

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)

OKLO POWER LLC)

(Aurora Powerhouse at Idaho National Laboratory))

) Docket No. 52-049-COL

) August 20, 2020

**OKLO POWER LLC’S ANSWER OPPOSING BEYOND NUCLEAR ET AL.
AUGUST 17, 2020 MOTION FOR LEAVE TO FILE A REPLY**

I. INTRODUCTION

On July 31, 2020, Beyond Nuclear and other anti-nuclear groups (collectively, “Filers”) filed what they styled as an “Emergency Petition” on the above-captioned docket (“Unauthorized Filing”).¹ Filers cited no procedural basis for the Unauthorized Filing. On August 10, 2020, Oklo Power LLC (“Oklo”) and the U.S. Nuclear Regulatory Commission (“NRC”) Staff each submitted Answers highlighting the multiple procedural and substantive deficiencies in the Unauthorized Filing (“Response Pleadings”) that necessitate its rejection.² Now, Filers have

¹ Emergency Petition by [Filers] 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) (ML20213C692) (“Unauthorized Filing”).

² Oklo Power LLC’s Answer Opposing July 31, 2020 Unauthorized Filing by Beyond Nuclear et al. (Aug. 10, 2020) (ML20223A390) (“Oklo Answer”); NRC Staff Answer Opposing Emergency Petition to Suspend Docketing Decision and Hearing Notice (Aug. 10, 2020) (ML20223A406) (“Staff Answer”).

submitted a “Motion for Leave to Reply” (“Motion”),³ along with their proposed reply (“Reply”),⁴ seeking to rebut the Response Pleadings.

In accordance with 10 C.F.R. § 2.323(c), Oklo submits this Answer opposing the Motion. As explained below, the Motion should be summarily rejected, and the proposed Reply should be ignored, because Filers have not satisfied the requisite standard. More broadly, the Commission should reject this obvious procedural maneuvering to “get the last word,” which has become all-too-commonplace in recent NRC adjudicatory proceedings.

II. ARGUMENT

NRC regulations at 10 C.F.R. § 2.323(c) provide that Filers have “no right” to file a Reply. Instead, the regulations state that permission to file a reply may be granted “*only* in compelling circumstances,” which requires a demonstration by the moving party “that it could not reasonably have anticipated the arguments to which it seeks leave to reply.”⁵ As explained below, Filers do not come close to satisfying this textbook legal standard.

As a preliminary matter, Filers argue that 10 C.F.R. § 2.323 (the NRC’s procedural rule for general motions) “does not apply to the Emergency Petition.”⁶ However, they offer no alternative view as to what specific procedural provision allegedly *does* authorize their

³ Petitioners’ Motion for Leave to Reply to NRC Staff and Oklo Oppositions to Emergency Petition to Revoke or Suspend Docketing Notice and Hearing Notice for COL Application (Aug. 17, 2020) (ML20230A570) (“Motion”).

⁴ 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 (Aug. 17, 2020) (ML20230A571) (“Reply”). *See also* Corrected [Reply] (Aug. 18, 2020) (ML20231A323).

⁵ 10 C.F.R. § 2.323(c) (emphasis added).

⁶ Motion at 1-2.

Unauthorized Filing. That is because no such provision exists.⁷ Likewise, Filers do not explain why they “could not reasonably have anticipated” that Oklo and the NRC Staff would argue that the Unauthorized Filing is governed by this rule. Indeed, the “Certificate of Counsel” at the end of the Unauthorized Filing indicates that it *was* filed pursuant to 10 C.F.R. § 2.323.⁸

Furthermore, the Commission has previously explained—in rejecting another extra-procedural “Emergency Petition” filed by Filers’ counsel in a different proceeding—that such submissions are (1) “filed pursuant to 10 C.F.R. § 2.323,” and (2) “procedurally improper.”⁹ Any claim that Filers could not reasonably have anticipated these precise arguments is simply disingenuous.

