

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
OFFICE OF THE SECRETARY**

**BEFORE THE COMMISSION**

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In the Matter of: )	February 4, 2008
)	
AmerGen Energy Company, LLC )	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear )	
Generating Station) )	
)	
_____ )	

**AMERGEN’S ANSWER OPPOSING CITIZENS’ MOTION FOR LEAVE TO REPLY**

AmerGen Energy Company, LLC (“AmerGen”) hereby files its Answer opposing the Motion Citizens<sup>1</sup> filed on January 25, 2008,<sup>2</sup> requesting leave to file a reply to AmerGen’s January 15, 2008 Answer Opposing Petition for Stay and to Reopen the Record (“Answer to the Petition”). Because Citizens have failed to demonstrate the requisite compelling circumstances under 10 C.F.R. § 2.323(c), the Commission should deny the Motion.

<sup>1</sup> The six organizations comprising “Citizens” are Nuclear Information and Resource Service (“NIRS”), Jersey Shore Nuclear Watch, Inc. (“JSNW”), Grandmothers, Mothers and More for Energy Safety (“GRAMMES”), New Jersey Public Interest Research Group (“NJPIRG”), New Jersey Sierra Club (“NJ Sierra Club”), and New Jersey Environmental Federation (“NJEF”).

<sup>2</sup> “Motion By Nuclear Information And Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers And More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch And New England Coalition for Leave to Reply to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies” (Jan. 25, 2008) (“Motion”).

## BACKGROUND

On January 3, 2008, Citizens and various other organizations submitted a Petition<sup>3</sup> to the Nuclear Regulatory Commission (“NRC” or “Commission”) requesting, among other things, that the Commission “suspend the currently pending license renewal proceedings”<sup>4</sup> for Oyster Creek Nuclear Generating Station (“Oyster Creek”) and other plants, and “reopen the record” of the Oyster Creek license renewal proceeding, such that new contentions could be filed.<sup>5</sup> Pursuant to the Commission’s January 11 Order,<sup>6</sup> AmerGen filed its Answer to the Petition on January 15, and the NRC Staff and Entergy filed their answers on January 18, 2008.

On January 25, 2008, Citizens filed the instant Motion and attached their Reply.<sup>7</sup> The Motion states that because their underlying Petition “is unusual both substantively and procedurally, [Citizens] could not have anticipated all of the arguments” that would be made in opposition to the Petition.<sup>8</sup> As a result, Citizens conclude that they have demonstrated “the type of ‘compelling circumstances’ which warrant a reply.”<sup>9</sup>

## ARGUMENT

Citizens argue that because they did not anticipate certain arguments in response to their Petition, they should be granted the opportunity to correct their lack of foresight and respond to

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<sup>3</sup> “Petition By Nuclear Information And Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers And More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch And New England Coalition for Leave to Reply to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies” (Jan. 3, 2008) (“Petition”).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Commission Order (January 11, 2008) (unpublished) (Setting Date for Filing of Answers to Petition).

<sup>7</sup> *See generally* “Reply By Nuclear Information And Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers And More For Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc.; Pilgrim Watch And New England Coalition to Oppositions to Petition to Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies” (Jan. 25, 2008) (“Reply”).

<sup>8</sup> Motion at 1. Citizens provide a variety of examples of such unanticipated arguments in their Reply.

<sup>9</sup> *Id.*

all the specific objections in the Answers to the Petition.<sup>10</sup> This misconstrues Citizens’ burden, which is to show that there are “compelling circumstances, such as where the moving party demonstrates that it *could not have reasonably anticipated* the arguments to which it seeks leave to reply.”<sup>11</sup> Citizens cannot simply point to specific arguments that they did not anticipate as proof that they have met the standard. Rather, they must show that they could not *reasonably* have anticipated these arguments.<sup>12</sup> Citizens are faced with a high hurdle, because the “compelling circumstances” requirement is generally understood to signal an “extraordinary action [that] should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.”<sup>13</sup>

Citizens have not carried their burden. Citizens understood at the time they filed the Petition that respondents might “fault the Petition for its failure to comply with an array of procedural requirements” that Citizens considered inappropriate.<sup>14</sup> In fact, Citizens anticipated that their Petition might be interpreted as a petition for enforcement under 10 C.F.R. § 2.206, or a petition for rulemaking under Section 2.802.<sup>15</sup> Further, Citizens anticipated that respondents might argue that Citizens improperly bypassed the Atomic Safety and Licensing Board (“Board”) in raising their issues for the first time with the Commission.<sup>16</sup> Citizens also

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<sup>10</sup> See *Id.* at 1-2.

