

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

November 14, 2013

<sup>2</sup> Hearing Request and Petition to Intervene by the Environmental Law and Policy Center (Sept. 23, 2013) (“Petition”). The Petition included a separate exhibit explaining the bases for ELPC’s two contentions. *See* Petition, Exhibit 4, Contentions Included with Petition to Intervene by the Environmental Law and Policy Center at 2 (“Contentions”). Exelon treats the Petition and the Contentions as one document for purposes of this Motion to Strike.

2020” justifies a Board finding that the License Renewal Application at issue here is premature (despite the explicit language of 10 C.F.R § 54.17(c) authorizing submittal at this time).<sup>3</sup>

Thus, in accordance with 10 C.F.R. § 2.323(a), Exelon Generation Company LLC (“Exelon”) moves to strike these portions of ELPC’s Reply.<sup>4</sup> As explained in detail below, ELPC’s Reply impermissibly includes a new basis, new arguments, and new factual claims without satisfying the standards governing late-filed contentions. Because ELPC included this new information in its Reply for the first time, the Board should strike it.<sup>5</sup>

## **II. BACKGROUND**

On May 29, 2013, Exelon filed its license renewal application (“LRA”) for Byron Station Units 1 and 2 (“Byron”) and Braidwood Station, Units 1 and 2 (“Braidwood”).<sup>6</sup> On September 23, 2013, ELPC filed its Petition. In that Petition, ELPC proffered two contentions (Contentions 1 and 2). Exelon and the NRC Staff filed timely, separate answers opposing the Petition on October 28, 2013.<sup>7</sup> On November 4, 2013, ELPC filed a single Reply responding to Exelon’s and the NRC’s Staff’s Answers. In the Reply, ELPC does not limit itself to defending the adequacy of Contentions 1 and 2 as pled in its Petition. Instead, as discussed in Section IV

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<sup>3</sup> Reply at 12 (citation omitted).

<sup>4</sup> Attachment 1 to this Motion is a .pdf file with the proposed text to be stricken crossed out using the “Cross Out Text” function in Adobe Acrobat.

<sup>5</sup> In a Motion to Strike, Exelon cannot address whether ELPC’s new basis, arguments, and factual claims provide an adequate basis for an admissible contention. Therefore, if the Board decides to consider the new information set forth in ELPC’s Reply, then Exelon requests an opportunity to substantively respond to the admissibility of the new information in writing. In addition, in accordance with 10 C.F.R. § 2.323(b), counsel for Exelon certifies that they made a sincere effort to contact the other parties in this proceeding on November 8, 2013, to explain to them the factual and legal issues raised in this motion, and to resolve those issues to the extent practicable, and certifies that these efforts to avoid the need for this motion have been unsuccessful. During the parties’ consultations, counsel for ELPC stated that ELPC opposes Exelon’s motion. Counsel for the Staff stated that the Staff does not object to the filing of this motion.

<sup>6</sup> License Renewal Application, Byron and Braidwood Stations, Units 1 & 2 (May 29, 2013), *available at* ADAMS Accession No. ML13161A223.

<sup>7</sup> Exelon’s Answer Opposing the Hearing Request and Petition to Intervene filed by the Environmental Law and Policy Center (Oct. 28, 2013) (“Exelon’s Answer”); NRC Staff Answer to Environmental Law and Policy Center’s Hearing Request and Petition to Intervene (Oct. 28, 2013).

below, ELPC introduces a new basis, new arguments, and new factual claims—information absent from its Petition—in an attempt to fix its otherwise legally-deficient contentions.

### III. LEGAL STANDARDS

The purpose and scope of a reply brief is specific and narrow. A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties' answers.<sup>8</sup> A reply cannot be used as a vehicle to introduce new arguments or support, cannot expand the scope of arguments set forth in the original petition, and cannot be used to cure an otherwise deficient contention.<sup>9</sup> As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria . . . .<sup>10</sup>

The prohibition against making new arguments in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading

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<sup>8</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>9</sup> *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-11-14, 74 NRC \_\_\_\_ (slip op. at 9-11) (Dec. 22, 2011) (granting in part a motion to strike on the ground that new arguments not raised in the petition for interlocutory review are "outside the appropriate scope of a reply"); *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and finding that petitioners impermissibly "expand[ed] their arguments" by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-54, *aff'd*, CLI-06-17, 63 NRC 727 (2006) (refusing to consider references to various documents identified in a petitioner's reply that were not included in the original petition).

<sup>10</sup> *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

standards and for the Board to enforce those standards are paramount.”<sup>11</sup> It has further stated that:

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they “realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”<sup>12</sup>

Accordingly, a petitioner must include all of its arguments and claims in its *initial* filing. Allowing a petitioner to amend or supplement its pleadings in reply to an applicant’s or the NRC Staff’s answers would run afoul of the Commission’s clear directives and disrupt the adjudicatory process. Indeed:

[a]llowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.<sup>13</sup>

Allowing a petitioner to freely amend or supplement its reply would also prejudice the applicant because NRC regulations do not allow the applicant to respond as of right to the reply.<sup>14</sup> Accordingly, principles of fairness mandate that a petitioner restrict its reply to addressing issues raised in the applicant’s or NRC Staff’s answer.<sup>15</sup> “Allowing new claims in a

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<sup>11</sup> *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (“LES”), *recons. denied*, CLI-04-35, 60 NRC 619, 622-23 (2004).

