

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	
Southern Nuclear Operating Company)	Docket Nos. 52-025-COL and 52-026-COL
)	
(COL Application for Vogtle Electric)	May 16, 2011
Generating Plant, Units 3 and 4))	
)	

**SOUTHERN NUCLEAR OPERATING COMPANY’S ANSWER
IN OPPOSITION TO PETITIONERS’ MOTION FOR MODIFICATION OF THE
COMMISSION’S APRIL 19, 2011, ORDER TO PERMIT A CONSOLIDATED REPLY**

Southern Nuclear Operating Company, Inc. (“SNC”), the applicant in the above-referenced COLA proceeding hereby opposes Petitioners’ Motion for Modification of the Commission’s April 19, 2011, Order to Permit a Consolidated Reply (“Motion”) submitted on May 6, 2011.¹ By Order dated April 19, 2011, the Nuclear Regulatory Commission (“NRC” or “Commission”) instructed the parties as to the schedule for filing answers to the Petition,² and that applicants in the various licensing proceedings should respond accordingly.³ The Order did

¹ “Petitioners’ Motion for Modification of the Commission’s April 19, 2011, Order to Permit a Consolidated Reply,” Docket Nos. 52-037-COL, *et al.* (May 6-9, 2011) (filed in Docket Nos. 52-025-COL and 52-026-COL on May 6, 2011) (“Motion”).

² 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, Docket Nos. 52-037-COL, *et al.* (Apr. 14-18, 2011) (filed in Docket Nos. 52-025-COL and 52-026-COL on Apr. 14, 2011), as amended on Apr. 18, 2011 (“Petition”).

³ Order, Docket Nos. 52-037-COL, *et al.* (Apr. 19, 2011) (by the Secretary of the Commission). SNC answered the Petition on May 2, 2011, pursuant to the Order. [SNC]’S 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, Docket Nos. 52-025-COL and 52-026-COL (May 2, 2011) (“SNC Answer”).

not provide for any reply to answers to be filed, and the NRC's procedural rules do not provide for one.

It is clear from 10 C.F.R. § 2.323(c) that no right to reply to an answer to a motion is permitted except 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."⁴ None of the matters raised by Petitioners constitute "compelling circumstances" that warrant an exception to NRC's standing rule that replies not be allowed. Indeed, Petitioners' Motion amounts to nothing more than an attempt to submit just such a reply to the Answers under the guise of a motion for leave to reply, without showing any compelling circumstances necessary under 10 C.F.R. § 2.323(c).⁵ Petitioners should not be allowed to evade the requirement to show compelling circumstances for making a reply by simply repackaging and summarizing their reply under the guise of a motion for leave to file a reply.

As demonstrated in the SNC Answer to the Petition, the Petition does not satisfy the standards for any pleading before the Commission, whether it be the standards for a motion, a motion to reopen a closed record, or a petition to intervene.⁶ Petitioners should, therefore, have anticipated the procedural arguments raised in response to the Petition. Petitioners' counsel includes experienced NRC litigators who should be very familiar with the NRC's rules of practice, upon which each of SNC's procedural arguments were based. Petitioners' argument that the Petition has been mischaracterized as a motion because the relief it seeks could not be

⁴ Regardless of Petitioners' claim that their filing is not a motion, they seek leave to reply under the regulation governing motions. *See* Motion, at p. 1 (citing 10 C.F.R. § 2.323(c)). Additionally, in the past, the NRC has treated filings similar to the Petition as general "motions" under 10 C.F.R. § 2.323, although the Petition does not meet those applicable regulatory standards. *See* SNC Answer, pp. 6-7.

⁵ *See* 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, Docket Nos. 52-037-COL *et al.* (May 6-9, 2011) (filed in Docket Nos. 52-025-COL and 52-026-COL on May 6, 2011).

