

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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

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CLI-14-06

**MEMORANDUM AND ORDER**

This proceeding stems from the application of Exelon Generation Company, LLC to renew the operating licenses for Byron Nuclear Station, Units 1 and 2 and Braidwood Nuclear Station, Units 1 and 2.<sup>1</sup> Before us is the appeal of the Environmental Law and Policy Center (ELPC) of LBP-13-12, an Atomic Safety and Licensing Board decision that denied ELPC's request for hearing and petition to intervene.<sup>2</sup>

ELPC styles its filing as an appeal pursuant to 10 C.F.R. § 2.311(a), as if it were an appeal of the Board's decision to reject ELPC's intervention petition and hearing request. But ELPC's "appeal" does not challenge any of the Board's grounds for rejecting ELPC's hearing

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<sup>1</sup> See Byron Nuclear Station, Units 1 and 2, and Braidwood Nuclear Station Units 1 and 2; Exelon Generation Company, LLC, 78 Fed. Reg. 44,603 (July 24, 2013).

<sup>2</sup> See *Notice of Appeal of ASLBP No. 13-929-02-LR-BD01 by Environmental Law and Policy Center* (Dec. 16, 2013); *Appeal of ASLB Denial of ELPC's Petition for Intervention and Hearing Request As Request for Protective Stay* (Dec. 16, 2013) (Appeal); LBP-13-12, 78 NRC \_\_ (Nov. 19, 2013) (slip op.).

request and instead requests a “protective stay” of the proceeding.<sup>3</sup> We consider ELPC’s submission as a request for a protective stay and, for the reasons outlined below, we deny the request.

## I. BACKGROUND

On September 23, 2013, ELPC requested a hearing on Exelon’s license renewal application and submitted two contentions with its petition to intervene.<sup>4</sup> In Contention 1, ELPC claimed that Exelon’s environmental reports for the Byron and Braidwood plants failed to include an analysis of the need for power, resulting in “material legal flaws” in Exelon’s environmental analysis of reasonable alternatives to the nuclear stations.<sup>5</sup> ELPC argued that the lack of a need-for-power analysis led Exelon to “improperly reject potentially better, lower-cost, safer and environmentally preferable energy efficiency, renewable energy resource, and distributed generation alternatives.”<sup>6</sup> ELPC acknowledged that, under our regulations (specifically, 10 C.F.R. § 51.53(c)(2)), license renewal applicants need not include a need-for-power discussion in their environmental reports. ELPC argued, however, that section 51.53(c)(2) “improperly constrained” the alternatives analysis, “in clear violation of” the National Environmental Policy Act (NEPA).<sup>7</sup> In Contention 2, ELPC claimed that the proposed license renewals are “premature,” given that the current operating licenses for the Byron and Braidwood units will not expire “for another eleven to fourteen years.”<sup>8</sup>

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<sup>3</sup> See Appeal at 1, 3.

<sup>4</sup> See *Hearing Request and Petition to Intervene by the Environmental Law and Policy Center* (Sept. 23, 2013) (Petition), Ex. 4, Contentions Included with Petition to Intervene by the Environmental Law and Policy Center, at 1-6 (Contentions).

<sup>5</sup> See Contentions at 1-4.

<sup>6</sup> See *id.* at 2.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 4-6.

In LBP-13-12, the Board rejected both contentions, finding that each impermissibly challenged an NRC regulation, fell beyond the scope of the renewal proceeding, and failed to meet contention pleading requirements.<sup>9</sup> The Board explained that absent a rule waiver, NRC rules and regulations are not subject to attack in an adjudicatory proceeding, and that ELPC had neither sought a rule waiver nor pointed to any special circumstances that might warrant one.<sup>10</sup> The Board further explained that ELPC's "sole remedy" to challenge the lawfulness of a regulation is to file a petition for rulemaking with the Commission.<sup>11</sup> In addition, the Board concluded that the contentions lacked even "minimal factual" support for their underlying claims and failed to identify a genuine dispute with the applicant on a material issue.<sup>12</sup> Having found both contentions inadmissible, the Board denied ELPC's intervention petition and terminated the proceeding before it.<sup>13</sup>

In its appeal, ELPC addresses only Contention 1. We address the appeal below.

