

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	Docket Nos. 50-454-LR
EXELON GENERATION COMPANY, LLC)	50-455-LR
)	50-456-LR
(Byron Nuclear Station, Units 1 and 2;)	50-457-LR
Braidwood Nuclear Station, Units 1 and 2))	January 13, 2014
)	

**EXELON’S MOTION TO STRIKE ENVIRONMENTAL LAW & POLICY CENTER’S
UNAUTHORIZED REPLY**

On November 19, 2013, the Atomic Safety and Licensing Board (“Board”) denied Environmental Law & Policy Center’s (“ELPC”) request for hearing and petition to intervene,¹ and terminated the contested proceeding.² It found inadmissible both of ELPC’s two proffered contentions. Specifically, the Board not only found that the proposed contentions directly and impermissibly challenged Nuclear Regulatory Commission (“NRC” or “Commission”) rules, but also held that ELPC had “failed to make even the ‘minimal’ factual showing—as opposed to bare assertions and speculation—that is necessary to raise a ‘genuine dispute’ as required by 10 C.F.R. § 2.309(f)(1)(v)-(vi).”³

¹ Hearing Request and Petition to Intervene by the Environmental Law and Policy Center (Sept. 23, 2013) (“Petition to Intervene”).

² See *Exelon Generation Co., LLC* (Braidwood Nuclear Station, Units 1 & 2 and Byron Nuclear Station, Units 1 & 2), LBP-13-12, 77 NRC ___, slip op. at 3-8 (Nov. 19, 2013) (“LBP-13-12”).

³ *Id.* at 4-7 (footnote omitted). ELPC’s first proposed contention challenged the need for power (“Contention 1”) and the second alleged that Exelon’s license renewal application was premature.

On December 16, 2013, ELPC filed a Notice of Appeal and an Appeal “as Request for Protective Stay.”⁴ In so doing, however, ELPC did not seek review of the Board’s decision in LBP-13-12. Instead, it sought a “protective stay” that would act as a placeholder and “preserve its right to intervene” in this proceeding while it prepares a rulemaking petition seeking to revise NRC rules to require a need for power analysis for merchant plants at the license renewal stage.⁵

Exelon Generation Company, LLC (“Exelon”) and the NRC Staff submitted their separate Answers on December 26, 2013, arguing that the Appeal is procedurally and substantively deficient and should be denied for multiple reasons.⁶ ELPC submitted a Reply to those Answers in further support of its Appeal on January 2, 2014.⁷ In accordance with 10 C.F.R. § 2.323(a), Exelon hereby moves to strike ELPC’s Reply in its entirety.⁸ Such a motion should be granted for numerous reasons.

First and foremost, ELPC’s Reply is unauthorized as a matter of law. As the Commission has observed, “when reply briefs are permitted, our rules provide explicitly for their filing” or “set strict conditions on their filing.”⁹ In its Reply, ELPC restates that its December 16, 2013 filing is an appeal filed pursuant to the interlocutory review provision of

⁴ Notice of Appeal of ASLBP No. 13-929-02-LR-BD01 by Environmental Law & Policy Center (Dec. 16, 2013) (“Notice of Appeal”), *available at* ADAMS Accession No. ML13350A662; Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay (Dec. 16, 2013) (“Appeal”), *available at* ADAMS Accession No. ML13350A666.

⁵ Appeal at 1, 3.

⁶ Exelon’s Answer Opposing Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay (Dec. 26, 2013) (“Exelon’s Answer”), *available at* ADAMS Accession No. ML13360A183; NRC Staff Answer to Environmental Law and Policy Center Appeal of LBP-13-12 and Request for Protective Stay (Dec. 26, 2013), *available at* ADAMS Accession No. ML13360A341.

⁷ ELPC Reply In Support of Its Appeal of the ASLB Denial of ELPC’s Petition for Intervention and Hearing Request (Jan. 2, 2014) (“Reply”).

⁸ In accordance with 10 C.F.R. § 2.323(b), counsel for Exelon certify that they made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues to the extent practicable, and certify that these efforts to avoid the need for this motion have been unsuccessful. Counsel for the Staff stated that the Staff supports the relief requested in this motion. Counsel for ELPC stated that ELPC opposes Exelon’s motion and will respond to it.

⁹ *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008).

10 C.F.R. § 2.311.¹⁰ That regulation allows ELPC to appeal the Board’s decision denying its Petition to Intervene. Section 2.311(b) provides the NRC Staff and Exelon with a right to file Answers to that appeal. However, Section 2.311 does not permit the filing of a reply.¹¹ The Commission has stricken responsive filings that are not authorized by regulation or order and should do the same here.¹²

The Commission has made clear that “extra filings,” as is the case here, will be permitted “only where necessity or fairness dictates.”¹³ However, ELPC did not seek leave of the Commission to file its Reply.¹⁴ Fairness dictates, on this ground alone, that it be stricken as neither NRC Staff nor Exelon has an opportunity to substantively respond to the filing. Furthermore, ELPC offers no reason whatsoever to justify its unauthorized filing, thereby failing to explain the necessity of the Reply.¹⁵

¹⁰ See Reply at 4-5; see also Notice of Appeal (stating that ELPC’s appeal is filed “[p]ursuant to 10 C.F.R. § 2.311(a)”).

