

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF ANSWER TO ENVIRONMENTAL LAW AND POLICY CENTER  
APPEAL OF LBP-13-12 AND REQUEST FOR PROTECTIVE STAY

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Mitzi A. Young  
Anita Ghosh  
Christina L. England  
Counsel for NRC Staff

December 26, 2013

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EXELON GENERATION COMPANY, LLC ) Docket Nos. 50-454-LR, 50-455-LR  
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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b) and 2.342(d), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer in opposition to the Environmental Law and Policy Center (ELPC) appeal and request for stay<sup>1</sup> of LBP-13-12,<sup>2</sup> the Atomic Safety and Licensing Board (Board) decision that denied ELPC’s intervention petition. In its brief, ELPC indicates that it will file a petition for rulemaking asking that license renewal regulations be revised to require a need for power analysis for merchant plants such as Byron and Braidwood. See Appeal at 2-3. ELPC requests (1) a protective stay that preserves its ability to seek a stay under 10 C.F.R. § 2.802(d), allowing a decision on ELPC’s future rulemaking petition to be “applied to” the Byron and Braidwood license renewals, and (2) deferral of the renewal of the Byron and Braidwood licenses until the Commission rules on ELPC’s rulemaking petition and allows ELPC time to raise Contention 1 (need for power) in an adjudicatory proceeding. See Appeal at 3. As explained in further detail below, ELPC fails to identify any error of law or fact in the Board’s

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<sup>1</sup> See Notice of Appeal of ASLBP No. 13-929-02-LR-BD01 by [ELPC] (Dec. 16, 2013) (Notice); Appeal of ASLB Denial of ELPC’s Petition for Intervention and Hearing Request as Request for Protective Stay (Dec. 16, 2013) (Appeal). Although entitled “appeal,” neither filing presents any basis to reverse LBP-13-12, but request a stay of the “proceeding.”

<sup>2</sup> Memorandum and Order (Denying Hearing Request and Petition to Intervene), LBP-13-12, 78 NRC \_\_\_, (Nov. 19, 2013) (LBP-13-12).

decision, fails to address or meet the Commission's standards for issuance of a stay, and fails to demonstrate any grounds that would warrant the Commission's exercise of its inherent supervisory authority to suspend the adjudicatory proceeding or defer staff licensing decisions (scheduled for August 2015) as a matter of discretion. Accordingly, the Commission should affirm the Board's decision in LBP-13-12 and deny ELPC's appeal and stay request.

## II. STATEMENT OF THE CASE

This proceeding concerns the May 29, 2013, application of the Exelon Generation Company, LLC, (Exelon or the Applicant) to renew the operating licenses for the Byron Nuclear Station, Units 1 and 2 (Byron), and Braidwood Nuclear Station, Units 1 and 2 (Braidwood), for an additional 20 years beyond October 31, 2024, November 17, 2026, October 17, 2026, and December 18, 2027, respectively.<sup>3</sup> On September 23, 2013, ELPC filed a hearing request and petition to intervene, proffering two contentions that raised environmental issues related to the Byron and Braidwood facilities.<sup>4</sup> Contention 1 claims that 10 C.F.R. § 51.53(c)(2) violates the National Environmental Policy Act of 1969 (NEPA)<sup>5</sup> by stating that a need for power analysis is not required in a license renewal applicant's environmental report.<sup>6</sup> Contention 2 claims the license renewal applications (submitted more than 10 years in advance of license expiration) were premature and unreasonable under NEPA, and could result in environmental impact statements that would be "stale by the time the existing licenses expire."<sup>7</sup> On October 28, 2013, Exelon and the NRC Staff opposed ELPC's petition, and on November 4, 2013, ELPC filed its

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<sup>3</sup> Byron and Braidwood License Renewal Application, 78 Fed. Reg. 44,603 (July 24, 2013).

<sup>4</sup> Hearing Request and Petition to Intervene by the Environmental Law and Policy Center (Sept. 23, 2013) (Petition).

