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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of:) February 23, 2009
Exelon Generation Company, LLC)
(License Renewal for Oyster Creek Nuclear Generating Station)) Docket No. 50-219

EXELON'S ANSWER TO CITIZENS' MOTION FOR LEAVE TO FILE A REPLY

In accordance with 10 C.F.R. § 2.323(c), Exelon Generation Company, LLC ("Exelon") hereby files its Answer opposing Citizens' Motion For Leave to File a Reply dated February 19, 2009.¹ Section 2.323(c) authorizes the Commission to grant Citizens' Motion for Leave "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." Citizens have utterly failed to demonstrate that there are compelling circumstances here – namely because there are no such compelling circumstances. Moreover, Citizens flaunt NRC's consultation requirement set forth in Section 2.323(b), providing an independent basis for the Commission to deny Citizens' latest request.

I. CITIZENS' MOTION DOES NOT SATISFY 10 C.F.R. § 2.323(c)

Citizens allege that they could not reasonably have anticipated that the Staff's Answer would make new factual arguments or that the Staff would argue that the Motion to Reopen was not timely. Motion for Leave at 2. As demonstrated below, these allegations clearly do not rise to the level of "compelling circumstances."

¹ Motion For Leave To File A Reply To The NRC Staff's Opposition To Citizens' Motion To Reopen (Feb. 19, 2009) ("Motion for Leave").

A. Citizens Should Have Anticipated The Staff's Factual Arguments

Three weeks ago, Citizens claimed in their Motion to Reopen, based upon the Inspection Report,² that the discovery of water in the poly bottle that drains water from Bay 11, three days after the refueling cavity had been drained, “provid[es] direct evidence that water sources other than the refueling cavity are *probably* draining to the sand bed region.” Motion for Leave at 2 (emphasis added). The Staff responded with language from the same Inspection Report that AmerGen “entered Bay 11 within a few hours of identifying the water [in the poly bottle], visually inspected the bay, and found it dry.” NRC Staff’s Response in Opposition to Citizens’ Motion to Reopen the Record and to Postpone Final Disposition of the Licensing Decision at 12 (Feb. 12, 2009) (*quoting* Inspection Report at 6) (“Staff Answer”). Thus, there is sufficient information already before the Commission to demonstrate that Citizens’ allegations are mere speculation and by no means “compelling.”

Citizens are now back before the Commission – this time in the form of a Motion for Leave – attempting to obfuscate the plain meaning and real conclusions of the Inspection Report. Specifically, Citizens’ Motion for Leave focuses on two *footnotes* in the Staff’s Answer discussing an unverified report that explains why Bay 11 was dry, although water was found in the poly bottle. Motion for Leave at 2-4. The footnotes explain that AmerGen employees removed a clog in the funnel connected to the poly bottle, “which resulted in water draining to the poly bottle.” Staff Answer at 5 n.9; *see also id.* at 12 n.18. Whether verified or not, the Staff did not rely on this information. Instead, the Staff relied on Exelon’s follow-on visual inspection, which confirmed that Bay 11 was dry. Because the unverified report was not

² Citizens’ Motion to Reopen the Record and to Postpone Final Disposition of the Licensing Decision (Feb. 2, 2009) at 2 (“Motion to Reopen”) (*citing* Inspection Report No. 05000219/2008007 (Jan. 21, 2009), *available at* ADAMS Accession No. ML090210106 (“Inspection Report”)).

material to the Staff's finding on this issue, Citizens' allegation by no means rises to the level of "compelling circumstances" required under Section 2.323(b) for grant of their Motion for Leave.

Citizens next claim that they could not have reasonably anticipated that the Staff would provide a "factual" affidavit that contains a number of "questionable assertions that Citizens have had no opportunity to rebut." Motion for Leave at 3. It is incredible that Citizens would not reasonably have anticipated that the Staff would include a "factual" affidavit. Citizens themselves included a factual affidavit. Motion to Reopen, Exh. CRO 1 (Declaration of Dr. Rudolf Hausler).³ Indeed, the rules contemplate such affidavits. 10 C.F.R. § 2.326(b). Moreover, if the presence of a factual affidavit qualified as a "compelling circumstance" under Section 2.323(b), then *every* Answer to a Motion to Reopen that enclosed an affidavit would warrant a reply because a movant obviously does not know what the responding affidavit will contain until it is filed. Such a circular, self-serving argument does not rise to the level of a "compelling circumstance."

