

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
EXELON GENERATION COMPANY, LLC)	Docket No. 50-352-LR
)	Docket No. 50-353-LR
(Limerick Generating Station, Units 1 and 2))	
		November 26, 2012

(License Renewal Application)

**NRDC's Response To Exelon's Motion For Order Establishing Deadline For Response To
NRDC's Request For Waiver Pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(L)**

Pursuant to 10 C.F.R. 2.323(c), the Natural Resources Defense Council (“NRDC”) hereby responds to Exelon’s November 16, 2012 motion (“Exelon Mot.”) seeking an extension of time to respond to NRDC’s Waiver Request (“Waiver Request”), which was filed in response to the Commission’s October 23, 2012 Memorandum and Order (“CLI-12-19”).

Introduction

Exelon Generating Company LLC (“Exelon”) seeks thirty days to respond to NRDC’s Waiver Request, on the grounds that the ten (10) day response time generally provided for motion’s practice is insufficient in this instance. At the same time, however, Exelon argues that NRDC should not be permitted a reply brief, even though such a brief is generally provided for hearing requests, where the response time is similar to that sought by Exelon here.

Exelon should not be permitted to have it both ways. The Commission’s regulations set out two general procedural schemes in adjudicatory proceedings. For “motions,” the regulations set a strict and short deadline for responses – ten (10) days – and forbid reply briefs altogether unless the movant can demonstrate that it could not have reasonably anticipated an issue raised in the response. 10 C.F.R. § 2.323(c). For requests to participate in proceedings, on the other

hand, the Commission allows a significantly more lenient twenty-five days to respond, and also allows a reply brief. 10 C.F.R. § 2.309(h).

In this instance, Exelon and its counsel seek to avail themselves of the more lenient timeline established for requests to participate, while seeking to deny the movant's the reply brief that necessarily follows from such an approach. Accordingly, and as explained in more detail below, the Board should either require that a response be filed within 15 days, or, alternatively, authorize a reply brief in granting Exelon the significant extension of time it seeks.¹

Background

A. The Commission's adjudicatory regulations

Under the Commission's regulations the way a third party may seek to participate in a relicensing proceeding is to file a timely request for hearing and intervention, setting for the specific Contentions sought to be litigated. 10 C.F.R. § 2.309. Under that procedure, once the request is filed, the applicant may respond within twenty-five days, and a reply may be filed within seven days thereafter. *Id.* §§ 2.309(h)(1) and (2). This regulatory scheme recognizes that more than three weeks may be necessary to adequately respond to a hearing request, and that a reply is appropriate, irrespective of whether the issues addressed in the reply could not have been reasonably anticipated in the opening hearing request. *Id.*

Once a proceeding had been initiated, the Commission's regulations on motions generally govern the time for filings. *Id.* § 2.323. Under those regulations, a party must file a motion within ten (10) days after the occurrence or circumstance from which the motion arises, after which a response, if any, must be filed within ten (10) days thereafter. *Id.* §§ 2.323(a), (c). No reply briefs are permitted, unless "the moving party demonstrates that it could not have

¹ As explained below, given the timing for Exelon's response, NRDC seeks fourteen days to file its Reply.

reasonably anticipated the arguments to which it seeks leave to reply.” *Id.* § 2.323(c). As the Commission explained in setting out these strict timelines, the need for the “expeditious management of a hearing” necessitates these short time limits. 69 Fed. Reg. 2182, 2200 (2006).

In addition, the Commission’s regulations allow a party to seek a *waiver* of a Commission regulation that would otherwise preclude presentation of certain Contentions for hearing. 10 C.F.R. § 2.335. Although this regulation speaks to the ability of a “party” to seek such a waiver, in its ruling leading to the present Waiver Request the Commission explained that in this context the term applies to any “petitioners, not just parties” to a proceeding. CLI-12-19 at 14, n.55. In other words, a non-participant to a proceeding may seek to become a party *through* a waiver request – in which case the request is much more like a request for a hearing and intervention than a motion.

B. Background to the present motion

On October 23, 2012, the Commission remanded this proceeding to permit NRDC to submit a petition, pursuant to 10 C.F.R. 2.335, to waive the application of 10 C.F.R. § 51.53(c)(3)(ii)(L) in connection with certain of NRDC’s Contentions related to the relicensing of Limerick Generating Station Units 1 and 2 (“Limerick”). Although motions must be filed within ten (10) days, the Commission’s order provided *more than thirty (30) days* for NRDC to prepare its Waiver Request. CLI-12-19 at 17.

