

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

| | | |
|---|---|-----------------------|
| 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) |) | December 26, 2013 |
| |) | |

**EXELON’S ANSWER OPPOSING APPEAL OF ASLB DENIAL OF ELPC’S PETITION
FOR INTERVENTION AND HEARING REQUEST AS
REQUEST FOR PROTECTIVE STAY**

I. INTRODUCTION

On November 19, 2013, the Atomic Safety and Licensing Board (“Board”) denied a request for hearing filed by the Environmental Law and Policy Center (“ELPC”) and terminated the contested portion of this proceeding.¹ ELPC does not seek review of that decision.² Instead, twenty-seven days after the Board’s Order, ELPC has filed an “Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay,” dated December 16, 2013 (“Stay Request”). While the precise relief ELPC seeks is unclear, it is clear that there is no regulatory basis whatsoever to stay or suspend this proceeding, as ELPC suggests. Because ELPC labels its request as a “stay,” however, Exelon Generation Company,

¹ See *Exelon Generation Co., LLC* (Braidwood Nuclear Station, Units 1 & 2 and Byron Nuclear Station, Units 1 & 2), LBP-13-12, 77 NRC ___, slip op. at 8 (Nov. 19, 2013) (“Board’s Order”); Hearing Request and Petition to Intervene by the Environmental Law and Policy Center (Sept. 23, 2013) (“Petition”).

² See also Notice of Appeal of ASLBP No. 13-929-02-LR-BD01 by Environmental Law & Policy Center (Dec. 16, 2013) (“Notice of Appeal”). Although ELPC filed a “Notice of Appeal,” in its filings it does not actually seek review of the Board’s Order.

LLC (“Exelon”) hereby answers and opposes ELPC’s Stay Request pursuant to 10 C.F.R. § 2.342(d).³

As further explained below, ELPC’s Stay Request is procedurally and substantively deficient and, for numerous reasons, should be rejected in its entirety. First, the Stay Request is untimely and unauthorized. Second, it fails to address, much less meet, the standards required to obtain a stay. Third, ELPC has not filed a rulemaking petition, so 10 C.F.R. § 2.802(d) provides no basis for relief. Finally, even if the Commission considers the substance of ELPC’s request to delay a decision on license renewal, the Stay Request fails to address—much less meet—the high threshold required for obtaining such drastic relief.

II. BACKGROUND

On May 29, 2013, Exelon filed the license renewal application (“LRA”) for Byron Station Units 1 and 2 (“Byron”) and Braidwood Station, Units 1 and 2 (“Braidwood”).⁴ On September 23, 2013, ELPC filed its Petition, proffering two contentions (Contentions 1 and 2). Contention 1 alleged that Exelon’s evaluation of reasonable alternatives to renewal of the facilities’ licenses is deficient because “it is improperly constrained by 10 CFR 51.53(c)(2), which provides, in clear violation of [the National Environmental Policy Act], that the application need not analyze the ‘need for power’ at the stations.”⁵ Contention 2 alleged that Exelon’s LRA for Byron and Braidwood was “premature.”⁶

³ ELPC invokes 10 C.F.R. § 2.311(a) as the regulatory basis for its Stay Request. *See* Notice of Appeal. Exelon’s response conforms to the requirements for briefs in opposition to appeal under Section 2.311(b).

⁴ *See* Byron Nuclear Station Units 1 & 2 and Braidwood Stations, Units 1 & 2 (May 29, 2013), Exelon Generation Company, 78 Fed. Reg. 44,603 (July 24, 2013).

⁵ *See* Petition, Exhibit 4, Contentions Included with Petition to Intervene by the Environmental Law and Policy Center at 2 (Sept. 23, 2013).

⁶ *Id.* at 5.

On November 19, 2013, the Board denied ELPC's Petition, because neither contention was admissible.⁷ With regard to Contention 1, the Board not only found that it directly and impermissibly challenged a Commission rule,⁸ but also held that ELPC had "failed to make even the 'minimal' factual showing—as opposed to bare assertions and speculation—that is necessary to raise a 'genuine dispute' as required by 10 C.F.R. § 2.309(f)(1)(v)-(vi)."⁹ In so ruling, the Board further noted that ELPC supplied "no factual support for Contention 1 whatsoever."¹⁰ Nearly four weeks later, ELPC filed the instant Stay Request.