## II. ELPC'S APPEAL

While styled an "appeal" of the Board's decision, ELPC nowhere contests any of the Board's grounds for rejecting its contentions. Instead, ELPC characterizes its appeal as a "petition for a protective stay" of the license renewal proceeding.<sup>14</sup> Specifically, ELPC requests a stay to "preserve ELPC's right to intervene in the [Byron and Braidwood] license renewal proceeding while it pursues the [Board's] recommended course of filing a petition for

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<sup>9</sup> LBP-13-12, 78 NRC at \_\_\_ (slip op. at 3-7).

<sup>10</sup> See *id.* at \_\_\_ (slip op. at 5-7); see also 10 C.F.R. § 2.335.

<sup>11</sup> See LBP-13-12, 78 NRC at \_\_\_ (slip op. at 4) (citing 10 C.F.R. § 2.802).

<sup>12</sup> See *id.* at \_\_\_ (slip op. at 6-7) (citing contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi)).

<sup>13</sup> See *id.* at \_\_\_ (slip op. at 8).

<sup>14</sup> See Appeal at 3.

rulemaking.”<sup>15</sup> ELPC acknowledges that the proper avenue for challenging an NRC rule is to file a petition for rulemaking, as the Board described.<sup>16</sup> ELPC goes on to state that it plans to file a rulemaking petition to request the NRC to require a “cost/benefit need for power analysis for license renewals.”<sup>17</sup>

ELPC stresses that while it is not currently asking the NRC to suspend its review of the license renewal application, it may wish to seek a suspension of the proceeding later, under 10 C.F.R. § 2.802(d).<sup>18</sup> Section 2.802(d) allows a rulemaking petitioner the opportunity to request a suspension of a licensing proceeding in which the petitioner is a participant, pending disposition of the rulemaking petition.<sup>19</sup> Critically, however, ELPC has not yet filed a petition for rulemaking. It merely seeks a “protective stay” to “preserve” an opportunity to later request a suspension of the proceeding under § 2.802(d) “if its petition for rulemaking is pending at the time that the NRC intends to issue its final decision” on the renewal applications.<sup>20</sup> ELPC also requests that the NRC defer any final decision on the renewal application until the agency has made a “final ruling on ELPC’s forthcoming rulemaking [petition]” and has provided “sufficient

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<sup>15</sup> *Id.*

<sup>16</sup> *See id.* at 1-2.

<sup>17</sup> *See id.* at 2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *See* 10 C.F.R. § 2.802(d).

<sup>20</sup> *See ELPC Reply in Support of Its Appeal of the ASLB Denial of ELPC’s Petition for Intervention and Hearing Request* (Jan. 2, 2014), at 1-4 (Reply). Exelon moved to strike ELPC’s reply as unauthorized. *See Exelon’s Motion to Strike Environmental Law & Policy Center’s Unauthorized Reply* (Jan. 13, 2014); *see also ELPC’s Answer Opposing Exelon’s Motion to Strike ELPC’s Reply* (Jan. 23, 2014); *NRC Staff Answer Opposing Environmental Law and Policy Center Motion for Leave to File Reply* (Feb. 3, 2014). Section 2.311 does not contemplate replies. We have considered ELPC’s reply only as additional clarification of arguments presented in the appeal, and, specifically, its identification of the relief it seeks (namely, a protective stay).

time for ELPC to raise its Contention 1 that Exelon has not conducted the need for power analysis necessary under NEPA.”<sup>21</sup>

We deny the request for a protective stay. What ELPC seeks is to keep the door to the adjudicatory proceeding open although no contention remains before the Board—in effect, to hold the proceeding in abeyance indefinitely pending potential future events. But ELPC’s request is inconsistent with our longstanding interest in sound case management and regulatory finality and would be unfair to the other parties.<sup>22</sup> Under our practice, “once all contentions have been decided, the contested [adjudicatory] proceeding is terminated.”<sup>23</sup> We generally have denied requests to hold adjudicatory proceedings in abeyance “pending the outcome of other Commission actions.”<sup>24</sup> Nor do our rules contemplate motions filed “as a ‘placeholder’ for a further motion to be filed later.”<sup>25</sup> And rarely do we grant an “indefinite or very lengthy stay . . . on the mere possibility of change.”<sup>26</sup>

Here, ELPC has not filed a rulemaking petition even though it has known since at least the date of the Board’s decision (November 19, 2013) that rulemaking is the appropriate avenue for challenging an NRC rule.<sup>27</sup> Nor does ELPC suggest when it plans to submit its petition for rulemaking. We are not inclined to issue a protective stay based on ELPC’s bare assertion that

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<sup>21</sup> See Appeal at 3.

