewed in its entirety."[14]

IV. THE BOARD SHOULD DENY INTERVENORS' MOTION FOR RECONSIDERATION

The Board should deny Intervenors' Motion for Reconsideration because Intervenors, once again, failed to consult with FENOC before filing their motion and also filed the motion late through the E-Filing system without good cause. Alternatively, Intervenors' Motion for Reconsideration should be denied because it fails to meet the extraordinarily high standard for reconsideration.

A. The Board Should Deny Intervenors' Motion for Reconsideration Because Intervenors Failed to Consult with FENOC

The Motion for Reconsideration is procedurally defective because Intervenors failed to consult with FENOC—at all—before filing it. Under 10 C.F.R. § 2.323(b), "[a] motion must be rejected if it does not include a *certification* by the attorney or representative of the moving party

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[12] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (emphasis added).

[13] *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007).

[14] *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-5-19, 62 NRC 403, 411 (2005).

that the movant has made a *sincere effort to contact other parties* in the proceeding and *resolve* the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."[15] In this proceeding, the Board itself has mandated in the Initial Scheduling Order ("ISO"), Section G.1, that "*motions will be summarily rejected if they do not include the certification* specified in 10 C.F.R. § 2.323(b) that a sincere attempt to resolve the issues has been made."[16] Contrary to the NRC regulations and the Board's ISO, Intervenors made no attempt to contact FENOC and resolve the issues raised in the Motion for Reconsideration. Because Intervenors did not consult with FENOC and the Motion for Reconsideration does not include the mandatory certification, it must be rejected.[17]

Intervenors should be well-aware of this requirement as the Board and other Parties have previously pointed out Intervenors' failures to comply with the Section 2.323(b) consultation requirements. For example, Intervenors failed to consult or provide the required certification when they submitted a proposed contention related to the Fukushima accident.[18] The Board ruled that the proposed contention was "hopelessly flawed" and "must be denied" for failure to consult with FENOC or provide the requisite certification.[19] The Board concluded that the proposed contention "can therefore be rejected on this ground alone."[20] Intervenors repeated this same fatal deficiency in their June 4, 2012 Motion to Amend and Supplement Proposed

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15 Emphasis added.

16 Initial Scheduling Order at 18 (June 15, 2011) (emphasis added).

17 The Commission and licensing boards have supported this outcome in the past. *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-29, 68 NRC 899, 902 n.12 (2008) (rejecting a motion for failing to comply with consultation requirements of Section 2.323(b)); *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), Order (Denying New York State's Motion to Supplement), at 3-5 (June 7, 2012) (unpublished) (denying an intervenor's request to supplement the record because the intervenor failed to provide a sufficient Section 2.323(b) consultation).

18 *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station), LBP-11-34, 74 NRC __, slip op. at 12 (Nov. 23, 2011).

19 *Id.*

20 *Id.*

Contention No. 5 (Shield Building Cracking), which both FENOC and the NRC Staff pointed out in their answers to that motion.[21] In summary, the Motion for Reconsideration should be summarily rejected, as required by the NRC regulations, the ISO, and precedent.

B. The Board Should Deny Intervenors' Motion for Reconsideration Because Intervenors Filed It Late Without Good Cause

The deadline for the Motion for Reconsideration was October 22, 2012.[22] Intervenors' counsel e-mailed a copy of the Motion for Reconsideration to the Board and other Parties at 11:54 p.m. on October 22, 2012, and stated that he had been experiencing an error message when attempting to file the motion through the E-Filing system.[23] Intervenors' counsel stated that he would "try to properly file [the motion] in the EIS [sic] system on October 23."[24] NRC regulations state that "[s]ervice must be made electronically to the E-Filing system" and that service is only complete when it is electronically transmitted to the E-Filing system.[25] Therefore, Intervenors had not properly filed the Motion for Reconsideration on October 22, 2012.

Over a week later, Intervenors filed their Nunc Pro Tunc Motion through the E-Filing system. They requested that the Board allow the late filing because when they originally attempted to file the Motion for Reconsideration through the E-Filing system, they "could not for the reason, they later learned, that certain JAVA setting were wrongly set."[26] This request to extend the deadline for the filing is governed by 10 C.F.R. § 2.307, which states that a deadline "may be extended by . . . the presiding officer for good cause."

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21 FENOC's Answer Opposing Intervenors' Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking), at 14-15 (June 29, 2012); NRC Staff's Answer to Motion to Amend and Supplement Proposed Contention No. 5 (Shield Building Cracking), at 12 (June 29, 2012).

22 *See* 10 C.F.R. § 2.323(e) (requiring a motion for reconsideration to be filed within 10 days of the action for which reconsideration is requested).

23 E-mail from T. Lodge, Counsel to Intervenors, to Board and Parties, NRC Proceeding "Davis Besse 50-346-LR" (Intervenors' Motion for Reconsideration) (Oct. 22, 2012).

24 *Id.*

25 *See* 10 C.F.R. §§ 2.305(c), (f)(1).

26 Nunc Pro Tunc Motion at 1-2.

Although FENOC normally would not oppose a request to file late due to purported E-Filing difficulties, Intervenors have not shown good cause here for a number of reasons. First, Intervenors provide no justification for the week delay in filing through the E-Filing system, especially given that they told the Board and other Parties that they would file on October 23. Second, Intervenors' filing of the Nunc Pro Tunc Motion less than a week before the oral argument on the subject matter of the Motion for Reconsideration adds unnecessary inefficiency and additional questions to this proceeding. Third, Intervenors repeatedly make filings at the last minute, eliminating any ability to resolve problems with the E-Filing system before deadlines. Finally, once again, Intervenors did not consult with FENOC about the Nunc Pro Tunc Motion, as required by 10 C.F.R. § 2.323(b). For these reasons, the Nunc Pro Tunc Motion should be denied, and the Motion for Reconsideration should be rejected as untimely.

