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

**BEFORE THE COMMISSION**

| | | |
|---|---|---|
| In the Matter of: | ) | Docket Nos.: |
| EXELON GENERATION COMPANY, LLC; EXELON CORPORATION; EXELON FITZPATRICK, LLC; NINE MILE POINT NUCLEAR STATION, LLC; R. E. GINNA NUCLEAR POWER PLANT, LLC; and CALVERT CLIFFS NUCLEAR POWER PLANT, LLC | ) | STN 50-456, STN 50-457, 72-73, STN 50-454, STN 50-455, 72-68, 50-317, 50-318, 72-8, 50-461, 72-1046, 50-10, 50-237, 50-249, 72-37, 50-333, |
| (Braidwood Station, Units 1 and 2; Byron Station, Unit Nos. 1 and 2; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Clinton Power Station, Unit No. 1; Dresden Nuclear Power Station, Units 1, 2, and 3; James A. FitzPatrick Nuclear Power Plant; LaSalle County Station, Units 1 and 2; Limerick Generating Station, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; Peach Bottom Atomic Power Station, Units 1, 2, and 3; Quad Cities Nuclear Power Station, Units 1 and 2; R. E. Ginna Nuclear Power Plant; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Three Mile Island Nuclear Station, Unit 1; Zion Nuclear Power Station, Units 1 and 2; and Associated Independent Spent Fuel Storage Installations) | ) | 72-12, 50-373, 50-374, 72-70, 50-352, 50-353, 72-65, 50-220, 50-410, 72-1036, 50-171, 50-277, 50-278, 72-29, 50-254, 50-265, 72-53, 50-244, 72-67, 50-272, 50-311, 72-48, 50-289, 72-77, 50-295, 50-304, and 72-1037 -LT |
| | ) | June 20, 2021 |

# EXELON'S ANSWER OPPOSING THE STATE OF ILLINOIS'S MOTION TO YET AGAIN AMEND THE PROTECTIVE ORDER

## I. INTRODUCTION

On May 3, 2021, the NRC announced an opportunity for the public to request access to Sensitive Unclassified Non-Safeguards Information ("SUNSI") in this proceeding, for purposes of developing hearing requests and petitions to intervene.[1] The State of Illinois ("State" or

[1] Consideration of Approval of Transfer of Licenses and Conforming Amendments, 86 Fed. Reg. 23,437 (May 3, 2021).

"Illinois") waited three weeks, until the original deadline for such petitions of May 24, 2021, before asking Exelon[2] to access its SUNSI.[3]

On that same day, the Secretary issued an order extending the deadline for hearing requests until June 14, 2021.[4] Between May 24, 2021, and June 4, 2021—ten days—Illinois and Exelon consulted in good faith to amend the Original Protective Order to allow Illinois to access Exelon's SUNSI. Illinois agreed to comply with the terms of the Original Protective Order and fully joined a motion to amend it to add a few representatives as Authorized Recipients. Illinois did not ask to modify the SUNSI handling obligations therein.[5] The Secretary granted that motion and issued the Amended Protective Order on June 9, 2021.[6] The Secretary also issued a second extension of the hearing request deadline until June 23, 2021—another ten days—applicable to Illinois, to allow the State time to review the SUNSI.[7] Even though the extension was caused by the State's failure to timely request SUNSI at the outset, Exelon cooperatively agreed to the second extension.

The Amended Protective Order specified that the State "must"[8] file Non-Disclosure Declarations executed by its Authorized Recipients within 2 business days of the issuance of the Amended Protective Order. The State failed to comply with that requirement.

---

2 "Exelon" herein is Exelon Generation Company, LLC, on behalf of itself and Exelon Corporation; Exelon FitzPatrick, LLC; Nine Mile Point Nuclear Station, LLC; R. E. Ginna Nuclear Power Plant, LLC; and Calvert Cliffs Nuclear Power Plant, LLC.

