

Attachment 1

Howard Crystal

From: Howard Crystal
Sent: Friday, November 16, 2012 10:29 AM
To: 'Polonsky, Alex S.'; 'gfettus@nrdc.org'; 'Maxwell.Smith@nrc.gov'
Cc: Swett, Laura V.
Subject: RE: Waiver petition scheduling

Alex –

Thanks for the further email and the voicemail message. We too are open to further discussion on this issue, but it is not clear to me from your email and message what it is you would like to discuss. If, as you assert, Section 2.335's silence on the time for responses means that it is reasonable for your client to seek and obtain a 30 day time frame to respond before we file our opening brief, even though motions are generally responded to in 10 days, and the NRC staff has already indicated it can respond in 15 days (which we have also told you we would not oppose), then the fact that Section 2.335 is also silent on reply briefs – i.e., it does not say that there shall be no replies – also counsels in favor of resolving the reply issue at this time, in the reasonable manner we have suggested – i.e., that we agree NRDC is entitled to a reply that addresses matters not reasonably anticipated in the opening briefs, as the rules otherwise provide. If I am correct in gathering from your email and voicemail that your client's position remains that while it is entitled to an extension of time now, before we have filed, my client is not entitled to anything at all, then, again, it is not clear to me what else there is to discuss. On the other hand, if your client remains open to our original proposal, or to agreeing to a 15 days response time as NRC staff has indicated it would consent to, then let's have a further discussion. Thanks -

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From: Polonsky, Alex S. [mailto:apolonsky@morganlewis.com]
Sent: Friday, November 16, 2012 8:39 AM
To: Howard Crystal; 'gfettus@nrdc.org'; 'Maxwell.Smith@nrc.gov'
Cc: Swett, Laura V.
Subject: RE: Waiver petition scheduling

Howard,

I just left you a voice mail. Exelon intends to file a Motion today. If you would like to discuss the the below email trail further, then please call me this morning.

Regards,

Alex S. Polonsky
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From: Polonsky, Alex S.
Sent: Thursday, November 15, 2012 1:43 PM
To: 'hcrystal@meyerglitz.com'; 'gfettus@nrdc.org'; 'Maxwell.Smith@nrc.gov'
Cc: Swett, Laura V.
Subject: Re: Waiver petition scheduling

Howard,

Thank you for your email. It appears that Exelon will need to file a request with the Board for a 30-day response time. But I remain open to discussing this further.

Section 2.335 authorizes responses, but does not give the timeframe for those responses. The Board will set the schedule for the responses. The default is not, as you suggest, 10 days. That deadline is contained in a different regulation which applies to motions, not waiver petitions.

Our opening position is that Section 2.335 does not authorize replies, at all. If a Board ruled that replies were authorized, then the Board would likely apply the "compelling circumstances" test standard from section 2.323. That test likely cannot be met until NRDC has reviewed our answer. Accordingly, Exelon cannot agree now to NRDC filing a reply later. It appears from Max's email which followed shortly after yours, that the Staff feels the same.

Regards,

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From: Howard Crystal [<mailto:HCrystal@meyerglitz.com>]
Sent: Wednesday, November 14, 2012 02:46 PM
To: Polonsky, Alex S.; Fettus, Geoffrey <gfettus@nrdc.org>; Smith, Maxwell <Maxwell.Smith@nrc.gov>
Cc: Swett, Laura V.
Subject: RE: Waiver petition scheduling

Alex -

Thank you for your email last evening. As you know, during our phone conference yesterday we explained that we believe it would be more efficient to resolve the entire briefing schedule for the waiver petition now, rather than deal with it on a piecemeal basis. We proposed that the parties agree that the applicant and NRC would have a fixed response date, after which petitioner would have an opportunity to file a reply focused on any additional issues from the responses that petitioners could not have reasonably anticipated in the waiver petition. There was agreement on the call that the waiver regulation was not explicit regarding replies, with counsel for NRC noting that it is a gray area. We left the call with an informal understanding that we would talk to our respective clients about proposing to the Board a schedule whereby the petition would be filed by November 27, 2012, responses would be filed by December 27, 2012, and a reply would be due by January 11, 2013, with the understanding that the Board might choose not to accept the schedule, including the provision allowing for a reply brief.

Your email indicates that your client will be seeking thirty days to file a response, and that you will oppose NRDC filing a reply without NRDC first seeking leave to file that reply. You also indicate that your client's

position is that such a motion for leave should be filed only after the responses are filed. You have asked for our response to your present position.

First, since you have not provided any further basis for your position that there should not be a reply brief, we assume you have nothing further to add other than what you stated yesterday, which merely asserted that there is no explicit provision for a reply brief and any need for such a brief would not be ripe until oppositions are filed. We do not find that position persuasive since the goal of this effort is to reach a compromise as to how to proceed with both the response and reply. Indeed, even if the parties all agreed that NRDC could file a reply addressing matters raised in the oppositions that could not reasonably have been anticipated, under the approach we discussed yesterday your client could still move to strike anything in the reply it maintained does not meet that standard. Since the standard we propose is routinely recognized by hearing boards as a legitimate basis for reply briefs in all situations, our proposed approach remains preferable to yours.

Second, if you are correct in your assertion that it is premature to consider the need for a reply brief at this time, it is similarly premature to consider the question of the time you will need to respond to the waiver petition. Rather, consistent with your position, we suggest that after you have reviewed our petition you determine whether you can respond within ten days, and, if not, consult with NRDC and NRC Staff and file a motion at that time, if necessary, to which we will respond. Since that is the procedure you insist on for replies, we see no basis for a different approach to your request. Of course, we will consider any reasonable request for additional time after you review our petition, and will let you know promptly whether we can agree to your request.

Alternatively, we are prepared at this time to agree to a fifteen day time period, following the filing of our waiver petition, for your response, without any advance agreement on reply briefs. If you are prepared to file your response within fifteen days of the petition filing, please send us an appropriate unopposed motion and we can get that on file. However, for the reasons discussed above we are not in a position to agree to a longer extension at this time, unless, again, your client will reconsider the approach we discussed yesterday, which involved a reasonable approach and compromise.

We look forward to hearing from you. Best -

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From: Polonsky, Alex S. [<mailto:apolonsky@morganlewis.com>]
Sent: Tuesday, November 13, 2012 6:30 PM
To: Fettus, Geoffrey; Howard Crystal; Smith, Maxwell
Cc: Swett, Laura V.
Subject: Waiver petition scheduling

Gentlemen,

I am writing to follow-up on our discussion from earlier today about schedule. Exelon will be seeking 30 days to file an Answer to NRDC's waiver petition. Exelon would oppose NRDC filing a reply without NRDC first seeking leave to file that reply. Logically, such a motion would be filed after NRDC has reviewed Exelon and the Staff' answers to determine if a reply is indeed justified. And that

motion would need to articulate the justification. We would consult as required by NRC regulations before you filed the motion to seek leave, assuming you believe such a motion was necessary. Please let me know your response.

Regards,

Alex S. Polonsky

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