C. The Board Should Deny Intervenors' Motion for Reconsideration Because It Does Not Satisfy the Standards for Reconsideration

As identified above, a presiding officer may grant leave for a party to file a motion for reconsideration only "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."[27] The Commission has explained that this "extraordinary action" is available only when "the claim could not have been raised earlier."[28]

Intervenors do not contest that "Contention 4, as limited by [the] Board and the Commission, challenges only the MAAP code generated source terms used by FENOC in performing its SAMA analysis."[29] Rather, Intervenors argue that the Board erred in granting FENOC's Motion to Strike because Intervenors "did, indeed, challenge the MAAP code-

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27 10 C.F.R. § 2.323(e).

28 Changes to Adjudicatory Process, 69 Fed. Reg. at 2207.

29 *See* Motion for Reconsideration at 2 (citing Order Granting FENOC's Motion to Strike at 6).

generated source terms used by FENOC."[30] Intervenors contend that the arguments in Intervenors' Answer, which are all related to the Davis-Besse Shield Building cracking phenomena and the apparent corrosion of the Davis-Besse inner steel containment vessel, contain an adequate connection to the SAMA source terms such that they are within the scope of Contention 4.[31]

Intervenors, however, already made these arguments in their Answer to FENOC's Motion to Strike, and therefore do not satisfy the reconsideration standard that the claim could not have been raised earlier.[32] For example, Intervenors themselves explain: "Intervenors pointed out in their opposition to summary disposition (*and in their response to the Motion to Strike at p. 5*) that the scenarios of a fatally-cracked and compromised shield building and corroded containment shell were not addressed in the course of benchmarking."[33] Intervenors further explain: "Intervenors contended on summary disposition (*and in their response to the Motion to Strike at p. 6*) that the inputs and assumptions for the Davis-Besse SAMA are inappropriate."[34] Therefore, by their own admission, Intervenors are only repeating earlier arguments. Similarly, arguments about "key plant-unique facts," "garbage in, garbage out," and "input data" all were included in Intervenors' Answer to FENOC's Motion to Strike.[35] The Commission has explained that reconsideration "should not be used as an opportunity to reargue

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30 *Id.*

31 *See id.* at 4 ("Intervenors challenged the sufficiency of input data used in the MAAP model since that model did not account for the shield building cracking and containment structure corrosion.").

32 *See, e.g.*, Answer to FENOC's Motion to Strike at 2 ("To meet their burden on summary disposition, Intervenors came forward with a factual showing that Davis-Besse's plant-unique shield building cracking and containment shell corrosion phenomena were categorically excluded from consideration within FENOC's SAMA analysis.").

33 Motion for Reconsideration at 2 (emphasis added).

34 *Id.* (emphasis added).

35 *See* Answer to FENOC's Motion to Strike at 4-6.

facts and rationales which were (or should have been) discussed earlier."[36] This is exactly what Intervenors attempt here.

Additionally, there is no indication that the Board somehow missed or ignored Intervenors' arguments about the connection between SAMA source terms and the Davis-Besse Shield Building cracking phenomena or the apparent corrosion of the Davis-Besse inner steel containment vessel. To the contrary, in its Order, the Board acknowledged:

> Intervenors assert that their opposition arguments are relevant to the source terms used in FENOC's SAMA analysis because the source terms do not account for a cracked shield building or a corroded steel containment.[37]

The Board then rejected Intervenors' argument, finding Intervenors' Answer beyond the scope of Contention 4 as admitted by the Board and limited by the Commission:

> While Intervenors' concerns regarding the Davis-Besse containment may well have some relation to FENOC's SAMA analysis, the scope of Contention 4 does not encompass any and all arguments Intervenors have relating to SAMAs. Contention 4 is a very narrow contention, and it is beyond reason to suggest that Intervenors' arguments regarding the Davis-Besse shield building and containment are within its scope.[38]

Because Intervenors have simply repeated earlier arguments that were acknowledged and rejected by the Board, Intervenors have failed to demonstrate the "compelling circumstances" required by 10 C.F.R. § 2.323(e). Intervenors' arguments reflect a disagreement with the Board's ruling, not a "clear and material error" that "could not have reasonably been anticipated," as Section 2.323(e) requires. Moreover, Intervenors have identified no "manifest

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[36] Changes to Adjudicatory Process, 69 Fed. Reg. at 2207; *see also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 252 (2010).

[37] Order Granting FENOC's Motion to Strike at 5.

[38] *Id.* at 6.

injustice" that would occur by the Board's Order.[39] Accordingly, Intervenors do not satisfy the standards for reconsideration and their Motion for Reconsideration should be denied.

V. CONCLUSION

As explained above, Intervenors failed to consult with FENOC about their Motion for Reconsideration, this motion is untimely without good cause, and this motion does not satisfy the high standards for reconsideration. Therefore, the Board should deny Intervenors' Motion for Reconsideration and Nunc Pro Tunc Motion in their entirety.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Signed (electronically) by Timothy P. Matthews

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Dated in Washington, D.C.
this 1st day of November 2012

[39] Changes to Adjudicatory Process, 69 Fed. Reg. at 2207.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "FENOC's Answer Opposing Intervenors' Motion for Reconsideration of Order Striking Intervenors' Answer to FENOC's Motion for Summary Disposition of Contention 4" was filed with the Electronic Information Exchange in the above-captioned proceeding on the following recipients.

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