<sup>12</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

<sup>13</sup> *LES*, CLI-04-35, 60 NRC at 622-23 (internal quotes and citation omitted).

<sup>14</sup> *See* 10 C.F.R. § 2.309(i)(3).

<sup>15</sup> *See Hous. Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979) (“the cardinal rule, so far as fairness is concerned, is that each side must be heard”).

reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.”<sup>16</sup> Consequently, “new arguments may not be raised for the first time in a reply brief”<sup>17</sup> and “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”<sup>18</sup>

A licensing board has the authority to strike individual arguments and exhibits, including new bases for a contention that are introduced for the first time in reply.<sup>19</sup> As explained below, this Board should do so here.

#### **IV. ELPC’S NEW INFORMATION MUST BE STRICKEN**

As previously stated, ELPC’s Reply contains a new basis, new arguments, and new factual claims that should be stricken. ELPC should not be permitted to reinvent or remedy its defective contentions by providing new claims that are not narrowly focused on the arguments first presented in the petition or raised in the answers to it.<sup>20</sup> This is especially true because, as explained above, Exelon and the NRC Staff are not allowed to respond. Accordingly, the Board should strike the new information that ELPC impermissibly provided in its Reply, as shown in Attachment 1 to this Motion.

##### **A. ELPC Cannot Amend Contention 1 to Focus on Exelon’s Status as a Merchant Generator as the Pivotal Basis of the Contention**

In Contention 1, ELPC claimed that Exelon’s ERs for Byron and Braidwood are deficient because they did not include a “need for power analysis,”<sup>21</sup> despite the specific exclusion of this

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<sup>16</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>17</sup> *LES*, CLI-04-25, 60 NRC at 225 (internal citations omitted).

<sup>18</sup> Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

<sup>19</sup> *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”); *see also Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 399-400, 407, 429 (2008).

<sup>20</sup> *See Palisades*, CLI-06-17, 63 NRC at 732.

<sup>21</sup> Petition at 4.

analysis under 10 C.F.R. § 51.53(c)(2). ELPC argued, without qualifications, that this exclusion is “in clear violation” of the National Environmental Policy Act (“NEPA”).<sup>22</sup> Contention 1 then claimed that Exelon has identified a need for power, and then used that need to reject certain alternatives, suggesting that Exelon had opened the door to a need for power analysis.<sup>23</sup> Finally, ELPC speculated about how considering the need for power might affect an energy alternatives analysis.<sup>24</sup> Not once in the text of ELPC’s Petition does the term “merchant generator” appear.<sup>25</sup>

ELPC has added a new basis to Contention 1 in its Reply. Despite not even mentioning Exelon being a merchant generator in its Petition—either explicitly or implicitly—in its Reply, ELPC for the first time relies on Exelon’s merchant generator status as the pivotal basis supporting Contention 1. According to ELPC, the Commission’s rule excluding need for power analysis is allegedly illegal because “here, the applicant seeking relicense is a *merchant generator*.”<sup>26</sup> According to ELPC’s new legal argument, when a license renewal applicant is a merchant generator, the alleged “policy justifications” supporting the exclusion of need for power from the license renewal environmental review do not apply.<sup>27</sup>

ELPC may claim that it stumbled upon this fact only after reviewing Exelon’s and the Staff’s Answers.<sup>28</sup> However, ELPC has long known that Exelon is a merchant generator because that fact was central in ELPC’s litigation against Exelon in the Clinton Early Site Permit (“ESP”) proceeding, and it was identified in the Environmental Reports (“ERs”) that Exelon submitted to

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<sup>22</sup> Contentions at 2.

<sup>23</sup> See *id.* at 3-4; Exelon’s Answer at 13-14.

<sup>24</sup> See Contentions at 4.

<sup>25</sup> Nor did ELPC mention any other similar term or concept in its Petition or Contentions.

<sup>26</sup> Reply at 2 (emphasis added); see also *id.* at 1 (“This is especially true in light of the Commission’s ruling that need for power analyses are particularly important for unregulated merchant plants such as Exelon’s Byron and Braidwood facilities”); *id.* at 5 (“these policy justifications do not apply to Exelon as a merchant generator.”).

<sup>27</sup> *Id.* at 5.

