

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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))	February 3, 2014
)	

**EXELON’S ANSWER OPPOSING ELPC’S UNTIMELY MOTION
FOR LEAVE TO FILE A REPLY**

Pursuant to 10 C.F.R. § 2.323(c), Exelon Generation Company, LLC (“Exelon”) hereby opposes Environmental Law & Policy Center’s (“ELPC”) *ex post facto* “Motion for Leave to File Its Reply” (“Motion for Leave”), filed on January 23, 2014. The Motion for Leave continues ELPC’s pattern of baseless and wasteful submittals prepared without researching the relevant regulations and precedent, including numerous attempts to rehabilitate facially-deficient pleadings with unauthorized additional filings and arguments that unnecessarily consume the resources of the Commission, the NRC Staff, and Exelon. The Motion for Leave is especially wasteful because ELPC seeks to have the Commission¹ consider a Reply that it filed three weeks earlier (on January 2),² because ELPC now asserts that it did not know that NRC regulations do not authorize such replies until Exelon filed a motion to strike it.³ The Commission should

¹ Although ELPC’s Motion for Leave is captioned “Before the Atomic Safety and Licensing Board,” Exelon presumes that ELPC intended to submit the motion for the Commission’s consideration.

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

³ See Exelon’s Motion to Strike Environmental Law & Policy Center’s Unauthorized Reply (Jan. 13, 2014) (“Motion to Strike”). In accordance with 10 C.F.R. § 2.323(b), counsel for Exelon certify that they made a sincere effort to make themselves available to listen and respond to the moving party, and that their efforts to resolve the issues have been unsuccessful. Exelon notes, however, that any consultation on an *ex post facto* motion for leave to correct a faulty initial filing is inherently problematic. Cf. *NextEra Energy Seabrook, LLC*,

terminate this cycle of pointless filings and deny ELPC's Motion for Leave as untimely and baseless.

II. PROCEDURAL BACKGROUND

The procedural history of ELPC's attempt to intervene in this proceeding is not discussed in detail here because it is recited in the Atomic Safety Licensing Board's ("Board") decision denying ELPC's hearing request and petition to intervene,⁴ in Exelon's Answer to ELPC's appeal,⁵ and in Exelon's Motion to Strike.⁶ Briefly, in LBP-13-12, the Board denied ELPC's hearing request, without oral argument, because its two contentions—on the “need for power” and the timing of Exelon's license renewal application (“LRA”)—impermissibly challenged NRC rules, were insufficiently supported, and failed to raise a genuine dispute.⁷ In so ruling, the Board noted in passing that ELPC's “sole remedy to challenge the wisdom or lawfulness of 10 C.F.R. § 51.53(c)(2) [a regulation excluding need for power from the scope of the license renewal environmental review] is to file a petition for rulemaking with the Commission itself.”⁸

ELPC did not seek review and reversal of the denial of its hearing request.⁹ Moreover, in the more than two months since the Board issued LBP-13-12, ELPC has not actually filed any petition for rulemaking, but has instead used the Board's statement as the pretext for *four* filings

(Seabrook Station, Unit 1), Licensing Board Order (Denying Extension Request and Denying Motion for Leave to File for Reconsideration) at 3 (unpublished) (Mar. 9, 2011) (“Filing a motion out of time, and then moving after the fact to excuse their lateness, and thereafter asking the parties if they object to the second motion hardly achieves the purpose of the rule: that is, to spare licensing boards from having to address issues that the parties might be able to resolve on their own”).

⁴ See *Exelon Generation Co., LLC* (Braidwood Nuclear Station, Units 1 & 2 and Byron Nuclear Station, Units 1 & 2), LBP-13-12, 78 NRC ___, slip op. at 2 (Nov. 19, 2013) (“LBP-13-12”).

⁵ See Exelon's Answer Opposing Appeal of ASLB Denial of ELPC's Petition for Intervention and Hearing Request as Request for Protective Stay at 2-3 (Dec. 26, 2013) (“Exelon's Answer”).

⁶ See Motion to Strike at 2-3.

⁷ See LBP-13-12, slip op. at 4-7.

⁸ *Id.* at 4.

⁹ See Exelon's Answer at 1 & n.2.

before the Commission, in what it incredulously describes as a “good-faith effort to follow the [Board’s] prescribed procedure.”¹⁰

After Exelon and the NRC Staff filed answers explaining that there was no justification for ELPC’s requested “protective stay” to “preserve its right to intervene” in this proceeding,¹¹ ELPC filed its unauthorized Reply. Exelon moved to strike the Reply because, among other things, the Commission’s rules do not allow replies in appeals under 10 C.F.R. § 2.311.¹² ELPC waited until Exelon filed the Motion to Strike, and then used that filing as the alleged 10-day “trigger” for moving, on January 23, for leave to file its January 2 Reply.