In substantive terms, Filers argue that they should be granted leave to file their Reply because they could not reasonably have anticipated Oklo and NRC Staff arguments regarding: (1) the discretionary nature of Staff docketing decisions, (2) the “multiple legal arguments” as to why the Unauthorized Filing must be rejected on procedural grounds, (3) Staff’s suggestion of an extension of the hearing request deadline, and (4) alleged “mischaracterizations” of the Unauthorized Filing.¹⁰ As explained below, each of these claims is baseless.

First, Filers argue that the Motion should be granted “principally” because they could not reasonably have anticipated arguments that the Staff’s docketing decision is a discretionary act not subject to challenge in adjudicatory proceedings.¹¹ As explained below, this claim rings hollow. The Unauthorized Filing, itself, notes that “[t]he NRC Staff’s docketing decisions

⁷ The Unauthorized Filing requests a specific action, and therefore clearly is a “motion” under fundamental tenets of legal procedure. *See Motion*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A written or oral application requesting a court to make a specified ruling or order.”).

⁸ *See* Unauthorized Filing at 33.

⁹ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-19-7, 90 NRC ___, ___ (2019) (slip op. at 9).

¹⁰ Motion at 2-3.

¹¹ *Id.* at 2.

normally are committed to the discretion of the Staff.”¹² Filers even cited case law for this proposition.¹³ Moreover, the NRC has personally admonished Filers’ counsel that “the Staff’s docketing decision is outside the scope of our adjudicatory proceedings.”¹⁴ By any objective measure, Filers’ decision not to rebut these fundamental precepts in their *initial* filing is not the result of an inability to anticipate such arguments, and does not give rise to a “compelling circumstance” warranting a belated opportunity to do so now.

Second, the Unauthorized Filing unquestionably challenges the Staff’s docketing decision and asks the Commission to exercise its “supervisory authority” to “return” (i.e., dismiss) the pending application.¹⁵ As detailed in Oklo’s Answer, the Commission squarely and consistently has rejected previous filings requesting these same things in other proceedings.¹⁶ Filers—represented by an attorney with decades of experience in NRC adjudicatory proceedings—cannot legitimately argue that it was unreasonable or impossible to anticipate that the Response Pleadings would discuss the legal precedent, standards, and regulations pertaining to the essence of their Unauthorized Filing—namely, challenges to docketing decisions, motions to dismiss applications, and requests for exercise of “supervisory authority.” This is particularly so, given Filers’ counsel’s personal awareness of many of these rulings.¹⁷ Filers’ failure to anticipate and respond to these foreseeable arguments does not now give rise to “compelling circumstances.”

¹² Unauthorized Filing at 4.

¹³ *Id.* (citing *U.S. Dep’t of Energy* (High Level Waste Repository), CLI-08-20, 67 NRC 402, 406 (2008)).

¹⁴ See Letter from A. Bates, NRC, to D. Curran and J. Blackburn, TSEP, Exelon Nuclear Texas Holdings, LLC (Victoria County Station, Units 1 and 2), Docket Nos. 52-031-COL and 52-032-COL at 2 (Dec. 30, 2008) (ML083650299) (citing *DOE*, CLI-08-20, 68 NRC at 274).

¹⁵ *E.g.*, Unauthorized Filing at 4, 31.

¹⁶ See generally Oklo Answer §§ II, III.A.

¹⁷ See, *e.g.*, *id.* at 4, 8, 10. Furthermore, Filers not only could have anticipated such arguments, they also were obligated to “call attention” to, and candidly disclose, unfavorable precedent to the tribunal. *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978).

Third, Filers claim they were unable to anticipate Staff’s statement that “it would not oppose a request to extend the deadline for intervention petitions until after the Staff’s completion of Step 1.”¹⁸ As a general matter, Filers acknowledge that Staff made a similar statement during Filers’ consultation on the Unauthorized Filing.¹⁹ Thus, they reasonably could have anticipated that a similar statement would appear in Staff’s Answer. Indeed, Oklo *did* anticipate this possibility and pre-emptively explained, in its Answer pleading, the multiple and overlapping reasons that an extension is entirely unjustified in these circumstances.