<sup>28</sup> See, e.g., *id.* at 6 (citing Exelon’s Answer brief regarding its merchant generator status).

support the license renewal at issue here.<sup>29</sup> ELPC is not permitted to amend its contention by introducing this new basis in its Reply.<sup>30</sup>

In addition, Exelon had no way of anticipating, let alone addressing, ELPC's new basis for Contention 1. To be sure, Exelon's Answer notes its own merchant generator status, in explaining the similarities between the *Clinton ESP* decisions and this proceeding. Those decisions—unmentioned in ELPC's Petition—directly contradict the original Contention 1 by holding that the exclusion of a need for power analysis does not violate NEPA *per se*.<sup>31</sup>

Exelon's discussion of the facts in *Clinton ESP* does not justify ELPC's attempt to amend its contention with a new legal theory set forth for the first time in reply.<sup>32</sup> For example, in the *Bellefonte* combined license proceeding, petitioners filed a thinly-supported need for power contention asserting, among other things, that the applicant had ignored certain topics.<sup>33</sup> The applicant and the NRC Staff objected on various grounds, including on the grounds that the application did not ignore the petitioners' issues.<sup>34</sup> The petitioners then filed a detailed reply,

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<sup>29</sup> See Exelon's Answer at 11-14 (citing *Env'tl. Law & Policy Ctr. v. NRC*, 470 F.3d 676, 684 (7th Cir. 2006); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-05-29, 62 NRC 801, 806-08 (2005); Applicant's Environmental Report – Operating License Renewal Stage, Byron Station, Units 1 and 2 at 7-21 to 7-22 (May 2013), available at ADAMS Accession No. ML13162A372; Applicant's Environmental Report – Operating License Renewal Stage, Braidwood Station, Units 1 and 2 at 7-21 to 7-22 (May 2013), available at ADAMS Accession No. ML13162A365).

<sup>30</sup> See *Palisades*, CLI-06-17, 63 NRC at 732 (“New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria...”).

<sup>31</sup> See Exelon's Answer at 10-14.

<sup>32</sup> See *Bellefonte*, LBP-08-16, 68 NRC at 407 (striking new substantive arguments made for the first time in reply).

<sup>33</sup> See *id.*

<sup>34</sup> See *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), Applicant's Answer Opposing Petition to Intervene at 62-64 (July 1, 2008), available at ADAMS Accession No. ML081830694; NRC Staff Answer to Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, The Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy at 50-65 (July 1, 2008), available at ADAMS Accession No. ML081830790.

including new references.<sup>35</sup> The Board struck this material—even though it was arguably responsive to the applicant’s and the Staff’s objections—holding that the petitioners’ approach “violates the prohibition on using reply pleadings to make additional substantive arguments.”<sup>36</sup>

Likewise, federal courts have consistently rejected attempts by parties to salvage deficient claims by making new substantive arguments in response to dispositive motions or on appeal, rather than by properly amending the underlying complaint.<sup>37</sup> Similar principles underpin the *Bellefonte* decision, and should be applied here.

Allowing ELPC to effectively amend its contention through its Reply would disrupt the adjudicatory process and prejudice Exelon, given its inability to respond. The Board should therefore strike the text of ELPC’s Reply on pages i, 1, 2, and 5 through 7, as shown in Attachment 1.

**B. ELPC Offers A New Argument and Factual Claims Regarding Solar Power Generation in Support of Contention 2**

In its Petition, ELPC argued that because Exelon has requested license renewal more than ten years before the expiration of the existing licenses, the resulting Environmental Impact Statements (“EISs”) “will be stale by the time the existing licenses expire” and “result in the need for supplemental EISs.”<sup>38</sup> The only factual support ELPC offered for these bases is a 19-page, single-spaced report prepared by the Edison Electric Institute (“EEI Report”).<sup>39</sup> However,

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<sup>35</sup> See *Bellefonte*, LBP-08-16, 68 NRC at 407.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., *Agnew v. NCAA*, 683 F.3d 328, 348 (7th Cir. 2012) (“[i]t is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by briefs on appeal”) (quoting *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989)); *Grayson v. O’Neill*, 308 F.3d 808, 817 (7th Cir. 2002) (upholding the district court’s rejection of a new basis for plaintiff’s claim, proffered without amending the complaint); *Schuler v. Pricewaterhousecoopers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) (“Because he first makes his affirmative argument in his reply brief, we do not consider it”).

<sup>38</sup> Contentions at 5.

<sup>39</sup> Petition, Attachment 2 (Edison Electric Institute, *Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business* (Jan. 2013)).



ELPC generally cited the *entire* report, providing no pinpoint cites and identifying no specific facts. Instead, ELPC offered only the following sweeping statement: “electricity generation and planning has been, and will very likely continue to be, a rapidly changing area.”<sup>40</sup> ELPC provided no further specificity about the types of changes that are allegedly occurring, nor did ELPC cite to any such examples in the EEI Report.

In contrast, in its Reply, ELPC for the first time provides a specific example of a change to demonstrate that Exelon’s LRA is allegedly premature: “distributed solar could reduce load by ten percent by 2020.”<sup>41</sup> ELPC also provides a pinpoint cite to page 5 of the EEI Report and references another source cited in the report, a publication titled Bloomberg New Energy Finance.<sup>42</sup> ELPC then argues that “[t]his kind of substantial change in just the next six years must be considered when evaluating the costs and benefits of, and alternatives to, license renewal.”<sup>43</sup>

Up until it filed its Reply, ELPC made no mention of any changes regarding distributed solar power generation or any other specific examples of anticipated changes in power generation or planning in support of Contention 2. ELPC had an obligation to identify the specific factual information supporting Contention 2 earlier, but failed to do so. Overlooking ELPC’s failure to follow the applicable NRC legal standards would upset the adjudicatory

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<sup>40</sup> Contentions at 6.