In addition, Citizens do not identify the purported "questionable assertions" they allege the Staff's Affidavit contains. Such silence cannot fulfill the existing burden of a "compelling circumstance." Nor is the Commission authorized by law to grant the Motion for Leave based on such a deficiency.

Citizens then radically digress and, for almost two pages, beseech the Commission for an opportunity to cross-examine not only the Staff's witnesses, Motion for Leave at 4, but Exelon's witnesses as well. *Id.* at 5. This digression is not only inexplicable, but also has no place, much less a legal basis, in the Motion for Leave. Citizens' entreaty does not demonstrate *why* compelling circumstances exist to file a Reply. Rather, the digression appears to be yet another

³ Exelon did not include an affidavit because it is so clearly obvious from the Inspection Report that Citizens raised no significant safety concern, that it deemed a responding affidavit unnecessary.

attempt by Citizens to intimidate the Commission by suggesting that *any* decision on the merits will be reversed on appeal if Citizens are not allowed to cross-examine witnesses in a reopened evidentiary hearing. Motion for Leave at 3-4. Recognized and exposed as such, this digression should be ignored or stricken as the Commission deems appropriate.

B. Citizens Should Have Anticipated the Staff's Timeliness Argument

Finally, Citizens claim that they could not reasonably have anticipated that the Staff would argue that the Motion to Reopen was untimely. This is simply incredible. Timeliness is the very first requirement in Section 2.326(a), the regulation governing the disposition of such motions. This argument is even more preposterous, given that Citizens themselves consumed two pages of their Motion to Reopen addressing this timeliness requirement and suggesting that they might be challenged on this prong. Motion to Reopen at 10-12.

Moreover, there are blatant deficiencies regarding certain of the purportedly "new" facts that Citizens rely upon in their failed attempt to demonstrate timeliness. Citizens identify five such purportedly "new" facts in their Motion to Reopen. Motion to Reopen at 11. Curiously, the second fact mentioned in the instant Motion for Leave *was not* one of the purportedly "new" facts identified in the Motion to Reopen. *Compare id. with* Motion for Leave at 5. Citizens may not raise facts in a Reply that they did not raise in their Motion to Reopen. *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 224, *recons. denied*, CLI-04-35, 60 NRC 619 (2004) (rejecting a new argument raised for the first time in a reply brief).

Accordingly, the second fact cannot be raised now. Similarly, Exelon addressed in its Answer that one of Citizens "new" facts was known to the public in November 2008.⁴ A three month-old

⁴ See Exelon's Answer to Citizens' Motion to Reopen the Record and to Postpone Final Disposition of the Licensing Decision at 6 n.29 (Feb. 11, 2009) (referring to fact number 1 in Citizens' Motion to Reopen, which is fact number "v" in Citizens' Motion for Leave).

fact is neither “new” nor provides “compelling circumstances” to warrant the Commission granting leave to file a Reply.

Finally, when these many deficiencies are picked away from the bones of Citizens Motion for Leave, it becomes obvious that the Commission should deny the Motion because Citizens have already effectively filed their reply. Citizens may have filed a pleading titled as a Motion for Leave to File a Reply, but it goes way beyond requesting leave. Its substantive content constitutes a *de facto* reply. *See e.g.* Motion for Leave at 2 (Section I heading); *id.* at 3 (“The staff’s approach directly illustrates why a remand to the license board for further evaluation of facts is required,” and remainder of that paragraph), *id.* at 4 (two full paragraphs on that page).

II. CITIZENS FLAUNT THE NRC’S CONSULTATION REQUIREMENT

Citizens’ failure to properly consult with Exelon and the Staff prior to filing their Motion for Leave provides an independent basis for the Commission to deny the relief requested.

10 C.F.R. § 2.323(b) states that:

A motion *must* be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a *sincere effort* to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.

