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

**BEFORE THE COMMISSION**

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| In the Matter of | ) | |
| | ) | Docket Nos. 50-289 and 50-320 |
| EXELON GENERATION COMPANY, LLC | ) | |
| | ) | March 12, 2020 |
| (Three Mile Island Nuclear Station, Units 1 and 2) | ) | |

**EXELON GENERATION COMPANY, LLC'S ANSWER OPPOSING ERIC J. EPSTEIN'S FEBRUARY 16, 2020 FILING AS REFERRED TO THE COMMISSION BY THE ATOMIC SAFETY AND LICENSING BOARD'S ORDER OF FEBRUARY 19, 2020**

## I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b) and the Commission's Order of February 25, 2020,[1] Exelon Generation Company, LLC ("Exelon Generation") timely files this answer opposing the "Motion to Stay Memorandum and Reply to Proposed Order Denying Intervention and Petition," filed by Eric J. Epstein on February 16, 2020 ("Filing").[2] Originally, the Filing was submitted before the Atomic Safety and Licensing Board ("Board"), but did not identify or explain its procedural basis. As explained further below, on February 19, 2020, the Board denied the Filing to the extent it requested a stay or reconsideration of the Board's decision in LBP-20-2,[3] and referred it to the Commission "for whatever further action it may deem appropriate."[4]

The Commission's Order of February 25, 2020, established March 12, 2020, as the

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1 Order (Clarifying Time for Response) at 1 (Feb. 25, 2020) (unpublished) (ML20056F226) (issued by the Office of the Secretary on behalf of the Commission) ("SECY Order").

2 Motion to Stay Memorandum and Reply to Proposed Order Denying Intervention and Petition (Feb. 16, 2020) (ML20047A004) ("Filing").

3 Licensing Board Memorandum and Order (Denying Intervention Petition and Terminating Proceeding), LBP-20-2, 91 NRC __ (Jan. 23, 2020) (slip op.).

4 Licensing Board Memorandum and Order (Denying Motion for Stay and to Reply to Licensing Board Decision and Referring Pleading to the Commission) (Feb. 19, 2020) (unpublished) (ML20050E118) ("Board Order Denying Filing").

deadline for briefing from Exelon Generation and the U.S. Nuclear Regulatory Commission ("NRC") Staff on the referred Filing, thus this answer is timely.[5] As explained below, the Commission should reject the Filing without *any* "further action." To the extent the Filing is generously viewed as a petition for review of LBP-20-2, it should be denied because it does not identify an error of law or abuse of discretion.

## II. PROCEDURAL HISTORY

On September 10, 2019, the NRC published a Hearing Opportunity Notice[6] in the *Federal Register* associated with Exelon Generation's July 1, 2019, license amendment request ("LAR").[7] In the LAR, Exelon Generation requests, pursuant to 10 C.F.R. § 50.90, that NRC amend the operating license for Three Mile Island Nuclear Station, Unit 1 ("TMI-1") to revise the site emergency plan ("SEP") and Emergency Action Level ("EAL") scheme to reflect TMI-1's permanently-defueled condition.[8] On November 12, 2019, Mr. Epstein and Three Mile Island Alert, Inc. ("TMIA") (collectively, "Petitioners") filed a Petition to Intervene and Hearing Request ("Petition") on the above-captioned docket.[9]

The NRC Staff and Exelon Generation filed their answers opposing the Petition on December 6, 2019, and December 9, 2019, respectively.[10] On December 10, 2019, the Board

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5 SECY Order at 1.

6 Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 84 Fed. Reg. 47,542 (Sept. 10, 2019) ("Hearing Opportunity Notice").

7 *See* Letter from Michael P. Gallagher, Exelon, to U.S. Nuclear Regulatory Commission, "License Amendment Request – Proposed Changes to the Three Mile Island Emergency Plan for Permanently Defueled Emergency Plan and Emergency Action Level Scheme" (July 1, 2019) (ML19182A182) ("LAR").

8 The LAR references TMI-2, but does not propose any amendments to the TMI-2 possession-only license.

9 Eric J. Epstein, Chairman of Three Mile Island Alert, Inc.'s Petition to Intervene and Hearing Request (Nov. 12, 2019) (ML19316E095) ("Petition").

