

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Paul B. Abramson
Dr. Gary S. Arnold

In the Matter of

EXELON GENERATION COMPANY, LLC

(Renewal of Operating Licenses for the
Braidwood Nuclear Station, Units 1 and 2 and
Byron Nuclear Station, Units 1 and 2)

Docket Nos. 50-454-LR, 50-455-LR,
50-456-LR, 50-457-LR

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

November 19, 2013

MEMORANDUM AND ORDER

(Denying Hearing Request and Petition to Intervene)

Before the Atomic Safety and Licensing Board (the Board) is a petition¹ submitted by the Environmental Law and Policy Center (the Center) in response to a notice of an opportunity for a public hearing regarding an application by Exelon Generation Company, LLC (Exelon).² Exelon seeks to renew its operating licenses for Byron Nuclear Station, Units 1 and 2, and Braidwood Nuclear Station, Units 1 and 2, which are located, respectively, near Byron, Illinois and Braidwood, Illinois.

¹ Hearing Request and Petition to Intervene by the Environmental Law and Policy Center (Sept. 23, 2013) [hereinafter Petition]. Although the Center purports to file its Petition pursuant to 10 C.F.R. § 2.714, this regulation was abolished in 2004. The Board treats the Petition as though filed under 10 C.F.R. § 2.309. See Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,220–22 (Jan. 14, 2004).

² Byron and Braidwood License Renewal Application, 78 Fed. Reg. 44,603 (July 24, 2013).

We deny the Center's Petition because each of its two proffered contentions challenges a Commission regulation in violation of 10 C.F.R. § 2.335(a). Additionally, we conclude that neither contention is accompanied by sufficient factual support to raise a genuine dispute, and therefore neither is admissible for this reason as well.³

I. BACKGROUND

The NRC is considering Exelon's application to renew for twenty years its operating licenses for the Byron and Braidwood units. The current operating licenses for Byron Nuclear Station, Units 1 and 2, expire, respectively, on October 31, 2024 and November 6, 2026.⁴ The current operating licenses for Braidwood Nuclear Station, Units 1 and 2, expire, respectively, on October 17, 2026 and December 18, 2027.⁵

On September 23, 2013, the Center filed a timely hearing request and petition to intervene. On October 28, 2013, both Exelon and the NRC Staff filed answers opposing the Petition, contending that neither of the Center's two contentions is admissible.⁶ On November 4, 2013 the Center filed a reply.⁷ Exelon moved on November 14, 2013 to strike portions of the Center's Reply.⁸

³ See 10 C.F.R. §§ 2.309(f)(1)(v)–(vi) (2013).

⁴ 78 Fed. Reg. at 44,603.

⁵ Id.

⁶ Exelon's Answer Opposing the Hearing Request and Petition to Intervene Filed by the Environmental Law and Policy Center (Oct. 28, 2013) [hereinafter Exelon's Answer]; NRC Staff Answer to Environmental Law and Policy Center Hearing Request and Petition to Intervene (Oct. 28, 2013) [hereinafter Staff Answer]. Because of the partial shutdown of the Federal Government, the Commission extended the time to file oppositions by eight days. See Aerotest Operations, Inc. (Aerotest Radiography & Research Reactor) et al., Notice (Oct. 17, 2013) (unpublished).

⁷ Reply in Support of the Environmental Law and Policy Center's Hearing Request and Petition to Intervene (Nov. 4, 2013) [hereinafter Reply].

⁸ Exelon's Motion to Strike Portions of ELPC's Reply (Nov. 14, 2013) [hereinafter Motion to Strike].

II. ANALYSIS

To participate as a party in an adjudicatory proceeding concerning a proposed licensing action, a petitioner must (1) establish it has standing; and (2) proffer at least one admissible contention.⁹

Neither Exelon nor the NRC Staff objects to the Center's standing.¹⁰ We need not independently consider the issue, because the Center has not submitted an admissible contention.

