

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

DOCKETED  
USNRC

January 28, 2004 (2:20PM)

**Before the Commission**

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**In the Matter of**

**EXELON GENERATION COMPANY, LLC**

**(Early Site Permit for the Clinton ESP Site)**

**Docket No. 52-007**

**January 28, 2004**

**EXELON'S MOTION TO APPLY  
NEW 10 CFR PART 2 RULES OF ADJUDICATION**

Exelon Generation Company, LLC ("Exelon") hereby moves the Commission to apply the new 10 CFR Part 2 adjudicatory rules ("New Part 2 Rules")<sup>1</sup> to the proceeding concerning Exelon's application for an Early Site Permit ("ESP") for the Clinton site. As discussed below, application of the New Part 2 Rules to this proceeding is permitted by the new rules; would promote efficiency, consistency, and other benefits; and would not result in prejudice to Petitioners or the NRC Staff.

This motion is permitted by the new rules. The New Part 2 Rules apply to "proceedings noticed on or after the effective date [of February 13, 2004], unless otherwise directed by the Commission."<sup>2</sup> Thus, the new rules explicitly allow the Commission to direct the application of the new rules to a proceeding noticed before their effective date.

<sup>1</sup> Final Rule, *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182 (Jan. 14, 2004).

<sup>2</sup> *Id.* (emphasis added).

Grant of this Motion would promote the efficiency and other benefits intended by the new rules. The Commission issued the New Part 2 Rules in order to “improve the effectiveness and efficiency of the NRC’s hearing process, and better focus the limited resources of all involved.”<sup>3</sup> It follows that the ESP proceeding would be more efficient and effective if it were governed by the New Part 2 Rules.

Grant of this Motion is particularly appropriate given the very early stage of this proceeding. A petition to intervene has been filed, and Exelon has not opposed the standing of the Petitioners. However, Petitioners have not yet proffered any contentions, and the Commission has not yet established a Licensing Board. For these reasons, application of the New Part 2 Rules will not disrupt this proceeding.<sup>4</sup> For similar reasons, application of the New Part 2 Rules will not prejudice any of the parties.

Finally, application of the new rules would be especially appropriate with respect to the Clinton ESP proceeding. An ESP proceeding has never been conducted under the existing rules in Part 2. All ESP proceedings on future applications will be conducted under the New Part 2 Rules. Given these circumstances, there is particular merit to conducting the Clinton ESP proceeding under the New Part 2 Rules to ensure consistent treatment of, and to set appropriate precedents for, proceedings on future ESP

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<sup>3</sup> *Id.* at 2190.

<sup>4</sup> Under 10 CFR § 2.309 of the new rules, a petitioner would normally be required, as part of the petition to intervene, to file contentions within 60 days of the notice of the proceeding. This provision is somewhat different from 10 CFR § 2.714 of the existing rules, which permits a petitioner to bifurcate its petition to intervene and contentions, and to submit contentions at least 15 days prior to the special prehearing conference. In order to accommodate the differences between the rules, and given the current status of this proceeding, we suggest that the Commission designate a reasonable date for filing of contentions (e.g., March 1, 2004), which could be longer than the 60-day period provided by the new § 2.309.

applications. Establishing such precedents would have the benefit of adding predictability to the process for future ESP proceedings.

We note that Dominion Nuclear North Anna, LLC has also filed a motion seeking to apply the New Part 2 Rules to the ESP application for the North Anna site,<sup>5</sup> which was filed contemporaneously with the Clinton ESP application. We support Dominion's motion and urge the Commission to grant it. In doing so, and to ensure consistent treatment for the Clinton ESP proceeding, the Commission should also apply the New Part 2 Rules to the Clinton ESP proceeding.

