

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of)
Oklo Power, LLC) Docket No. 52-049-COL
Aurora Reactor)
_____)

**CORRECTED PETITIONERS' REPLY TO OPPOSITIONS TO EMERGENCY
PETITION BY BEYOND NUCLEAR, ET AL. TO IMMEDIATELY REVOKE OR
SUSPEND DOCKETING NOTICE AND HEARING NOTICE FOR COMBINED
LICENSE APPLICATION BY OKLO POWER, LLC
AND REQUEST FOR CLARIFICATION THAT NUCLEAR ENERGY
INNOVATION AND MODERNIZATION ACT DOES NOT MANDATE
OR AUTHORIZE DISREGARD OF NRC PROCEDURAL REQUIREMENTS
FOR NEW REACTOR LICENSE APPLICANTS**

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August 17, 2020

CORRECTED AUGUST 18, 2020

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**CORRECTED PETITIONERS’ REPLY TO NRC STAFF AND OKLO
OPPOSITIONS TO EMERGENCY PETITION TO REVOKE OR
SUSPEND DOCKETING NOTICE AND HEARING NOTICE
FOR OKLO COL APPLICATION**

I. INTRODUCTION

Petitioners hereby reply to oppositions by the U.S. Nuclear Regulatory Commission (“NRC”) Staff and Oklo Power LLC (“Oklo”) to Petitioners’ emergency petition to revoke or suspend the docketing notice and hearing notice in this proceeding.¹ The Staff does not deny that it failed to make the completeness finding required by NRC regulations as a prerequisite to the issuance of a docketing notice and hearing notice. Instead, it claims to be protected by the broad shelter of its Commission-conferred discretion to conduct the Oklo safety review as it sees fit, without interference. Further, the Staff contends that the novelty of Oklo’s combined license (“COL”) application justifies creating a new two-step post-docketing review process that includes the many of

¹ Respectively, these pleadings are: NRC Staff Answer Opposing Emergency Petition to Suspend Docketing Decision and Hearing Notice (Aug. 10, 2020) (“Staff Opp.”); Oklo Power LLC’s Answer Opposing July 31, 2020 Unauthorized Filing by Beyond Nuclear et al. (Aug. 10, 2020) (“Oklo Opp.”); and Emergency Petition by Beyond Nuclear, et al. to Immediately Revoke or Suspend Docketing Notice and Hearing Notice for Combined License Application by Oklo Power, LLC and Request for Clarification That Nuclear Energy Innovation and Modernization Act Does Not Mandate or Authorize Disregard of NRC Procedural Requirements for New Reactor License Applicants (July 31, 2020) (“Emergency Petition”).

the same steps that formerly made up the completeness review. As broad as the scope of the Staff's discretion may be, however, it does not include the authority to completely ignore clear obligations imposed on the Staff by NRC regulations and Commission decisions. Under these regulations and precedents, the Staff was not lawfully entitled to issue a docketing notice or hearing notice before making a finding that Oklo's application was complete for purposes of commencing a safety review.²

Oklo, for its part, claims to be outraged by the Petitioners' "Unauthorized Filing," calling it an "abusive ploy" to undermine the "*normal* adjudicatory process."³ But the amount of heat generated by Oklo's invective is inversely proportional to the light shed by its legal and factual arguments. Oklo does not have one word to say about the NRC's docketing regulations, nor does it point to any completeness findings by the Staff.

Petitioners respectfully submit that an outrage has indeed been committed – but not by Petitioners. It was the NRC Staff who intentionally disregarded regulations designed to protect the integrity of NRC safety reviews and the hearing process -- and Oklo who raised a loud and furious storm of meritless objections when Petitioners blew the whistle. Taken together, the Staff's and Oklo's Oppositions confirm the urgent need for the Commission to exercise its supervisory jurisdiction to correct the prejudicial effect of the Staff's legal error on the hearing process for the Oklo application. Supervisory review by

² See Emergency Petition, Section V.A.

³ Oklo Opp. at 4 and 5, respectively (emphasis in original). By calling the Emergency Petition a "abusive ploy," Oklo engages in the type of "intemperate and disrespectful rhetoric" that has "no place in filings before the Commission or its boards." *Nuclear Management Co.* (Monticello Nuclear Generating Plant), CLI-06-06, 63 N.R.C. 161, 164 (2006) (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 N.R.C. 746, 748-49 (1978); *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3) ALAB-121, 6 A.E.C. 319, 320 (1973)).

the Commission is also needed to protect the overall integrity, fairness and efficiency of future NRC licensing reviews of novel reactor designs.