10 NRC Staff Answer to Three Mile Island Alert Petition (Dec. 6, 2019) (ML19340C563); Exelon Generation Company, LLC's Answer Opposing Eric J. Epstein's and Three Mile Island Alert Inc.'s Petition to Intervene (Dec. 9, 2019) (ML19343C738).

issued an order establishing December 16, 2019, as the deadline for any reply pleadings from Petitioners.[11] Petitioners did not file any reply pleadings by that date.[12] On January 23, 2020, the Board issued its decision, in LBP-20-2, concluding that Petitioners failed to establish standing or proffer an admissible contention.[13] Accordingly, the Board denied the Petition and terminated the adjudicatory proceeding.[14] The Board further noted that appeals of LBP-20-2 could be filed before the *Commission* within 25 days—*i.e.*, by February 18, 2020.[15] On February 16, 2020, Mr. Epstein submitted the instant Filing before the *Board*.

On February 19, 2020, the Board issued an Order noting the ambiguity of the Filing and construing it as encompassing "one or more of three possible requests for relief," including as a possible request for a stay, reconsideration, or appeal of the Board's decision in LBP-20-2.[16] The Board denied the Filing to the extent it was a request for a stay or reconsideration of LBP-20-2, because it failed to satisfy the applicable requirements for such requests.[17] To the extent Mr. Epstein intended the Filing to be an appeal of LBP-20-2, the Board noted that it had been "directed to the wrong presiding officer," and thus referred it to the Commission "for whatever further action it may deem appropriate."[18] On February 20, 2020, the NRC Staff filed a motion

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11 Licensing Board Memorandum and Order (Initial Prehearing Order) at 2 (Dec. 10, 2019) (unpublished) (ML19344A039).

12 On December 26, 2019, Mr. Epstein did, however, send an email inviting those on the proceeding's service list to "please review" a hyperlinked letter from the Federal Emergency Management Agency ("FEMA Letter"). *See* LBP-20-02 at __ (slip op. at 9 n.21). The Board issued an Order providing Staff and Exelon Generation an opportunity to respond to that email, *see* Licensing Board Memorandum and Order (Establishing Schedule for Responses to Hearing Petitioner's E-Mail) (Dec. 27, 2019) at 2 (unpublished), but neither filed an answer.

13 LBP-20-02, at __ (slip op at 2).

14 *Id*.

15 *Id*. at __ (slip op at 29).

16 Board Order Denying Filing at 2.

17 *Id*. at 2-3.

18 *Id*. at 3-4. To the extent it could be construed as something other than an appeal, such as a motion for the Commission to exercise its supervisory authority, the Filing is out of time and fails to address any applicable procedural standards. *See generally, e.g.*, 10 C.F.R. § 2.323.

before the Commission requesting clarification of the deadline to respond.[19] The Commission granted that request on February 25, 2020, establishing March 12, 2020, as the deadline for responsive filings from the NRC Staff and Exelon Generation.[20]

## III. STANDARD OF REVIEW

The Commission generally defers to Board decisions on standing and contention admissibility absent an "error of law or abuse of discretion."[21] An appeal that does not point to an error of law or an abuse of discretion, but simply restates the petitioner's arguments, does not constitute a valid appeal.[22] Furthermore, a petitioner's failure to acknowledge and rebut each ground for the Board's ruling is sufficient justification for the Commission to reject the petitioner's appeal.[23] New arguments first presented on appeal "which the Board never had the opportunity to consider" clearly cannot demonstrate Board error.[24] The purpose of an appeal "is to point out error made in the Board's decision, not to attempt to cure deficient [petitions] by presenting arguments and evidence never provided to the Board."[25]

## IV. THE FILING SHOULD BE DENIED

### A. The Filing Does Not Discuss LBP-20-2

The Board denied the Petition because Petitioners failed to demonstrate standing, as

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19 NRC Staff, Motion for Clarification at 2 (Feb. 20, 2020) (ML20054B078).