On November 13, 2012, the parties had a teleconference concerning the scheduling for the waiver request. *See* Attachment 1 (email exchange). Exelon’s counsel requested approximately 30 days to respond to the filing. NRDC’s counsel suggested that the parties submit a proposed Stipulation with the extension sought by Exelon, along with a request that

NRDC can file a reply brief addressing any matters raised in the responses that NRDC could not have reasonably anticipated in the original filing. *Id.*

Exelon rejected NRDC's proposal for such a reply brief, asserting, as it does in its current Motion, that it would be premature to authorize a reply brief before responses are filed, and that NRDC would have to seek leave to file such a reply after reviewing the responses. *Id.* Exelon suggested that for purposes of a reply brief, the waiver request should be treated as a motion under 10 C.F.R. § 2.323, pursuant to which no reply brief is presumptively permitted, *see* Attachment 1, but that it would nonetheless seek far more than the ten (10) day opposition time also provided by that same regulation. For its part, the NRC Staff essentially accepted NRDC's compromise proposal for a fifteen day response time, stating that it "has no objection to a fifteen-day response period for answering any waiver petition NRDC elects to file." *See* Attachment 2 (further email exchange).

On November 16, 2012 Exelon filed the instant motion. Once again, Exelon argues that NRDC is not entitled to a reply brief by relying solely on 10 C.F.R. § 2.323(c), the regulation governing motions. At the same time, Exelon seeks far more time to file its response to the waiver request than provided for in that very same regulation.²

² Exelon sought a deadline of December 27, 2012 to respond to the Waiver Request, but that was based on the assumption that the Request would not be filed until November 27, 2012. Exelon Mot. at 4. In fact, the Waiver Request was filed on November 21, 2012, and thus even under Exelon's own proposed thirty-day schedule the latest date a response should be allowed would be December 21, 2012.

Discussion³

NRDC is not seeking to preclude Exelon from sufficient time to respond to NRDC's Waiver Request. However, NRDC is seeking to insure that the Board consistently applies its regulatory scheme so that all parties are treated fairly. Exelon's request for relief does not reach that result.

The Board might consider NRDC's Waiver Request to be the equivalent of a motion under 10 C.F.R. § 2.323. Under those circumstances, NRDC appreciates that it is not entitled to a reply brief without filing a separate motion for leave to file once responses have been filed. *Id.* § 2.323(c).

However, if that is the proper way to handle a waiver request under 10 C.F.R. § 2.335, then it inexorably follows that the Board should apply the rules that govern motions, pursuant to which responses are due within ten (10) days. 10 C.F.R. § 2.323(c). Accordingly, under this interpretation – pressed here by Exelon *vis-a-vis* NRDC's right to reply – the Board should deny the motion to the extent it affords Exelon more time to respond to the Waiver Request than it would have received even had it been considered an initial hearing request.⁴

Alternatively, consistent with the time period Exelon seeks for its response, the Board might consider the Waiver Request to be more like a request for a hearing, governed by 10

³ It bears noting at the outset that Exelon's motion itself may be considered untimely, as it seeks relief related to the Commission's October 23, 2012 ruling, and thus was arguably due not later than ten days from that date – *i.e.*, November 2, 2012. *See* 10 C.F.R. § 2.323(a). While the Board might deny the motion on that basis alone, it should not both consider the motion, and grant Exelon the relief it seeks, while rejecting NRDC's similarly reasonable request for a reply brief.

⁴ Before Exelon filed its motion NRDC had already agreed to a fifteen day response time, to which NRC Staff also acquiesced. Attachment 1. Thus, NRDC has no objection, even under this strict view of the November 21, 2012 Waiver Request, to permitting responses within fifteen days of NRDC's filing, which would be December 6, 2012.

C.F.R. § 10 C.F.R. § 2.309(h). There are several compelling reasons to consider the Waiver Request to be governed by these procedures rather than those governing motions.

First, the Commission itself afforded NRDC more than thirty (30) days to file the Waiver Request from the date of its ruling. CLI-12-19 at 17. As noted, motions are generally due ten (10) days from an underlying decision, while requests for a hearing are generally due considerably later. 10 C.F.R. § 2.309(b). The fact that the Commission allowed NRDC such a time period to file the Waiver Request suggests a view that the Request is more akin to a hearing request than a motion.

Second, and relatedly, the Commission also noted that although the waiver provision speaks of filings by a “party,” which are generally done by motion, the waiver provision NRDC has invoked is available to any “petitioner,” and thus NRDC could have – indeed, in the Commission’s view, *should* have – filed a Waiver Request as part of an initial request for a hearing. CLI-12-19 at 14, n.55. Thus, again, the Commission appears to view the Waiver Request as akin to an initial hearing request, filed by any petitioner, rather than a motion, filed by a party.