3 At that time, the NRC Secretary already had issued the Original Protective Order in this proceeding, granting SUNSI access to a petitioner that had timely requested such access. Secretary's Order (May 17, 2021); as corrected by Secretary's Order (May 19, 2021).

4 Secretary's Order (May 24, 2021).

5 Joint Motion to Amend Protective Order (June 4, 2021).

6 Secretary's Order (June 9, 2021).

7 Secretary's Order (June 14, 2021).

8 Amended Protective Order ¶ 24.

Instead, the State sent an email to Exelon's counsel on Friday afternoon, June 11, 2021, advising that the State wanted to negotiate *new* SUNSI handling terms to replace certain terms to which it previously agreed. The State explained—for the first time—that it was "unable" to comply with paragraph 18 of the Amended Protective Order, which requires the return or destruction of the SUNSI once it is no longer needed to participate in this proceeding. Over the next two business days, Applicants consulted with Illinois, in good faith, seeking to understand the basis for this vague and untimely assertion. In sum, the State's cursory response essentially was: *because I said so*. The State never provided a reasoned explanation for its claim.

Now, on the eve of the second extended hearing request deadline, the State has filed a Motion[9] asking to be released from the requirements of paragraph 18 of the Original and Amended Protective Order. However, the State still has not provided a reasoned explanation for its belated request, and thus fails to satisfy the "good cause" standard applicable to its Motion. Furthermore, the Motion is untimely. This defect, alone, requires that the Motion be denied. Additionally, the relief requested in the Motion might produce an unlawful result because it indirectly requires the NRC to surrender its statutory obligations under the federal Freedom of Information Act ("Federal FOIA"), and instead permit the State to adjudicate access requests under the Illinois Freedom of Information Act ("Illinois FOIA"). The State provides no basis to conclude that the NRC must subrogate its statutory obligations in this manner. Accordingly, pursuant to 10 C.F.R. §§ 2.323(c) and 2.1325(b), for the reasons detailed below, the Applicants submit this Answer opposing the Motion.

---

[9] The People of the State of Illinois's Motion to Enter Second Amended Protective Order (June 17, 2021) ("Motion").

## II. THE MOTION IS DOUBLY LATE AND MUST BE DENIED

The Motion is subject to the NRC's procedural rule for general motions at 10 C.F.R. § 2.323. This regulation specifies that "[a]ll motions . . . *must* be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."[10] The occurrence or circumstance from which the Motion arises is the "return or destruction" obligation in paragraph 18 of the protective order. A proposed protective order with this language was filed on the adjudicatory docket for this proceeding on May 10, 2021.[11] The Secretary issued the Original Protective Order with this same language on May 17, 2021.[12] And, in response to the State's SUNSI access request, the Applicants directly sent a copy of the Original Protective Order to the State via email on May 25, 2021.[13] Thus, the State was aware of the "return or destruction" provision no later than May 25, 2021.

The State then negotiated with Exelon an amendment to the Original Protective Order and filed a joint motion, which the Secretary granted. The State remained silent about paragraph 18 during those negotiations and again in the joint motion to the Commission. Left unsaid in the State's Motion is a justification that the State did not read the Protective Order carefully the first or second time around.

As a result, the State did not raise its concern about paragraph 18 until it filed its motion this last Thursday, 23 days after the triggering event—far beyond the codified 10-day limit. NRC adjudicatory participants are expected to be prepared to participate in the proceeding and to comply with all applicable deadlines. The State has identified no reason it could not have raised

---

10 10 C.F.R. § 2.323(a)(2) (emphasis added).

11 Joint Motion for Protective Order (May 10, 2021).

12 Secretary's Order (May 17, 2021).

13 Email from A. Polonsky to S. Satter, "Request for Access to Proprietary Information - Exelon Application for Order Approving License Transfers and Proposed Conforming License Amendments" (May 25, 2021).

this issue sooner; and it provides no reason that its continued delays must be repeatedly accommodated, without explanation, in this proceeding. Accordingly, the Motion must be denied on timeliness grounds alone.

