

May 16, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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|---|------------------|--------------------------------------|
| In the Matter of AmerenUE (Callaway Plant Unit 2) |))) | Docket No. 52-037-COL |
| In the Matter of AP1000 Design Certification Amendment 10 CFR Part 52 |))) | NRC-2010-0131 RIN 3150-A18 |
| In the Matter of Calvert Cliffs 3 Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3) |))) | Docket No. 52-016-COL |
| In the Matter of Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3) |))) | Docket No. 52-033-COL |
| In the Matter of Duke Energy Carolinas, L.L.C. (William States Lee III Nuclear Station, Units 1 and 2) |)))) | Docket Nos. 52-018-COL 52-019-COL |
| In the Matter of Energy Northwest (Columbia Generating Station) |))) | Docket No. 50-397-LR |
| In the Matter of Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station) |)))) | Docket No. 50-293-LR |
| In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station, Units 2 and 3) |)))) | Docket Nos. 50-247-LR 50-286-LR |
| In the Matter of ESBWR Design Certification Amendment 10 CFR Part 52 |))) | NRC-2010-0135 RIN-3150-A185 |
| In the Matter of FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1) |)))) | Docket No. 50-346-LR |

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| In the Matter of Florida Power & Light Co. (Turkey Point, Units 6 and 7) |))) | Docket Nos. 52-040-COL 52-041-COL |
| In the Matter of Luminant Generation Co., L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4) |)))) | Docket Nos. 52-034-COL 52-035-COL |
| In the Matter of Nextera Energy Seabrook, L.L.C. (Seabrook Station, Unit 1) |))) | Docket No. 50-443-LR |
| In the Matter of Nuclear Innovation North America, L.L.C. (South Texas Project, Units 3 and 4) |)))) | Docket Nos. 52-012-COL 52-013-COL |
| In the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) |)))) | Docket Nos. 50-275-LR 50-323-LR |
| In the Matter of PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant) |))) | Docket No. 52-039-COL |
| In the Matter of Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3) |)))) | Docket Nos. 52-022-COL 52-023-COL |
| In the Matter of Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2) |)))) | Docket Nos. 52-029-COL 52-030-COL |
| In the Matter of South Carolina Electric and Gas Co. and South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3) |)))))) | Docket Nos. 52-027-COL 52-028-COL |
| In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) |)))) | Docket Nos. 52-025-COL 52-026-COL |

In the Matter of)
Tennessee Valley Authority) Docket Nos. 52-014-COL
(Bellefonte Nuclear Power Plant,) 52-015-COL
Units 3 and 4))

In the Matter of)
Tennessee Valley Authority) Docket No. 50-0391-OL
(Watts Bar Unit 2))

In the Matter of)
Virginia Electric and Power Co.) Docket No. 52-017-COL
d/b/a Dominion Virginia Power and)
Old Dominion Electric Cooperative)
(North Anna Unit 3))

NRC STAFF'S ANSWER TO PETITIONERS' MOTION FOR MODIFICATION OF THE
COMMISSION'S APRIL 19, 2011, ORDER TO PERMIT A CONSOLIDATED REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby provides its answer to the Petitioners' Motion for Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply ("Motion"). The Commission should deny the Motion because it does not demonstrate the "compelling circumstances" needed to justify a reply under the Commission's regulations. 10 C.F.R. § 2.323(c).

PROCEDURAL BACKGROUND

From April 14 to April 18, 2011, several parties in the above captioned proceedings ("Petitioners") filed an 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 ("Petition").¹ On April 19, 2011, the Office of the

¹ E.g. Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related (continued. . .)

Secretary issued an Order in each proceeding setting a deadline of May 2, 2011, for parties and amici to respond to the Petition.² On May 2, 2011, the NRC Staff filed an Answer 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 (“Answer”) in each proceeding.³ The applicants in the captioned proceedings also filed answers to the Petition. Motion at 2 & n.1. Between May 6 and May 12, 2011, the Petitioners filed the instant Motion to permit a reply.

LEGAL STANDARDS FOR MOTIONS TO PERMIT A REPLY

Section 2.323(c) provides that there is no right to reply to answers to motions, but that permission to file a reply may be granted “only in *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” (emphases added). Although the Petitioners contend that the Staff and applicants incorrectly characterized their initial filing as a motion, the Petitioners agree that the standard for granting a reply should be the “compelling circumstances” standard in 10 C.F.R. § 2.323(c). See Motion at 1, 3 (citing 10 C.F.R. 2.323(c)) (“As discussed below [this motion satisfies] the NRC’s standard for allowing a reply because this case involves compelling circumstances.”).

(. . .continued)

Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (April 15, 2011) (ADAMS Accession No. ML111050477).