<sup>22</sup> See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 391 (2001).

<sup>23</sup> See *Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-700 (2012).

<sup>24</sup> See *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 10 & n.36 (2010).

<sup>25</sup> See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009).

<sup>26</sup> See *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 4 (2011).

<sup>27</sup> See *Florida Power & Light Co.* (Turkey Point Power Plant, Unit Nos. 3 & 4), DD-82-2, 15 NRC 1343, 1345 (1982) (section 2.802(d) suspension request “inapplicable” where no petition for rulemaking before the Commission).

it intends to file a petition for rulemaking at some unknown time in the future.<sup>28</sup> Moreover, ELPC does not address the standards weighed for licensing proceeding suspension requests<sup>29</sup> or stay requests,<sup>30</sup> and it otherwise provides insufficient reason for holding the adjudicatory proceeding open.

ELPC can raise its concerns through established agency processes. As ELPC describes, a final decision on the Byron and Braidwood license renewal application is not expected before August 2015.<sup>31</sup> It may be in ELPC's interest, therefore, to file its petition for rulemaking without delay.

We leave for another day any arguments regarding the propriety or merits of a request under section 2.802(d) to suspend the Byron and Braidwood licensing proceeding pending disposition of a rulemaking petition, or for some other form of relief. No section 2.802(d) request is before us, no rulemaking petition is pending, and a decision on the renewal

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<sup>28</sup> Cf. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-09-10, 69 NRC 521, 527-28 (2009) (ensuring that results of judicial review of rulemaking petition denial would be implemented in a meaningful way where state timely "ha[d] taken every conceivable procedural step to assure that the ultimate outcome of its rulemaking petition . . . would inform the NEPA analysis" of the licensing proceedings).

<sup>29</sup> See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Station), CLI-12-6, 75 NRC 352, 373 (2012); *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 173-74 (2011).

<sup>30</sup> When considering "stays or other forms of temporary injunctive relief," we have applied the stay factors outlined in 10 C.F.R. § 2.342(e), which "restate commonplace principles of equity." See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2008); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) (applying section 2.342(e) standards to motion to stay issuance of license); see also 10 C.F.R. § 2.342(e) (regarding requests to stay presiding officer decisions).

<sup>31</sup> See Appeal at 3; Byron and Braidwood Nuclear Stations, Units 1 and 2: License Renewal Application; License Renewal Review Schedule, available at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/byron-braidwood.html> (last visited Apr. 21, 2014) (reflecting the Staff's current estimated review schedule, which provides for a decision on the application by the Director, Office of Nuclear Reactor Regulation, in August 2015).

application is not expected for at least another year and a half.<sup>32</sup> The only matter before us today is ELPC's request for a "protective stay," which we deny.<sup>33</sup>

IT IS SO ORDERED.

For the Commission

**[NRC Seal]**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland  
this 2<sup>nd</sup> day of May 2014.

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<sup>32</sup> In this regard, ELPC's request that we defer a decision on the license renewal applications pending disposition of its "forthcoming rulemaking" and other potential events is premature. See Appeal at 3. To the extent that this relief is independent of ELPC's request for a protective stay, we deny it on this basis. See *Oyster Creek*, CLI-08-13, 67 NRC at 399-400; *Callaway*, CLI-11-5, 74 NRC at 163.

<sup>33</sup> Exelon and the Staff both also argue that ELPC's stay request was filed out of time. *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), at 5; *NRC Staff Answer to Environmental Law and Policy Center Appeal of LBP-13-12 and Request for Protective Stay* (Dec. 26, 2013), at 7. Given our decision to deny ELPC's request, we need not reach questions regarding its timeliness.