20 SECY Order at 1.

21 *Tenn. Valley Auth.* (Clinch River Nuclear Site Early Site Permit Application), CLI-18-5, 87 NRC 119, 121 (2018) (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte Res., Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014)).

22 *See Shieldalloy*, CLI-07-20, 65 NRC at 503-05; *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-10, 37 NRC 192, 198 (1993) (quoting *Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-92-3, 35 NRC 63, 67 (1992)) ("A mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of a Licensing Board in the order below.'").

23 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

24 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (quoting *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004)).

25 *USEC*, CLI-06-10, 63 NRC at 458 (citation omitted).

required by 10 C.F.R. §§ 2.309(a) and (d), and for the additional reason that the original Petition failed to proffer an admissible contention, as required by 10 C.F.R. §§ 2.309(a) and (f).[26] Significantly, the Filing never once asserts that the Board erred in its decision. In fact, the Filing does not even *discuss* the Board's decision. As the Commission repeatedly has explained, an appellant "must adequately call the Commission's attention to claimed errors in the Board's approach," otherwise it will "deem waived any arguments . . . not clearly articulated in the petition for review."[27] Mr. Epstein's failure even to *acknowledge* the Board's reasons for denying the Petition (much less, his failure to rebut each one) alone warrants the Commission's summary rejection of the Filing.[28]

## B. The Filing Identifies No Error of Law or Abuse of Discretion in LBP-20-2

### 1. The Filing Identifies No Defect as to Standing

The Petition presented three theories of standing. More specifically, Petitioners argued that TMIA (in a representative capacity by way of its members) and Mr. Epstein (as an individual) demonstrated traditional standing, and were entitled to standing pursuant the "proximity presumption," and because they had participated in previous NRC proceedings.[29] As explained below, the Board appropriately rejected each of these arguments, and the Filing demonstrates no error of law or abuse of discretion in the Board's conclusions. The Filing

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[26] *See generally* LBP-20-2, 91 NRC at __ (slip op. at 18, 19, 24, 26). A discussion of the legal standards for standing and contention admissibility is presented in LBP-20-2. *Id*. at __ (slip op. at 10-14, 19-20). For the sake of brevity, that discussion is incorporated here by reference, rather than republished in full.

[27] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001) (citing *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999); *Curators of the Univ. of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 132 n.81 (1995)).

[28] *See Millstone*, CLI-04-36, 60 NRC at 638 ("[T]he appeal does not even challenge the Board's ruling that Contention 1 falls outside the scope of this proceeding. [Petitioner's] failure to challenge this last ruling is, in and of itself, sufficient justification to reject [its] appeal as to Contention 1.") *id*. at 639 ("[G]eneral arguments [that] do not come to grips with the Board's reasons for rejecting" an inadmissible contention will not "revive" it on appeal.).

[29] Petition at 18-23.

merely repeats Petitioners' earlier arguments, raises entirely new ones for the first time here, and fails to engage with the discussion in LBP-20-2. Thus, it provides an insufficient basis to review, much less reverse, the Board's decision as to standing.

First, the Board found that "prior participation in other proceedings does not, a priori, grant [] standing in this case."[30] The Board's conclusion is fully supported by binding legal precedent—including Commission decisions involving Mr. Epstein himself—which the Board aptly cited in its decision.[31] In the Filing, Mr. Epstein merely states that his standing was "not questioned" in a prior proceeding,[32] and that the only changes since that proceeding are "Exelon's mergers and acquisitions, NRC staff transfers, and an embedded bias to revise history and deny standing to reactor communities."[33] But the Filing does not address or dispute—and therefore concedes the correctness of—the Board's application of settled law, which clearly holds that standing in a prior proceeding, alone, is not a sufficient demonstration of standing.[34]

Second, the Board explained that the standard "proximity presumption" was only applicable to proceedings for reactor "construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool,"[35] which this proceeding is not, and could only be applied to *this* proceeding upon a further demonstration of

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30 LBP-20-2 at __ (slip op. at 15).

