

February 4, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	
In the Matter of)	
_____)	
AMERGEN ENERGY COMPANY, LLC)	Docket No.
(Oyster Creek Nuclear Generating Station))	50-219-LR
_____)	
_____)	
In the Matter of)	
_____)	
ENERGY NUCLEAR OPERATIONS, INC.)	Docket Nos.
(Indian Point Nuclear Generating)	50-247-LR
Units 2 and 3))	and 50-286-LR
_____)	
_____)	
In the Matter of)	
_____)	
ENERGY NUCLEAR OPERATIONS, INC.)	Docket No.
(Pilgrim Nuclear Power Station))	50-293-LR
_____)	
_____)	
In the Matter of)	
_____)	
ENERGY NUCLEAR OPERATIONS, INC.)	Docket No.
(Vermont Yankee Nuclear Power Station))	50-271-LR
_____)	

NRC STAFF'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Commission's January 11, 2008 Order,¹ the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "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

¹ The Order states that the Petition is governed by 10 C.F.R. §§ 2.306 and 2.323. The Order stated that replies to any answers are governed by 10 C.F.R. § 2.323(c).

Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc; Pilgrim Watch and New England Coalition (“Petitioners”) 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” (“Motion”) filed January 25, 2008, along with “Reply by [Petitioners] to Opposition 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” (“Reply”). The Staff submits that the Motion should be denied, on the grounds the petitioners have not demonstrated that they have met the criterion set forth in 10 C.F.R. § 2.323(c) for filing a reply.

DISCUSSION

Petitioners move for leave to file a reply to answers filed in opposition to their January 3, 2008 Petition.² They claim that they could not have anticipated either the procedural arguments or the arguments concerning the significance of the Audit of NRC’s License Renewal Review Program (OIG-07-A-15) (Sept. 6, 2007) (“OIG Report”) raised in answers to their Petition and therefore the compelling circumstances contemplated by 10 C.F.R. § 2.323(c) for the filing of replies exist. Motion at 1-2. Petitioners, however, have not met the standard.

Section 2.323(c) provides that there is no right to reply to answers to motions, but that permission to file a reply may be granted “only in *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” (emphasis added). In 2004, the Commission added the “compelling

² “Petition for 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 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”).

circumstances” standard to its rules governing motions for leave to file replies to motions (§ 2.323(c)) and motions for leave to file motions for reconsideration (§ 2.323(e)).³ See Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). In so doing, the Commission stated that it was raising the standard in § 2.323(e) “to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.” *Id.* Similarly then, a demonstration of compelling circumstances in a motion for leave to reply should show that manifest injustice would occur in the absence of a reply and that the arguments raised in the reply could not have been raised earlier.

Petitioners have not demonstrated compelling circumstances. As the moving party, it was incumbent on the petitioners to identify all applicable rules and case precedents and distinguish them in their Petition and not in their Reply. Because Petitioners elected to file under 10 C.F.R. § 2.323, there was no page limitation and Petitioners had an unfettered opportunity to raise every relevant argument in support of their Petition in the first instance.⁴ There is no injustice in denying Petitioners’ request to make arguments they could have first raised in their Petition.

Petitioners have not shown that they could not have raised the arguments in their Reply earlier. Petitioners could have reasonably anticipated arguments that their Petition did not meet the requirements of 10 C.F.R. § 2.323. Petitioners expressly filed their Petition pursuant to 10 C.F.R. § 2.323. Petition at 1, 7. Therefore they should have reasonably anticipated

³ Section 2.323(e) requires “a showing of compelling circumstances such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”

⁴ Since the issuance of the OIG Report, Petitioners had over three months to contemplate arguments that they could raise in support of their Petition as well as arguments that might be raised against their Petition.

arguments that their Petition did not comply with the timeliness and consultation requirements contained in § 2.323.

Petitioners could reasonably have anticipated arguments that they had not met the requirements for suspension of proceedings because they relied upon a case applying those standards in their Petition. See Petition at 7 (*citing Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-02-23, 56 NRC 230 (2002)). Petitioners cannot rely on a case as the basis for their Motion and then claim to be surprised when that same case and other relevant cases are used in arguments against their Motion. Moreover, anticipation of an argument does not become unreasonable simply because a party disagrees with the argument's interpretation of precedent.

Petitioners could have reasonably anticipated arguments that they have not met the standards for reopening of records (10 C.F.R. § 2.326) and stays (10 C.F.R. § 2.342) because these are two types of adjudicatory relief that they requested in their Petition. See Petition at 1-2, 30-31. Petitioners filed their Petition as part of four on-going adjudicatory proceedings. Therefore they could have reasonably anticipated arguments and case law concerning their compliance with the Commission's procedures and standards for adjudicatory relief.

Petitioners have not demonstrated that they could not have reasonably anticipated arguments about the significance (or lack thereof) of the OIG Report. The OIG Report expressly states that its "judgmental sample" was limited to the operating experience element of only eleven aging management programs that were common to most of the SERs reviewed and thus it "does not extrapolate results from the sample to the entire universe of reviews." See OIG Report at 45 nn.24 & 25. The OIG Report does not conclude that the Staff's license renewal review process is inadequate nor does it recommend an overhaul of the Staff's license renewal review process. See OIG Report at 7, 36-37. Thus, petitioners could have reasonably anticipated arguments that the OIG Report does not support their requests for suspension, overhaul, and reopening of records of license renewal proceedings.

CONCLUSION

In sum, Petitioners' Motion raises nothing that they could not have addressed in their Petition. Petitioners' failure to provide a reasonable basis for their assertion of compelling circumstances should result in denial of their Motion.

Respectfully submitted,

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Dated at Rockville, Maryland
This 4th day of February 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
AMERGEN ENERGY COMPANY, LLC) Docket No. 50-219-LR
)
(Oyster Creek Nuclear Generating Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO REPLY" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S mail, first class, this 4th day of February, 2008.

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February 4, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247/286-LR
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(Indian Point Nuclear Generating)
Units 2 and 3))

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February 4, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Pilgrim Nuclear Power Station))
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February 4, 2008

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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ENTERGY NUCLEAR VERMONT YANKEE,) Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)
OPERATIONS, INC.)
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(Vermont Yankee Nuclear Power Station))

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