Third, the waiver regulation itself is silent on *both* the timing for any responses to the Waiver Request, or the availability of a reply brief. 10 C.F.R. § 2.335(b). Thus, the Board plainly has the flexibility to tailor any particular waiver proceeding in the manner it deems most appropriate and fair. Here, given the Commission’s ruling – which afforded NRDC more than *thirty* days to file the Waiver Request, and specifically noted that the request is available to *any petitioner* – it is evident that the Commission’s regulations for initial requests for a hearing are more applicable than the considerably more draconian regulations for motions.

Moreover, the considerable extension of time sought by Exelon here is also consistent with this approach. If Exelon viewed the Waiver Request as a straightforward motion, as to which it insists no replies are permitted absent “compelling circumstances,” Exelon Mot. at 4, then it would have simply responded to the motion within ten (10) days, as provided by 10 C.F.R. § 2.323(c). Indeed, NRDC specifically suggested that, in light of Exelon’s insistence that it is premature for NRDC to consider a reply brief before reviewing the responses (as provided by that rule), *at bare minimum* Exelon itself should have waited to review the Waiver Request before seeking *its* extension, since it similarly had no way to know in advance whether the Waiver Request is more involved than a motion would be. *See* Attachment 1. Nonetheless, Exelon insisted on filing its motion *before* the Waiver Request was filed, resting on its expectation that the Request would be sufficiently involved so as to require more than the presumptive ten (10) days to respond. Under these circumstances, while the Board certainly may grant Exelon the extension it seeks, there is no basis to at the same time *deny* NRDC the reply brief to which it is also entitled, where, again the waiver regulation speaks neither in favor nor against reply briefs.⁵

Finally, Exelon’s Motion ignores this Board’s admonition (*see* Initial Scheduling Order (May 7, 2012 at 4), citing 10 C.F.R. § 2.334(b)), that departures from the hearing schedule, presumably including deadlines established by Commission Regulations, must be supported by a

⁵ Exelon claims that 10 C.F.R. § 2.335(b) does not permit reply briefs, Exelon Mot. at 3, but in fact, as noted, the regulation is silent on the matter. As for Exelon’s reliance on another case where a reply was disallowed, *id.* at 3, n.7, that case did not involve the unique circumstances here where the Commission afforded more than thirty days for filing of the Waiver Request, and expressly recognized one could be filed by any petitioner.

showing of good cause.⁶ Exelon offers no reason why the requested extension is needed, other than that in other cases, bearing no resemblance to this case, longer time has been allowed for filing responses to waiver requests. Exelon Mot. at 3.

To the extent that “NRC practice,” as opposed to binding precedents or Regulations is relevant, we believe of more relevance is NRC Staff’s position on the appropriate time for filing a response to a pleading for which no time limit is provided in the rules. NRC’s Office of General Counsel has provided the following guidance on this matter:

6.15.2 Responses to Motions

6.15.2.1 Time for Filing Responses to Motions

Unless specific time limits for responses to motions are expressly set out in specific regulations or are established by the presiding adjudicatory board, the time within which responses to motions must be filed is set forth in 10 C.F.R. § 2.323 (formerly § 2.730).

NUREG-0386, Digest 16 United States Nuclear Regulatory Commission Staff Practice and Procedure Digest Commission, Appeal Board and Licensing Board Decisions July 1972 – September 2010 (June 2011), General Matters at 59. The Board should therefore reject Exelon’s contention that the regulations governing motions have no applicability to the deadline for its response, while at the same time barring NRDC from filing a reply.

Conclusion

Accordingly, NRDC respectfully requests that, in the event the Board grants Exelon the requested thirty day extension, to December 21, 2012, the Order also provide that NRDC may file a reply brief within fourteen (14) days.⁷

⁶ See, e.g., *FirstEnergy Nuclear Operating Co.*, CLI-06-02, 63 N.R.C. 9, 18, n. 36 (2006)

⁷ As noted, among NRDC’s concerns is that the extension Exelon has requested – to and including December 27, 2012, puts NRDC’s reply time in the middle of the Christmas to

Respectfully Submitted,

s/ (electronically signed)

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New Year's holiday period. Under these circumstances, and in order to protect long scheduled family obligations, NRDC respectfully requests fourteen (14) days to prepare its Reply.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRDC's Response To Exelon's Motion For Order Establishing Deadline For Response To NRDC's Request For Waiver Pursuant to 10 C.F.R. § 51.53(c)(3)(ii)(L), and supporting documents, were served via the Electronic Information Exchange (EIE) on the 26th day of November 2012, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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