

May 16, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
Entergy Nuclear Generation Company and)	Docket No. 50-293-LR
Entergy Nuclear Operations, Inc.)	ASLBP No. 06-848-02-LR
)	
(Pilgrim Nuclear Power Station))	
)	
In the Matter of)	
)	Docket Nos. 50-247-LR
Entergy Nuclear Operations, Inc.)	and 50-286-LR
)	ASLBP No. 07-858-03-LR
(Indian Point Nuclear Generating Units 2 and 3))	

**ENTERGY’S ANSWER OPPOSING
MOTION TO PERMIT UNAUTHORIZED REPLY**

Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) hereby oppose “Petitioners’ Motion for Modification of the Commission’s April 19, 2011 Order to Permit a Consolidated Reply” (May 6-9, 2011) (“Motion”), which was filed on May 6, 2011 by Pilgrim Watch and by Hudson River Sloop Clearwater, Inc. (“Clearwater”) in the Pilgrim and Indian Point license renewal proceedings, respectively. The same Motion and accompanying Reply¹ are being filed in approximately twenty proceedings by some fifty individuals and organizations who, between April 14 and 18, 2011, filed with the Commission an “Emergency Petition to Suspend all Pending Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from the Fukushima Daiichi Nuclear Power

¹ Petitioners’ Reply to Responses to 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 (May 6-9, 2011) (“Reply”).

Station Accident” (“Petition”).² The Motion asks the Commission to allow a consolidated reply to the answers that were filed opposing the Petition.³ The Motion should be denied, because neither the Commission’s April 19, 2011 Order nor the Commission’s rules allow replies, and the Motion does not make the requisite showing of compelling circumstances to overcome the general prohibition against replies.

On April 19, 2011, the Secretary issued an Order (“Order”) that “set a schedule for further briefing” in connection with the Petition. Order at 1. The Order directed that (1) “[a]ny supplements to the petition may be filed no later than Thursday, April 21, 2011” (*id.* at 1-2, footnote omitted) and (2) that “[a]ny person may file an answer to the petition, or a brief *amicus curiae*, no later than Monday, May 2, 2011.” *Id.* at 2. The Order does not authorize any additional filings relating to the Petition.

Likewise, the Commission’s Rules of Practice do not authorize a reply. In particular, 10 C.F.R. § 2.323(c) provides:

The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

² The Petition requests that the Commission take a two-page list of actions, which can be summarized as including: 1) suspension of all decisions pending completion of the NRC’s review of the Fukushima Daiichi accident; 2) suspension of all proceedings, hearings or opportunities for public comment on any issue considered in that review; 3) performance of an environmental analysis of the accident; 4) performance of a safety analysis of the accident’s regulatory implications; 5) establishment of procedures and a timetable for raising of new issues in pending licensing proceedings; 6) suspension of all decisions and proceedings pending the outcome of any independent Congressional, Presidential or NRC investigations; and 7) request for a Presidential investigation.

On April 19, 2011, a Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Relating Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (April 19, 2011) (“Makhijani Declaration”) was filed by Pilgrim Watch in the Pilgrim proceeding and by Clearwater in the Indian Point proceeding. The Makhijani Declaration was also filed in the other proceedings to which the Petition relates.

³ Responses to the Petition were filed by Entergy, a number of other applicants, the NRC Staff, the Nuclear Energy Institute, and the Commonwealth of Massachusetts (“Massachusetts”). *See* Motion at (unnumbered) page 2, note 1. All responses, except that of Massachusetts, opposed the relief sought in the Petition.

10 C.F.R. § 2.323(c).

The Motion acknowledges that the standards in 10 C.F.R. § 2.323(c) govern the disposition of the Motion. Motion at 3. However, the Motion does not meet these standards. It makes no showing of compelling circumstances that would warrant allowing a reply.

First, the Motion claims that the Fukushima accident raises “unprecedented technical and legal issues for which there is very little precedent in NRC jurisprudence.” *Id.* There is in fact substantial Commission precedent on the standards that the Commission applies to petitions to suspend proceedings, including very similar petitions that were filed after 9/11.⁴ The Petition simply ignored that case law and standards. The Motion fails to demonstrate why the petitioners should now be entitled to a “second bite at the apple” to address those standards.

Second, the Motion argues that the petitioners could not have anticipated that the Petition would be characterized as a “motion” to suspend “proceedings.” Motion at 3-4. There is no merit to this assertion. Commission case law clearly holds that petitions to suspend proceedings are treated by the Commission as motions under 10 C.F.R. § 2.323. Oyster Creek, CLI-08-23, 68 N.R.C. at 476; Diablo Canyon, CLI-02-23 56 N.R.C. at 237. Moreover, the Motion itself treats the Petition as a motion, by invoking the provisions of 10 C.F.R. § 2.323(c) (applicable only to motions) to justify the filing a reply.