II. ARGUMENT

A. The Staff's Discretion in Conducting Licensing Reviews Does Not Extend to Violating NRC Regulations.

The Staff does not deny that a completeness finding is required by NRC regulations and caselaw, nor does it deny that it failed to make any completeness finding regarding the Oklo application. Instead, the Staff argues that its conduct is not reviewable because it “has discretion in how to structure and conduct its reviews.”⁴ While the Staff may have discretion with respect to the manner in which it conducts its safety reviews, it does not have discretion to ignore the clear procedural regulations that provide order, efficiency and fairness to the review process.⁵

The Staff is also incorrect in suggesting that Petitioners seek to interfere with the discretionary aspects of the Staff's safety review. Petitioners seek only to ensure that the Staff complies with clear, non-discretionary procedural regulations that are designed in part to protect Petitioners' hearing rights.⁶ For example, contrary to the Staff's suggestion, Petitioners do not generally object to the Staff's use of audits during its post-

⁴ Staff Opp. at 5 (citing Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 476 (2008)).

⁵ *Accardi v. Shaunessy*, 347 U.S. 260, 266-67 (1954); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 2), CLI-04-12, 59 N.R.C. 237, 241-42 (2004); Statement of Policy on Conduct of New Reactor Licensing Proceedings, 75 Fed. Reg. 20,969, 20,971 (Apr. 17, 2008).

⁶ See Emergency Petition, Section V.A.

docketing review of Oklo’s COL application.⁷ Petitioners do object, however, to the Staff’s use of *post-docketing* audits to continue the completeness review that should have been finished *pre-docketing*. And Petitioners do object to the Staff’s failure to finish or publish, in advance of its docketing decision, the report of its pre-docketing audit.⁸

The Staff also attempts to de-emphasize the importance of the completeness finding by selectively quoting a Commission decision stating that “the decision to docket an application ‘is simply a screening process – a determination whether the license application contains sufficient information for the NRC to *begin its safety review*.’”⁹ As the Commission also recognized, however, that “screening process” entails a review of whether the application “is complete and acceptable for docketing.”¹⁰ And the completeness finding, in turn, triggers the commencement of the formal license review and process for requesting an adjudicatory hearing.¹¹ Thus, the Staff’s implementation of the initial “screening process” for a license application has critical significance for interested members of the public who seek to participate in the licensing process through an adjudicatory hearing.

⁷ See Staff Opp. at 6. Oklo’s additional claim that Petitioners seek copies of all documents audited by the NRC is simply incorrect. Oklo Opp. at 17.

⁸ See Emergency Petition, Section V.D; Staff Opp. at 6 n. 24 (stating that the “summary report” for the Staff’s pre-docketing audit “is in concurrence at the time of this filing and will be released publicly.”)

⁹ Staff Opp. at 5 (quoting *Dept. of Energy* (High Level Waste Repository: pre-Application Matters), CLI-08-20, 68 N.R.C. 272, 274 (2008) (emphasis added by NRC Staff)).

¹⁰ *Id.*, 68 N.R.C. at 274-75.

¹¹ *Id.*

Further, the Staff argues that it ““does not violate any clear legal duty by proceeding first to docket an application and thereafter to request additional information.””¹² But the two cases cited by the Staff stand only for the unremarkable proposition that *after making a completeness finding* and docketing an application, the Staff may continue to “request clarification or further discussion of particular items in the application” through Requests for Additional Information (“RAIs”).¹³ And in both of those cases – in contrast to this proceeding – the Staff issued completeness findings in the docketing notices.¹⁴

Finally, both the Staff and Oklo attempt to throw up a smokescreen around the Staff’s failure to make completeness findings, arguing that Petitioners have failed to show any defects in the Staff’s novel two-step approach to the licensing review process.¹⁵ But their arguments only serve to confirm that the NRC Staff is *still* in the process of determining whether Oklo’s COL application is complete, even after having docketed it.¹⁶ It is the NRC Staff’s burden to justify its departure from regulatory compliance, not Petitioners’ burden to show that compliance would be reasonable. The reasonableness of the

¹² Staff Opp. at 6 (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 336 (1999)). *See also* Staff Opp. at 7 n.25 (citing *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 349 (1998)).

¹³ *Duke Energy Corp.* 49 N.R.C. at 336; *Balt. Gas & Elec. Co.*, 48 N.R.C. at 349.

¹⁴ *Duke Energy Corp.* 49 N.R.C. at 331; *Balt. Gas & Elec. Co.*, 48 N.R.C. at 336.

¹⁵ Staff Opp. at 8-9, Oklo Opp. at 3-4.