<sup>5</sup> 42 U.S.C. § 4321 *et seq.*

<sup>6</sup> Petition at 3-4, Exhibit 4.

<sup>7</sup> Petition at 5; LBP-13-12 at 6.

reply.<sup>8</sup>

In LBP-13-12, the Board denied ELPC's petition, finding that both contentions were inadmissible because each challenged a Commission regulation and lacked sufficient factual support.<sup>9</sup> As to Contention 1, the Board stated the Commission can meet its NEPA responsibility to consider reasonable alternatives to a proposed license renewal without a need for power inquiry and that it was not the Board's role "to review and reconsider the wisdom of the Commission regulations." LBP-13-12 at 3-4. The Board also found that (1) ELPC neither requested a waiver nor met the § 2.335 requirement to submit an affidavit setting forth special circumstances that might justify a waiver of NRC regulations, (2) the Board could not "reword the clear language of the Commission's regulations" even if it were to permit ELPC's arguments (improperly raised for the first time in its Reply) that Exelon's merchant generator status makes need for power provisions (10 C.F.R. § 51.53(c)(2) and 51.95(c)(2)) inapplicable and (3) ELPC's base assertions and speculation does not make the minimal factual showing necessary to raise a genuine dispute.<sup>10</sup> Consequently, the Board ruled that Contention 1 violates 10 C.F.R. § 2.335(a), raises an out of scope issue, and did not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (v) and (vi).<sup>11</sup>

On December 16, 2013, more than three weeks after the decision, ELPC filed the instant appeal of LBP-13-12 and stay request.

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<sup>8</sup> See generally Exelon's Answer Opposing the Hearing Request and Petition to Intervene Filed by [ELPC] (Oct. 28, 2013) (Exelon Answer); NRC Staff Answer to [ELPC] Hearing Request and Petition to Intervene (Oct. 28, 2013) (Staff Answer); Reply in Support of [ELPC's] Hearing Request and Petition to Intervene (Nov. 4, 2013).

<sup>9</sup> LBP-13-12 at 2.

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> *Id.* The Board was not persuaded that Exelon's merchant status was a unique circumstance under § 2.335. *Id.* at 5. In addition, the Board found that Contention 2's challenge to the permissible 20-year timeframe for filing a renewal application in 10 C.F.R. § 54.17, similarly attacked the Commission's regulations and was inadmissible under § 2.309(f)(1)(iii), (v), (vi). *Id.* at 6-7.

### III. LEGAL STANDARDS FOR REVIEW

#### A. Standards for Appeals

Under 10 C.F.R. § 2.311, “[t]he Commission gives substantial deference to Board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.”<sup>12</sup> In accordance with 10 C.F.R. § 2.311(b), an appeal must be initiated by the filing of a notice of appeal and accompanying supporting brief. The Commission's Rules of Practice require that an appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal.<sup>13</sup> Moreover, the brief must contain sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issues sought to be raised on appeal.<sup>14</sup> Failure to include such information is tantamount to abandonment of an issue.<sup>15</sup> Further, any issue not addressed in an appeal brief is considered to be waived.<sup>16</sup>

#### B. Standards for Stays under 10 C.F.R. § 2.342

In accordance with 10 C.F.R. § 2.342(a), “within ten (10) days after service of a decision or action of a presiding officer, any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review.” The “application for a stay . . . must contain . . . [a] concise statement of the grounds for stay, with reference to the [four] factors specified in [2.342(e) to be considered in determining whether to grant a stay],” namely: “(1) Whether the moving party has made a strong showing

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<sup>12</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008) (citations omitted).

<sup>13</sup> *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 181 (1989). See, e.g., 10 C.F.R. § 2.341(b)(2), (b)(4).

<sup>14</sup> *Id.*

<sup>15</sup> *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001) (White Mesa).

<sup>16</sup> *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 10, 12 (1990) (TMI).

