

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:) Docket Nos. 50-269-SLR
DUKE ENERGY CAROLINAS, LLC) 50-270-SLR and
) 50-287-SLR
(Oconee Nuclear Station, Units 1, 2, and 3)) October 26, 2021
)

**APPLICANT'S ANSWER OPPOSING PETITIONERS'
MOTION FOR EXTENSION OF TIME TO REPLY**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the U.S. Nuclear Regulatory Commission (“NRC”) Atomic Safety and Licensing Board’s (“Board”) order of October 13, 2021 (“Initial Prehearing Order”),¹ Duke Energy Carolinas, LLC (“Duke” or “Applicant”) submits this Answer in opposition to Beyond Nuclear’s and the Sierra Club’s (collectively, “Petitioners”) motion (“Motion”)² to extend the deadline for filing a reply to Applicant’s and the NRC Staff’s answers opposing (“Oppositions”)³ their Hearing Request and Petition for Waiver (“Petition”)⁴ in the above-captioned proceeding. Pursuant to 10 C.F.R. § 2.309(i)(2) and the Initial Prehearing Order, Petitioners are required to file any reply pleading no later than 7 days after the

¹ Licensing Board Memorandum and Order (Initial Prehearing Order) at 5 (Oct. 13, 2021) (ML21286A586).

² Petitioners’ Partially Unopposed Motion for Extension of Time to Reply to Oppositions to Hearing Request and Waiver Petition (Oct. 26, 2021) (“Motion”).

³ Applicant’s Answer Opposing Request for Hearing, Petition to Intervene, and Petition for Waiver Submitted by Beyond Nuclear and Sierra Club (Oct. 22, 2021) (ML21295A718) (“Applicant’s Opposition”); NRC Staff’s Answer Opposing Beyond Nuclear and the Sierra Club’s Hearing Request (Oct. 22, 2021) (ML21295A755).

⁴ Hearing Request and Petition to Intervene by Beyond Nuclear and Sierra Club and Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3)(i), 51.53(c)(3)(ii)(L), 51.71(d), 51.95(c)(1), and 10 C.F.R. Part 51 Subpart A, Appendix B, Table B-1 to Allow Consideration of Category 1 NEPA Issues (Sept. 27, 2021) (Package ML21270A249) (“Petition”).

Oppositions were filed—*i.e.*, by October 29, 2021.⁵ The Motion asks the Board to *double* the time provided in NRC regulations and the Initial Prehearing Order, permitting Petitioners 14 days to file their reply—*i.e.*, by November 5, 2021.⁶ Petitioners claim “good cause” exists for this extension for four reasons, including their desire to re-check the accuracy of their expert’s assertions and to re-consider the legal arguments applicable to this proceeding.

As discussed below, none of these reasons remotely satisfy the “good cause” threshold applicable to adjudicatory extension requests. Accordingly, the Board should deny the Motion, just as the Commission did with a similar request from Petitioners and their counsel in another recent proceeding.⁷

II. **PETITIONERS FAIL TO ESTABLISH GOOD CAUSE**

10 C.F.R. § 2.307(a) allows extensions upon a demonstration of “good cause.” The Commission has explained that, in the context of adjudicatory filings, “good cause” requires a showing of “unavoidable and extreme circumstances.”⁸ As demonstrated below, no such circumstances are present here.

⁵ Initial Prehearing Order at 2 (establishing October 29, 2021 as the deadline); 10 C.F.R. § 2.309(i)(2) (“The reply must be filed within 7 days after service of th[e] answer”) (the Oppositions were served on October 22, 2021, *see supra* note 3; and 7 days later is October 29, 2021).

⁶ Motion at 2.

⁷ *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), Order (Denying Extension Request) (Dec. 9, 2020) (unpublished) (ML20344A438).

⁸ See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998); *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998), *petition for review denied sub nom.*, *Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256, 264 (D.C. Cir. 2000) (holding that “the Commission did not abuse its discretion in adopting the ‘unavoidable and extreme circumstances’ test” to give content to the “good cause” standard in ruling on extension requests). See also *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC 474, 476 (2010) (applying the “unavoidable and extreme circumstances” standard to a petitioner’s appeal of a Licensing Board decision denying intervention); *In re Bjella*, 806 F.2d 211, 216 (10th Cir. 1986) (*en banc*) (“There is no significant distinction between a showing of good cause and a showing of unusual or extreme circumstances.”).

