UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
VIRGINIA ELECTRIC AND POWER COMPANY and OLD DOMINION ELECTRIC COOPERATIVE	)	Docket Nos. 50-338-SLR and 50-339-SLR
(North Anna Power Station, Units 1 and 2)	)	June 1, 2021

APPLICANTS' ANSWER OPPOSING PETITIONERS' MOTION FOR LEAVE TO REPLY

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Virginia Electric and Power Company, on behalf of itself and Old Dominion Electric Cooperative (collectively, "Applicants"), submits this Answer opposing the Motion for Leave to Reply ("Motion")[1] regarding the Appeal[2] of LBP-21-4,[3] filed by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (collectively, "Petitioners"). In LBP-21-4, the Atomic Safety and Licensing Board ("Board") denied Petitioners' December 14, 2020 hearing request, petition to intervene, and petition for waiver

[1] Motion for Leave to Reply to Opposition Briefs by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia (May 25, 2021) (ML21145A376) ("Motion"). The Motion was accompanied by the proposed Reply to Opposition Briefs by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia (May 25, 2021) (ML21145A377) ("Proposed Reply").

[2] Brief on Appeal of LBP-21-04 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (Apr. 23, 2021) (ML21113A317) ("Appeal").

[3] *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-21-4, 93 NRC __ (Mar. 29, 2021) (slip op.) (ML21088A364) as modified by the Licensing Board's Memorandum and Order (Correcting Text of Decision) (Mar. 31, 2021) (unpublished) (ML21090A099) ("LBP-21-4").

("Petition").[4] On April 23, 2021, Petitioners filed their Appeal under 10 C.F.R. § 2.311, which disallows reply pleadings.

As noted in Applicants' and the U.S. Nuclear Regulatory Commission ("NRC") Staff's responsive briefs, the Appeal identified no error of law or abuse of discretion in LBP-21-4 because, among other reasons, Petitioners failed even to engage with the relevant legal standards.[5] Having been alerted to the many defects in their Appeal, Petitioners now seek leave to file a further pleading, claiming "necessity" and "fairness" require an opportunity for them to advance *eight* additional arguments.[6] Conspicuously absent from the Motion, however, is any explanation as to why Petitioners could not have advanced those arguments initially. Moreover, acceptance of the Proposed Reply would circumvent the Commission's page limitations for appeals, resulting in unfair advantage for Petitioners.

Ultimately, Petitioners' failure to advance their arguments at the outset, disagreement with arguments advanced by Applicants and the NRC, and simple desire to "get the last word," are not circumstances (let alone compelling circumstances) warranting a reply. Thus, the Motion should be denied.

II. ACCEPTANCE OF THE PROPOSED REPLY WOULD CIRCUMVENT THE COMMISSION'S CODIFIED PAGE LIMITS FOR APPEALS

The NRC's Rules of Practice and Procedure in 10 C.F.R. Part 2, Subpart C prescribe page limits for two types of appeals. Petitions for review under Section 2.341 are limited to 25

---

4 Hearing Request and Petition to Intervene by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.71(d), and 51.95(c)(1) to Allow Consideration of Category 1 NEPA Issues (Dec. 14, 2020) (ML20349D952) ("Petition").

5 Applicants' Brief in Opposition to Appeal of LBP-21-4 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (May 18, 2021) (ML21138A894) ("Applicants' Brief"); NRC Staff's Brief in Response to Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia's Appeal of LBP-21-4 (May 18, 2021) (ML21138A942) ("Staff Brief").

6 Motion at 2; Proposed Reply at 2-7.

pages of argument, but may be supplemented by a reply pleading of up to 5 pages.[7] Appeals as of right under Section 2.311 (the requirement applicable here) may include up to 30 pages of initial argument, but replies are not permitted.[8] Under both scenarios, the Commission limited the size of the filings to 30 total pages of argument. Among other things, these requirements are intended "to hold all parties to the same number of pages of argument."[9]

Contrary to this intent, Petitioners now seek an unfair advantage by filing a reply that is not permitted at all under Section 2.311 and would exceed the 30-page limit. More specifically, Petitioners already have presented 30 pages of argument related to a single proposed contention in their Appeal; and the Proposed Reply seeks to present an additional 7 pages of argument. This exceedance is unwarranted here. As explained in Section III below, Petitioners seek to reiterate and expand upon earlier arguments, and identify no legitimate basis for filing an unauthorized reply, *regardless* of length.

