

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of	)		)	Docket Nos.	52-031-COL
	)		)		52-032-COL
EXELON NUCLEAR TEXAS HOLDINGS, LLC	)		)		
(Victoria County Station, Units 1 and 2)	)		)	December 24, 2008	

**ANSWER OF EXELON OPPOSING SECOND MOTION FOR LEAVE TO FILE REPLY**

On December 5, 2008, Texans for a Sound Energy Policy (“TSEP”) submitted a Motion to the U.S. Nuclear Regulatory Commission (“NRC”) requesting that the Commission (1) revoke the NRC staff’s decision to docket the combined license (“COL”) application for Victoria County Station, Units 1 and 2, (2) return the COL application to Exelon, and (3) dismiss the licensing proceeding.<sup>1</sup> The NRC staff and Exelon Nuclear Texas Holdings, LLC (“Exelon”) submitted their answers opposing the Motion to Revoke Docketing on December 12 and 15, 2008, respectively.<sup>2</sup> On December 19, 2008, TSEP submitted a Reply to the NRC staff and Exelon answers, along with an associated Motion for Leave to Reply.<sup>3</sup> TSEP seeks leave to reply because, in its view, the NRC staff and Exelon answers presented arguments that TSEP

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<sup>1</sup> Texans for a Sound Energy Policy’s Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding for Exelon’s Victoria Combined License Application (Dec. 5, 2008) (“Motion to Revoke Docketing”).

<sup>2</sup> Answer to Texans for a Sound Energy Policy’s Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding for Exelon’s Victoria Combined License Application (Dec. 12, 2008); Answer of Exelon Opposing Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding (Dec. 15, 2008) (“Exelon Answer”).

<sup>3</sup> Texans for a Sound Energy [sic] Policy’s Reply to Exelon’s and NRC Staff’s Answers to Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding (Dec. 19, 2008) (“Reply”); Texans for a Sound Energy Policy’s Motion for Leave to Reply to Exelon’s and NRC Staff’s Answers to Motion to Revoke Docketing Decision and Dismiss [sic] Licensing Proceeding for Victoria Combined License Application (Dec. 19, 2008) (“Motion for Leave to Reply”).

could not have anticipated.<sup>4</sup>

This is the second time in less than a month in which TSEP has sought leave to submit a reply to answers filed by the NRC staff and Exelon.<sup>5</sup> As with TSEP's previous motion for leave to reply, the instant Motion for Leave to Reply should be denied because there are no compelling circumstances that warrant the filing of a reply.<sup>6</sup>

NRC regulations at 10 C.F.R. § 2.323(c) specify that a movant "has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer," and that leave "may be granted 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." Rather than requesting leave to file a reply, a movant is expected "to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly."<sup>7</sup>

TSEP presents three arguments as to why a reply is warranted. As demonstrated below, none of these arguments satisfies the standards for a request to submit a reply.

First, TSEP claims that it could not have anticipated that the NRC staff and Exelon would argue that Commission regulations give the NRC staff discretion to determine whether a COL application is complete and acceptable for docketing.<sup>8</sup> TSEP, however, has not demonstrated that it could not have reasonably anticipated the arguments for which it seeks leave to reply. Given that TSEP discussed 10 C.F.R. § 2.101(a)(3) and the docketing of the COL application throughout its Motion to Revoke Docketing, TSEP should have recognized that the NRC staff's

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<sup>4</sup> Motion for Leave to Reply at 1-2.

<sup>5</sup> See *Texans for a Sound Energy Policy's Motion for Leave to Reply to Exelon's and NRC Staff's Opposition to Petition to Hold Hearing Notice for Victoria Combined License Application in Abeyance* (Nov. 25, 2008).

<sup>6</sup> See *Answer of Exelon Opposing Motion for Leave to File Reply* (Dec. 3, 2008).

<sup>7</sup> *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991).

<sup>8</sup> See *Motion for Leave to Reply* at 2.

and Exelon's answers would present arguments on the applicability of Section 2.101 and would discuss recent Commission case law regarding the NRC staff's role with respect to the docketing of an application.<sup>9</sup>

Second, TSEP argues that it could not have anticipated that Exelon would argue that retaining the COL application on the docket would not harm TSEP, but that Exelon would suffer significant economic harm if docketing of the COL application were revoked.<sup>10</sup> TSEP should have anticipated that Exelon would point out that TSEP's interests would not be harmed by retaining Exelon's application on the docket because TSEP claimed the docketing of Exelon's COL application should be revoked to provide TSEP with "procedural protection."<sup>11</sup> Exelon merely pointed out that this "procedural protection" was unnecessary.<sup>12</sup> Likewise, TSEP should have anticipated that once it raised the issue of potential harm, Exelon would present a countervailing point of view on why docketing of the COL application should not be revoked.<sup>13</sup>

Third, TSEP asserts that leave to reply is warranted because it could not have anticipated Exelon's argument that NRC regulations allow an application to be revised after docketing.<sup>14</sup> Again, TSEP has not demonstrated that it could not have reasonably anticipated this argument. Since Exelon notified the NRC that it expects to designate another reactor technology, Exelon

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<sup>9</sup> Despite TSEP's assertion to the contrary, Exelon has not claimed that "the Commission has no jurisdiction over [this] proceeding" or that the Commission lacks "inherent supervisory authority over all NRC proceeding." *See* Motion for Leave to Reply at 2. Rather, Exelon argued that Commission regulations and precedent prevent TSEP from challenging the NRC staff's docketing decision in this adjudicatory proceeding. *See* Exelon Answer at 4.

<sup>10</sup> *See* Motion for Leave to Reply at 2.

<sup>11</sup> Motion to Revoke Docketing at 7.

<sup>12</sup> *See* Exelon Answer at 7-9.

<sup>13</sup> *See id.* at 9-10. Moreover, TSEP was aware that the U.S. Department of Energy loan guarantee program was important to Exelon's interest. *See* Motion to Revoke Docketing at 4 (quoting an Exelon spokesman discussing the federal loan guarantee program).

<sup>14</sup> *See* Motion for Leave to Reply at 2-3.

has consistently maintained that it plans to revise its COL application.<sup>15</sup> Given that TSEP was aware of Exelon's plan to revise its COL application prior to filing its Motion to Revoke Docketing, TSEP should have anticipated that Exelon would argue that NRC regulations specifically allow for an application to be revised after docketing.

As set forth above, the Motion for Leave to Reply fails to demonstrate compelling circumstances that warrant the need for a reply. Rather, it appears that TSEP is repeatedly attempting to circumvent the Commission's Rules of Practice which grant no right to file a reply. Accordingly, the Motion for Leave to Reply should be denied.

Respectfully submitted,

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<sup>15</sup> See Letter from Thomas S. O'Neill, Exelon, to NRC, at 1 (Nov. 24, 2008), available at ADAMS Accession No. ML083370296 ("Exelon expects to decide on an alternate reactor technology in early 2009, and will develop a *revision* to the VCS Units 1 and 2 COL Application to reflect the new technology selected.") (emphasis added).

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 24, 2008 a copy of the “Answer of Exelon Opposing Second Motion for Leave to File Reply” was filed electronically with the Electronic Information Exchange.

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