<sup>41</sup> Reply at 12 (citation omitted). Notably, ELPC’s description appears to differ from the projected “change” described in the EEI Report. The EEI Report actually states that: “BNEF [*i.e.*, Bloomberg New Energy Finance] projects 22-percent compound annual growth in PV [*i.e.*, photovoltaic] installations through 2020, resulting in 30 gigawatts (GW) of capacity overall (and approximately 4.5 GW coming from distributed PV). This would account for *10 percent of capacity [not load] in key markets* coming from distributed resources and even a larger share of year-round energy generated.” EEI Report at 5 (emphasis added). ELPC’s argument is therefore entirely new, and Exelon has had no opportunity to respond to it.

<sup>42</sup> ELPC does not attach or provide a website address for the specific article published in Bloomberg New Energy Finance that is cited in the EEI Report.

<sup>43</sup> Reply at 12.

process and, again, prejudice Exelon. The Board should therefore strike the text indicated in Attachment 1, page 12.

## V. CONCLUSION

The Licensing Board should strike the new basis, new arguments, and new factual claims described above and identified in Attachment 1. The new information ELPC impermissibly introduces in its Reply attempt to expand the scope of Contentions 1 and 2, without addressing the criteria for late-filed or amended contentions in 10 C.F.R. § 2.309(c)(1).

Respectfully submitted,

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

Signed (electronically) by Raphael P. Kuyler

Alex S. Polonsky

Raphael P. Kuyler

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Phone: 202-739-5146

Fax: 202-739-3001

E-mail: [apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)

E-mail: [rkuyler@morganlewis.com](mailto:rkuyler@morganlewis.com)

Donald P. Ferraro

Assistant General Counsel

Exelon Business Services Company

200 Exelon Way, Suite 305

Kennett Square, PA 19348

Phone: 610-756-5381

Fax: 610-765-5730

E-mail: [donald.ferraro@exeloncorp.com](mailto:donald.ferraro@exeloncorp.com)

*Counsel for Exelon Generation Co., LLC*

Dated in Washington, D.C.  
this 14th day of November, 2013

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**

November 4, 2013

*Counsel for Environmental Law & Policy Center*

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of

Exelon Generation Company, LLC

Docket Nos. 50–454, 50–455, 50–456, 50–  
457; 2013-0169

(Braidwood Nuclear Station, Units 1 and 2  
and Byron Nuclear Station, Units 1 and 2)

ASLBP No. 13-929-02-LR-BD01

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**REPLY IN SUPPORT OF THE ENVIRONMENTAL LAW AND POLICY CENTER’S  
HEARING REQUEST AND PETITION TO INTERVENE**

Petitioner Environmental Law and Policy Center (“ELPC”) hereby replies to the Answers of Exelon Generation (“Exelon”) and the Nuclear Regulatory Commission (“NRC” or “Commission”) Staff (“Staff”) to ELPC’s Contentions Included with Petition to Intervene (“Contentions”). In its Contentions, ELPC raised two contentions – Failure to Include Need for Power Analyses and Premature License Renewals – that satisfy the NRC’s admissibility requirements set forth in 10 C.F.R. § 2.309(f).

The Staff and Exelon Answers fail to demonstrate that ELPC’s Contentions 1 and 2 are inadmissible. ELPC’s Contention 1 argues that the Commission must interpret its regulations as requiring Exelon to conduct need for power analyses of the Byron and Braidwood nuclear facilities in order to comply with the National Environmental Policy Act’s (“NEPA”) cost/benefit analysis requirement. ~~This is especially true in light of the Commission’s ruling that need for power analyses are particularly important for unregulated merchant plants such as Exelon’s Byron and Braidwood facilities. See 68 Fed. Reg. 55,905, 55,910–911 (Sept. 29, 2003).~~ ELPC’s Contention 2 argues that renewal of the Byron and Braidwood operating licenses is

premature at this time. Contention 2 is neither an attack on a NRC regulation nor does it lack sufficient factual support.

For these reasons, ELPC has demonstrated standing and admissible contentions. Therefore, the Atomic Safety and Licensing Board (“Board”) should grant ELPC’s request for hearing and petition to intervene.

**I. EXELON’S FAILURE TO INCLUDE NEED FOR POWER ANALYSES IN ITS LICENSE RENEWAL APPLICATIONS VIOLATES NEPA (CONTENTION 1).**

Exelon’s failure to include need for power analyses in its Environmental Reports violates NEPA’s cost/benefit requirement. Exelon claims that the NRC “fully meets its NEPA obligations for license renewal without an inquiry into the ‘need for power.’” (Exelon Ans. at 7). However, NEPA requires a basic cost/benefit analysis in environmental review. The need for power analysis is a necessary and required component of this cost/benefit analysis. While 10 C.F.R. §§ 51.53(c)(2) and 51.95(c)(2) removes the need for power analysis requirement in license renewal proceedings, reliance on these regulations in this proceeding violates NEPA’s cost/benefit analysis requirement. The Board should interpret 10 C.F.R. §§ 51.53(c)(2) and 51.95(c)(2) to require a need for power analysis in this proceeding in order to avoid violating NEPA.