For example, Oklo noted that the NRC’s codified adjudicatory process *already* provides a mechanism for challenging “new” and “materially different” information that may arise during the course of the Staff’s review, and that the iterative nature of significant licensing actions is a normal part of the process that is fully contemplated by existing regulations.²⁰ Oklo also explained that neither the Staff’s two-step review process, nor Filers’ identification of immaterial administrative nits, constitute “extreme and unavoidable circumstances”²¹ warranting a departure from this codified and longstanding practice or an extension of *any* duration.²² Indeed, the thrust of Oklo’s Answer was that “infinite”²³ (i.e., lacking a finite end date) extensions of the hearing request deadline, such as the one proposed by Filers—and the one effectively proposed by Staff²⁴—are unwarranted, unnecessary, and likely unprecedented. At bottom, Filers fail to

¹⁸ Staff Answer at 4.

¹⁹ Motion at 3 (improperly characterizing its consultation as a “confidential” “settlement” negotiation).

²⁰ Oklo Answer at 18-19; 10 C.F.R. § 2.309(c).

²¹ See Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998) (extensions should be granted only when such circumstances are present).

²² Oklo Answer at 18-22.

²³ *Id.* at 2.

²⁴ Staff’s Answer does not disclose to the Commission any estimated “Step 1” completion timeline. Such an open-ended extension realistically could result in a delay of the adjudicatory proceeding for many months, and potentially could be longer than any such extension ever granted by the Commission.

explain why they could not have anticipated—as Oklo did—that a discussion of extending the hearing request deadline might appear in Staff’s Answer.²⁵

Fourth, Filers allege they could not have anticipated Oklo’s general characterizations of the Unauthorized Filing as seeking to “undo” work performed by the Staff, and as seeking an “infinite” extension of time to file a hearing request. But Filers offer no explanation for these dubious assertions. The Unauthorized Filing asks the Commission to “revoke or suspend” the docketing and hearing notices for this proceeding. The Merriam-Webster dictionary defines “undo” as meaning “to make of no effect or as if not done; make null; reverse.”²⁶ By any reasonable measure, this description captures the essence of Filers’ demand. Further, Filers ask that the hearing notice be withheld, but do not propose or specify a *finite* due date for hearing requests. Thus, their demand for an extension is fairly characterized as *infinite*.²⁷ Filers fail to explain why they could not have anticipated that the Unauthorized Filing would be characterized using these simple terms and their widely-accepted definitions.

Finally, a brief review of the proposed Reply confirms that the information therein amounts to nothing more than: (1) a reiteration of Filers’ earlier baseless and procedurally-defective arguments; (2) the addition of new, untimely arguments that Filers could have but did not raise in the Unauthorized Filing; and (3) ordinary rebuttal to the Response Pleadings. These

²⁵ However, Oklo agrees with Filers that such relief *clearly was not requested* in the Unauthorized Filing. See Motion at 3. Thus, to the extent Staff’s statement presents a new *de facto* Motion, it “must” be rejected, as a matter of law, because it is not accompanied by a statement that Staff consulted the other parties on their plan to file such a motion. 10 C.F.R. § 2.323(b).

²⁶ *Undo*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/undo> (last visited Aug. 18, 2020).

²⁷ See *Infinite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/infinite> (last visited Aug. 18, 2020) (defining the “infinite” as “extending indefinitely”); see also *Indefinite*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/indefinite> (last visited Aug. 18, 2020) (defining “indefinite” as “not precise” and “having no exact limits”).

simply do not present the “compelling circumstances” required by 10 C.F.R. § 2.323(c), and the Motion does not satisfy Filers’ affirmative burden to demonstrate otherwise.

III. CONCLUSION

The Commission should reject Filers’ continued efforts to give credence to their Unauthorized Filing, and disallow further attempts to delay the standard course of NRC action in this proceeding. The interests of necessity and fairness would be best served by issuing a swift rejection of the Unauthorized Filing for all of the reasons stated in the Response Pleadings, and by summarily rejecting the Motion and proposed Reply for the reasons stated above, so as to avoid disruption of the proceeding schedule.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 20th day of August 2020

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, the foregoing “Oklo Power LLC’s Answer Opposing Beyond Nuclear et al. August 17, 2020 Motion for Leave to File a Reply” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty

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