In response to Dominion's motion, the petitioners in that proceedings—all of whom are petitioners in the Clinton ESP proceeding—have argued that “[g]iven the novelty of the [ESP] proceeding and the potential complexity of the issues that have been raised . . . Petitioners believe that a formal hearing will be a more effective and efficient means of resolving the parties’ disputes.”<sup>6</sup> First, we note that the New Part 2 Rules contain provisions for formal hearings under certain circumstances. Therefore, Petitioners’ arguments on the need for a formal hearing are inapposite (i.e., the issue at stake in this Motion is whether the new rules should apply, not whether there should be a formal hearing). In any event, the Commission has already held in its Statements of Consideration accompanying the New Part 2 Rules that complexity of issue is not a

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<sup>5</sup> See *Applicant's Motion to Apply New Adjudicatory Process*, Dominion Nuclear North Anna, LLC, Early Site Permit for the North Anna ESP Site, Docket No. 52-008 (January 16, 2004).

<sup>6</sup> *Petitioners' Opposition To Dominion Nuclear's Application For New Adjudicatory Process*, Docket No. 52-008, at 2 (January 26, 2004).

sufficient basis for a formal hearing.<sup>7</sup> Specifically, in discussing the final rules, the Commission noted that the proposed rule included a criterion that called for the use of formal hearing procedures in those reactor licensing proceedings that involved a large number of complex issues.<sup>8</sup> However, the Commission determined that the “numerous/complex issues criterion may not be well-suited for determining whether the procedures of Subpart G should be used in a given proceeding.”<sup>9</sup> As evident from Section 2.310(d) of the final rules, the Commission determined that formal hearing procedures are appropriate only for those issues that concern the credibility of an eyewitness, or the intent or motive of a party or eyewitness. Accordingly, the argument of the petitioners in the North Anna ESP proceedings lacks merit.

In sum, application of the New Part 2 Rules to this proceeding would serve the Commission’s objective of improving the effectiveness and efficiency of the NRC’s hearing process, and better focusing the resources of all involved. Where, as here, the new adjudicatory process can be applied prospectively and seamlessly, the Commission should direct its application, as permitted by the new rules.

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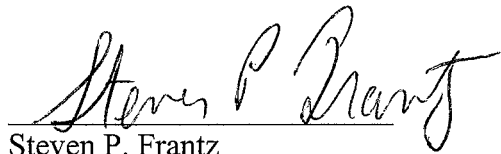
<sup>7</sup> We note that the aspects raised by Petitioners in this proceeding do not appear to involve complex factual issues.

<sup>8</sup> 69 *Fed. Reg.* at 2203-04.

<sup>9</sup> *Id.* at 2204.

For all these reasons, the Commission should grant Exelon's Motion by issuing an order directing that the New Part 2 Rules shall apply to the Clinton ESP proceeding.

Respectfully submitted,

A handwritten signature in black ink, reading "Steven P. Frantz". The signature is written in a cursive style with a horizontal line underneath the name.

Steven P. Frantz

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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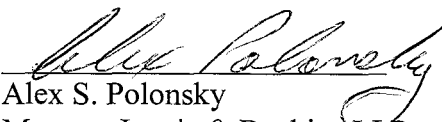
**(Early Site Permit for the Clinton ESP Site)**  
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**NOTICE OF APPEARANCE OF ALEX S. POLONSKY**

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance in the above-captioned matter as counsel on behalf of Applicant, Exelon Generation Company, LLC, 200 Exelon Way, KSA3-E, Kennett Square, PA, 19348.

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Dated: January 28, 2004

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of Exelon's Motion to Apply New 10 CFR Part 2 Rules of Adjudication, and Notice of Appearance of Alex S. Polonsky were served upon the persons listed below by U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, on this 28th day of January 2004.

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Washington, DC 20555-0001

Atomic Safety and Licensing Board  
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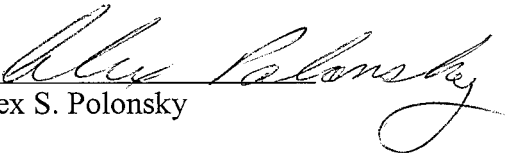
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