

submission.² The Commission authorized NRDC to file a waiver petition that addresses as many as three contentions.³ NRDC has informed Exelon that it intends to file a timely Waiver Petition.

Waiver Petitions are governed by 10 C.F.R. § 2.335. Although Section 2.335(b) explicitly grants Exelon and the NRC Staff the right to respond to NRDC's waiver petition, it does not specify a time by which that response must be filed.⁴ Nor did the Commission articulate a deadline for responses in its October 23, 2012 Order. In other NRC proceedings, where, as here, waiver petitions were filed after the initial briefing schedule deadline for Petitions to Intervene had passed, Boards have established by Order the deadlines for responses to waiver petitions.⁵ Boards have authorized responses to waiver petitions to be filed about 30 days after the waiver petition.⁶ Accordingly, Exelon's request for 30 days is reasonable and consistent with precedent, especially considering the intervening holiday.

Given the absence of any pre-established deadline, Exelon, NRDC, and the NRC Staff consulted on this Motion pursuant to 10 C.F.R. § 2.323(b) during a conference call on November 13, 2012, and subsequently via e-mail. NRDC agreed to a 15-day timeline for Exelon's response (*i.e.*, by December 12, 2012), but would only agree to a 30-day timeline for Exelon's response (*i.e.*, by December 27, 2012) if Exelon agreed that NRDC could file a reply 15 days later (*i.e.*, by January 11, 2013). In other words, NRDC has conditioned its agreement to a

² *Id.* at 17.

³ *Id.* at 15 ("We include in the remand Contentions 1-E, 2-E and 3-E, to the extent the Board dismissed them as challenges to the rule.").

⁴ The 10 day response time in Section 2.323(c) does not apply because a waiver petition is not a motion.

⁵ *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Licensing Board Order (Authorizing FUSE to Submit a Section 2.335 Petition) at 3 (Nov. 21, 2007) (unpublished) (ordering responses to be filed 28 days after the waiver petition); *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), Licensing Board Memorandum and Order (Memorializing Initial Prehearing Conference Directives) at 2, Item D (Feb. 2, 1998) (unpublished) (ordering responses to be filed 28 days after the waiver petition).

⁶ *Id.*

December 27, 2012 deadline for Exelon's and the NRC Staff's response on an agreement that NRDC can file a reply by January 11, 2013.

Exelon rejected NRDC's conditional offer because allowing NRDC to file a reply is contrary to Commission regulations. The plain text of Section 2.335(b) does not contemplate a right of reply to responses to a waiver petition.⁷ Rather, that section states that "[a]ny other participant may file a response [to the waiver petition] by counter-affidavit or otherwise." The silence in Section 2.335(b) regarding replies is particularly instructive given the Commission's explicit provisions for replies in other hearing contexts, such as with requests for hearing and petitions to intervene under Section 2.309(i)(2),⁸ and appeals before the Commission under Section 2.341(b)(3).⁹ Thus, Section 2.335 simply does not authorize any replies.¹⁰

⁷ See also *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Licensing Board Order (Denying Motion for Leave to File a Reply to Waiver Petition and Directing the Filing of a Brief) at 1 (May 4, 2010). In that proceeding, the Board denied a motion for leave to file a reply to responses opposing a waiver petition, relying exclusively on the arguments cited in the Applicant's and NRC Staff's Answers. Both Answers emphasized that a reply is not authorized by the rules. See "Applicant's Response to Motion for Leave to Reply to Oppositions to Waiver Petition" at 3 (May 3, 2010); "NRC Staff's Response to San Luis Obispo Mothers for Peace's Motion for Leave to Reply to Oppositions to Waiver Petition" at 3-4 (Apr. 29, 2010).

⁸ Section 2.309(i)(2) allows the party that filed the request for hearing, petition to intervene, or new or amended contention, to "file a reply to any answer. The reply must be filed within 7 days after service of that answer."

⁹ Section 2.341(b)(3) allows appellants to file reply briefs to answers supporting or opposing Commission review: "The petitioning party may file a reply brief within 10 days of service of any answer. This reply brief may not be longer than 5 pages."

¹⁰ This view is consistent with a position of the NRC Staff in the Diablo Canyon ISFSI proceeding:

Under the Commission's rules, the Board makes its decision on the basis of the petition, affidavit, and any response. See 10 C.F.R. § 2.335(c). While the rules contemplate that the Commission may direct further proceedings to aid its determination if the Board certifies the matter, no additional filings (*e.g.* a reply) are allowed before the Board. Compare 10 C.F.R. § 2.335(c) with 10 C.F.R. § 2.335(d) (showing that the presiding officer rules based on the petition, affidavit and any responses, while the Commission rules on those "among other things"). Thus, all those requesting a waiver are effectively informed in advance that they must make their arguments to the Board in a single filing without a reply. See 10 C.F.R. § 2.335(b).

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), NRC Staff's Response to San Luis Obispo Mothers for Peace's Motion for Leave to Reply to Oppositions to Waiver Petition) at 5 (Apr. 29, 2010).

If the Board were to conclude that a reply could be entertained under Section 2.335, then, because Section 2.335 is silent on the issue, a party would need to acquire Board approval through a motion for leave to file a reply. And that party logically could only move for leave after reviewing the responses to which the party wishes to reply, to determine if a reply is indeed justified. This is because a Board may grant a motion for leave to file a reply “only in compelling circumstances.”¹¹ NRDC could not possibly demonstrate that such circumstances exist now, before Exelon or the NRC Staff have filed their responses. The regulation contemplates “compelling circumstances” in a limited context, such as “where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.”¹² As Exelon and the NRC Staff have yet to file any responses, no unanticipated arguments yet exist, and likewise, no “compelling circumstances” justify NRDC’s request for leave to file a prospective reply.

In an e-mail on November 14, 2012, the NRC Staff stated that it agrees with Exelon that providing for a reply brief at this point is premature and, therefore, the NRC Staff would object to a motion for leave to file a reply submitted before the Staff and Exelon have filed responses to the waiver petition. Counsel for the NRC Staff informed counsel for Exelon that it would accept a response time for the Staff of either 15 or 30 days.

Accordingly, Exelon respectfully requests that the Board authorize Exelon (and the NRC Staff) to file responses to NRDC’s waiver petition by December 27, 2012. The Board should not accept NRDC’s conditional request for authorization to file a reply. Section 2.335 does not authorize replies. If the Board decides that Section 2.335 is not so limited, then the Board should

¹¹ 10 C.F.R. § 2.323(c) (a moving party “has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted *only* in compelling circumstances”) (emphasis added).

¹² *Id.*

only review an NRDC request for leave to file a reply after NRDC has reviewed Exelon's and the NRC Staff's responses, and determined that compelling circumstances justify such a request.

Respectfully submitted,

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

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	Docket Nos. 50-352-LR
)	50-353-LR
(Limerick Generating Station, Units 1 and 2))	
)	November 16, 2012

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that on November 16, 2012, Exelon served a copy of “**EXELON MOTION FOR ORDER ESTABLISHING DEADLINE TO FILE RESPONSES TO NRDC’S ANTICIPATED NOVEMBER 27, 2012 WAIVER PETITION**” in this proceeding through the NRC’s E-Filing system.

Signed (electronically) by Laura V. Swett

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