**A. Exelon and Staff Do Not Provide Legal Justification For Their Claim That NEPA Does Not Require a Need For Power Analysis**

Exelon relies on 10 C.F.R. §§ 51.53(c)(2) to justify excluding a need for power analysis in this relicensing proceeding. 10 C.F.R. §§ 51.53(c)(2) states that for license renewals, “the [environmental] report is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives.” ~~Where, as here, the applicant seeking relicense is a merchant generator,~~ 10 C.F.R. § 51.53(c)(2) violates NEPA’s requirement that federal agencies’ environmental reviews include at least a basic cost/benefit

analysis. The need for power analysis component constitutes the ‘benefits’ portion of a cost/benefits analysis in the context of a nuclear license renewal because the benefit of continuing to operate a plant is the electricity it provides. *See* 68 Fed. Reg. 55,905, 55909 (Sept. 29, 2003). Without the need for power analysis, the benefits of a renewed license are not analyzed and cannot be weighed against the environmental impacts, or ‘costs,’ as NEPA requires.

Although NEPA does not explicitly require a cost/benefit analysis, courts have long held that at least a basic cost/benefit analysis must be done for a proposed federal action. For example, in *Calvert Cliffs Coordinating Committee, Inc. v. AEC*, the D.C. Circuit held that “economic and technical benefits of planned actions must be assessed and then weighed against the environmental costs.” 449 F.2d 1109, 1123 (D.C. Cir. 1971). Similarly, in *Ill. Commerce Com. v. Interstate Commerce Com.*, the court affirmed that “NEPA was intended to ensure that decisions about federal actions would be made only after responsible decision-makers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs.” 848 F.2d 1246, 1259 (D.C. Cir. 1988) *quoting Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974), *cert denied*, 423 U.S. 937 (1975)). Further, the NRC acknowledges this requirement, for example stating in its denial of a petition for rulemaking requesting that the NRC no longer require the need for power analysis for new plant licensing that “[a]lthough NEPA does not explicitly mention cost-benefit balancing, judicial interpretations of the statute have established that Federal agencies must balance environmental costs against the anticipated benefits of the action in the EIS.” 68 Fed. Reg. at 55,909. Commission regulations recognize this requirement, providing that an EIS “will include a consideration of the economic, technical, and

other benefits and costs of the proposed action and alternatives.” 10 C.F.R. § 51.71(d). Therefore, by not requiring a need for power analysis in the license renewal environmental review, the NRC violates NEPA’s requirement that environmental review include at least a basic cost/benefit analysis.

As part of its argument that ELPC Contention 1 is out of the scope of the proceeding under 10 C.F.R. 2.309(f)(iii), Exelon claims that the NRC “fully meets its NEPA obligations for license renewal without an inquiry into the ‘need for power.’” (Exelon Ans. at 7). Exelon argues that “the significant environmental impacts associated with the siting and construction of a nuclear power plant have already occurred by the time a licensee is seeking renewed license. Because the impacts for license renewal are more limited, the NRC determines only whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable.” (Exelon Ans. at 9, internal quotations omitted). This justification explains why Exelon believes that license renewal has fewer environmental impacts than plant construction, but it does not explain why NEPA’s clear cost/benefit requirement should not apply to license renewal.

Exelon’s justification parrots the NRC’s justification for why it believes that NEPA requires a cost/benefit analysis (including a need for power analysis) in the environmental review for initial licensing and plant construction, but not for the environmental review of license renewal. In 2003, the NRC denied a petition for rulemaking by the Nuclear Energy Institute requesting that the NRC remove the need for power requirement for initial licensing, just as it had for license renewal. 68 Fed. Reg. at 55,905. The NRC denied the petition, finding that “the petitioner has not demonstrated that consideration of the need for power is no longer a necessary part of the Commission’s NEPA obligations for reactor licensing decisions. The need for power



must be addressed in connection with new power plant construction so that the NRC may weigh the likely benefits (e.g., electrical power) against the environmental impacts of constructing and operating a nuclear power reactor.” *Id.* at 55,910. In its denial, the NRC’s justification for the different treatment of license renewal is the same as Exelon’s here, essentially that the environmental impacts from plant construction have already occurred at license renewal and that the impacts from continuing operation are much less significant than the plant construction. *Id.* This rationale misses the point because NEPA’s cost/benefit requirement is not tied to the relative severity of environmental impacts, but is a requirement that applies to environmental review for all “major federal actions.” 42 U.S.C. § 4332(2)(C). License renewal is a “major federal action” under NEPA and regardless of the relative severity of environmental impacts, NEPA’s requirements apply to all “major federal actions.” *Id.*; 78 Fed. Reg. 37,282, 37,282 (June 20, 2013). Neither Exelon nor Staff cite any case law or provide any relevant explanation as to why NEPA’s cost/benefit requirement does not apply to license renewal.<sup>1</sup>