## III. THE MOTION MUST BE DENIED BECAUSE THE STATE'S UNSUPPORTED AND CONCLUSORY ASSERTIONS FAIL TO ESTABLISH "GOOD CAUSE"

Illinois claims the requested amendment is necessary because it has determined, unilaterally and without reasoned explanation, that it is "unable" to comply with the terms of the Amended Protective Order—terms to which Illinois previously agreed. The State claims it is unable to comply with the "return or destroy" obligation in paragraph 18 due to the following requirement in the Illinois State Records Act:

> Sec. 3. Records as property of State.
>
> (a) All records created or received by or under the authority of or coming into the custody, control, or possession of public officials of this State in the course of their public duties are the property of the State. These records may not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law.[14]

Based on the plain meaning of the statutory text, the "except as provided by law" provision appears to avoid any conflict between the basic statutory prohibition and the terms of the Amended Protective Order—because orders of a federal agency are "law." However, according to the Motion, it is the Illinois Attorney General's "opinion" that the Amended Protective Order does not qualify for the underlined exception.[15] Unfortunately, the State

---

[14] 5 ILCS 160/3 (emphasis added). As a preliminary matter, it is unclear whether the Commission can take "official notice" of state law. At least one licensing board has observed that "official notice of state law is not a good concept in a federal proceeding." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 525, 549 (1989), *rev'd in part on other grounds and remanded*, ALAB-937, 32 NRC 135 (1990), *aff'd in part and rev'd in part on other grounds*, ALAB-941, 32 NRC 337 (1990), and *aff'd on other grounds*, ALAB-947, 33 NRC 299 (1991). That concept should apply equally, here, where the State is purporting to offer an unexplained "opinion" without presenting the minimal support of a competent affidavit.

[15] Motion at 4.

provides *no explanation, basis, or support* for that opinion. Furthermore, the State claims that the Illinois Attorney General's opinion is "dispositive" here[16]—but that is yet another bare assertion in the Motion without basis or explanation.

In broad terms, the lack of any explanation or basis for the opinion deprives the Commission of the ability to assess the State's conclusory assertion. For example, if the "opinion" relies on a blanket determination that an order of a federal agency does not constitute "law," then the State fails to support that determination with any citations or explain why such a determination falls within the *exclusive purview* of the Illinois Attorney General. The Commission is imminently more qualified to opine on whether its own orders constitute "law."

Likewise, the State cites a separate statutory provision for the proposition that the Illinois Attorney General is authorized to provide "opinions" on statutory interpretation.[17] However, the Motion does not claim (much less demonstrate) that such "opinions" have the effect of a definitive pronouncement of state law. It would be difficult to imagine the Illinois Attorney General appearing in a state court proceeding and declaring victory over every matter of statutory interpretation merely because it is empowered to offer its "opinion." In federal proceedings, where a tribunal seeks a definitive interpretation of state law, that interpretation typically is obtained by certification of the question to the *state supreme court*—not the state attorney general.[18] Ultimately, the State provides no support for its claim that the Illinois Attorney General's "opinion" provides a "dispositive" interpretation of state law that is binding in this proceeding before the NRC.

---

16 *Id*.

17 Motion at 4 (citing 15 ILCS 205).

18 *See* Ill. Sup. Ct. R. 20 (providing procedures for certification of questions of Illinois state law).

Additionally, federal agency orders have long been considered to have the force and effect of "law," and are part of an entire branch of law known as "administrative law." If the State truly is advocating that, under Illinois state law, the word "law" departs from its generally accepted meaning (*i.e.*, that Illinois has a singularly unique definition of "law" that does not include administrative or judicial orders), then the Commission should require the State to provide some modicum of support, explanation, or precedent before uncritically accepting this sweeping redefinition of a fundamental legal concept. Here, the State acknowledges that there exists no "on point" case law supporting its questionable claim.[19] That simply is another reason for the NRC to question the State's conclusory claim.[20]

Unquestionably, the State has the affirmative burden to demonstrate "good cause" for granting the Motion.[21] The State's cursory assertions here do not remotely satisfy that burden. More broadly, if the Secretary were to accept, uncritically, the State's unexplained interpretation of state law as a basis for non-compliance with the Amended Protective Order, it would create a slippery slope for other attorneys general in future proceedings to use this *because I said so* approach in a self-serving manner. The Secretary should reject this approach.