III. LEGAL STANDARDS

ELPC cites to no legal basis whatsoever for its requested relief. However, the sole NRC regulation authorizing stay applications to be filed as part of an adjudicatory proceeding is 10 C.F.R. § 2.342, which permits parties to seek a stay of a decision or action of a presiding officer pending the filing and resolution of a petition for review.¹¹ Parties requesting a stay must do so within ten days after service of the decision at issue.¹² In determining whether to grant or deny an application for a stay under 10 C.F.R. § 2.342, the Commission considers:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.¹³

⁷ See Board's Order at 3, 6-7. ELPC's Stay Request does not mention or raise any issues related to Contention 2.

⁸ See *id.* at 4.

⁹ *Id.* at 5-6 (footnote omitted).

¹⁰ *Id.* at 6.

¹¹ See *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 158 (2011); see also 10 C.F.R. § 2.342(a).

¹² 10 C.F.R. § 2.342(a).

¹³ *Id.* § 2.342(e).

The Commission has further explained:

Of these factors, irreparable injury is the most important. Specifically, “[a] party seeking a stay must show it faces imminent, irreparable harm that is both ‘certain and great.’” Without a showing of irreparable injury, Petitioners must make “an overwhelming showing” of likely success on the merits. (This has also been referred to as a demonstration of “virtual certainty.”) And if a movant makes neither of these first two showings, then we need not consider the remaining factors.¹⁴

Failure to address these stay standards is reason enough to deny a request for a stay.¹⁵

In addition, 10 C.F.R. § 2.802(d) allows a rulemaking petitioner to “request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant pending disposition of the petition for rulemaking.”¹⁶ The Commission considers suspension of a licensing proceeding to be “a drastic action that is not warranted absent immediate threats to public health and safety or other compelling reason.”¹⁷ In deciding whether to suspend a licensing proceeding, the Commission considers three criteria: (1) whether moving forward will jeopardize the public health and safety; (2) whether continuing the review process will prove an obstacle to fair and efficient decision-making; and (3) whether going forward will prevent appropriate implementation of any pertinent rule or policy changes that might emerge from the Commission’s ongoing evaluation.¹⁸ Absent extraordinary cause, seldom does the

¹⁴ *S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012) (citations omitted).

¹⁵ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) (citing *State of Ill.* (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-11, 32 NRC 333, 334 (1990)).

¹⁶ 10 C.F.R. § 2.802(d).

¹⁷ *Callaway*, CLI-11-5, 74 NRC at 158 (internal quotations omitted) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)).

¹⁸ *Id.* at 158-159.

Commission interrupt licensing reviews or adjudications, particularly by an indefinite or very lengthy stay, on the mere possibility of change.¹⁹

IV. ARGUMENT

As indicated above, ELPC's Stay Request should be summarily denied on multiple grounds. The bases for and specifics of their request (*e.g.*, its duration) are vague and uncertain. At best, ELPC seems to request the Commission to grant a "protective stay that preserves [its] ability to seek a stay under 10 C.F.R. § 2.802(d)," but it then goes on to request that the Commission "[n]ot make a determination on the pending license renewals . . . until the Commission makes a final ruling on ELPC's forthcoming rulemaking [petition] and allows sufficient time for ELPC to raise its Contention 1."²⁰ The latter aspect of the request suggests that ELPC would like the stay to remain in place for a significant period of time. Regardless of how the Stay Request is interpreted, as shown below, ELPC falls far short of satisfying the standards necessary for obtaining its desired relief.

A. The Stay Request Is Untimely and Unauthorized

ELPC's Stay Request is both untimely and unauthorized as a matter of law under 10 C.F.R. § 2.342(a). ELPC filed its Stay Request on December 16, 2013, twenty-seven days after the Board's November 19, 2013 Order denying ELPC's Petition. As previously noted, stay applications are due within ten days after service of the decision or action at issue.²¹ Accordingly, ELPC's Stay Request should be rejected as untimely.

¹⁹ *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 4 (2011).

²⁰ Stay Request at 3.

²¹ 10 C.F.R. § 2.342(a).

Second, 10 C.F.R. § 2.342 applies only to “a decision or action of a presiding officer . . . pending filing of and a decision on a petition for review.”²² This provision does not authorize ELPC’s Stay Request because ELPC is requesting a stay of a future decision on Exelon’s LRA, not a stay of the Board’s decision denying ELPC’s hearing request and petition to intervene.²³ Further, ELPC has not filed a petition for review—only the Stay Request itself—and the time for filing such a petition has now already passed, so ELPC’s requested stay is unauthorized as a matter of law.