II. ELPC’S MOTION SHOULD BE DENIED BECAUSE IT IS UNTIMELY

The Commission should reject ELPC’s Motion for Leave as untimely. Under 10 C.F.R. § 2.323(a)(2), “[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” Exelon and the NRC Staff filed their separate Answers to ELPC’s Notice of Appeal on December 26, 2013. To be timely, ELPC’s Motion for Leave should, therefore, have been filed no later than 10 days thereafter, or by January 5, 2014. ELPC, however, waited until ten days after Exelon moved to strike its Reply, filing its Motion for Leave on January 23, 2014, 18 days late.

ELPC instead claims that the appropriate trigger date for its Motion was Exelon’s January 13 Motion to Strike, because ELPC’s original 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

¹⁰ ELPC’s Answer Opposing Exelon’s Motion to Strike ELPC’s Reply at 2 (Jan. 23, 2014) (“ELPC Answer to MTS”); *see also id.* at 1 (*quoting* LBP-13-12, slip op. at 4); Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay at 1 (Dec. 16, 2013) (“Appeal”); Reply at 2; Motion for Leave at 2.

¹¹ Exelon’s Answer at 5, 8; *see also generally* NRC Staff Answer to Environmental Law and Policy Center Appeal of LBP-13-12 and Request for Protective Stay (Dec. 26, 2013).

¹² *See* Motion to Strike at 2-3. ELPC has now effectively acknowledged that its reply was improper. *See* ELPC Answer to MTS at 2 (acknowledging that ELPC filed its appeal of the denial of ELPC’s hearing request under 10 C.F.R. § 2.311, but that it filed its Reply pursuant to Section 2.341).

Strike.”¹³ In other words, ELPC argues that its own failure to realize that it had violated the Rules of Practice—until Exelon identified the violation for ELPC—allows ELPC to file a belated and retroactive Motion for Leave.

ELPC’s theory of timely filings is not the law. ELPC cites no rule or precedent for its theory.¹⁴ And the Commission has indicated the opposite, emphasizing that parties have an obligation to file pleadings in a timely manner and that, for example, it “disfavor[s] motions for extensions of time that are themselves filed out-of-time.”¹⁵ Motions for Leave filed 18 days late, to file otherwise-unauthorized pleadings, are similar to motions for extension of time that themselves are out-of-time. Motions for Leave must be filed in a timely manner—and the Commission should not entertain them when the moving party waits until after an opposing party seeks to strike the underlying, unauthorized pleading.¹⁶

For these reasons, the Commission should deny the Motion for Leave as untimely. To do otherwise would establish a precedent that has the potential to undermine the structured adjudicatory process set forth in the Commission regulations.

III. ELPC’S REPLY SHOULD BE DENIED FOR SUBSTANTIVE REASONS AS WELL

ELPC’s Motion for Leave should also be denied because ELPC has not met the high hurdle for grant of such a motion. A movant is expected “to anticipate potential arguments and

¹³ Motion for Leave at 2.

¹⁴ Even if notice by an opposing party were a legitimate legal trigger under these circumstances, which it is not, then ELPC’s motion is still untimely. On January 8, 2014, five days before filing its Motion to Strike, Exelon consulted with ELPC, as required by 10 C.F.R. § 2.323(b). During that consultation, Exelon informed ELPC that Section 2.311 does not authorize replies. Under ELPC’s rationale, this oral notice by Exelon to ELPC would be the legal trigger for ELPC to file a Motion for Leave. Thus, even under ELPC’s own unprecedented theory that it could wait for another party to call into question the basis for its Reply, the motion was still late.

¹⁵ *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 477 (2010).

¹⁶ *Cf., e.g., Progress Energy Fl., Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-22, 70 NRC 640, 648 (2009) (requiring a motion for leave to file a reply to be “submitted no less than three (3) business days prior to the time the reply would need to be filed”).

lengthy responses and to frame their opening pleadings accordingly.”¹⁷ When reply briefs are permitted, the “rules provide explicitly for their filing” or “set strict conditions on their filing.”¹⁸ In the context of an interlocutory appeal similar to ELPC’s, but under 10 C.F.R. § 2.1015(b), the Commission flatly denied a motion for leave to reply, for the simple reason that “reply briefs are not provided here.”¹⁹ In so doing, the Commission noted, however, that “extra filings” should be permitted in the future “only where necessity or fairness dictates.”²⁰ Similarly, Section 2.323(c) allows replies to motions “only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.” The Commission has not specified the circumstances when “necessity and fairness” might allow a reply under Section 2.1015, or the precise standard for motions for leave to file a reply under Section 2.311. But for parties such as ELPC, which is represented by counsel and has previously litigated issues before a Licensing Board all the way to the U. S. Court of Appeals,²¹ the Commission should not entertain such an extra filing—certainly not without a demonstration by the moving party that it could not have reasonably anticipated the arguments made by the opposing parties.²²

¹⁷ *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991).