---

19 Motion at 4.

20 Likewise, the Motion is replete with factual errors and mischaracterizations that weigh in favor of requiring the State to articulate the analytical basis for its conclusion, to ensure it is not tainted by similar fundamental errors. For example, the State calls SpinCo an "entity not yet formed, with no operating history," and asserts that it will become the "new operator" of NRC licensed facilities. Motion at [unnumbered PDF page 2]. These claims are demonstrably erroneous, as evidenced by the plain language of the LTA. *See, e.g.*, LTA (cover letter at 3) ("Exelon Generation will remain the same Pennsylvania limited liability company as today, but will be renamed [SpinCo]."); *id*., Encl. 1 at 8 ("Following the Spin Transaction, SpinCo (the re-named Exelon Generation) will remain the licensed operator of the Facilities it currently operates."). The State also mischaracterizes the consultations regarding this Motion, claiming Applicants "denied" the requested relief. Motion at 6. In fact, Applicants simply noted that they were unable to *join* the Motion based on the cursory basis provided by the State, but invited the State to provide further information. They declined to do so.

21 10 C.F.R. § 2.325.

## IV. THE MOTION SHOULD BE DENIED BECAUSE THE REQUESTED RELIEF MIGHT YIELD AN UNLAWFUL RESULT

Aside from the State's failure to carry its burden to demonstrate "good cause," the Motion should be denied for the separate and additional reason that granting it might lead to an unlawful result. NRC protective orders are rooted in the agency's Federal FOIA obligations; indeed, the Commission has observed that 10 C.F.R. § 2.390—the regulation that provides for such protective orders—"embodies the standards of Exemption 4 of the [Federal] FOIA."[22] If the Motion is granted, the State admits that the Illinois FOIA would become the governing law over further release of Exelon's SUNSI.[23] Under that scenario, presumably[24] the NRC would no longer have any authority to adjudicate SUNSI access requests or define SUNSI handling obligations for the SUNSI provided to the State—effectively surrendering the information, and the agency's Federal FOIA duties and obligations, to the State. But, the State provides no basis to assert that the NRC could knowingly abdicate its Federal FOIA responsibilities in a manner akin to a FOIA "Agreement State"[25] program (but without NRC oversight).[26] Ultimately, the State articulates no authority or basis to conclude that its proposed scheme is lawful, much less necessary here. As such, this end-run around the Federal FOIA should be summarily rejected.

---

22 *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 163, 172 (2005).

23 Motion at 5.

24 The State does not address this matter explicitly.

25 *See* Atomic Energy Act of 1954, as amended, § 274 (providing a statutory basis under which NRC may relinquish to states portions of its regulatory authority to license and regulate certain materials).

26 Even assuming *arguendo* the NRC could abdicate its responsibilities under an "equivalent protection" theory, the State has not demonstrated that the Federal FOIA and Illinois FOIA are, in fact, equivalent. *Compare, e.g.*, Motion at 5 (citing 5 ILCS 140/7(1)(g)) (requiring a demonstration of "competitive harm" to protect proprietary information) *with Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (holding such a demonstration is not required under the Federal FOIA).

## V. IN THE ALTERNATIVE, IF THE SECRETARY ISSUES A SECOND AMENDED PROTECTIVE ORDER, IT SHOULD REJECT THE STATE'S PROPOSED LANGUAGE

Notwithstanding the overwhelming bases for denying the Motion discussed above, and assuming *arguendo* that the Secretary issues a Second Amended Protective Order, it should not accept the language proposed by the State.