B. ELPC’s Filing Fails to Address or Satisfy the Requirements for a Stay Application

Even if the Commission considers ELPC’s Stay Request on its merits, it should be denied because it neither addresses nor satisfies the 10 C.F.R. § 2.342(e) standards for seeking a stay. ELPC’s failure to even *address* the stay standards is reason enough to deny its Stay Request.²⁴

Even on the merits, however, the Stay Request is wholly deficient. The most important stay factor is the requirement to show “imminent irreparable harm that is both ‘certain and great.’”²⁵ ELPC clearly faces no imminent, irreparable harm. Indeed, as ELPC admits, the Commission’s decision on Exelon’s LRA is scheduled for August 2015 at the earliest—twenty months from now.²⁶

Since ELPC has failed to make a showing of irreparable injury, it must “make an overwhelming showing of likely success on the merits” for the Commission to consider granting its stay request.²⁷ ELPC, however, has made no such showing. It has not even filed its

²² *Id.*

²³ See Stay Request at 1; *Oyster Creek*, CLI-08-13, 67 NRC at 400.

²⁴ See *Oyster Creek*, 67 NRC at 399 (citing *State of Ill.*, CLI-90-11, 32 NRC at 334).

²⁵ *Vogtle*, CLI-12-11, 75 NRC at 529.

²⁶ See Stay Request at 3.

²⁷ *Vogtle*, CLI-12-11, 75 NRC at 529.

rulemaking petition, so it cannot show that it is overwhelmingly likely to be successful in changing the Commission's rules. Even if ELPC were to be successful in precipitating a rule change, as the Board held, ELPC has failed to show that a need for power analysis would be expected to lead to a different result with respect to its contention or the review of Exelon's LRA.²⁸ On the contrary, the Board found ELPC's need-for-power contention inadmissible for the additional reason that it was completely unsupported.²⁹ Thus, since ELPC has failed to make either of the first two showings required by 10 C.F.R. § 2.342(e), the Commission need not consider the remaining factors.³⁰

C. ELPC Has No Basis to Request a Stay Pending a Rulemaking

Although not cited as the basis for ELPC's Stay Request, 10 C.F.R. § 2.802(d) allows a rulemaking petitioner to "request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant *pending* disposition of the petition for rulemaking."³¹ While ELPC may eventually file a rulemaking petition,³² no such petition is pending before the Commission. Requests to stay or suspend an adjudicatory proceeding will not be granted based on prospective future actions.³³ Thus, ELPC has no basis to request a stay under 10 C.F.R. § 2.802(d).

²⁸ See Board's Order at 6.

²⁹ *Id.*

³⁰ See *Vogtle*, CLI-12-11, 75 NRC at 529.

³¹ 10 C.F.R. § 2.802(d) (emphasis added).

³² See Stay Request at 1.

³³ *Cf. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-04, 35 NRC 69, 80 (1992) (declining to hold license transfer action in abeyance pending resolution of the question of Long Island Power Authority's corporate existence where no state court action seeking such a resolution had been filed); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 423 n.21 (2008) (noting that intent to file rulemaking regarding Table S-3 of Part 51 analysis of Greater-than-Class-C ("GTCC") waste did not support intervenor's claim that the GTCC waste portion of its proposed contention challenging NRC regulations should be admitted and held in abeyance pending the outcome of NRC action on its future rulemaking petition); see also *Fla. Power & Light Co.* (Turkey Point Power Plant, Unit Nos. 3 & 4), DD-82-2,

D. ELPC’s Stay Request Fails to Demonstrate That the Drastic Relief Requested is Warranted

Finally, even if the Commission were to overlook all of the foregoing deficiencies and consider ELPC’s Stay Request under the three criteria for requesting “suspensions” of licensing proceedings or licensing decisions set forth in *Callaway* and discussed in Section III above, the Stay Request fails. The Commission has made clear that suspension of a licensing decision is a “drastic action” that is not warranted absent a “compelling reason.”³⁴ ELPC’s Stay Request falls far short of this mark.

