

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of

Exelon Generation Company, LLC

Docket Nos. 50–454, 50–455, 50–456, 50–457

(Braidwood Nuclear Station, Units 1 and 2  
and Byron Nuclear Station, Units 1 and 2)

January 23, 2014

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**ELPC’S MOTION FOR LEAVE TO FILE ITS REPLY**

Petitioner Environmental Law and Policy Center (“ELPC”) hereby moves the Nuclear Regulatory Commission for leave to file a reply to NRC Staff Opposition to Environmental Law & Policy Center Appeal of LBP-13-12 and Request for Protective Stay and Exelon’s Answer Opposing Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay, both filed on December 26, 2013. ELPC respectfully requests that it be permitted to file its Reply previously submitted on January 2, 2014 and attached hereto as Attachment 1. This request is timely under 10 C.F.R. § 2.323(a)(2) because it is filed within ten days of Exelon’s January 13, 2014 Motion To Strike ELPC’s Reply. In accordance with 10 C.F.R. § 2.323(b), ELPC certifies that it made a sincere effort to contact Exelon’s representatives and NRC Staff to resolve the issue raised in this motion. Exelon stated that it opposes the motion and will respond.

The Commission allows replies when its regulations do not explicitly provide for them “where necessity or fairness dictates.” *U.S. Department of Energy* (High-Level Waste Repository), 67 NRC 386, 393 (2008). Here, it is both necessary and fair that the Commission allow ELPC to file its Reply. ELPC’s Reply is necessary to address three important misunderstandings of ELPC’s positions raised in Staff’s and Exelon’s Answers. First, Staff states

that ELPC is now seeking to “suspend the adjudicatory proceeding or defer a licensing decision.” Staff Answer at 9. Second, Staff states that ELPC “has waived its right to appeal.” Staff Answer at 7. Third, Staff and Exelon argue that ELPC’s appeal and stay request are untimely. Staff Answer at 7; Exelon Answer at 5. ELPC’s Reply is limited to addressing these three points in order to clarify ELPC’s position on each and clarify the relief ELPC seeks.

Fairness also supports the Commission granting ELPC leave to file its Reply. ELPC’s stay request stems from the ASLB’s November 19, 2013 Order, which states at page 4 that ELPC’s “sole remedy to challenge the wisdom or lawfulness of 10 C.F.R. § 51.53(c)(2) is to file a petition for rulemaking with the Commission itself.” ELPC’s stay request is a good-faith and sensible way of following the ASLB’s prescribed procedure while protecting its ability to have the legitimate legal issue it raises with respect to the legality of 10 C.F.R. § 51.53(c)(2) addressed in the Byron 1 & 2 and Braidwood 1 & 2 license renewals. Accordingly, fairness dictates that the Commission allow ELPC’s Reply.

Finally, ELPC’s Motion is timely. Exelon’s Motion to Strike ELPC’s Reply is the proper “occurrence or circumstance” from which to start § 2.323(a)(2)’s ten day timeline. The claim that ELPC’s originally-filed Reply was first called into question and the argument that its Reply requires a Motion for Leave was first raised in Exelon’s Motion to Strike, filed on January 13, 2014. Moreover, as described in ELPC’s Opposition to Exelon’s Motion to Strike, ELPC’s Reply is a good-faith and reasonable attempt to clarify its position regarding its request for a protective stay and flows from ELPC’s good-faith and sensible way of following the ASLB’s prescribed procedure. For these reasons, the Commission should find this Motion for Leave to be timely.

Therefore, the Commission should grant ELPC leave to file its Reply because doing so would serve both necessity and fairness.

Respectfully Submitted,

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

Justin Vickers

Environmental Law and Policy Center

35 East Wacker Drive, Suite 1600

Chicago, Illinois 60601

(312) 673-6500

[jvickers@elpc.org](mailto:jvickers@elpc.org)

*Counsel for Environmental Law & Policy Center*

Dated in Chicago, IL  
this 23rd day of January, 2014

## **Attachment 1:**

**“ELPC Reply in Support of its Appeal of The ASLB Denial of ELPC’s Petition for  
Intervention and Hearing Request”**

**January 2, 2014**

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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In the Matter of

Exelon Generation Company, LLC

(Braidwood Nuclear Station, Units 1 and 2  
and Byron Nuclear Station, Units 1 and 2)

Docket Nos. 50–454, 50–455, 50–456, 50–  
457; 2013-0169

ASLBP No. 13-929-02-LR-BD01

January 2, 2014

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**ELPC REPLY IN SUPPORT OF ITS APPEAL OF THE ASLB DENIAL OF ELPC’S  
PETITION FOR INTERVENTION AND HEARING REQUEST**