⁴ Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376, 380 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 N.R.C. 385, 389-90 (2001); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 N.R.C. 393, 399 (2001), reconsideration denied, CLI-02-2, 55 N.R.C. 5 (2002); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23 56 N.R.C. 230, 237 (2002); AmerGen Energy Co., LLC et al. (Oyster Creek Nuclear Generating Station et al.), CLI-08-23, 68 N.R.C. 461, 476 (2008); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000); Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 N.R.C. ___, slip op. at 8-10 (July 8, 2010).

Further, Petition clearly seeks suspension of proceedings. In particular, the Petition asks the Commission to “[s]uspend all proceedings” with respect to “any reactor-related or spent fuel pool-related issues that have been identified for investigation in the Task Force’s Charter” and “with regard to any other issues that the Task Force subsequently may identify as significant in the course of its investigation.” Petition at 2, 28. The Petition also states, “The proceedings should be suspended pending completion of the Task Force’s investigation into those issues and the issuance of any proposed regulatory decisions and/or environmental analyses of those issues.” *Id.* at 2, 28-29. In addition, the Petition asks the Commission “to suspend all decisions and proceedings regarding all licensing and related rulemaking proceedings, as discussed above, pending the outcome of any independent investigation of the Fukushima accident. . . .” *Id.* at 3. It is inexplicable how the Motion can now claim that the Petition did not seek the suspension of licensing proceedings.

In any event, suspending “decisions” and suspending “proceedings” appears to be a distinction without a difference. Any request to suspend a “proceeding” or suspend “a decision” in a proceeding would be considered a motion, as it is asking the Commission to take some action in a proceeding.⁵ Further, the Commission has treated a request to stay consideration of a petition for review (i.e., a request to withhold a decision) as “at bottom” seeking a suspension of a proceeding. *Vermont Yankee*, CLI-10-17, slip op. at 8-10.

Third, the Motion claims that the petitioners “also could not have anticipated the numerous technical arguments that the Responses have made in challenging the validity of Dr. Makhijani’s supporting declaration regarding the new and significant information demonstrated

⁵ See Black’s Law Dictionary (6th Ed. 1990) (defining a “motion” as “an application made to a court or judge for purposes of obtaining a rule or order directing some act to be done in favor of the applicant.”).

by the Fukushima accident, or that the Responses would fail to provide expert support for their technical arguments.” Motion at 4. The petitioners obviously should have anticipated that the responses to the Petition would point out the weaknesses in and insufficiency of Dr. Makhijani’s arguments. That Entergy and the other applicants responding to the Petition found it unnecessary to support their observations and arguments with a declaration⁶ provides no grounds for a reply.

Finally, the Motion states that the petitioners “could not have anticipated the numerous ways in which the opponents misinterpret NEPA’s requirement for consideration of new and significant information in NRC licensing decisions.” *Id.* Again, the raising of legal arguments in refutation of the arguments presented in a motion is the expected focus of a response to a motion and cannot possibly be claimed to be “unanticipated.” Moreover, Entergy’s discussion of the standards for considering new and significant information was based on well-established, cited case law. The legal arguments in the responses do not become “unanticipated” simply because petitioners failed to research, or disagree with, the applicable law and precedent. The petitioners had the opportunity to raise every relevant legal argument in support of their Petition in the first instance. It was therefore incumbent on them to identify all applicable precedents and distinguish them in their Petition and not in a reply. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 N.R.C. 461, 469 (1991); U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), Memorandum and Order (Denying Petition to Certify Issue to the Commission and Motion for Leave to File Replies) at 4-5 (Dec. 22, 2008) (ADAMS Accession No. ML083570498).

⁶ One does not need a countering declaration to point out that the assertions in Dr. Makhijani’s declaration raised issues beyond the scope of license renewal proceedings, were speculative and unsupported by facts, and failed to provide any discussion specific to the proceedings that the Petition sought to disrupt.

For the above stated reasons, the Commission should deny the Motion and disregard the Reply attached to it.

Respectfully submitted,

/Signed electronically by /

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Dated: May 16, 2011

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(Pilgrim Nuclear Power Station))	

CERTIFICATE OF SERVICE

I hereby certify that copies of Entergy's Answer Opposing Motion to Permit Unauthorized Reply, dated May 16, 2011, was provided to the Electronic Information Exchange for service on the individuals below, this 16th day of May, 2011.

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I hereby certify that copies of Entergy's Answer Opposing Motion to Permit Unauthorized Reply, dated May 16, 2011, were served on the persons below by deposit in the U.S. mail, first class, postage prepaid, and by email, this 16th day of May, 2011.

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