**~~B. The NRC’s Policy Justification For Failing to Require a Need For Power Analysis Does Not Apply In This Case~~**

~~In the absence of legal justification for exempting license renewals from NEPA’s need for power requirement, both Staff and Exelon point to the NRC’s policy justifications to support their proposed rejection of Contention 1. (Exelon Ans. at 8-9; Staff Ans. at 12-14). Notwithstanding that the NRC’s policy justifications cannot in and of themselves undo NEPA’s requirements, these policy justifications do not apply to Exelon as a merchant generator.~~

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<sup>1</sup> The NRC rejected the Nuclear Energy Institute’s claim that NEPA’s cost/benefit requirement need not apply to initial licensing, in part, for a similar lack of support or case law. The NRC denied the petition for rulemaking in part because “[t]he petitioner failed to cite any recent judicial decisions which interpret NEPA which hold (or otherwise suggest) that a Federal agency, acting on a project proposal presented by a private sponsor or applicant, need not conduct an independent review of the need for the project, but may simply accept the applicant’s assertion with respect to need.” 68 Fed. Reg. at 55,910.

~~The NRC's policy reason for removing need for power analyses in license renewals was that the change was necessary to address the concern of some states that their traditional authority over electricity resource planning would be lessened or usurped by a need for power requirement. 59 Fed. Reg. 37,724, 37,724 (July 25, 1994). The Commission's rationale for the change was that states and utilities with planning requirements would demand a need for power analysis or equivalent, and that the ultimate decision regarding whether continued operation of a plant is necessary would be made by another regulatory body or a regulated utility. The Commission stated that, "[b]ecause the objectives of the utility and State decisionmakers will ultimately be the determining factors in whether a nuclear power plant will continue to operate, NRC's proposed decision standard is appropriate." 61 Fed. Reg. 28,467, 28,473 (June 5, 1996).~~

~~These policy justifications for removing the need for power analysis requirement do not apply to Exelon's Byron and Braidwood plants because Exelon is a merchant generator and Byron and Braidwood operate in Illinois, which is a "de-regulated state". (Exelon Ans. at 12 ("Exelon is still a merchant generator")); U.S. Energy Information Administration, "Status of Electricity Restructuring by State," *available at*: [http://www.eia.gov/electricity/policies/restructuring/restructure\\_elect.html](http://www.eia.gov/electricity/policies/restructuring/restructure_elect.html). There is no regulatory body other than the NRC to require a need for power analysis or deciding whether continued operation of Byron and Braidwood is necessary or prudent. See Byron and Braidwood License Renewal Application at 1-3 (not listing any state "utility" regulator as a "Regulating Agency"). Indeed, the Commission recognized that its policy justification does not apply to merchant generators like Exelon precisely because of this lack of non-NRC regulatory oversight. In rejecting the Nuclear Energy Institute's petition for rulemaking discussed above, the Commission stated that, "in the non-regulated environment foreseen by the petition, NRC consideration of the need for power~~

~~may become more, not less, crucial because a State decisionmaker may no longer conduct need for power assessments.” 68 Fed. Reg. 55,909-55,910 (internal quotations and comments omitted).~~

~~The Commission should interpret 10 C.F.R. §§ 51.53(e)(2) and 51.95(e)(2) as not applying to Exelon because requiring a need for power analysis in the Environmental Reports and in the SEIS will not “intrude adversely on traditional State regulatory authority over these matters,” 59 Fed. Reg. at 37,724. Further, as the NRC recognized in its denial of NEI’s petition, for merchant plants like Byron and Braidwood, absent NRC action, there is no regulatory body making the “need” determination required by NEPA.~~

### **C. The Clinton ESP Case Is Irrelevant In This Proceeding**

Exelon argues that the Clinton nuclear power plant Early Site Permitting proceedings and 7<sup>th</sup> Circuit decision in that case bars ELPC’s need for power contention in this case. (Exelon Ans. at 13). The 7<sup>th</sup> Circuit’s decision in *Envtl. Law & Policy Ctr. v. NRC*, however, is inapposite and ELPC is not making the same argument here as it did in the Clinton proceedings. 470 F.3d 676 (7th Cir. 2006) (hereinafter “*Clinton ESP*”). In *Clinton ESP*, the court held that a need for power analysis was not required at the Early Site Permitting stage because the cost/benefit analysis required by NEPA would be done later in the licensing process before any actual construction or reactor operation could take place. *Id.* at 684. The Court implicitly affirmed NEPA’s cost/benefit requirement and held that the NRC’s Early Site Permit regulations “are not inconsistent with the environmental law [NEPA], because all relevant issues will eventually be considered.” *Id.* In this case, there is no later proceeding before Byron and Braidwood will be allowed to extend operations, and so there is no future point where the cost/benefit analysis “will eventually be

considered.” *Id.* Therefore, NEPA’s need for power requirement must be satisfied at this license renewal stage.