First, the State's proposed revisions improperly change defined terms in the Amended Protective Order. The State advocates defining Authorized Recipients other than the State's Authorized Recipients as "Covered Petitioners." However, the term "Petitioners" refers to the entities petitioning to intervene in this proceeding, whereas the term "Authorized Recipients" refers to the representatives of those Petitioners who are authorized to access SUNSI. Throughout the Motion, the State perpetuates a third definition of "Petitioners" to mean Exelon (*i.e.*, the Applicants), which also is incorrect. The State's conflated terminology should not be injected into the Amended Protective Order.

Second, the State proposes to revise its current and ongoing obligation to protect SUNSI in accordance with the prescriptive requirements of the Amended Protective Order by replacing it with a vague and subjective duty to protect SUNSI in a manner "consistent" with those strict requirements. However, the prescriptive requirements of the Amended Protective Order are purposeful and necessary to protect the SUNSI against unauthorized disclosure. On the other hand, relinquishing the choice of protection measures to the State's subjective view of what may be "consistent" with those prescriptive requirements is too vague to be enforceable. Accordingly, this proposed change should be rejected.

## VI. CONCLUSION

For all of the many reasons explained above, the Motion should be denied.

Respectfully submitted,

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

Tamra S. Domeyer, Esq.
EXELON GENERATION COMPANY, LLC
4300 Winfield Road
Warrenville, IL 60555
Phone: (630) 657-3753
E-mail: Tamra.Domeyer@exeloncorp.com

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

Alex S. Polonsky, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5830
Email: Alex.Polonsky@morganlewis.com

*Signed (electronically) by Ryan K. Lighty*

Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5274
Email: Ryan.Lighty@morganlewis.com

*Counsel for Exelon Generation Company, LLC*

Dated at Washington, D.C.
this 20th day of June 2021

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

**BEFORE THE COMMISSION**

| | | |
|---|---|---|
| In the Matter of: | ) | Docket Nos.: |
| EXELON GENERATION COMPANY, LLC; EXELON CORPORATION; EXELON FITZPATRICK, LLC; NINE MILE POINT NUCLEAR STATION, LLC; R. E. GINNA NUCLEAR POWER PLANT, LLC; and CALVERT CLIFFS NUCLEAR POWER PLANT, LLC | ) | STN 50-456, STN 50-457, 72-73, STN 50-454, STN 50-455, 72-68, 50-317, 50-318, 72-8, 50-461, 72-1046, 50-10, 50-237, 50-249, 72-37, 50-333, |
| (Braidwood Station, Units 1 and 2; Byron Station, Unit Nos. 1 and 2; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Clinton Power Station, Unit No. 1; Dresden Nuclear Power Station, Units 1, 2, and 3; James A. FitzPatrick Nuclear Power Plant; LaSalle County Station, Units 1 and 2; Limerick Generating Station, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; Peach Bottom Atomic Power Station, Units 1, 2, and 3; Quad Cities Nuclear Power Station, Units 1 and 2; R. E. Ginna Nuclear Power Plant; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Three Mile Island Nuclear Station, Unit 1; Zion Nuclear Power Station, Units 1 and 2; and Associated Independent Spent Fuel Storage Installations) | ) | 72-12, 50-373, 50-374, 72-70, 50-352, 50-353, 72-65, 50-220, 50-410, 72-1036, 50-171, 50-277, 50-278, 72-29, 50-254, 50-265, 72-53, 50-244, 72-67, 50-272, 50-311, 72-48, 50-289, 72-77, 50-295, 50-304, and 72-1037 -LT<br><br>June 20, 2021 |

## CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Exelon's Answer Opposing the State of Illinois's Motion to Yet Again Amend the Protective Order" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

*Signed (electronically) by Ryan K. Lighty*
Ryan K. Lighty, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 739-5274
Ryan.Lighty@morganlewis.com

*Counsel for Exelon Generation Company, LLC*