UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-346-LR
FIRSTENERGY NUCLEAR OPERATING COMPANY	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	May 16, 2011

FIRSTENERGY'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] FirstEnergy Nuclear Operating Company ("FirstEnergy" or "FENOC") filed its Answer in opposition to the Petition with the Commission pursuant to 10 C.F.R. § 2.323(c) and the Commissioner's Scheduling Order of April 19, 2011.

With a Motion filed in this proceeding on May 6, 2011, Petitioners now seek another "bite at the apple," asking that the Commission modify its April 16 Scheduling Order to allow submission of a Reply. The Order already provided the Petitioners with an opportunity to

[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.

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 Replies are only permitted where the Secretary or presiding officer finds compelling circumstances exist (10 C.F.R. § 2.323(c)), and Petitioners' Motion provides no such compelling circumstances.

II. ARGUMENT

Petitioners contend that further pleading should be authorized for two reasons: (1) because the accident at Fukushima raises "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."[2]

Petitioners' first argument does not articulate a plausible basis for authorizing a Reply because the circumstances surrounding the accident at Fukushima were known to Petitioners before they filed their Petition.

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 alleged lack of foresight and respond to all the specific objections in FirstEnergy's Answer to the Petition.[3] This misconstrues Petitioners' burden. Compelling circumstances would only exist where, for example, "the moving party demonstrates that it *could not have reasonably anticipated* the arguments to which it seeks leave to reply."[4] Petitioners cannot simply point to

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[2] Petitioners' Motion for Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply ("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.

[3] *See* Motion at 5-6.

[4] 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*.

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.[5] 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."[6]

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*.[7] This assertion is, however, belied by the plain language of the Petition. The petition specifically requests the Commission to "[s]uspend all decisions regarding issuance of construction permits, new reactor licenses, COLs, ESPs, license renewals, or standardized design certification,"[8] "[**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"[9] and "[**s]uspend all decisions and proceedings** regarding all licensing and related rulemaking proceedings."[10]

Petitioners contend that by mischaracterizing the "core" request in the Emergency Petition, the Responses somehow unfairly argue that "the Petition is subject to a host of procedural regulations which are simply irrelevant, and with which Petitioners did not

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5 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.

6 *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)).

7 Motion at 3.

8 Petition at 1.

9 *Id.* at 2 (emphasis added).

10 *Id.* at 3 (emphasis added).

comply."[11] However, Petitions to suspend proceedings have historically been treated by the Commission as motions under 10 C.F.R. § 2.323.[12] Therefore, it should have reasonably been 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.

Finally, Petitioners fail to meet their applicable burden in arguing 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."[13] Again, failing to anticipate arguments is not a basis for granting leave to file a Reply, because 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.

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11 Motion at 5-6.

12 *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002) (citing 10 C.F.R. § 2.730, which now is 10 C.F.R. § 2.323).

13 Motion at 6.

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

III. CONCLUSION

Petitioners have failed to establish compelling circumstances to justify the Secretary or presiding officer to authorize a Reply. For these reasons, the Motion should be denied.

Respectfully submitted,

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

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COUNSEL FOR FIRSTENERGY

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

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CERTIFICATION OF SERVICE

I hereby certify that, on May 16, 2011, a copy of "FirstEnergy'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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