(Emphasis added). The “sincere effort” in this regulation has been interpreted to require more than a unilateral announcement or notification that a party will be filing a motion. *See Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), LBP-06-05, 63 NRC 116, 129 (2006). It also has been interpreted to require more than a few hours advance notice. *Id.* at 129-30 & 130 n.18 (stating that “it may be understandable if the ‘sincere effort’ does not occur until the last few days” but chiding “[t]he last minute timing of the telephone call, on the same day that the motion had to be filed”); *see also Entergy Nuclear Operations, Inc.* (Indian Point

Nuclear Generating Units 2 and 3) (unpublished Order) at 6 n.6 (Feb. 29, 2007) (“the requirement established by 10 C.F.R. § 2.323(b) . . . contemplates something more than mere notification that a motion will be filed made moments before a deadline”).

Citizens did not make a sincere effort to resolve the issues raised in their Motion for Leave. Rather, Citizens merely announced their intention to file the Motion for Leave and gave Exelon and the Staff only five hours to respond. *See* E-mail from R. Webster to A. Polonsky (Feb. 19, 2009; 12:23 p.m.) (Attach. 1) (emphasis added). More importantly, Citizens gave Exelon and the Staff only five hours to respond. *Compare id.* (12:23 p.m.) with E-mail from R. Webster to A. Polonsky (Feb. 19, 2009; 4:51 p.m.) (Attach. 1) (stating that Citizens would file by 5:30 p.m. the same day). The lack of a sincere effort is further evidenced by the fact that Citizens contacted Exelon counsel two days earlier, on Tuesday, February 17, 2009, to consult about the Petition that Citizens *simultaneously* filed with this Motion for Leave, but did not mention a Motion for Leave at any time during that consultation. Citizens’ counsel’s explanation—that they are “operating to tight time frames”—is irrelevant, and in no way removes the consultation requirement. E-mail from R. Webster to A. Polonsky (Feb. 19, 2009; 5:39 p.m.) (Attach. 1). It is also curious, because February 19—seven days after the Staff filed its Answer—was not the deadline for Citizens to file the Motion for Leave. *See* 10 C.F.R. § 2.323(a) (“A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”).

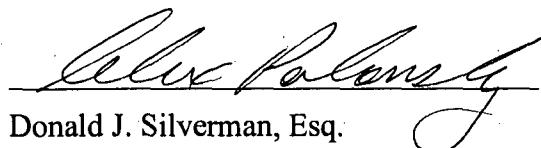
If the Commission finds that Citizens did not meet the consultation requirements of Section 2.323(b), then it *must* reject the Motion for Leave.

III. CONCLUSION

For the foregoing reasons, the Commission must deny Citizens' Motion for Leave.

Exelon once again urges the Commission to reschedule the Affirmation Session for the earliest possible date, and to deny all of Citizens' outstanding appeals.

Respectfully submitted,



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Dated in Washington, D.C.
this 23rd day of February, 2009

COUNSEL FOR
EXELON GENERATION COMPANY, LLC

**ATTACHMENT 1 TO EXELON'S ANSWER
TO CITIZENS' MOTION FOR LEAVE TO FILE A REPLY**

Polonsky, Alex S.

From: Richard Webster [rwebster@easternenvironmental.org]
Sent: Thursday, February 19, 2009 5:39 PM
To: Polonsky, Alex S.
Cc: Mary Baty; Julia LeMense
Subject: Re: Consultation re motion

Alex,

I made a good-faith effort to consult with you and the Staff on this motion. I sent an e-mail and left a voice mail. I can hardly be held accountable for your failure to check your e-mail or voice mail for many hours. We are operating to tight time frames and therefore I don't think it is reasonable to expect that I would delay to accommodate your schedule. However, as discussed, if we are able to agree to an approach that is mutually acceptable I will consider withdrawing the motion.

Finally, I was rather surprised that you have been discussing possible approaches to resolving the reply issue with the Staff, when the Staff had not made any contact with me at all before 5:25 today.