III. PETITIONERS FAIL TO IDENTIFY ANY LEGITIMATE BASIS WARRANTING A REPLY

Petitioners claim that Applicants' and NRC Staff's Answers "misinterpret governing case law or mistakenly assert that Appellants have raised an issue for the first time in their appeal."[10] Thus, Petitioners claim, the Proposed Reply is necessary "to ensure a correct, meaningful, and fair record in this proceeding."[11] However, as explained below, Petitioners fail to explain why they could not have offered their views on "governing case law" in their initial pleading and have not identified any legitimate "mistaken assertions" regarding arguments they raised for the first

---

7 10 C.F.R. § 2.341(b)(3).

8 10 C.F.R. § 2.311(b).

9 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001) (quoting *Hydro Resources Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001)).

10 Motion at 2.

11 *Id*.

time on appeal. Thus, nothing in the Motion identifies a circumstance "where necessity or fairness dictates" an opportunity to file an additional pleading.

When reply briefs are permitted, the "rules provide explicitly for their filing" or "set strict conditions on their filing."[12] But when reply pleadings are not authorized—as is the case here—movants and appellants are expected to "anticipate" counterarguments that will be raised by party opponents and to "frame their *opening* pleadings accordingly."[13] In the past, the Commission has denied motions for leave to reply for the simple reason that "reply briefs are not provided for here."[14] In so doing, the Commission noted that "extra filings" should be permitted "only where necessity or fairness dictates."[15]

The Commission has not specified the circumstances when "necessity and fairness" might allow a reply under Section 2.311.[16] However, Section 2.323(c) is instructive, in that it allows replies to motions "only 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."

No such circumstances exist here. As discussed below, Petitioners reasonably could have anticipated, or the Motion merely mischaracterizes, each of the Applicant and NRC Staff

---

12 *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008).

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

14 *High-Level Waste Repository*, CLI-08-12, 67 NRC at 393 (rejecting a request to file a reply as to an appeal under 10 C.F.R. § 2.1015(b)).

15 *Id*.

16 However, by way of example, the Commission has found that an unauthorized reply in support of a Section 2.311 appeal was "understandable" where the licensing board "did not direct the litigants' attention to the applicable regulation for appeal, and [petitioner] is not represented by counsel on appeal." *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses With Regard to Reliable Hardened Containment Vents (Effective Immediately)*, CLI-13-02, 77 NRC 39, 44 n.20 (2013). Neither of those circumstances is present here. Petitioners are represented by experienced NRC counsel, and the Board specifically directed Petitioners to Section 2.311. *See North Anna*, LBP-21-4, 93 NRC at __ (slip op. at 36).

arguments cited therein. And, the Commission is more than capable of addressing the various arguments without Petitioners' further explanations.[17] Consequently, the Motion should be denied.

First, Petitioners contend that Applicants misrepresented the Commission's decision in *Fansteel*.[18] More specifically, Petitioners suggest that Applicants cited this case to challenge "the validity of a declaration by counsel"—a topic they claim the case does not address.[19] Petitioners argue that *Fansteel* "merely stand[s] for the proposition that to be admissible, contentions must be supported by documented evidence and/or expert opinion."[20] However, Petitioners misrepresent the "proposition" for which Applicants cited this case.