First, the continuation of this license renewal proceeding presents no immediate threat to public health and safety.³⁵ A licensing decision is well over a year away.³⁶ So there is certainly no “immediate” concern.³⁷ And while ELPC expresses concern over its purported need to “preserve [its] right to intervene” after resolution of its forthcoming rulemaking petition,³⁸ such a desire to protect a litigation position does not raise a public health and safety threat.³⁹

Second, ELPC has not alleged any obstacles to fair and efficient decision-making. To the contrary, ELPC’s request to suspend this proceeding is inimical to the Commission’s policy of

15 NRC 1343, 1345 (1982) (finding no basis to suspend the effectiveness of the Turkey Point license amendments under Section 2.802(d) where rulemaking petition was not yet docketed due to filing deficiencies).

³⁴ *Callaway*, CLI-11-5, 74 NRC at 158 (internal quotations and citations omitted).

³⁵ *See, e.g., id.* at 163-65 (finding no imminent risk to public health and safety that requires suspension of licensing proceedings or decisions pending the Commission’s review of the Fukushima Daiichi events); *Petition for Rulemaking to Amend 10 C.F.R. § 54.17*, CLI-11-1, 73 NRC at 5 (concluding that continuation of license renewal proceeding would not jeopardize the public health and safety, particularly where ample time remained to decide the rulemaking before the licenses may be renewed).

³⁶ *See* Board’s Order at 2; Stay Request at 3 (acknowledging that the final license renewal determination is not scheduled until at least August 2015).

³⁷ *See Callaway*, CLI-11-5, 74 NRC at 163 (finding no imminent threat to public health and safety that requires suspension of pending license renewal proceedings where the period of extended operation, provided renewed licenses were issued, would not begin for at least one year), *appeal denied, Mass. v. NRC*, 708 F.3d 63 (2013).

³⁸ Stay Request at 3.

³⁹ *See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 373-374 (2012) (holding that a petitioner’s desire to protect its litigation position does not raise a public health and safety threat).

providing prompt, efficient, and fair resolution of adjudications.⁴⁰ Significantly, the Commission has stated that its reluctance to suspend licensing proceedings is particularly strong when the suspension would last for a long period of time and where the duration of the suspension would depend on the completion of other pending Commission actions.⁴¹ ELPC's vague request, which could become a protracted stay to allow it to prepare and file a rulemaking petition, would actually undermine fair and efficient decision-making on this important licensing action for Exelon by generating significant and needless delay.

Third, denial of the Stay Request will not thwart implementation of any potential rule change or policy change that might emerge from the Commission's "ongoing" evaluation of any issue.⁴² ELPC has proffered no rulemaking petition, so there is no ongoing evaluation of any rule or policy change. Thus, ELPC cannot meet the third *Callaway* factor.⁴³

Thus, stated simply, ELPC has offered no compelling reason justifying the drastic action of suspending the final licensing determination in this proceeding and the Board should therefore reject the Stay Request.

⁴⁰ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001) (denying suspension request based on, among other things, the Commission's obligation to achieve expeditious decision making in a licensing proceeding even while terrorism-related standards are reviewed); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) ("applicants for a license are also entitled to a prompt resolution of disputes concerning their applications").

⁴¹ See, e.g., *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 10 (2010) ("We generally have declined to hold proceedings in abeyance pending the outcome of other Commission actions or adjudications."); *Petitions for Rulemaking: Denial*, 71 Fed. Reg. 74,848 (Dec. 13, 2006); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 275-77 (2003) (rejecting request for suspension pending completion of the NRC's review of measures to protect against terrorist attacks); *Vt. Yankee Nuclear Power Corp. & AmerGen Vt., LLC* (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing to suspend all license transfer proceedings pending analysis of limited liability companies).

⁴² See *Callaway*, CLI-11-5, 74 NRC at 159 (emphasis added).

⁴³ In any event, if ELPC's apparently-forthcoming rulemaking petition leads to the promulgation of any new or amended regulations, then Exelon would comply with those regulations, as applicable.

V. CONCLUSION

In summary, ELPC's Stay Request is untimely, has no basis, and fails to demonstrate that a stay or suspension is warranted in this proceeding. For the foregoing reasons, Exelon respectfully requests that the Commission deny ELPC's Stay Request in its entirety.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 26th day of December, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2013 copies of “Exelon’s Answer to Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay” were served upon the Electronic Information Exchange (the NRC’s e-filing system), in the above-captioned proceeding.

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