⁶ *See* SNC Answer, at pp. 3-7.

granted in an adjudication stands logic on its head. It is Petitioners who submitted the Petition on the docket of each pending licensing proceeding. The fact that the submission of the Petition on the individual dockets was improper, or that it requests relief that cannot be awarded under the Commission's rules of procedure, is reason enough for the Petition to be summarily rejected. The admitted absence of any procedural basis for the Petition is hardly grounds to grant the relief sought thereunder, or to grant Petitioners' pending Motion based on the assertion that Petitioners could not have anticipated the Answers' application of the Commission's procedural regulations.

Similarly, the standards for the suspension of licensing proceedings are well-established, and some of Petitioners' counsel have been counsel in proceedings in which the Commission has applied those standards in the past.⁷ Accordingly, the arguments asserted in SNC's Answer on the merits of Petitioners' request to suspend licensing proceedings, whether viewed on an agency-wide basis or in the context of this COLA proceeding, were predictable and were not novel.

Petitioners seek in the Motion to draw a distinction without a difference in their characterization of the relief sought by their Petition. The request to suspend all "reactor licensing decisions" is in effect a request to suspend those proceedings, no more and no less. Petitioners did not explain this supposed distinction in the Petition itself, and in fact do request to suspend proceedings in the Petition.⁸ Regardless of how Petitioners characterize the relief

⁷ See, e.g., *In re Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-01, __ NRC __, (Jan. 24, 2011) (see original service list available at ML110250087); *In re Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001) (see original service list available at ML013650133).

⁸ Petition, at pp. 1-2 ("Petitioners request the Commission to take the following immediate actions: Suspend 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...The Commission should also suspend all licensing and related rulemaking proceedings with regard to any other issues that the Task Force subsequently may identify as significant in the course of its investigation. 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[.]").

sought, though, the Commission's rules of decision established in *Private Fuel Storage*,⁹ *Diablo Canyon*,¹⁰ and *McGuire*¹¹ apply. As demonstrated in the Answers of SNC and other applicants, the Petition falls far short of meeting those standards.¹² Additionally, as SNC noted in its Answer, under this currently controlling standard, the Commission has considered potential license issuance as a part of requests to suspend proceedings, and has not withheld license issuances.¹³ In effect, the Commission has rejected the distinction that Petitioners are now attempting to draw.

Similarly, Petitioners continue to point to the need for the Environmental Impact Statements to consider new and significant information, without pointing to any new and significant information that would justify analysis.¹⁴ The Petitioners' circular logic that the proceedings should be suspended because the NRC's Task Force on Japan has not yet uncovered any new and significant information, and that all reactor licensing should be suspended until new and significant information is uncovered, is not consistent with the very NEPA precedent cited in the Petition itself. "[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision-making

⁹ CLI-01-26, 54 NRC at 380.

¹⁰ See *In re Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237-39 (2002).

¹¹ *In re Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 389-91 (2001).

¹² See SNC Answer, at pp. 7-16.

¹³ See SNC Answer at pp. 9-10 (citing *Diablo Canyon*, CLI-02-23, 56 NRC at 238-39 (considering the effect "even if the NRC approves the requested ISFSI license") and *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 485 (2008) (discussing how regulatory changes could be implemented at Diablo Canyon "even after the license issued" and stating that the Commission "expect[s] licensees and license renewal applicants to adjust their aging management programs to reflect lessons learned in the future...").

¹⁴ See Motion, at p. 4.

intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”¹⁵

Accordingly, SNC respectfully requests that the Commission deny Petitioners’ Motion.

Respectfully submitted,

Signed (electronically) by M. Stanford Blanton

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Dated this 16th day of May, 2011.

¹⁵ *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989).

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CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER IN OPPOSITION TO PETITIONERS' MOTION FOR MODIFICATION OF THE COMMISSION'S APRIL 19, 2011, ORDER TO PERMIT A CONSOLIDATED REPLY in the above-captioned proceeding have been served by electronic mail as shown below, this 16th day of May, 2011, and/or by e-submittal.

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*And upon any other persons designated on the official service list compiled by the Nuclear Regulatory Commission in this proceeding.

(Original signed by M. Stanford Blanton)

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Dated this 16th day of May, 2011.