¹⁶ For instance, the Staff admits that even now in the process of “evaluating the extent to which [Part 52 regulations listed by Oklo as inapplicable to its design] are technically relevant to the Aurora design and the extent to which they are not technically relevant such that exemptions under 10 C.F.R. § 50.12 would be required.” Staff Opp. at 8. Thus, the Staff has not yet completed the task, fundamental to its completeness review, or determining what regulations must be addressed by Oklo’s COL application or require an exemption.

requirement for completeness findings was determined a long time ago when the regulation was promulgated; moreover, the importance of the regulation has been repeatedly confirmed over time.¹⁷

B. The Authorities Claimed by the Staff and Oklo to Bar Consideration of the Emergency Petition Do Not Apply to an Unlawfully Commenced Proceeding.

The Staff and Oklo argue that consideration of the Petitioners' Emergency Petition is barred by an array of legal precedents and procedural regulations. But all of the precedents and regulations they cite are inapposite because they presume the existence of a lawfully commenced licensing proceeding. The Staff and Oklo argue, for instance, that the Oklo licensing proceeding may not be terminated or suspended without a demonstration by Petitioners that continuing the proceeding would pose an "immediate threat to public health and safety."¹⁸ The cases they rely on, however, are distinct from this proceeding in the key respect that all involved requests to suspend lawfully commenced licensing proceedings during consideration of new safety or security information, or to await related rulings by other tribunals.¹⁹ Here, in contrast, no lawful adjudication has commenced and there is nothing "*normal*" about this adjudicatory

¹⁷ See Emergency Petition, Section V.A.

¹⁸ Staff Opp. at 5 (citing *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 N.R.C. 141, 158 (2011); *AmerGen Energy Co.*, 68 N.R.C. at 484; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000)); Oklo Opp. at 5.

¹⁹ In *Union Elec. Co.*, for example, the petitioners sought suspension of all pending NRC licensing proceedings for consideration of new safety issues arising from the Fukushima-Daichii accident. 74 N.R.C. at 146. In *Amergen Energy Co.*, the petitioners sought to suspend four NRC license renewal proceedings for consideration of the results of an Inspector General report bearing on the adequacy of license renewal reviews. 68 N.R.C. at 473-74. In *Vermont Yankee*, the petitioners sought to suspend a license transfer proceeding pending the outcome of relevant state regulatory proceeding and the issuance of a letter by the U.S. Internal Revenue Service. 52 N.R.C. at 162.

process.”²⁰ Thus, rather than seeking a stay, Petitioners request revocation or suspension of this proceeding to correct the Staff’s fundamental legal error.

The Staff and Oklo also claim that Petitioners must be required to establish standing to intervene in the Oklo proceeding before their claims may be considered.²¹ Again, however, the cases cited by the Staff and Oklo involved no dispute as to whether the Staff had unlawfully commenced a proceeding by disregarding the governing law. Petitioners should not be required to demonstrate standing in order to seek dismissal of an unauthorized legal proceeding.

In any event, Petitioners have demonstrated a legally cognizable interest in this proceeding, because the Staff’s misconduct is clearly something the Staff considers itself entitled to commit now and in the future, for review of any novel license application at any potential location in the U.S. Petitioners have demonstrated they are potential neighbors of many sites where companies may seek to build and operate reactors of new designs. Therefore, they have standing to challenge the NRC Staff’s new general approach of making up its own procedures for commencing licensing proceedings and disregarding the governing regulatory requirements.²²

Further, Oklo argues that the Emergency Petition should be disregarded because it was not filed within ten days of the Staff’s issuance of the docketing notice or hearing

²⁰ Oklo Opp. at 5 (emphasis in original).

²¹ Staff Opp. at 9 and n.38 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 N.R.C. 393, 398 (2001); Oklo Opp. at 14 (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 N.R.C. 1, 6 (1996); *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 N.R.C. 577, 579-83 (2005)).

²² See Emergency Petition, Section III.

notice.²³ Again, this argument presumes that a legitimate adjudicatory proceeding had begun, to which the ten-day rule in Section 2.323 could fairly be applied. Here, application of such a rule makes no sense, given the lack of any lawful ongoing licensing proceeding. In addition, application of the rule would be grossly unfair. Ten days would not have been a sufficient period of time for Petitioners to review and evaluate Oklo's entire license application for the relationship between its numerous gaps and the gaps in the NRC's regulatory framework for licensing the Oklo reactor. Nor, in such a short time-frame, could Petitioners have assessed the Staff's newly-invented "Step 1" and "Step 2" process for assessing the completeness of the application after the hearing process had begun.