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.”<sup>17</sup> A party's failure to address the four stay factors in 10 C.F.R. § 2.342(e) is reason enough to deny a stay request.<sup>18</sup> Irreparable harm is the most crucial factor in ruling on a stay request.<sup>19</sup>

C. Standards for Suspension of Licensing Proceedings Pending Rulemaking

Under 10 C.F.R. § 2.802(d), a rulemaking petitioner may ask “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.” The conclusion of a licensing proceeding need not await the outcome of a final rulemaking petition “[a]s ‘every license the Commission issues is subject to the possibility of additional requirements.’”<sup>20</sup> Nonetheless, if an issue is sufficiently urgent, the petitioner may request suspension of licensing proceeding while the rulemaking is pending.<sup>21</sup> The Commission will suspend an ongoing proceeding, however, only as a drastic action and such action is not warranted absent an immediate threat to public health and safety.<sup>22</sup> To request a suspension under § 2.802(d), the petitioner must show that continuation of the licensing proceeding pending consideration of the rulemaking petition would,

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<sup>17</sup> 10 C.F.R. § 2.342(b)(2), (e); see also *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) (“The moving party [requesting a stay] must show that four factors weigh in its favor: ‘likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest.’”) (citation omitted).

<sup>18</sup> *Oyster Creek*, CLI-08-13, 67 NRC at 399.

<sup>19</sup> *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee, CLI-06-8, 63 NRC 235, 237 (2006); *Oyster Creek*, CLI-08-13, 67 NRC at 400 (without irreparable harm, movant must show likelihood of success on the merits is a “virtual certainty.”) (citation omitted).

<sup>20</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-4, 57 NRC 273, 277 (2003) (emphasis in original) (citation omitted).

<sup>21</sup> *Cleveland Elec. Illuminating Power Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-57, 14 NRC 1037, 1038-39 (1981).

<sup>22</sup> *Oyster Creek*, CLI-08-23, 68 NRC 461, 484 (2008) (citation omitted).

jeopardize public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge.<sup>23</sup>

#### IV. ARGUMENT

ELPC's appeal essentially requests a stay of the effectiveness of LBP-13-12, and suspension of the issuance of the Byron and Braidwood renewed licenses, to preserve ELPC's opportunity to raise its need for power challenges pending a decision on ELPC's anticipated rulemaking petition. As described in further detail below, ELPC does not identify any error of law or fact in the Board's decision, address or meet the Commission's standards regarding stays, or demonstrate any grounds that would warrant suspension of the instant adjudicatory proceeding or any future renewed licenses. Accordingly, ELPC's request should be denied.

##### A. ELPC's Protective Stay Request Waives an Appeal of LBP-13-12

ELPC states that it filed the instant "appeal" under 10 C.F.R. § 2.311 "as a petition for a protective stay" in order to preserve its "right to intervene in the [Byron and Braidwood] license renewal proceeding while it pursues the ASLB's recommended course of filing a petition for rulemaking."<sup>24</sup> An order denying an intervention petition may be appealed as to the question of whether the petition should have been granted. 10 C.F.R. § 2.311(c). Appeals of rulings on intervention petitions must identify an error of fact or law and contain sufficient information to allow the Commission to intelligently dispose of the issues raised on appeal.<sup>25</sup> Any issue not briefed is considered waived as failure to include such information is tantamount to abandonment of an issue.<sup>26</sup>

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<sup>23</sup> *Union Elec. Co. d/b/a Ameren Missouri et al.* (Callaway Plant Unit 2), CLI-11-5, 74 NRC 141, 158, 174 (2011) (Fukushima events) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)).

<sup>24</sup> See Notice at 1; Appeal at 3.

<sup>25</sup> *St. Lucie*, ALAB-921, 30 NRC at 181.

<sup>26</sup> *TMI*, ALAB-926, 31 NRC at 1, 10, 12; *White Mesa*, CLI-01-21, 54 NRC at 253.