A. Contention 1

Contention 1 is labeled: "Failure to Include Need for Power Analyses in the Braidwood and Byron Environmental Reports."¹¹ The Center claims that Exelon's evaluation of reasonable alternatives to renewal of the facilities' licenses is deficient because, allegedly, "it is improperly constrained by 10 CFR 51.53(c)(2), which provides, in clear violation of NEPA, that the application need not analyze the 'need for power' at the stations."¹²

However, in connection with reactor operating licenses, the Commission has made an explicit determination that it can satisfy its responsibility under NEPA to consider reasonable alternatives to the proposed action at the license renewal stage without an inquiry into the need for power. As stated during the rulemaking process, "the significant environmental impacts

⁹ 10 C.F.R. § 2.309(a) (2013). Exelon also contends, in a footnote, that the Petition is subject to dismissal because the Center's attorneys had not initially filed a notice of appearance pursuant to 10 C.F.R. § 2.314(b) and therefore "there is no showing that the individuals who signed the Petition are authorized to represent the Petitioner." Exelon's Answer at 3, n.12. Although the better practice would be to file a section 2.314(b) notice of appearance, pursuant to 10 C.F.R. § 2.304(d) the signature of a person signing a pleading "is a representation that the document has been subscribed in the capacity specified with full authority." In any event, on November 4, 2013 the Center's counsel filed notices of appearance that fully comply with 10 C.F.R. § 2.314(b), and we decline to dismiss the Petition for that reason.

¹⁰ Exelon's Answer at 3–4; Staff Answer at 15–16.

¹¹ Petition, Exh. 4, Contentions Included with Petition to Intervene by the Environmental Law and Policy Center at 1 (Sept. 23, 2013) [hereinafter Contentions].

¹² Contentions at 2 (emphasis added).

associated with the siting and construction of a nuclear power plant have already occurred by the time a licensee is seeking a renewed license.”¹³ Moreover, “the NRC has no role in the energy planning decisions of State regulators and utility officials.”¹⁴ Accordingly, the Commission has determined that “the NRC will neither perform analyses of the need for power nor draw any conclusions about the need for generating capacity in a license renewal review.”¹⁵ In contrast, the Center contends that “[i]t is impossible to engage in the rigorous and objective evaluation of alternatives required by NEPA without first analyzing the need for power.”¹⁶ The thrust of Contention 1, therefore, is that the Commission has promulgated a regulation that violates the National Environmental Policy Act (NEPA).¹⁷

It is, however, “not the role of licensing boards to review and to reconsider the wisdom of the Commission’s regulations.”¹⁸ Absent a petition for a waiver, no rule or regulation of the Commission “is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding.”¹⁹ The Center’s sole remedy to challenge the wisdom or lawfulness of 10 C.F.R. § 51.53(c)(2) is to file a petition for rulemaking with the Commission itself, pursuant to 10 C.F.R. § 2.802.

¹³ Denial of Petition for Rulemaking, 68 Fed. Reg. 55,905, 55,910 (Sept. 29, 2003).

¹⁴ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,472 (June 5, 1996).

¹⁵ Id.

¹⁶ Contentions at 2.

¹⁷ National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2006).

¹⁸ Honeywell Int’l (Metropolis Works Uranium Conversion Facility), LBP-12-6, 75 NRC 256, 270 (2012).

¹⁹ 10 C.F.R. § 2.335(a) (2013).

To be sure, Section 2.335 does create a process for seeking waivers of NRC regulations in “extraordinary” situations where special circumstances can be demonstrated.²⁰ But the Center has not requested a waiver, nor has it complied with the requirement of providing an affidavit setting forth “with particularity” the special circumstances that might justify a waiver.²¹ On the contrary, the Center’s Petition challenges the lawfulness of Section 51.53(c)(2) per se, and not as applied to any unique or unusual circumstances in this proceeding.

In its Reply, the Center argues for the first time that Exelon’s status as a merchant generator operating in a “de-regulated state” means that “[t]he Commission should interpret 10 C.F.R. §§ 51.53(c)(2) and 51.95(c)(2) as not applying to Exelon.”²² Even if we were to permit the Center to raise this new policy argument in its Reply,²³ and regardless of whether the argument has merit, this Board is not empowered to reword the clear language of the Commission’s regulations. Indeed, even a properly supported request for a waiver cannot be granted when it seeks to exempt circumstances that are “common to a large class of facilities” rather than “unique.”²⁴

Contention 1 is therefore not admissible, because it both violates 10 C.F.R. § 2.335(a) and raises an issue outside the scope of this proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii).

Moreover, even if the Commission wished or had empowered its licensing boards to review the lawfulness or wisdom of its regulations, the Center has failed to make even the

²⁰ Exelon Generation Co. (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC ___, ___, (slip op. at 7–8) (Oct. 31, 2013).

²¹ 10 C.F.R. § 2.335(b) (2013).

²² Reply at 6–7.