¹⁸ *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), LBP-05-19, 62 NRC 134 (2005), *aff’d*, CLI-05-29, 62 NRC 801 (2005), *aff’d sub nom., Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (7th Cir. 2006).

²² For example, the Commission has found that an unauthorized reply in support of a 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.” *Exelon’s Answer* at 3 n.11 (*quoting Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-13-02, 77 NRC 39, 44 n.20 (2013)). But neither of those circumstances is present here, because ELPC is an experienced litigant and is represented by counsel, and the Board specifically directed ELPC’s attention to Section 2.311. *See* LBP-13-12, slip op. at 8.

ELPC plainly and unambiguously asked for a “protective stay” of this proceeding.²³ Therefore, ELPC could and should have anticipated Exelon’s and the NRC Staff’s arguments that its self-described “protective stay” request failed to address or satisfy the rule governing stays (10 C.F.R. § 2.342), and otherwise failed to justify suspending the final decision on Exelon’s application.²⁴ ELPC’s apparent failure to research the relevant regulations and precedent and respond to potential objections does not mean that such objections could not have been *reasonably* anticipated.²⁵

To justify its Reply, ELPC vaguely claims that its motion “is necessary to address three important misunderstandings of ELPC’s positions raised in Staff’s and Exelon’s Answers.”²⁶ Those alleged misunderstandings are that: (1) the Staff states that ELPC seeks to “suspend the adjudicatory proceeding or defer a licensing decision”; (2) the Staff states that ELPC “has waived its right to appeal”; and (3) Exelon and the Staff argue that ELPC’s appeal and stay request are untimely.²⁷ ELPC does not explain, however, why it believes that it could not have reasonably anticipated these alleged misunderstandings at the time of its Appeal. We address each of these in turn.

First, ELPC filed its appeal “as a petition for a protective stay in order to preserve [its] right to intervene in [this] proceeding while it pursues the ASLB’s recommended course of filing a petition for rulemaking.”²⁸ Moreover, ELPC asked that the Commission “[n]ot make a determination on the pending license renewals of Byron 1 & 2 and Braidwood 1 & 2 until the

²³ Appeal at 1.

²⁴ *Id.*; *see also generally* Exelon’s Answer.

²⁵ *See Shoreham*, CLI-91-8, 33 NRC at 469 (“We expect future movants to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly”).

²⁶ ELPC’s Motion for Leave at 1.

²⁷ *Id.* at 1-2.

²⁸ Appeal at 3.

Commission makes a final ruling on ELPC's forthcoming rulemaking."²⁹ In other words, ELPC requested a suspension of this adjudicatory proceeding and a suspension of the final license renewal decision. ELPC certainly could and should have anticipated that the Staff (and Exelon) would interpret its arguments in this fashion.

Second, by failing to challenge the Board's order in its appeal, ELPC has waived its right to seek review and reversal of the Board's decision in LBP-13-12.³⁰ When ELPC failed to seek review of the merits of LBP-13-12 in its Appeal, it could and should have anticipated that the Staff (and Exelon) would have argued that it had waived any challenges to the merits of that decision.

Third, when ELPC filed its Appeal "as Request for Protective Stay," it could and should have anticipated that Exelon and the Staff would argue that its filing should be held to the timeliness standards of the stay regulation, 10 C.F.R. § 2.342, and that ELPC's filing was therefore late.

Finally, ELPC argues that "fairness dictates that the Commission allow ELPC's Reply," because ELPC's stay request "is a good faith and sensible way of following the [Board's] prescribed procedure," *i.e.*, the Board's statement that ELPC's remedy for its concerns about need-for-power was for it to file a rulemaking petition.³¹ The logic of this argument is difficult to discern, particularly since replies supporting stay requests are explicitly forbidden.³² In any

²⁹ *Id.*

³⁰ *See, e.g., Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 257 n.70 (2010) ("We will deem waived arguments made before that Board that are abandoned on appeal"); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (concluding that appellants abandoned an argument they raised before a licensing board but then failed to "reiterate or explain" in their appellate brief).

³¹ Motion for Leave at 2.

³² *See* 10 C.F.R. § 2.342(d) ("Further replies to answers will not be entertained.").

event, this theory provides no justification for ELPC to be allowed yet another opportunity to reargue the points in its stay request.³³

In summary, even if the Commission were to consider the merits of ELPC's Motion for Leave, it is unjustified.

IV. CONCLUSION

For the foregoing reasons, ELPC's Motion for Leave is untimely, lacks merit, and the Commission should deny it in its entirety.

Respectfully submitted,

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Counsel for Exelon Generation Co., LLC

Dated in Washington, D.C.
this 3rd day of February, 2014

³³ See, e.g., *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), CLI-92-11, 36 NRC 47, 51 n.8 (1992) (denying a motion for leave to file a reply in support of an appeal because "the reply adds nothing of substance" but instead "essentially provides additional comments regarding the same arguments" previously raised).

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of “Exelon’s Answer Opposing ELPC’s Untimely Motion for Leave to File a 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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