Petitioner Environmental Law & Policy Center (“ELPC”) hereby files this Reply to the Answers of the Nuclear Regulatory Commission (“Commission”) Staff and Exelon to ELPC’s appeal of the Atomic Safety and Licensing Board’s (“ASLB”) Order denying ELPC’s hearing request and petition to intervene. ELPC filed its appeal as a request for protective stay while it prepares its forthcoming petition for a rulemaking to require need for power analyses for merchant plant relicensings. The protective stay is meant to preserve ELPC’s rights with regard to the Byron 1 & 2 and Braidwood 1 & 2 license renewal applications as the rulemaking process moves forward. First, the protective stay will preserve ELPC’s right ensure that any rule coming out of its petition for rulemaking is enforced in this relicensing proceeding. Second, the protective stay will preserve ELPC’s right to seek a 10 C.F.R. §2.802(d) stay if its petition for rulemaking is pending at the time that the NRC intends to issue its final decision on these applications.

Staff ultimately agrees that “[i]f the NRC determines that rulemaking is warranted, the Commission could revisit whether Byron and Braidwood licensing reviews should be held in abeyance based on the complexity of the issues raised and the Staff’s review schedule.” Staff

Answer at 9-10. In addition, ELPC requests that the Commission allow it to request a stay under 10 C.F.R. §2.802(d) in the future if the Commission has not acted on ELPC's forthcoming rulemaking petition before it makes a final determination on the Byron 1 & 2 and Braidwood 1 & 2 license renewal requests.

Moreover, contrary to Staff's and Exelon's arguments, ELPC's appeal is timely and does not waive the merits of its Contention 1 that the National Environmental Policy Act ("NEPA") requires a need for power analysis as part of Byron 1 & 2's and Braidwood 1 & 2's environmental reviews.

**I. ELPC'S REQUEST FOR PROTECTIVE STAY SHOULD BE GRANTED.**

Staff argues that ELPC is now seeking to "suspend the adjudicatory proceeding or defer a licensing decision." Staff Answer at 9. However, ELPC is not asking the Commission to suspend or change the schedule of the Byron 1 & 2 and Braidwood 1 & 2 license renewal processes at this time.<sup>1</sup> Instead, ELPC is seeking to preserve its right to raise its need for power analysis issue with respect to Byron 1 & 2 and Braidwood 1 & 2 *in the future* once the NRC has addressed ELPC's rulemaking petition. The ASLB's November 19, 2013 Order at page 4 states that ELPC's "sole remedy to challenge the wisdom or lawfulness of 10 C.F.R. § 51.53(c)(2) is to file a petition for rulemaking with the Commission itself." ELPC is simply following this course, while making sure that it will be able to have these issues applied to the Byron 1 & 2 and Braidwood 1 & 2 license renewals.

Staff seems to agree that ELPC has the ability to raise its rulemaking petition need for power issue with respect to Byron 1 & 2 and Braidwood 1 & 2 once the NRC considers its

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<sup>1</sup> See ELPC's Appeal of ASLB Denial of ELPC's Petition for Intervention and Hearing Request as Request for Protective Stay (December 16, 2013) at 3 (stating that "ELPC is not requesting that the NRC stop work on the license renewal" because the current license renewal schedule should allow ample time for the Commission to consider ELPC's petition for rulemaking before a final decision on Byron 1 & 2 and Braidwood 1 & 2 license renewals).

rulemaking petition. Staff states that “[i]f the NRC determines that rulemaking is warranted, the Commission could revisit whether Byron and Braidwood licensing reviews should be held in abeyance based on the complexity of the issues raised and the Staff’s review schedule.” Staff Answer at 9-10. ELPC is asking the Commission to confirm that – in the situation that Staff poses – it would revisit the need for power issue before it decides upon license renewals for Byron 1 & 2 and Braidwood 1 & 2. If the situation arises where the Commission has not addressed ELPC’s rulemaking petition by the time it will make a final decision on the Byron 1 & 2 and Braidwood 1 & 2 license renewals, ELPC seeks to preserve its ability to seek a stay of the license renewals under the NRC’s petition for rulemaking regulations at 10 C.F.R. §2.802(d). This would allow ELPC to request that the Commission act on ELPC’s rulemaking petition before these largest-ever license renewals are finally determined.