²³ See La. Energy Servs., LP (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (stating that “new arguments may not be raised for the first time in a reply brief”).

²⁴ Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 (2005).

“minimal” factual showing—as opposed to bare assertions and speculation²⁵—that is necessary to raise a “genuine dispute” as required by 10 C.F.R. § 2.309(f)(1)(vi). The Center provides no factual support for its assertion that a need for power analysis could be expected to lead to a different result. Indeed, the Center supplies no factual support for Contention 1 whatsoever. Contention 1 is therefore also not admissible because it fails to satisfy the pleading requirements of 10 C.F.R. §§ 2.309(f)(1)(v)–(vi).²⁶

B. Contention 2

Contention 2 is labeled “License Renewal of Braidwood and Byron Is Premature.”²⁷ The Center claims that it “is premature to relicense nuclear facilities with existing permits that will not expire for eleven to fourteen years” because “relicensing more than ten years in advance of the expiration of the existing licenses will result in [environmental impact statements] that will be stale by the time the existing licenses expire.”²⁸

Contention 2 improperly challenges the reasonableness under NEPA of 10 C.F.R. § 54.17(c), which expressly allows application for a renewed license as early as 20 years before expiration of the license then in effect. The Commission “established the 20-year timeframe to balance the need to collect sufficient operating history data to support [a license renewal application] with the needs of a utility to plan for the replacement of retired nuclear power plants in the event of an unsuccessful [license renewal application].”²⁹

As with Contention 1, in its Petition and in its Reply the Center neither requests a waiver nor points to any unique or unusual circumstances in this proceeding that might possibly justify

²⁵ See Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

²⁶ See generally Exelon’s Answer at 14–16; Staff Answer at 21–25.

²⁷ Contentions at 4.

²⁸ *Id.* at 5.

²⁹ Filing a Renewed License Application, 77 Fed. Reg. 28,316, 28,317 (May 14, 2012).

waiving the Commission's regulation. The Center simply challenges the regulation per se. Moreover, just last year, the Commission denied a rulemaking petition to modify Section 54.17(c) to require license renewal applications to be filed no earlier than ten years before the expiration of existing licenses.³⁰ In denying that rulemaking petition, the Commission considered and rejected the very same arguments and proposed remedy that the Center seeks this Board to address through Contention 2.³¹ In particular, the Commission expressly addressed and rejected the argument "that the regulation conflicts with, circumvents, or frustrates the intent of NEPA."³²

Contention 2 is therefore not admissible, because it both violates 10 C.F.R. § 2.335(a) and raises an issue outside the scope of this proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii).

And again, even if the Commission wished or had empowered this Board to review the lawfulness or wisdom of its regulations, the Center has failed to make the minimal factual showing necessary to raise a "genuine dispute" under 10 C.F.R. § 2.309(f)(1)(vi). The Center claims that changes in the power generation business³³ will likely render obsolete environmental analyses that are performed too early. But surely the fact that (like many industries) the retail electric business is rapidly changing was something the Commission was aware of when, just last year, it rejected a petition to allow license renewal applications no earlier than ten years before the expiration of existing licenses. Contention 2 is therefore also not admissible because it fails to satisfy the pleading requirements of 10 C.F.R. §§ 2.309(f)(1)(v)–(vi).³⁴

³⁰ See id. at 28,316.

³¹ Compare Contentions at 5–6 with 77 Fed Reg. 28,316 et seq.

³² 77 Fed. Reg. at 28,320.

³³ See Petition, Attach. 2, Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business (Jan. 2013) at 1.

³⁴ See generally Exelon's Answer at 21–23; Staff Answer at 30–38.

III. ORDER

For the foregoing reasons, the Center's Petition is denied. Exelon's Motion to Strike is denied as moot.

The proceeding before this Board is therefore terminated. In accordance with 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

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Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 19, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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EXELON GENERATION COMPANY, LLC)
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BYRON NUCLEAR STATION, UNITS 1 AND 2) Docket Nos. 50-454-LR, 50-455-LR,
BRAIDWOOD NUCLEAR STATION, UNITS 1) 50-456-LR AND 50-457-LR
AND 2 (License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Hearing Request and Petition to Intervene)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk*.

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Docket Nos. 50-454-LR, 50-455-LR, 50-456-LR AND 50-457-LR
MEMORANDUM AND ORDER (Denying Hearing Request and Petition to Intervene)

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Dated at Rockville, Maryland,
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