² *E.g.*, Scheduling Order of the Secretary Regarding Petitions to Suspend Adjudicatory, Licensing and Rulemaking Activities, at 1–2 (April 19, 2011) (ADAMS Accession No. ML111091138).

³ *E.g.*, NRC Staff’s Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemakings Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (May 2, 2011) (ADAMS Accession No. ML111220535) (“Answer”). The Staff’s answer contained a brief description of the procedural status of all of the adjudications in which the Petitioners filed. *Id.* at 3-6.

DISCUSSION

The Petitioners advance several reasons why the Commission should consider their proposed reply, but none of them demonstrates the compelling circumstances envisioned by the regulation.⁴ As discussed below, the Petitioners could have anticipated the arguments to which they now seek leave to reply. The Petitioners had an unfettered opportunity to raise every relevant argument in support of their Petition in the first instance. There is no injustice in denying the Petitioners' request to make arguments they could have first raised in their Petition.

A. A Reply Brief Is Not the Appropriate Forum for a Thorough Discussion of the Regulatory Significance of the Fukushima Event

First, the Petitioners argue that the Commission should consider the Proposed Reply brief because "it is . . . appropriate to allow a thorough debate regarding the regulatory significance of the Fukushima accident." Motion at 3. The Staff agrees that a thorough discourse on the regulatory significance of the Fukushima event is appropriate. However, this does not demonstrate compelling circumstances because a reply brief in an adjudicatory setting is an inappropriate forum for such a discussion.

In NRC proceedings a reply is typically limited to responding to arguments raised in opposition to it. *See, e.g., Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)* (noting that a reply to an answer to a hearing request must focus on material in the hearing request or contained in the answer). Given this inherently

⁴ The Petitioners have kept their Motion relatively brief, providing only skeletal arguments. These arguments build on the Proposed Reply, which Petitioners have appended to their as-yet-ungranted Motion. 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, 2009) ("Proposed Reply"). In the Staff's view, the Petitioners' cursory Motion invites the Commission to read the Proposed Reply in order to decide whether to allow it, effectively defeating the regulatory presumption against allowing such replies and the requirement that parties file them with "permission." 10 C.F.R. § 2.323(c). Absent such permission, the Proposed Reply effectively does not exist, and so should not be relied upon.

narrow focus, a reply brief is not an appropriate mechanism for an open-ended debate on the broad ranging considerations related to the regulatory significance of the Fukushima event. Petitioners have other available avenues, such as the rulemaking process, to fully discuss the regulatory significance of the Fukushima event. See 10 C.F.R. § 2.802. As a result, Petitioners have not demonstrated that compelling circumstances justify a reply because other agency forums are designed to accommodate a broader array of issues associated with the Fukushima event than a reply brief that, by its nature, is narrow in scope. As discussed in the Staff's Answer, to the extent Petitioners believe procedural action is necessary in individual proceedings to preserve the integrity of the agency's discussion of the Fukushima event, Petitioners have a menu of regulatory options to choose from to request such action. Answer at 15, 17, 18, 19, 24.

B. The Petitioners Could Have Anticipated the Responses to the Petition

1. The Commission Has Previously Found A Similar Petition to Be A Motion

The Petitioners also assert that compelling circumstances exist because they could not have foreseen that “virtually all of the Responses [would] mischaracterize Petitioners’ Emergency Petition to suspend licensing decisions as a ‘motion’ to suspend licensing ‘proceedings.’” Motion at 3. If the Petition is appropriately characterized as a motion, the Petitioners observe, the Petition would be “subject to a host of procedural regulations” that “would result in the dismissal of the Petition.” *Id.* at 3-4. But, the Commission has previously described a similar petition to suspend as a motion. As a result, Petitioners could have anticipated that the other parties would view their Petition to suspend as a motion. In two of the above captioned proceedings, parties filed similar “petitions” that asked the Commission to

“suspend” license renewal reviews.⁵ In responding to these petitions, the Commission observed, “Petitioners’ requests do not fit cleanly within any of the procedures described in our rules of practice. We treat them here as general motions brought under the procedural requirements of 10 C.F.R. § 2.323.” *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 475-76 (2008). In light of this Commission precedent, the Petitioners could have foreseen that other parties would view a similarly-styled petition seeking similar relief as a motion.⁶ As a result, the other parties’ nearly unanimous characterization of the Petition as a motion does not constitute a compelling circumstance that would support the request to file a reply. Furthermore, Petitioners could have reasonably foreseen that a petition listing multiple forms of relief, including both suspension of licensing decisions and suspension of licensing proceedings as well as other procedural changes, would be interpreted as a motion. Petition at 1-3.