**D. Exelon’s Alternatives Analysis Does Not Satisfy NEPA’s Cost/Benefit Requirement**

Exelon and Staff attempt to frame ELPC’s contention as ELPC seeking to “redefine the purpose of the proposed action.” (Exelon Ans. at 10; Staff Ans. at 22). That portrayal misconstrues ELPC’s argument. ELPC is merely arguing that a need for power analysis is required by NEPA, and that such an analysis is necessary both to verify the need for Exelon’s claimed purpose of baseload generation, and to accurately assess alternatives.

The Commission and Exelon do not perform the alternatives analysis in a vacuum. The overall costs and benefits of each alternative are compared to the costs and benefits of the proposed action. In this way, NEPA also requires a cost/benefit analysis for alternatives. For example, the court in *Idaho v. Interstate Commerce Commn.*, held that NEPA requires that “the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; *alternatives must be considered which would affect the balance of values*. The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.” 35 F.3d 585, 595 (D.C. Cir. 1994) (emphasis added, internal quotations omitted)) *quoting Calvert Cliffs*, 449 F.2d at 112. Without a need for power analysis for alternatives, the alternatives analysis is constrained because the relative benefits of each alternative are left unknown.

A need for power analysis could find that energy efficiency and renewables will greatly minimize the need for future baseload power. Or, as stated in ELPC’s contentions, if a need for power analysis determined a future need for peak capacity rather than baseload power, it would significantly change the relative benefit of solar. Therefore, ELPC is not seeking to “disregard

Exelon's purpose in seeking a license renewal" or seeking to "engage in a broad-reaching inquiry into topics of apparent interest to ELPC." (Exelon Ans. at 11). Rather, ELPC is simply seeking to have the NRC confirm whether Exelon's proposed purpose is necessary and actually provides a benefit that outweighs its environmental costs by undertaking a need for power analysis, as NEPA requires.

As noted above, the Commission can avoid violating federal law by interpreting its rules to require a need for power analysis where, as here, there is no state or utility body responsible for conducting a need for power analysis in place of the NRC's analysis.

## **II. ELPC HAS RAISED AN ADMISSIBLE CONTENTION REGARDING THE PREMATURE EVALUATION OF LICENSE RENEWAL APPLICATIONS ELEVEN TO FOURTEEN YEARS PRIOR TO THE EXPIRATION OF EXISTING LICENSES (CONTENTION 2)**

Staff and Exelon mistakenly argue that Contention 2, which contends that license renewal is premature, is not admissible because it attacks NRC regulations, misstates the date on which agency action happens for the purposes of NEPA, and is not supported by sufficient facts. As explained below, each of Staff and Exelon's arguments against Contention 2 fails. The Board should require Exelon to wait until closer to the Byron and Braidwood license expiration dates before seeking renewal.

### **A. Contention 2 Does Not Attack a NRC Regulation and Therefore Is Not Out of Scope**

Exelon and Staff assert that because 10 C.F.R. § 54.17(c) forbids a licensee from filing a license renewal application more than 20 years before the existing license expires, any contention alleging that the NRC should postpone evaluation of an application until closer to the expiration of the existing license is an attack on a NRC rule. (*See* Exelon Ans. at 17; Staff Ans.

at 26). Exelon and Staff mischaracterize both the language of 10 C.F.R. § 54.17(c) and ELPC's Contention 2.

10 C.F.R. § 54.17(c) states, “[a]n application for a renewed license may not be submitted to the Commission earlier than 20 years before the expiration of the operating license or combined license currently in effect.” The plain language of this rule indicates that it does not grant an applicant the right to have its renewal application reviewed or approved by the NRC in any specific timeframe. The rule merely restricts how *early* an application can be *submitted*. In fact, the Commission has stated that “[t]ypically, such applications have been filed some 5-10 years before license expiration.” *Shaw Areva Mox Servs.* (Mixed Oxide Fuel Fabrication Facility), 66 NRC 169, 207 (2007).

The license renewals at issue in this case fall well outside of the typical five to ten-year timeframe. Exelon seeks renewal eleven to fourteen years before the existing licenses expire. Neither Exelon nor the Commission has indicated why it is prudent to issue a new license so far in advance. ELPC's contention is not an attack on 10 CFR 54.17(c). ELPC merely contends that renewal is premature in this case, especially since the proper need for power analyses have yet to be conducted.

**B. The Relevant Timeframe For Determination of Compliance With NEPA Is the Period of Extended Operation, Not the Period Already Covered By the Existing Operating Licenses**

Exelon and Staff mistakenly argue that a federal action for the purposes of NEPA is triggered when the Commission issues a renewed license. (Exelon Ans. at 19; Staff Ans. at 31-33). In fact, the relevant date for establishing a federal action is the date on which the existing license expires. In this case, the first of the existing licenses does not expire until 2024. Therefore, the first agency action for the purposes of NEPA would not occur until 2024.