In the relevant discussion from Applicants' Brief, Applicants noted that, in support of the waiver request, Petitioners had merely "submitted an affidavit of counsel that *self-endorsed* the assertions in the Petition."[21] Applicants also highlighted the Board's observation that counsel's affidavit "contains no independent or otherwise meaningful factual representations."[22] The following direct quote from Applicants' Brief is the precise proposition for which Applicants cited *Fansteel*: "Merely placing 'bare assertions and speculation' in affidavit form does not suddenly render them probative."[23]

---

17 *See also* NRC Staff Answer to Appellants' Motion for Leave to File a Reply Brief at 4 (May 28, 2021) (ML21148A300) ("Staff Answer to Motion") (emphasizing that Petitioners "have shown no reason to believe the Commission could not review [the record] and reach a correct decision on their appeal without affording [Petitioners] the 'extraordinary opportunity' to file an otherwise prohibited reply.").

18 Motion at 2-3 & n.6 (citing *Fansteel, Inc.* (Muskogee, OK Site), CLI-03-13, 58 NRC 195, 203 (2003)) (citation omitted).

19 *Id.* at 3.

20 *Id.* at 2 (citation omitted).

21 Applicants' Brief at 9 n.40 (emphasis added).

22 *Id*. (citing *North Anna*, LBP-21-4, 93 NRC at __ (slip op. at 28 n.51)).

23 *Id*. (citation omitted).

In other words, Applicants did not cite *Fansteel* to argue that an affidavit is invalid, *per se*, simply because the declarant is party counsel.[24] Rather, the thrust of Applicants' argument was that codified affidavit requirements, such as those applicable to waiver requests,[25] would be rendered meaningless if counsel could simply assert, without support or explanation, that a pleading counsel drafted is legally sound and the facts undisputed *simply because counsel says so*. Ultimately, Petitioners fail to identify any "erroneous interpretation" of case law warranting an additional pleading.

Second, Petitioners seek to "respond" to Applicants' argument that Petitioners "failed to make a cognizable challenge to the [Board's] reliance on two previous Commission decisions"—namely the *Turkey Point* and *Peach Bottom* decisions confirming that 10 C.F.R. § 51.53(c)(3) applies to subsequent license renewal applications ("SLRAs").[26] But, as Applicants previously discussed, Petitioners *failed to brief* this issue in their initial Petition; nevertheless, Petitioners submitted a peculiar request for "reconsideration" of these decisions (from other proceedings) for the first time in their Appeal (in this proceeding).[27] It should come as no surprise to Petitioners that Applicants would respond to this new request by: (1) pointing out that Petitioners never asked the Board to "reconsider" the *Turkey Point* or *Peach Bottom* decisions, and (2) citing the

---

[24] Notably, although Petitioners refer to "at least one previous case" on page 3 of their Motion in which the Atomic Safety and Licensing Board accepted a declaration from counsel, the Commission ultimately found that the "declaration lack[ed] the requisite detail and support to justify a waiver." *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 448 (2011). Additionally, the Board emphasized that although "the Curran Declaration recites and states facts…we do not deem it to be a declaration by an 'expert.'" *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-10-15, 72 NRC 257, 310 (2010).

[25] *See* 10 C.F.R. § 2.335(b).

[26] Motion at 3 (referring to *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), CLI-20-3, 91 NRC 33 (2020) and *Exelon Gen. Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-20-11, 92 NRC __ (Nov. 12, 2020) (slip op.)).

[27] Applicants' Brief at 13-14.

procedural regulation[28] directly applicable to requests for "reconsideration" of NRC adjudicatory orders (and noting Petitioners' failure to address, much less satisfy, any requirements therein).[29] Petitioners assert that "fairness" requires an opportunity for them to "address" these arguments in an additional pleading because they wish to "preserve [this issue] for potential judicial appeal."[30] But Petitioners fail to explain why this bare desire for a future "judicial appeal" (particularly on an issue they never bothered to brief) is, in any way, probative. Thus, they have not identified a compelling circumstance warranting a reply.