## **II. ELPC’S APPEAL AS REQUEST FOR PROTECTIVE STAY DOES NOT WAIVE THE MERITS OF ITS CONTENTION 1 ARGUMENT.**

Staff argues that ELPC “has waived its right to appeal” the merits of its originally filed Contentions because ELPC does not specifically challenge the ASLB’s Order in this appeal. Staff Answer at 7. However, by filing this appeal as a request for a protective stay, ELPC is not waiving the merits of its argument in Contention 1 – that Exelon has not conducted a need for power analysis as NEPA requires. The very purpose of ELPC’s request for protective stay is to preserve its right to raise this issue with respect to the Byron 1 & 2 and Braidwood 1 & 2 license renewals. ELPC does not specifically address the merits of its argument in this appeal because it is following the procedural course prescribed by the ASLB, which as stated above, is to file a petition for rulemaking. ELPC’s ultimate aim is to have its need for power analysis issue heard with respect to the Byron 1 & 2 and Braidwood 1 & 2 license renewals. Therefore, ELPC is not waiving this argument, but is following the ASLB’s direction to file it as a petition for

rulemaking and then raise the issue for the Byron 1 & 2 and Braidwood 1 & 2 license renewals after the NRC addresses ELPC's petition for rulemaking. *At this juncture*, "the Commission need only determine whether ELPC's request for a preservation stay should be granted." Staff Answer at 7.

### **III. ELPC'S REQUEST FOR A PROTECTIVE STAY IS TIMELY.**

Contrary to Staff's and Exelon's argument, ELPC's appeal as request for protective stay is timely. Staff argues that ELPC's request for protective stay is untimely because under 10 C.F.R. § 2.342(a) "[s]tays of the effectiveness of a Board order must be filed within ten (10) days." Staff Answer at 7; *see also* Exelon Answer at 5. However, ELPC is not filing for an instant stay of the effectiveness of the ASLB's November 19, 2013 Order, and ELPC is not requesting that the Byron 1 & 2 and Braidwood 1 & 2 license renewal processes be stayed at this time. ELPC is seeking to preserve its right to raise its need for power analysis issue in the future, after the NRC addresses ELPC's petition for rulemaking. This petition for rulemaking is the procedural course prescribed by the ASLB's Order. ELPC is following the ASLB's Order, not seeking to have the relicensing process stayed immediately. Meanwhile, ELPC is properly seeking to preserve its ability to intervene in the Byron 1 & 2 and Braidwood 1 & 2 license renewals if its petition is granted. ELPC is not seeking a stay of the ASLB's Order under § 2.342(a) and its appeal is not somehow untimely under that section.

ELPC's appeal as request for protective stay is timely as an appeal under 10 C.F.R. § 2.311(a)(1) & (2), as it was filed on December 16, 2013, within §2.311's 25-day time requirement. As stated above, ELPC's request for protective stay is not a request for an instant stay under § 2.342(a) and it is not a stand-alone motion under 10 C.F.R. § 2.323. Rather, it is a response to the ASLB's Order that seeks to preserve ELPC's rights while following the ASLB's



prescribed procedural course. ELPC filed its appeal as request for protective stay as an appeal under §2.311 because it is the proper procedure for the Commission to review the terms of an ASLB decision denying intervention (§2.311(a)(2)) and hearing requests (§2.311(a)(1)). Therefore, ELPC's appeal as request for protective stay is timely because it is not a stay request under § 2.342, nor a stand-alone motion under § 2.323, but was properly and timely filed as an appeal for Commission review under § 2.311.

#### **IV. CONCLUSION.**

For the foregoing reasons, Staff fails to demonstrate that ELPC's request for protective stay should be denied. ELPC's appeal as a request for protective stay: (1) is an appropriate way to preserve ELPC's right to intervene in the Byron 1 & 2 and Braidwood 1 & 2 license renewals while it follows the ASLB Order's recommended procedure, (2) does not constitute a waiver of its Contention 1 argument, and (3) is timely under 10 C.F.R. § 2.311. Therefore, the Commission should grant ELPC's request for a protective stay.

Respectfully Submitted,

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

Justin Vickers

Environmental Law and Policy Center

35 East Wacker Drive, Suite 1600

Chicago, Illinois 60601

(312) 673-6500

[jvickers@elpc.org](mailto:jvickers@elpc.org)

*Counsel for Environmental Law & Policy Center*

Dated in Chicago, IL  
this 2nd day of January, 2014

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

|   |   |                       |
|---|---|-----------------------|
| In the Matter of:                         | ) |                       |
|   | ) | Docket Nos. 50-454-LR |
|   | ) | 50-455-LR             |
| EXELON GENERATION COMPANY, LLC            | ) | 50-456-LR             |
|   | ) | 50-457-LR             |
| (Byron Nuclear Station, Units 1 and 2;    | ) |                       |
| Braidwood Nuclear Station, Units 1 and 2) | ) | January 23, 2014      |
|   | ) |                       |

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that on this date, a copy of “ELPC’s Motion for Leave to File its Reply” was served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Justin Vickers

Justin Vickers

Environmental Law and Policy Center

35 East Wacker Drive, Suite 1600

Chicago, Illinois 60601

(312) 673-6500

[jvickers@elpc.org](mailto:jvickers@elpc.org)

*Counsel for Environmental Law & Policy Center*