While 10 C.F.R. § 54.31(c) states that a renewed license “will become effective immediately upon its issuance,” Exelon and Staff misinterpret this language to mean that the relevant federal action is the issuance of the renewed license. For the purposes of NEPA, the relevant federal action is not the act of issuing renewed licenses, but rather allowing the plants to operate past their existing licenses. The Commission has ruled that for license renewals, the relevant environmental analysis timeframe “is considerably broader than ‘the present time.’” *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), 75 NRC 301, 341 (2012). In fact, “[i]t is the future environmental effect of activities during the renewal period that must be considered, not current environmental effects.” *Id.* Staff and Exelon’s interpretation would create an environmental review and alternatives analysis that is stale by the time the actual action of continued operation takes place. (*See* ELPC Petition at 5).

Given the likelihood of significant changes in the electricity market between today and 2024 that could affect the license renewals’ cost/benefit and alternatives analyses, the Board should postpone license renewal for the Byron and Braidwood units until closer to the expiration of the existing operating licenses. ELPC recommends using the Commission’s previously suggested five to ten-year time frame.

### **C. ELPC’s Support for Contention 2 is Sufficient**

Exelon and Staff assert that ELPC’s support for Contention 2 is insufficient because it relies on “bare assertions” in claiming that the Commission should postpone relicensing until closer to the time that the current licenses expire. (Exelon Ans. at 22-23; Staff Ans. at 37-38). 10 C.F.R. § 2.309(f)(1)(v) requires that a petitioner provide a “concise statement of the alleged facts” supporting its contention. ELPC met this standard by concisely stating that the changes in electric demand and generation technology will lead to a vastly different energy landscape from

today as we get closer to the expiration date of the existing operating licenses. As noted above, the Commission has held that the relevant timeframe for evaluating future environmental effects of the relicensing period is “the renewal period.” *Seabrook Station*, 75 NRC at 341. Future changes in the market could have a dramatic impact on the alternatives analysis conducted by Exelon, and therefore could change the cost/benefit determination for license renewal.

~~For example, the Edison Electric Institute (“EEI”) report cited in ELPC’s Contention 2 notes that distributed solar alone could have massive impacts on the electric outlook by 2020, let alone by 2024 when the first of the first operating license at issue in this case expires. Citing Bloomberg New Energy Finance, EEI notes that distributed solar could reduce load by ten percent by 2020. Edison Electric Institute, *Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business*, 5 (Jan. 2013) available at, <http://www.eei.org/ourissues/finance/Documents/disruptivechallenges.pdf>. This kind of substantial change in just the next six years must be considered when evaluating the costs and benefits of, and alternatives to, license renewal.~~

ELPC has not claimed that it knows what the energy outlook will look like by 2024 when the first of the existing operating licenses at issue in this case will expire. Rather, ELPC has alleged facts to support its contention that waiting until closer to the expiration dates will provide better information on the costs and benefits of relicensing these plants and prevent a stale environmental review. The NRC should be under no rush to relicense these plants when the landscape of electricity demand and generation is so rapidly changing. Therefore, the Board should postpone license renewal until closer to the end of the existing licenses when it is reasonable to evaluate whether or not license renewal is necessary.



### III. CONCLUSION

For the foregoing reasons, Staff and Exelon fail to demonstrate that ELPC's Need For Power and License Renewal Timing contentions are inadmissible under 10 C.F.R. § 2.309(f). The record demonstrates that ELPC has standing in this proceeding and has raised admissible contentions. Therefore, the Board should grant ELPC's request for a hearing and petition to intervene in this proceeding.

Respectfully Submitted,

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

Justin Vickers

Environmental Law and Policy Center

35 East Wacker Drive, Suite 1600

Chicago, Illinois 60601

(312) 673-6500

[jvickers@elpc.org](mailto:jvickers@elpc.org)

*Counsel for Environmental Law & Policy Center*

Dated in Chicago, IL  
this 4th day of November, 2013

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	Docket Nos. 50-454-LR
	)	50-455-LR
EXELON GENERATION COMPANY, LLC	)	50-456-LR
	)	50-457-LR
(Byron Nuclear Station, Units 1 and 2;	)	
Braidwood Nuclear Station, Units 1 and 2)	)	November 4, 2013

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that on this date, copies of “Reply in Support of the Environmental Law and Policy Center’s Hearing Request and Petition to Intervene” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Justin Vickers  
Justin Vickers  
Allen Gleckner  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1600  
Chicago, Illinois 60601  
(312) 673-6500  
[jvickers@elpc.org](mailto:jvickers@elpc.org)

*Counsel for Environmental Law & Policy Center*

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

_____	)	
In the Matter of	)	Docket Nos. 50-454-LR
	)	50-455-LR
EXELON GENERATION COMPANY LLC	)	50-456-LR
	)	50-457-LR
(Byron Nuclear Station, Units 1 and 2;	)	
Braidwood Nuclear Station, Units 1 and 2)	)	November 14, 2013
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2013 copies of Exelon's Motion to Strike Portions of ELPC's Reply were served upon the Electronic Information Exchange (the NRC's e-filing system), in the above-captioned proceeding.

*Signed (electronically) by Raphael P. Kuyler*

Raphael P. Kuyler

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Ave. NW

Washington, DC 20004

Phone: (202) 739-5146

Fax: (202) 739-3001

E-mail: rkuyler@morganlewis.com

*Counsel for Exelon Generation Co., LLC*