<sup>11</sup> 10 C.F.R. § 2.323(c) (emphasis added). Even if Citizens do show compelling circumstances, then their request “may,” but need not be granted. *Id.*

<sup>12</sup> Taken to its logical conclusion, Citizens’ argument would permit a finding of compelling circumstances in any request for leave to reply, with a plea that the opposing party’s answer included an argument that the moving party did not anticipate.

<sup>13</sup> See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (discussing changes to 10 C.F.R. § 2.323(e), which uses the same “compelling circumstances” language as Section 2.323(c)).

<sup>14</sup> Motion at 1.

<sup>15</sup> Petition at 7.

<sup>16</sup> *Id.*

acknowledge that their Petition includes a request to stay the proceeding,<sup>17</sup> a request to reopen the record,<sup>18</sup> a request for the opportunity to file (unspecified) late contentions,<sup>19</sup> and more.<sup>20</sup>

Thus, the unusual nature of their Petition was clear from the outset, and Citizens *could* have reasonably anticipated the procedural objections to their Petition that AmerGen and the NRC staff included in their Answer. But Citizens apparently did not, for example, anticipate that AmerGen would argue that the Petition must meet the requirements for a motion for a stay, or for a motion to reopen the record, despite the fact that they blatantly request a stay and reopening of the record. The admittedly-wide scope of their Petition put Citizens on notice that it reasonably could be interpreted as a request for a number of specific types of relief, each with its own requirements.<sup>21</sup>

Citizens' previous attempt to ignore these requirements is now the basis for their attempt to cure these deficiencies.<sup>22</sup> This circular and unfounded basis for the instant Motion must be rejected as a matter of law pursuant to 10 CFR § 2.323(c). In *Long Island Lighting Co.*, the movant requested leave to file a reply, arguing that the respondents had "recast the issues" in their answer.<sup>23</sup> Even under those purported circumstances, the Board rejected the request, because "[t]he parties have been afforded the opportunity called for by the regulations to make

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<sup>17</sup> Reply at 10 ("relief sought by Petitioners is much broader than what is typically sought in a stay motion: Petitioners seek suspension of current license renewal proceedings").

<sup>18</sup> *Id.* at 9 ("Petitioners request the Commission take a series of actions . . . including re-opening the Oyster Creek record").

<sup>19</sup> *Id.* (Petitioners request the Commission to . . . allow the presentation of evidence that may be yielded by a more thorough NRC Staff review."); *see also* Petition at 2 ("the Commission should reopen the record so that the revised safety reviews can form the basis of new contentions").

<sup>20</sup> Contrary to all logic, however, Citizens now argue that because their Petition requests the types of relief normally associated with *all* of these procedural mechanisms, they need not meet the procedural requirements for *any* of them. *See* Motion at 1 (Respondents . . . fault the Petition for failure to comply with an array of procedural requirements that do not apply to the Petition.); *see also* Reply at 9-10.

<sup>21</sup> *See* Reply at 9-10.

<sup>22</sup> *See id.*

<sup>23</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station), LBP-87-26, 26 NRC 201, 203, *recons. denied*, LBP-87-29, 26 NRC 302 (1987).

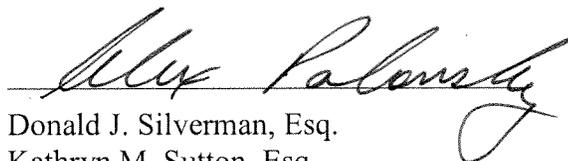
their cases, and the Board has sufficient information to reach a decision in the matter.”<sup>24</sup> Absent any justification, or demonstration that they could not reasonably have anticipated AmerGen’s and the NRC Staff’s arguments, Citizens have not shown the requisite compelling circumstances.

Citizens’ substantive arguments also lack merit.<sup>25</sup> Citizens complain that they “could not have reasonably anticipated the arguments that Respondents would make in order to minimize the safety significance of the Inspector General Report . . . .”<sup>26</sup> This argument simply strains credulity—Citizens *could*, and reasonably *should*, have expected that respondents might disagree with Citizens’ interpretation of the Inspector General Report.

**Conclusion**

For the foregoing reasons, the Commission should deny Citizens’ Motion in its entirety.