A. The Need to Address More Than One Legal Standard In a Reply Pleading Is Not an “Unavoidable and Extreme” Circumstance

Petitioners note that their Petition includes “both a hearing request and a petition for a waiver,” each of which are “governed by different legal standards, each with multiple sub-criteria.”⁹ For this reason, Petitioners claim that drafting a reply will be a “time-consuming process for which the standard seven-day period is insufficient.”¹⁰ However, there is nothing unique—much less “extreme”—about the routine process of addressing “multiple” legal standards in a single pleading. Indeed, Petitioners and their counsel filed a similar combined petition (*i.e.*, including “both a hearing request and a petition for waiver”) in a different NRC proceeding less than a year ago, and yet were able to complete the unremarkable task of filing a timely reply addressing the “multiple” criteria applicable thereto.¹¹ Clearly, the need to address multiple legal standards in an adjudicatory pleading does not constitute an “unavoidable and extreme” circumstance warranting an extension.¹²

B. Petitioners’ Failure to Fact-Check Their Petition Before Filing It Does Not Constitute an “Unavoidable and Extreme” Circumstance Warranting a Belated Opportunity to Do So Now

Petitioners also claim that they need additional time to review and respond to certain “factual assertions regarding the history of safety regulation at Oconee[.]”¹³ More specifically, Petitioners reference the portions of Applicant’s Opposition titled “Brief History of CLB

⁹ Motion at 2.

¹⁰ *Id.*

¹¹ See *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), Reply by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia to Oppositions to Hearing Request and Waiver Petition (Jan. 15, 2021) (ML21015A605).

¹² Additionally, to the extent Petitioners assert that the “standard seven-day period” for reply pleadings is *per se* insufficient, this argument impermissibly challenges the NRC’s codified conclusion in 10 C.F.R. § 2.309(i)(2) that seven days is sufficient. See 10 C.F.R. § 2.335 (prohibiting generic challenges to NRC regulations in individual adjudicatory proceedings absent a waiver).

¹³ Motion at 2.

Flooding Matters Governed by 10 C.F.R. Part 50 at Oconee from 2008 to Present” and “Significant Factual Errors, Omissions, and Mischaracterizations in the Mitman Declaration and the Petition.”¹⁴ However, Petitioners fail to explain why this presents a circumstance that is somehow “unavoidable and extreme.” Petitioners had an opportunity—and indeed an “iron-clad obligation”—to examine the relevant regulatory history and to check the veracity of their own claims *before* filing their Petition.¹⁵ Their failure to do so at the outset does not justify an untimely opportunity to do so now—particularly as part of a reply. Ultimately, Petitioners’ belated effort to carefully review the relevant public regulatory record cannot reasonably be viewed as an “unavoidable and extreme circumstance” warranting an extension.

C. Petitioners’ Failure to Address the Relationship Between NRC Safety Matters and NEPA In Their Petition Does Not Constitute an “Unavoidable and Extreme” Circumstance Warranting a Belated Opportunity to Do So Now

Petitioners argue that Applicant’s and the NRC Staff’s Oppositions “raise significant legal issues about the relationship between NRC safety regulation and the National Environmental Policy Act (“NEPA”).”¹⁶ Petitioners allege that “an adequate discussion of these issues requires more thorough research, analysis and briefing than can be accomplished” in seven days.¹⁷ Perhaps so. But Petitioners had a full and fair opportunity—and the legal obligation—to put forth an “adequate discussion” of this issue in their *Petition*, which clearly attempted to put this issue into controversy. Again, Petitioners offer no explanation as to how their failure to

¹⁴ Motion at 2 (citing Applicant’s Opposition at 10-19).

¹⁵ *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 496 (2010) (“petitioner has an iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.”).

¹⁶ Motion at 3.

¹⁷ *Id.*

address this obviously-relevant topic at the outset somehow constitutes an “unavoidable and extreme” circumstance warranting an extension of the reply deadline.

First, the relationship between NRC safety matters and NEPA lies at the heart of the Petition. Petitioners extensively discuss current licensing basis safety matters governed by Part 50 throughout their Petition and purport to raise NEPA-related contentions based on this information.¹⁸ Petitioners surely cannot claim surprise that the Oppositions squarely addressed this key topic. Second, Petitioners and their counsel were involved in another recent proceeding in which they similarly attempted to bootstrap a safety issue into an environmental contention. In that proceeding, the relationship between NRC safety issues and NEPA requirements was extensively briefed, considered by the Board, and briefed again on appeal.¹⁹ Clearly, Petitioners and their counsel were aware of this information and had ample opportunity to consider such issues *before* filing their Petition. Their failure to do so at the outset does not warrant an untimely opportunity to do so now as part of a reply—and certainly is not an “unavoidable and extreme” circumstance.