In addition, Petitioners could not have found the complete set of relevant documents in the folder for Docket No. 52-0049 on the NRC's Agencywide Documents Access and Management System ("ADAMS"). As conceded by the Staff, the application itself was not placed in the ADAMS docket file for Case No. 52-0049 until Petitioners complained in late July.²⁴ Even at today late date, with only two weeks remaining to file a timely hearing request, the Staff has yet to place all of the relevant correspondence regarding Oklo's application into the ADAMS folder for Docket No. 52-0049. While Oklo's Opposition points out that this correspondence can be found by putting the search term "Oklo" into ADAMS²⁵, that instruction is nowhere to be found in the hearing notice. Once a hearing notice is issued and the clock for requesting a hearing has started ticking,

²³ Oklo Opp. at 4 (citing 10 C.F.R. § 2.323).

²⁴ Staff Opp. at 4 n.12.

²⁵ Oklo Opp. at 21-22.

it should not be necessary to conduct a trial-and-error ADAMS search in order to find the entire set of documents that belongs in the docket folder. Nor is it even reasonable to assume that an ADAMS search for “key words” will yield every document that is relevant to an adjudicatory proceeding.

Due to the incompleteness of the Oklo license application and review framework and the difficulty of finding relevant documents, the time demands of preparing the Emergency Petition were comparable to, and indeed greater than, the demands of preparing a hearing request. Thus, Petitioners acted reasonably in taking 31 days to prepare the Emergency Petition, *i.e.*, within the 60-day period provided by the NRC for requesting a hearing.²⁶

C. The Staff’s Proposed Extension of Time is Not an Adequate Remedy.

The Staff proposes that the Commission should extend the deadline for requesting a hearing “until completion of Step 1 of the Staff’s review.”²⁷ But there are two problems with this proposal. First, as discussed in Section IV.B.2.d of Petitioners’ Emergency Petition, it does not appear that either Oklo’s application or the review process will be complete at the conclusion of Step 1, because during Step 2 the Staff plans to continue activities appropriate to Step 1 such as collecting information and establishing a regulatory framework. And because the Staff has abandoned the concept of a

²⁶ Petitioners note that while the obligation to consult opposing counsel in 10 C.F.R. § 2.323(b) should not apply in these circumstances for the same reasons, they did consult opposing counsel before filing their Emergency Petition and this Reply. Petitioners viewed consultation regarding the Emergency Petition as a reasonable measure, and indeed it led to the Staff’s initial offer of an extension of time to file a hearing request. Staff Opp. at 4.

²⁷ Staff Opp. at 10.

completeness finding, the Staff's proposal gives no basis for confidence that the application actually will be complete whenever the Staff declares Step 1 to be over.

Second, to grant an extension would require a presumption that the hearing notice was lawfully issued. As a result, the Staff effectively would be excused from making completeness findings in future new reactor licensing proceedings. And the Staff's inappropriate reliance on the Nuclear Energy Innovation and Modernization Act ("NEIMA") would not be addressed or corrected.²⁸ For Petitioners, who face the prospect of similar Staff noncompliance in NRC licensing proceedings for new reactors to which they may be neighbors, an extension of time therefore would not constitute adequate or appropriate relief. At a minimum, the Commission should require the Staff to make a supportable completeness finding before the time for requesting a hearing commences.

Oklo mischaracterizes the relief sought by Petitioners, saying that they "seek to undo the good work that the Staff has done to date" on its COL application.²⁹ Petitioners do not seek to undo any of the work done by the Staff to date; they simply seek to prevent the issuance of a hearing notice before the work is finished and the Staff makes a completeness review. And contrary to Oklo's assertion, Petitioners do not seek an "infinite extension of time to file a Hearing Request."³⁰ Petitioners request suspension of the hearing notice until after the Staff has made a completeness finding and issued the

²⁸ While the Staff's Opposition disclaims reliance on NEIMA with respect to Oklo's COL application (Staff Opp. at 3-4), this disclaimer is belied by the Staff's Acceptance Letter. *See* Emergency Petition, Section IV.B.2.b.

²⁹ Oklo Opp. at 2.

³⁰ *Id.*

appropriate docketing notice and hearing notice. That is not a request for an extension, and indeed an extension request would be premature at this point. It is certainly possible that the time needed to complete *both* Oklo's application *and* the NRC's governing regulatory scheme may be very long, such that it seems infinite to Oklo. But a lengthy acceptance review process does not provide an excuse to jump the gun and issue a hearing notice before Oklo's application can be deemed complete.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments by the NRC Staff and Oklo, consider the Emergency Petition, and grant the relief requested by Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 18, 2020, I posted copies of the foregoing PETITIONERS' CORRECTED REPLY TO NRC STAFF AND OKLO OPPOSITIONS TO EMERGENCY PETITION TO REVOKE OR SUSPEND DOCKETING NOTICE AND HEARING NOTICE FOR OKLO COL APPLICATION on the NRC's Electronic Information Exchange System.

 /signed electronically by/
Diane Curran