ELPC does not identify any errors of fact or law or purported abuse of discretion as the subject of its appeal.<sup>27</sup> In fact, ELPC essentially concedes that the Board did not err in rejecting Contention 1, and acknowledges that ELPC can only pursue consideration of need for power through a petition for rulemaking.<sup>28</sup> Moreover, ELPC makes no reference to Contention 2; thus any appeal of the Board's ruling on Contention 2 is similarly waived.<sup>29</sup> Because ELPC shows no error in LBP-13-12, ELPC provides no basis to disturb the decision and has waived its right to appeal. Therefore, the Commission need only determine whether ELPC's request for a preservation stay should be granted under applicable standards.

B. ELPC's Stay Request is Untimely and Does Not Satisfy NRC Stay Standards

As noted above, ELPC seeks a protective stay that preserves its ability to seek a stay under 10 C.F.R. § 2.802(d) and preserve its ability to have a decision on its future petition for rulemaking applied to the Byron and Braidwood license renewal applications.<sup>30</sup> However, ELPC's request, filed more than three weeks after the November 19, 2013, issuance of LBP-13-12 is untimely. Stays of the effectiveness of a Board order must be filed within ten (10) days.<sup>31</sup> ELPC request is fifteen days late, and its pleading is silent as to why there is good cause for its delay.<sup>32</sup> Therefore, the Commission should reject ELPC's request as untimely.

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<sup>27</sup> Rather, ELPC merely states (without elaboration) that NRC regulations violate NEPA and that the reasoning behind 10 C.F.R. § 51.53(c)(2) does not apply to "merchant plants." See Appeal at 2.

<sup>28</sup> See LBP-13-12 at 4-7. ELPC similarly does not dispute the Board's ruling that it failed to file a 10 C.F.R. § 2.335 waiver petition showing special circumstances. See LBP-13-12 at 5.

<sup>29</sup> *TMI*, ALAB-926, 31 NRC at 10, 12.

<sup>30</sup> Appeal at 3.

<sup>31</sup> 10 C.F.R. § 2.342(a). See also 10 C.F.R. § 2.323 (must file within 10 days after basis for motion).

<sup>32</sup> See *FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Nuclear Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 18 n.36 (2006).

Although a petitioner denied intervention is a participant rather than a party that may seek a stay under 10 C.F.R. § 2.342, the Commission has considered stays of board decisions and license issuance under the standards in § 2.342.<sup>33</sup> Such requests must address the grounds for the stay, with reference to the four factors in 10 C.F.R. § 2.342(e).<sup>34</sup> ELPC does not address any of the four stay factors in 10 C.F.R. § 2.342(e) and its failure to address the four stay factors in 10 C.F.R. § 2.342(e) is “reason enough to deny [a stay request].”<sup>35</sup>

Moreover, ELPC has not demonstrated it will suffer irreparable harm, the most crucial factor to be considered in granting a stay.<sup>36</sup> ELPC is aware of the August 2015 review completion schedule and does not object to continuation of the Staff’s licensing review.<sup>37</sup> The Byron and Braidwood license renewal review schedule provides ample time to promptly file a § 2.802 rulemaking petition. In addition, ELPC has not shown a likelihood of success on the merits of its yet to be filed rulemaking petition. If the NRC determines that rulemaking is warranted, the Commission can revisit whether the scope of the Byron and Braidwood reviews should include a need for power analysis or whether issuance of renewed licenses should be deferred until rulemaking is completed.<sup>38</sup> As the Commission recently noted, hearing procedures can be adjusted to accommodate new contentions based on information related to rulemaking.<sup>39</sup> If a rulemaking occurs, ELPC could file a new contention (formerly called a late-filed contention) provided it can meet the contention admissibility standards in 10 C.F.R.

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<sup>33</sup> *Oyster Creek*, CLI-08-13, 67 NRC at 399.

<sup>34</sup> *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 4 (2011) (PRM on § 54.17).

<sup>35</sup> *Oyster Creek*, CLI-08-13, 67 NRC at 399.

<sup>36</sup> *Vermont Yankee*, CLI-06-8, 63 NRC at 237.

<sup>37</sup> Appeal at 3.

