

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket Nos. 52-012-COL
NUCLEAR INNOVATION NORTH AMERICA LLC)	52-013-COL
(South Texas Project Units 3 and 4))	May 16, 2011

**NUCLEAR INNOVATION NORTH AMERICA LLC’S ANSWER OPPOSING
PETITIONERS’ MOTION TO PERMIT A CONSOLIDATED REPLY**

I. INTRODUCTION

Beginning on April 14, 2011, and continuing through April 21, 2011, the Petitioners filed with the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”), on the dockets of several licensing proceedings, an Emergency Petition to Suspend Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (“Petition”).¹ Although the Petition was not filed on the docket of the South Texas Project (“STP”) Units 3 and 4 combined license (“COL”) proceeding, the caption for the STP COL proceeding was included in the Petition filed in these other proceedings, and two intervenors in this proceeding, Public Citizen and the Sustainable Energy and Economic Development (“SEED”) Coalition, Inc. (collectively, “Petitioners”) were among

¹ See, e.g., Docket Nos. 52-027, 52-028, Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (original version dated Apr. 14-18, 2011; corrected version dated Apr. 18, 2011; served Apr. 14-21, 2011); Decl. of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 19, 2011) (“Makhijani Declaration”), available at ADAMS Accession No. ML111091154. All citations to the “Petition” in this Answer are to the corrected version of the Petition served on April 19, 2011, in Docket Nos. 52-027 and 52-028.

the individuals and organizations signing the Petition. Nuclear Innovation North America LLC (“NINA”) filed its Answer in opposition to the Petition with the Commission pursuant to 10 C.F.R. § 2.323(c) and the Commissioner’s Order dated April 19, 2011.

With a motion dated May 6-9, 2011, Petitioners now seek another “bite at the apple,” asking that the Commission modify its scheduling Order dated April 19, 2011 to allow submission of a Reply by Petitioners.² The Order already provided the Petitioners with an opportunity to supplement their petition by April 21, 2011, but allowed only for answers to the petition or briefs *amicus curiae* to be filed by May 2, 2011, with no provision for any further pleadings. As discussed below, the Petitioners’ Motion should be denied, because there are no compelling circumstances to authorize yet further briefing from the Petitioners.

II. ARGUMENT

Petitioners contend that further pleading should be authorized for two reasons: (1) because the events at Fukushima raise “unprecedented technical and legal issues” and “unprecedented safety and environmental concerns;” and (2) because Petitioners could not have anticipated the factual and legal arguments made in the Responses, which allegedly “mischaracterize” the Petition and “misinterpret the governing law.”³ Petitioners’ first argument does not articulate a plausible basis for authorizing a Reply. The events at Fukushima are clearly not new, compelling circumstances that provide a basis for filing a Reply, but rather they were known to Petitioners before they filed their original Petition—for that matter, these events formed that basis for that Petition. In addition, Petitioners have ignored substantial legal

² As of this date, the Motion has not been served in this docket, even though the caption refers to this docket.

³ Motion at 5. The pages of the Motion are not numbered. As such, references are based upon the frame of the “.pdf” file submitted by Petitioners.

precedent regarding the standards to be applied to petitions to suspend proceedings such as decisions issued after similar petitions were filed following the events of September 11, 2001.⁴

In their second argument, Petitioners contend that because they did not anticipate certain arguments in response to their Petition, they should be granted the opportunity to correct their apparent lack of foresight and respond to all the specific objections in the Answers to the Petition.⁵ This assertion evades Petitioners' burden, which is to show that there are "compelling circumstances, such as where the moving party demonstrates that it *could not have reasonably anticipated* the arguments to which it seeks leave to reply."⁶ Petitioners cannot simply point to specific arguments that they did not anticipate as proof that they have met the standard. Rather, they must show that they could not have *reasonably* anticipated these arguments.⁷ Petitioners are faced with a high hurdle, because the "compelling circumstances" requirement is generally understood to signal an "extraordinary action [that] should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier."⁸

Moreover, Petitioners have themselves mischaracterized the facts, asserting that their Petition does not amount to a motion to suspend licensing *proceedings*, but rather is somehow procedurally limited to a Petition to suspend licensing *decisions*. This assertion is, however, belied by the plain language of the Petition. In addition to the specific request to "[s]uspend all

⁴ See *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation)*, CLI-02-23, 56 NRC 230, 236-37 (2002); *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, CLI-01-28, 54 NRC 393, 398-99 (2001); *Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2)*, CLI-01-27, 54 NRC 385, 390-91 (2001); *Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation)*, CLI-01-26, 54 NRC 376, 377 (2001).

⁵ Motion at 5-6

⁶ 10 C.F.R. § 2.323(c) (emphasis added). Even if Petitioners do show compelling circumstances, then their request "may," but need not be granted. *Id.*

⁷ Taken to its logical conclusion, Petitioners' argument would permit a finding of compelling circumstances in any request for leave to reply, with a plea that the opposing party's answer included an argument that the moving party did not anticipate.

⁸ See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (discussing changes to 10 C.F.R. § 2.323(e), which uses the same "compelling circumstances" language as Section 2.323(c)).

decisions regarding issuance of construction permits, new reactor licenses, COLs, ESPs, license renewals, or standardized design certification,”⁹ the Petition requests that the Commission “[s]uspend all proceedings with respect to hearings or opportunities for public comment, on any reactor-related or spent fuel pool-related issues that have been identified for investigation in the Task Force’s Charter of April 1, 2011”¹⁰ and “[s]uspend all decisions and proceedings regarding all licensing and related rulemaking proceedings.”¹¹

Petitioners contend that by mischaracterizing the “core” request in the Emergency Petition as a request to suspend proceedings under 10 C.F.R. Part 2, the responses unfairly argue that “the Petition is subject to a host of procedural regulations which are simply irrelevant, and with which Petitioners did not comply.”¹² However, the Petition itself requests that the Commission suspend ongoing licensing proceedings. Furthermore, petitions to suspend proceedings have historically been treated by the Commission as motions under 10 C.F.R. § 2.323.¹³ Therefore, it should have been reasonably anticipated by the Petitioners that applicants would raise objections to the Petition under the applicable provisions in 10 C.F.R. Part 2 governing licensing proceedings.

Petitioners also should have anticipated that responses would be filed that point out the weaknesses in the arguments proffered by Dr. Makhijani. The responses directly deal with the issues raised by Dr. Makhijani; there is nothing unusual in the responses that warrants a reply.

⁹ Petition at 1.

¹⁰ Petition at 2 (emphasis added).

¹¹ Petition at 3 (emphasis added).

¹² Motion at 5.

¹³ *Diablo Canyon*, CLI-02-23, 56 NRC at 237; *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008).

Finally, Petitioners argue that they could not have anticipated legal arguments made by their opponents regarding “NEPA’s requirement for consideration of new and significant information in NRC licensing decisions.” However, a movant is expected “to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly.”¹⁴ In this case, the Petition itself raised claims regarding NEPA case law on new and significant information. Therefore, Petitioners should have reasonably anticipated that applicants would dispute Petitioners’ interpretation of that case law.

III. CONCLUSION

Petitioners have failed to establish compelling circumstances to justify authorizing a Reply. Accordingly, for all of these reasons, the Motion should be denied.

Respectfully submitted,

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Dated in Washington, DC
this 16th day of May 2011

¹⁴ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991).

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CERTIFICATION OF SERVICE

I hereby certify that, on May 16, 2011, a copy of “Nuclear Innovation North America LLC’s Answer Opposing Petitioners’ Motion to Permit a Consolidated Reply” was served electronically with the Electronic Information Exchange on the following recipients:

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