Third, Petitioners dispute Applicants' observation that Petitioners raised arguments regarding an 1875 earthquake for the first time on appeal.[31] According to Petitioners, they deserve an opportunity to "demonstrat[e] that the 1875 earthquake [referenced in the Appeal] is the design-basis earthquake explicitly referred to in [their] Contention."[32] But it remains an undisputed fact that there is no mention of "1875" anywhere in their Petition, or any other part of the record of proceedings before the Board. Only now, in Petitioners' Motion, do they attempt for the first time to make a tenuous connection between this discussion and their original arguments. However, Petitioners fail to justify, much less provide any explanation, as to why they could not have articulated this purported connection in their Appeal at the outset. Their failure to do so does not conjure an untimely opportunity to elaborate on poorly pled arguments at this late stage in the proceeding.

Fourth, Petitioners request an opportunity to "correct the NRC's [sic] Staff's erroneous claim that [Petitioners] are arguing, for the first time on appeal, that the 2011 Mineral earthquake

---

28 10 C.F.R. § 2.345(a)(1).

29 Applicants' Brief at 14.

30 Motion at 3.

31 *Id.* at 3-4.

32 *Id.* at 3.

should be 'incorporated into the [North Anna reactors'] design basis.'"[33] Petitioners claim this is a "mischaracterization" of their argument, and assert that they should be allowed to clarify their claims "[f]or fairness and completion of the record."[34] However, if there remains any confusion at this stage of the proceeding as to what Petitioners were trying to argue in their Petition, that is only the result of Petitioners' failure to make their arguments clearly. From the outset of this proceeding, Petitioners have made contradictory and competing assertions about whether they were purporting to raise environmental claims or safety ones.[35] Petitioners' unclear assertions have persisted in their Appeal.[36] The interests of "fairness" certainly do not warrant yet another opportunity to "clarify" their arguments through an additional pleading.[37].

Fifth, Petitioners dispute the NRC Staff's assertion that Petitioners raised new arguments regarding "ASME Code Class 1 piping" for the first time on appeal.[38] Petitioners seek leave to rebut this assertion on the grounds that Petitioners cited the North Anna Updated Final Safety Analysis Report ("UFSAR") as alleged support for these piping arguments, whereas the Board previously referenced the UFSAR in LBP-21-4.[39] But, the NRC Staff did not assert that the UFSAR had not been previously referenced. Rather, Staff argued that the specific "ASME Code

---

33 *Id.* at 4 (citations omitted).

34 *Id.*

35 Applicants' Answer Opposing Request for Hearing, Petition to Intervene, and Petition for Waiver Submitted by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia at 2 (Jan. 8, 2021) (ML21008A531) ("As a general matter, the arguments that Petitioners seek to advance in the Petition are particularly vague and lack even the minimum clarity and precision required for adjudicatory challenges."); *id*. at 40 ("Thus, to the extent Petitioners are attempting to bootstrap a safety issue into an environmental contention, the Board should soundly reject that obvious maneuvering.")

36 *See, e.g.*, Applicants' Brief at 22 n.100 (noting the conflicting statements in the Appeal and stating that "the Board cannot be faulted for considering the possibility that Petitioners were attempting to challenge the CLB and holding (correctly so) that such a challenge would be impermissible.").

37 *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 51 n.8 (1992) (denying a request to file an unauthorized reply where it would only "provide[] additional comments regarding the same arguments" originally addressed and essentially "add[] nothing of substance.").

38 Motion at 4-5 (discussing Staff Brief at 13-14 n.67).

39 *Id*.

Class 1 piping" arguments were new. Petitioners do not dispute this. Nor could they, because the record of proceedings below contains no arguments from Petitioners regarding "piping." Instead, Petitioners rely on an unpersuasive assertion that, because the Board briefly referenced the UFSAR in a footnote to LBP-21-4, the interests of "fairness" provide a blank check for them to "cite a *different* part of the UFSAR".[40] But Petitioners cite no support or authority for that assertion, which would essentially swallow-whole the Commission's prohibition of new arguments on appeal. Given the undisputed absence of "piping" arguments below, Petitioners should have anticipated that such arguments could be challenged as "new." That failure also provides no grounds for submitting an additional unauthorized pleading.