D. Counsel’s Workload Fails to Constitute an “Unavoidable and Extreme” Circumstance

Finally, Petitioners argue that competing workload priorities of their counsel justify their extension request.²⁰ More specifically, Petitioners cite (1) counsel’s need to file one pleading in

¹⁸ See generally Petition.

¹⁹ See generally *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), LBP-21-04, 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) (ML21090A099); *Va. Elec. & Power Co.*, Brief on Appeal of LBP-21-04 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (Apr. 23, 2021) (ML21113A317); *Va. Elec. & Power Co.*, Applicants’ Brief in Opposition to Appeal of LBP-21-4 by Beyond Nuclear, Sierra Club, and Alliance for Progressive Virginia (May 18, 2021) (ML21138A894); *Va. Elec. & Power Co.*, 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).

²⁰ Motion at 3-4.

another proceeding that is due *the week after* the instant reply is due,²¹ and (2) counsel’s voluntary decision to submit comments to the NRC on a matter for which the comment opportunity period opened nearly four months ago.²² As with Petitioners’ three failed arguments above, these circumstances likewise are insufficient to demonstrate “unavoidable and extreme circumstances.”

First and foremost, the Commission has long recognized that “multiple simultaneous proceedings” can place burdens on parties and their counsel, but it has explicitly declined to grant extensions “simply because going forward will prove difficult for litigants or their lawyers.”²³ The routine burdens associated with voluntary participation in adjudicatory proceedings are an unavoidable reality for all involved participants and—as a matter of settled precedent—do not establish “good cause” for adjudicatory extension requests.²⁴ More directly, Petitioners should be well aware that competing workload obligations of counsel are insufficient grounds for adjudicatory extensions, given that the Commission recently denied their request to extend a filing deadline on those very grounds.²⁵

* * *

²¹ Motion at 3 (referencing “a filing deadline of November 1”).

²² *Id.* at 3-4 (citing “Systematic Assessment for How the NRC Addresses Environmental Justice in Its Programs, Policies, and Activities,” 86 Fed. Reg. 36,2307 [sic] (July 9, 2021)).

²³ *Consolidated Edison Co. of NY* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229-30 (2001).

²⁴ See also *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 400 (2001).

²⁵ *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 & 2), Order (Denying Extension Request) (Dec. 9, 2020) (unpublished) (ML20344A438); see also Partially Unopposed Motion by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia for Extension of Deadline for Filing Hearing Requests (Nov. 23, 2020) (ML20328A278) as modified by Corrected Partially Unopposed Motion by Beyond Nuclear, Sierra Club, and Alliance for a Progressive Virginia for Extension of Deadline for Filing Hearing Requests (Nov. 23, 2020) (ML20344A291).

The Commission has long demonstrated its commitment to efficiency in license renewal proceedings without the need for deadline extensions.²⁶ More fundamentally, Petitioners' failure to fulfill their iron-clad obligation to review relevant documents at the outset does not give rise to an opportunity to supplement their Petition, or to cure the multitude of defects identified by the Applicant's and the NRC Staff's Oppositions, via reply pleading—much less, an extension of time for that purpose. Petitioners' failures are textbook examples of “avoidable” circumstances.

III. CONCLUSION

Petitioners have not demonstrated good cause for an extension of the deadline to file their reply pleading. Therefore, the Board should deny the Motion.

Respectfully submitted,

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

Tracey M. LeRoy, Esq.
DUKE ENERGY CORPORATION
4720 Piedmont Row Drive
Charlotte, NC 28210
(704) 382-8317
tracey.leroy@duke-energy.com

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

Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5796
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 Duke Energy Carolinas, LLC

Dated in Washington, DC
this 26th day of October 2021

²⁶ *Nat'l Whistleblower Ctr.*, 208 F.3d at 264 (“The NRC has expressed a clear and reasonable goal of expediting nuclear power plant license renewal proceedings, both to accommodate the large number of cases to be heard and to ensure fair processes for applicants and would-be intervenors alike.”). *See also Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-277, 1 NRC 539, 550-52 (1975) (early resolution of contested issues, not the convenience of the litigants, is in the public interest).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Applicant’s Answer Opposing Petitioners’ Motion for Extension of Time 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 Duke Energy Carolinas, LLC