<sup>38</sup> *PRM on § 54.17*, CLI-11-1, 73 NRC at 4.

<sup>39</sup> *Id.*

§ 2.309(c) and (f)(1). Thus, ELPC cannot show irreparable harm at this juncture.

Therefore, the Commission should reject ELPC's stay request because it does not meet the standards in 10 C.F.R. § 2.342(a) and (e).

C. Suspension of the Proceeding or Deferral of a Licensing Decision is Not Warranted

ELPC provides no basis to either suspend the adjudicatory proceeding or defer a licensing decision pending the final resolution of a future petition for rulemaking. While the Commission has the discretion to grant an administrative, preservation or housekeeping stay as an exercise of its inherent supervisory authority over NRC proceedings,<sup>40</sup> such action would appear unwarranted. ELPC does not indicate when it will file its rulemaking petition<sup>41</sup> or show that continuation of licensing proceedings would "jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge."<sup>42</sup>

Moreover, the Commission "limit[s] orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication," and absent "extraordinary cause" the Commission will not interrupt licensing reviews on the mere possibility of changes.<sup>43</sup> If the NRC determines that rulemaking is warranted, the Commission could revisit whether the Byron and Braidwood licensing reviews should be held in abeyance based on the complexity of the issues raised and the Staff's review

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<sup>40</sup> See, e.g., *Oyster Creek*, CLI-08-23, 68 NRC at 484-85 (citation omitted).

<sup>41</sup> Prospective future petitions for rulemaking are insufficient to stay or suspend an adjudicatory proceeding. See *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 423 n.21 (2008); *Fla. Power & Light Co.* (Turkey Point Power Plant, Unit Nos. 3 & 4), DD-82-2, 15 NRC 1343, 1345 (1982) (finding § 2.802(d) inapplicable because a petition for rulemaking was not currently before the Commission for consideration).

<sup>42</sup> See *Private Fuel Storage*, CLI-01-26, 54 NRC at 380.

<sup>43</sup> *PRM on § 54.17*, CLI-11-1, 73 NRC at 3-4 ("seldom [does the Commission] interrupt licensing reviews or . . . adjudications . . . on the mere possibility of change" because "[o]therwise, the licensing process would face endless gridlock.").

schedule.<sup>44</sup> Thus, ELPC does not demonstrate any immediate threat to public health and safety or other grounds that would warrant suspension of the instant adjudicatory proceeding or deferral of a Staff license renewal decision.

#### V. CONCLUSION

For the foregoing reasons, the Commission should affirm the Board's decision in LBP-13-12 and deny ELPC's stay request.

Respectfully submitted,

**/Signed (electronically) by/**

Mitzi A. Young  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15-D21  
Washington, DC 20555-0001  
Telephone: (301) 415-3830  
E-mail: [Mitzi.Young@nrc.gov](mailto:Mitzi.Young@nrc.gov)

**Executed in Accord with 10 CFR 2.304(d)**

Anita Ghosh  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15-D21  
Washington, DC 20555-0001  
Telephone: (301) 415-4113  
E-mail: [Anita.Ghosh@nrc.gov](mailto:Anita.Ghosh@nrc.gov)

**Executed in Accord with 10 CFR 2.304(d)**

Christina L. England  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15-D21  
Washington, DC 20555-0001  
Telephone: (301) 415-3138  
E-mail: [Christina.England@nrc.gov](mailto:Christina.England@nrc.gov)

Dated at Rockville, Maryland  
this 26th day of December, 2013

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<sup>44</sup> See *id.* at 5.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF OPPOSITION TO ENVIRONMENTAL LAW AND POLICY CENTER APPEAL OF LBP-13-12 AND REQUEST FOR PROTECTIVE STAY," dated December 26, 2013, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 26th day of December, 2013.

**/Signed (electronically) by/**

Mitzi A. Young  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15-D21  
Washington, DC 20555-0001  
Telephone: (301) 415-3830  
E-mail: [Mitzi.Young@nrc.gov](mailto:Mitzi.Young@nrc.gov)