31 LBP-20-2 at __ (slip op. at 14) (citing *Bell Bend*, CLI-10-7, 71 NRC at 138 & n.26 (citing *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162–63 (1993)) ("[T]he Board correctly concluded that Mr. Epstein could not rely on other boards' findings of standing in the two prior proceedings concerning the Susquehanna facility."); *cf. also* LBP-20-2 at __ (slip op. at 14) (noting a "narrow exception" if the proceeding is "merely another round in a continuing controversy," and citing *Consumers Power Co.* (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 12 (1974)).

32 Filing at 16 (mentioning a "1992 case" involving "Post-Defueling Monitored Storage at TMI-2").

33 Filing at 17.

34 To the extent the Filing could be read as attempting to invoke the *Midland* exception by claiming that the "1992 case" is a "continuing controversy" and the instant proceeding is "merely another round," Mr. Epstein fails to explain or support such a claim. Whereas, the instant LAR is not "another round" of any proceeding.

35 LBP-20-2 at __ (slip op. at 12) (quoting *St. Lucie*, CLI-89-21, 30 NRC at 329 (citation omitted)).

some "obvious potential for offsite consequences."[36] Because Petitioners failed to demonstrate an obvious potential for offsite consequences (or even acknowledge the applicable standard), the Board concluded they had not demonstrated standing under a proximity presumption theory.[37] The Board's explanation of controlling law, and conclusion in light of the facts here, are fully consistent with extensive case law on the proximity presumption.[38]

The Filing does not dispute that the Petition lacked a demonstration of any "obvious potential for offsite consequences." Nor could it, because there was none. Instead, Mr. Epstein makes the novel assertion—never raised in the proceedings below—that the "proximity presumption" is applicable here because the "[c]onstruction of spent fuel dry casks" at TMI requires "construction permits, operating licenses, or significant amendments thereto."[39] Even if this argument could be viewed as a challenge to the Board's conclusion (which the Filing does not even discuss), it fails to identify any error of law or abuse of discretion *by the Board*—because the argument was never even presented *to* the Board.[40]

Finally, the Board concluded that Petitioners' allegations fared no better under a traditional standing analysis. More specifically, Petitioners alleged an interest in avoiding purported harms from a speculative "shortfall" in the Nuclear Decommissioning Trust funds.[41] But as the Board explained, Petitioners failed to demonstrate any "plausible nexus" between these speculative alleged harms and the LAR at issue in *this proceeding*, which merely seeks to

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36 *Id*. at __ (slip op. at 15-16).

37 *Id*.

38 *See id*. at __ (slip op. at 11-13).

39 Petition at 12.

40 *See USEC,* CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. Moreover, even if this claim had been raised in the proceedings below, it is entirely unsupported. The scope of a proceeding is governed by the notice of opportunity for a hearing. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985). The Hearing Opportunity Notice for this proceeding explains unequivocally that it pertains to the LAR, not an imagined request to construct dry storage casks. *See* 84 Fed. Reg. at 47,548.

41 Petition at 21-22.

the revise the SEP and EAL scheme.[42] The Filing is utterly silent as to, and therefore fails to rebut, the Board's manifestly correct conclusion in this regard.

Ultimately, because the Filing simply restates Petitioners' arguments, fails to rebut each ground for the Board's ruling, and presents new arguments on appeal,[43] it fails to demonstrate any error of law or abuse of discretion in the Board's ruling on standing in LBP-20-2.[44]

2. The Filing Identifies No Defect as to Contention Admissibility

The Petition proffered two contentions purporting to challenge the LAR for not providing "financial assurance" (Contention 1) or an "environmental report" (Contention 2). As explained below, the Board appropriately rejected both proposed contentions. The Filing provides only a cursory mention of these contentions, and it clearly fails to engage with the Board's reasons for rejecting them in LBP-20-2. Accordingly, it likewise demonstrates no error of law or abuse of discretion in the Board's conclusions on contention admissibility.

In Contention 1, Petitioners argued that the LAR should be rejected because it allegedly did not demonstrate that "adequate funds for decommissioning will be available."[45] But the Petition cited no unmet legal requirement for such a demonstration related to the LAR (which, again, merely seeks to revise the SEP and EAL scheme). The Board rejected Contention 1 as beyond the scope of this proceeding because it improperly sought to "redirect the focus of this

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42 LBP-20-2 at __ (slip op. at 17-19).