¹¹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-06, 75 NRC 352, 360 n.36 (2012) (noting that 10 C.F.R. § 2.311 does not permit filing of a reply); see also, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-13-02, 77 NRC 39, 44 n.20 (2013) (“While § 2.341 specifically allows a petitioner to reply to its opponent’s answer, § 2.311 does not provide the opportunity to reply.”); *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 438-439 (2006) (“The Commission’s regulations governing appeals from the denial of intervention...do not provide for replies....”). In a recent case, the Commission noted that a petitioner’s “procedural misstep” in filing an unauthorized reply in support of its Section 2.311 appeal was “understandable” because the licensing board “did not direct the litigants’ attention to the applicable regulation for appeal, and [petitioner] is not represented by counsel on appeal.” *Pilgrim*, CLI-13-02, 77 NRC at 44 n.20. The Commission therefore considered, but found nothing material in the *pro se* petitioner’s reply. See *id.* Neither of those circumstances is present here. ELPC is represented by counsel and the Board specifically directed ELPC’s attention to 10 C.F.R. § 2.311 in its Order denying ELPC’s Petition to Intervene. See LBP-13-12, slip op. at 8.

¹² See, e.g., *North Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1) & *Northeast Energy Co.* (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 267 (1999) (striking unauthorized response to applicant’s reply brief in license transfer proceeding).

¹³ *High-Level Waste Repository*, CLI-08-12, 67 NRC at 393.

¹⁴ See *Detroit Edison Co.* (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 470, 471 (1978) (observing that “we might simply disregard [petitioner’s reply to the NRC Staff’s answer to his motion] as being an unauthorized filing” where petitioner did not seek leave to file a reply).

¹⁵ ELPC may claim that Section 2.311(b) references Section 2.341, and thereby implicitly authorizes a reply. This theory is incorrect. Section 2.311(b) states that “the supporting brief and any answer must conform to the

Even if ELPC had sought leave, the Reply does not support ELPC's request for a "protective stay" that is the subject of the Appeal. Rather than respond to the objections raised by NRC Staff and Exelon in their Answers, ELPC's Reply largely provides additional comments purportedly supporting the same unpersuasive and flawed arguments raised in the first instance in its stay request.¹⁶

In addition, Section II of ELPC's Reply raises one new claim—further underscoring the justification for striking it from the record.¹⁷ For the first time, ELPC states that it "is not waiving the merits of its argument in Contention 1."¹⁸ As ELPC concedes, it did not challenge the Board's contention admissibility rulings in its Appeal.¹⁹ Thus, ELPC's tactic continues its pattern of seeking to rehabilitate deficient pleadings by introducing new arguments in a reply.²⁰ Allowing ELPC to effectively amend its Appeal through its Reply would prejudice Exelon and NRC Staff, given their inability to respond to the new claim.²¹

requirements of §2.341(c)(2)." Replies, however, are authorized in a different provision—Section 2.341(b)(3). In any event, the case law is clear that no replies are authorized under Section 2.311. *See supra* note 11.

¹⁶ *Cf. Ohio Edison Co.* (Perry Nuclear Power Plan, Unit 1), CLI-92-11, 36 NRC 47, 51 n.8 (1992) (denying motion for leave to reply to an answer opposing an appeal where such reply added "nothing of substance" to petitioner's brief in support of its appeal). Moreover, Section III of the Reply highlights the baseless nature of ELPC's stay request by disavowing any reliance on the regulation governing stays of decisions, 10 C.F.R. § 2.342. *See* Reply at 4.

¹⁷ The presiding officer has the authority to strike individual arguments that are introduced for the first time in reply. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary "to take appropriate action to control the prehearing ... process"); *see also Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 399-400, 407, 429 (2008).

¹⁸ Reply at 3.

¹⁹ *See id.* ("ELPC does not specifically address the merits of its argument in this appeal").

²⁰ *See* LBP-13-12, slip op. at 5 & n.23 (noting that ELPC attempted to raise a significant new argument for the first time in its reply brief filed before the Board); *see also Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Units 2 & 3), CLI-11-14, 74 NRC 801, 809-810 (2011) (granting, in part, a motion to strike on the ground that new arguments not raised in a Section 2.341(b) petition for interlocutory review are "outside the appropriate scope of a reply").

²¹ *See Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("Allowing new claims in a reply...would unfairly deprive other participants of an opportunity to rebut the new claims.").

Ultimately, ELPC's unauthorized Reply is simply a last-ditch effort to salvage its rejected Petition to Intervene by seeking to reserve another opportunity to resurrect its claims in the future.²² There is no legal basis for ELPC to use its Reply as a placeholder to perhaps file a future petition for rulemaking and a subsequent new or amended contention.²³ In essence, the Reply seeks to hold this proceeding in abeyance for an undefined period, pending developments on ELPC's hypothetical petition for rulemaking. However, adoption of ELPC's approach is contrary to the Commission's general reluctance to "hold adjudications in abeyance pending the results of an ongoing reexamination of [its] rules,"²⁴ particularly as ELPC has not yet requested, and may never request, such a reexamination.

²² See, e.g., *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 257 (2010) ("We will deem waived arguments made before that Board that are abandoned on appeal."); *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (legal theory not raised in opening appellate brief was deemed abandoned).

²³ Cf. *Dominion Nuclear Ct., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (affirming licensing board's denial of intervenors' motion for leave to file new contentions intended as a "placeholder" for a further motion to reopen the record to be filed in the future).

²⁴ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390 (2001).

In summary, ELPC's Reply is unauthorized and improperly raises a new substantive argument. For the foregoing reasons, Exelon respectfully requests that the Commission strike ELPC's Reply in its entirety.

Respectfully submitted,

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Dated in Washington, D.C.
this 13th day of January, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2014 a copy of “Exelon’s Motion to Strike Environmental Law & Policy Center’s Unauthorized Reply” was served upon the Electronic Information Exchange (the NRC’s e-filing system), in the above-captioned proceeding.

Signed (electronically) by Raphael P. Kuyler

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