⁵ *E.g.* Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch and New England Coalition to Suspend License Renewal Reviews for *Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee* Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies (Jan. 3, 2008) (ADAMS Accession No. ML080090190) (“2008 Petition”). The 2008 Petition concerning the Pilgrim, Oyster Creek, Indian Point, and Vermont Yankee license renewal proceedings asked for both adjudicatory and non-adjudicatory relief. The 2008 Petition requested that the Commission suspend both Staff technical reviews and adjudicatory proceedings, conduct an investigation into the independence of the Staff, perform a complete overhaul of the license renewal review process, appropriately revise the staff’s review documents, and allow new contentions in all four proceedings. *Oyster Creek*, CLI-08-23, 68 NRC at 474.

⁶ *See also Hydro Resources, Inc.*, CLI-04-11, 63 NRC 483, 488-89 (2006) (noting that legal determinations made on appeal become controlling precedent, or law of the case, for all future decisions in that proceeding).

2. Other Parties' Reasonably Viewed the Petition as a Motion Because It Sought Relief That Is Normally Available in NRC Proceedings

Even if the Commission considered the arguments in the Proposed Reply, Petitioners still have not demonstrated that the Petition was anything other than a motion.⁷ Petitioners assert that the Petition “cannot be characterized as a motion or the equivalent of a motion . . . because the relief it seeks could not be granted in an adjudication.” Proposed Reply at 5. But, as discussed in the Staff’s Answer, the extraordinary forms of relief sought by the Petition, halting licensing decisions or suspending parts of licensing proceedings, are available under the Commission’s adjudicatory regulations and precedent. Answer at 8-18. Nonetheless, the standards to obtain such extraordinary relief are high. Petitioners have simply not met these high standards. Accordingly, this part of the Petitioners’ argument also does not show compelling circumstances warranting a reply because the Petition sought relief that can normally be granted in an adjudication. Petitioners should have expected other parties to respond accordingly.

3. Petitioners Have Not Pointed to Any Specific Arguments Responding to Dr. Makhijani’s Supporting Declaration or their National Environmental Policy Act Claims that They Could Not Have Anticipated

In addition, Petitioners assert that they could not have anticipated the other parties’ responses to Dr. Makhijani’s supporting declaration or the “numerous ways in which the opponents misinterpret [the National Environmental Policy Act’s (“NEPA”)] requirements.”

⁷ The claim that the Petition is not a document seeking relief in specific proceedings appears implausible. The Petitioners filed the document in several NRC adjudications. Petitioners now claim that they only filed the document in these proceedings “to give notice to interested parties.” Proposed Reply at 5. But, the Petitioners did not file their Motion in several contested cases, such as the South Texas license renewal proceeding, and some uncontested cases, such as the Salem and Hope Creek license renewal proceeding. Presumably, the applicants in these cases are entitled to notice that is the same as those that the Petitioners served. Omission of service in these cases implies that the Petition’s request for relief was limited to the cases in which it was actually served.

Motion at 4. But, the Commission should only grant leave to reply when a party “*demonstrates* that it could not reasonably have anticipated the arguments to which it seeks leave to reply.” 10 C.F.R. § 2.323 (emphasis added). The conclusory statements in the Motion do not constitute such a demonstration. Disputes over NEPA’s requirements and the importance of a given expert’s testimony are normal features of NRC proceedings. *E.g. NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-02, 73 NRC __ (slip op. at 27-32, 39-40) (Feb. 15, 2011) (ADAMS Accession No. ML110460252). Petitioners have not attempted to show what aspects of these disputes were truly unforeseeable rather than simple disagreements with the views stated in the Petition.

Even if the Commission considered the more detailed discussion of specific arguments in the Proposed Reply, that discussion exclusively focuses on areas of disagreement between the Petitioners and other parties. Proposed Reply at 8-20. The Proposed Reply does not provide any further explanation of why the Petitioners could not have anticipated these disagreements.

Therefore, Petitioners have not met the requirement to demonstrate why they could not have reasonably anticipated the arguments in response to Dr. Makhijani’s declaration and their NEPA claims. Thus, the Motion does not demonstrate that compelling circumstances warrant a reply brief.

CONCLUSION

For the reasons set forth above, the Commission should deny the Motion.

Respectfully submitted,

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⁸ Because the Staff is filling identical documents in each of the applicable proceedings, the signature block utilizes the term "Electronically Signed By" to indicate that each counsel signed for the proceedings listed below their signature.

⁹ Because the Indian Point proceeding is not under the Electronic Information Exchange filing process, the Staff will sign and serve a copy of this pleading by e-mail and regular mail in that proceeding.

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Dated at Rockville, Maryland
This 16th day of May 2011