43 The Filing also contains various other disjointed discussions that do not obviously pertain to either standing or contention admissibility. For example, it discusses a TMI-2 license transfer application submitted to the NRC in a separate licensing action after the Petition was filed. Filing at 4-7. It appears to repeat, without further explanation, certain "additional arguments" from the original Petition (*e.g.*, *id*. at 23, contradicting the Staff's conclusion that the LAR does not involve a "significant reduction in a margin of safety"), which were rejected by the Board (*e.g.*, LBP-20-2 at __ (slip op. at 28), correctly holding that the NRC Staff's No Significant Hazards Consideration determination is not subject to challenge). As noted above, mere repetition of arguments, and new arguments on appeal, cannot sustain a petition for review.

44 *See supra* Part III (citing case law that explains these are inadequate bases for an appeal). To the extent Petitioners argue that FEMA has "standing" in this proceeding, *see* Filing at 11, they fail to explain or support their assertion; and, in fact, FEMA has not asserted standing here.

45 Petition at 33.

proceeding to Exelon's April 12, 2019 exemption request to use a portion of the decommissioning trust fund for spent fuel management activities, which was approved by the NRC Staff on October 16, 2019."[46] The Board also noted that Petitioners improperly "mischaracterize the LAR as a license transfer proceeding."[47] The Filing neither acknowledges the Board's conclusions on Contention 1 nor explains how they purportedly could be erroneous.

In Contention 2, Petitioners argued that the LAR should be rejected because it did not include an "environmental report," which they claimed was required by NEPA.[48] But as the Board correctly noted, the NRC's NEPA regulations categorically exclude certain licensing actions from the environmental review otherwise required under 10 C.F.R. Part 51; and the LAR explicitly invoked such an exclusion.[49] The Board also noted that "a petitioner may challenge the invocation of a categorical exclusion either by showing the existence of special circumstances or by showing that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure."[50] But the Board rejected Contention 2 because Petitioners did not *attempt* to make either of these showings, and did not even appear *aware* that the LAR had invoked a categorical exclusion, "thus failing to fulfill their 'ironclad obligation'" to review the LAR.[51]

The Filing does little more than repeat Petitioners' original arguments, and offers no explanation as to how the Board's ruling as to either contention could be erroneous. In fact, the Filing actually *reinforces* the Board's conclusion that Petitioners failed to review, and

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46 LBP-20-2 at __ (slip op. at 21).

47 *Id*. at __ (slip op. at 23) (citing Petition at 25).

48 Petition at 40.

49 LBP-20-2 at __ (slip op. at 24-25).

50 *Id*. at __ (slip op. at 25) (citation omitted).

51 *Id*. at __ (slip op. at 25-26) (citation omitted).

fundamentally misunderstand the purpose of, the LAR. As Mr. Epstein asserts in the Filing:

> There can be no doubt that whether a *licensee transfer* [sic] is financially qualified (Contention 1), and whether the NRC can approve a *license transfer* without the environmental assessment and Environmental Impact Statement requested by Eric Epstein and TMI-Alert and required by NEPA (Contention 2) are within the scope of this proceeding.[52]

Unquestionably, the licensing action in the LAR is *not* a license transfer. And Petitioners' claim to the contrary, based on an imprecise reading of the LAR, fails to provide a basis for an admissible contention.[53]

## V. CONCLUSION

In summary, the Filing simply restates Petitioners' arguments and fails to rebut each (or any) ground for the Board's ruling. Thus, it necessarily fails to demonstrate any error of law or abuse of discretion in the Board's rulings on the contentions—and must be summarily rejected.

Respectfully submitted,

*Executed in Accord with 10 C.F.R. § 2.304(d)*
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Dated in Washington, DC
this 12th day of March 2020

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52 Filing at 20 (emphasis added).

53 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995), *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

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## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of "Exelon Generation Company, LLC's Answer Opposing Eric J. Epstein's February 16, 2020 Filing as Referred to the Commission by the Atomic Safety and Licensing Board's Order of February 19, 2020" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

*Signed (electronically) by Ryan K. Lighty*

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