Respectfully submitted,



Donald J. Silverman, Esq.  
Kathryn M. Sutton, Esq.  
Alex S. Polonsky, Esq.  
Raphael P. Kuyler, Esq.  
MORGAN, LEWIS & BOCKIUS, LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Phone: (202) 739-5502  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
E-mail: [ksutton@morganlewis.com](mailto:ksutton@morganlewis.com)  
E-mail: [apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)  
E-mail: [rkuyler@morganlewis.com](mailto:rkuyler@morganlewis.com)

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<sup>24</sup> *Id.* at 205. It is also worth noting that the *Long Island Lighting Co.* Board applied an earlier version of 10 C.F.R. § 2.323(c) (formerly § 2.730(c)). Section 2.730(c) provided that the “moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary.” It did not include the current “compelling circumstances” provision.

<sup>25</sup> None of Citizens’ substantive arguments specifically responds to any points in AmerGen’s Answer to the Petition. *See* Reply at 2-8. Nevertheless, AmerGen responds here to the extent Citizens’ Motion addresses issues raised in AmerGen’s Answer to the Petition.

<sup>26</sup> Motion at 1-2.

J. Bradley Fewell  
Associate General Counsel  
Exelon Corporation  
4300 Warrenville Road  
Warrenville, IL 60555  
Phone: (630) 657-3769  
E-mail: [Bradley.Fewell@exeloncorp.com](mailto:Bradley.Fewell@exeloncorp.com)  
COUNSEL FOR  
AMERGEN ENERGY COMPANY, LLC

Dated in Washington, D.C.  
this 4th day of February 2008

**UNITED STATES OF AMERICA  
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Generating Station)	)	
	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of “AmerGen’s Answer Opposing Citizens’ Motion for Leave to Reply” were served this day upon the persons listed below, by e-mail and first class mail, unless otherwise noted.

Secretary of the Commission\*  
U.S. Nuclear Regulatory Commission  
Attn: Rulemakings and Adjudications Staff  
One White Flint North  
11555 Rockville Pike  
Rockville, Maryland 20852-2738  
(E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov))

Administrative Judge  
E. Roy Hawkens, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [erh@nrc.gov](mailto:erh@nrc.gov))

Administrative Judge  
Paul B. Abramson  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [pba@nrc.gov](mailto:pba@nrc.gov))

Administrative Judge  
Anthony J. Baratta  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [ajb5@nrc.gov](mailto:ajb5@nrc.gov))

John A. Covino  
Valerie Anne Gray  
Division of Law  
Environmental Permitting and Counseling Section  
P.O. Box 093  
Hughes Justice Complex  
Trenton, NJ 08625  
(E-mail: [john.covino@dol.lps.state.nj.us](mailto:john.covino@dol.lps.state.nj.us))  
(E-mail: [valerie.gray@dol.lps.state.nj.us](mailto:valerie.gray@dol.lps.state.nj.us))

Suzanne Leta  
NJPIRG  
11 N. Willow Street  
Trenton, NJ 08608  
(E-mail: [sleta@njpirg.org](mailto:sleta@njpirg.org))

Mary C. Baty  
Kimberly A. Sexton  
James E. Adler  
Office of the General Counsel, 0-15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail: [kas2@nrc.gov](mailto:kas2@nrc.gov))  
(E-mail: [mcb1@nrc.gov](mailto:mcb1@nrc.gov))  
(E-mail: [jeal@nrc.gov](mailto:jeal@nrc.gov))

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\*\* First Class Mail only

Office of Commission Appellate  
Adjudication\*\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Richard Webster  
Julia LeMense  
Eastern Environmental Law Center  
744 Broad Street, suite 1525  
Newark, NJ 07102  
(E-mail: [rwebster@easternenvironmental.org](mailto:rwebster@easternenvironmental.org))  
(E-mail: [jlemense@easternenvironmental.org](mailto:jlemense@easternenvironmental.org))

Paul Gunter  
Kevin Kamps  
Beyond Nuclear  
6930 Carroll Avenue  
Suite 400  
Takoma Park, MD 20912  
(E-mail: [paul@beyondnuclear.org](mailto:paul@beyondnuclear.org))  
(E-mail: [kevin@beyondnuclear.org](mailto:kevin@beyondnuclear.org))

Emily Krause  
Law Clerk  
Atomic Safety and Licensing Board  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [eik1@nrc.gov](mailto:eik1@nrc.gov))

  
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Brian P. Oldham