Richard Webster
Legal Director
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark NJ, 07102
Tel. 973 424 1166
Fax. 973 710 4653

rwebster@easternenvironmental.org

On Feb 19, 2009, at 5:10 PM, Polonsky, Alex S. wrote:

> Richard,
>
> I will certainly endeavor to reply to you by then, but you should not
> expect that attempting to contact a party at 12:30, and giving them 5
> hours to reply, meets the NRC consultation requirement. And since I
> only got your message shortly after 4 p.m., Citizens are essentially
> giving Exelon about 1.5 hours to respond.
>
> Regards,
>
> Alex S. Polonsky
> Morgan, Lewis & Bockius LLP
> 1111 Pennsylvania Avenue, NW | Washington, DC 20004
> Direct: 202.739.5830 | Main: 202.739.3000 | Fax: 202.739.3001
> www.morganlewis.com
> Assistant: Angela M. Perry | 202.739.5315 |
> angela.perry@morganlewis.com

>
>
> -----Original Message-----
> From: Richard Webster [mailto:rwebster@easternenvironmental.org]
> Sent: Thursday, February 19, 2009 4:51 PM
> To: Polonsky, Alex S.
> Subject: Re: Consultation re motion
>
> Alex,
>
> For personal reasons I can only wait until 5:30 before filing.
>
>
> Richard Webster
> Legal Director
> Eastern Environmental Law Center
> 744 Broad Street, Suite 1525
> Newark NJ, 07102
> Tel. 973 424 1166
> Fax. 973 710 4653
>
> rwebster@easternenvironmental.org
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> On Feb 19, 2009, at 4:19 PM, Polonsky, Alex S. wrote:
>
>> Richard,
>>
>> I am just reading your email now, having been in a multi-hour
>> meeting. I will discuss this with my client and get back to you.
>>
>> Alex S. Polonsky
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>> Direct: 202.739.5830 | Main: 202.739.3000 | Fax: 202.739.3001
>> www.morganlewis.com
>> Assistant: Angela M. Perry | 202.739.5315 |
>> angela.perry@morganlewis.com
>>
>>
>> -----Original Message-----
>> From: Richard Webster [mailto:rwebster@easternenvironmental.org]
>> Sent: Thursday, February 19, 2009 12:23 PM
>> To: Mary Baty; Polonsky, Alex S.
>> Cc: Julia LeMense
>> Subject: Consultation re motion
>>
>> Mary and Alex,
>>
>> I am also going to file for leave to reply to NRC Staff's response to
>> our motion to reopen on the grounds that the Staff presented the
>> following unanticipated arguments:
>>

>> i) that the motion was not timely;
>> ii) the NRC Staff based part of its response on a unverified
>> assertion about blockage of a funnel capturing water from the Bay 11
>> that is unsupported by any documentation at all and, if true, further
>> illustrates the inadequacy of the proposed AMP;
>> iii) the SER itself finds ongoing corrosion in the upper drywell e.g.
>> 3-116 - this is not a fact at issue
>> iv) The Staff failed to acknowledge that the NRC has committed to
>> interpreting the standard for cross-examination in Subpart L hearings
>> as equivalent to the APA: "A party is entitled to . . . conduct such
>> cross-examination as may be required for a full and true disclosure
>> of
>> the facts." 5 U.S.C. § 556(d).

>> At this stage, I do not intend to actually file the reply. Please
>> let me know whether you will object to the motion for leave to reply.

>>

>> Thanks

>>

>> Richard Webster
>> Legal Director
>> Eastern Environmental Law Center
>> 744 Broad Street, Suite 1525
>> Newark NJ, 07102
>> Tel. 973 424 1166
>> Fax. 973 710 4653

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of:)	February 23, 2009
)	
Exelon Generation Company, LLC)	
)	Docket No. 50-219
(License Renewal for Oyster Creek Nuclear)	
Generating Station))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "EXELON'S ANSWER TO CITIZENS' MOTION FOR LEAVE TO FILE A REPLY" and its associated attachment were served this day upon the persons listed below, by e-mail and first class mail.

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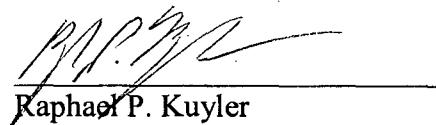
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