Sixth, Petitioners dispute Applicants' claim that Petitioners "raised the role of cost-benefit analysis" for the first time on appeal.[41] Petitioners maintain that their commentary contrasting the Design Basis Accidents issue versus the Severe Accidents issue in the Generic Environmental Impact Statement ("GEIS")[42] "did not add new evidence or arguments" on appeal.[43] However, Applicants do not dispute that Petitioners discussed the GEIS—albeit incorrectly[44]—in the proceedings below. Rather, the new argument on appeal is Petitioners' complaint that neither Applicants nor the NRC "perform[ed] a cost-benefit analysis to justify the *design* of the reactors."[45] Although admittedly unclear, this appears to be a criticism of the

---

40 *Id.* at 5 (emphasis added).

41 *Id*.

42 NUREG-1437, Rev. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Vol. 1, Main Report, at 1-21 (June 2013) (ML13106A241).

43 Motion at 5.

44 *See, e.g.*, Applicants' Brief at 19-20 (noting that Petitioners' belief that the GEIS Severe Accidents issue is limited solely to Severe Accident Mitigation Analyses is a fundamental flaw undergirding the entire Petition).

45 Appeal at 22 (emphasis added).

safety review performed when North Anna was initially licensed. Petitioners identify no portion of the record below in which they challenged the safety review for lack of a cost-benefit analysis.

Seventh and finally, Petitioners dispute Applicants' and NRC Staff's observations that Petitioners raised new arguments on appeal regarding "the existence of a relationship between safety and environmental issues in NRC licensing reviews [that] somehow nullifies the license renewal scope limitation' codified in 10 C.F.R. Part 54."[46] Petitioners seek to "correct" these assertions by way of reference to their earlier claims that Part 54 does not *restrict* the scope of license renewal *environmental* reviews.[47] But Applicants agree that argument is not new. Rather, the new argument is Petitioners' converse assertion, raised for the first time on appeal, that NEPA somehow *broadens* the scope of license renewal *safety* reviews. More specifically, Petitioners argued in their Appeal that "NRC precedents that might otherwise exclude consideration of issues related to *safety* and the North Anna *design* are not applicable" in this proceeding.[48] Petitioners explicitly noted that the "precedent" they deemed to be "not applicable" was the Commission's prohibition of challenges to the "current licensing basis" (a safety issue) in license renewal proceedings.[49] That argument is entirely new on appeal, and Petitioners neither claim nor demonstrate otherwise.

IV. CONCLUSION

For all of the reasons set forth above, the Commission should deny the Motion and strike the Proposed Reply. In the alternative, if the Commission grants the Motion, the Commission

---

46 Motion at 6.

47 *Id.* (Petitioners claim they "repeatedly stated that limitations on the scope of a license renewal review under 10 C.F.R. Part 54 do not restrict the scope of a NEPA review.").

48 Appeal at 27 (emphasis added).

49 *Id*. at 29 (citing and quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272 n.209 (2009)).

should, in the interests of fairness, issue an order providing an equivalent opportunity for Applicants and the NRC Staff to respond to the substance of the Proposed Reply.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
William S. Blair, Esq.
DOMINION ENERGY SERVICES, INC.
120 Tredegar Street, RS-2
Richmond, VA 23219
(561) 267-7459
william.s.blair@dominionenergy.com

Executed in Accord with 10 C.F.R. § 2.304(d)
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5796
kathryn.sutton@morganlewis.com
paul.bessette@morganlewis.com

Signed (electronically) by Ryan K. Lighty
Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Counsel for Virginia Electric and Power Company

Dated in Washington, DC
this 1st day of June 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	Docket Nos.	50-338-SLR and 50-339-SLR
VIRGINIA ELECTRIC AND POWER COMPANY and OLD DOMINION ELECTRIC COOPERATIVE		
(North Anna Power Station, Units 1 and 2)	June 1, 2021	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Applicants' Answer Opposing Petitioners' Motion for Leave to Reply" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
ryan.lighty@morganlewis.com

Counsel for Virginia Electric and Power Company