

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
EXELON GENERATION COMPANY, LLC)	Docket No. 52-007
)	
(Early Site Permit for Clinton ESP Site))	
)	

NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO APPLY
NEW 10 C.F.R. PART 2 RULES OF ADJUDICATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby answers the "Motion to Apply New 10 C.F.R. Part 2 Rules of Adjudication" submitted by Exelon Generation Company, LLC ("Applicant" or "Exelon") on January 28, 2004. In its motion, the Applicant requests that the Commission, in this proceeding on the Applicant's request for an Early Site Permit ("ESP") for the Exelon Site,¹ apply the newly revised version of the Commission's Rules of Practice in 10 C.F.R. Part 2 ("New Part 2").² See 69 Fed. Reg. 2182 (Jan. 14, 2004). As discussed below, the Staff does not oppose the Applicant's Motion.

DISCUSSION

New Part 2 is scheduled to become effective on February 13, 2004, and is applicable to proceedings initially noticed on or after that date; thus, under the literal terms of the final rule, New

¹ See "Notice of Hearing and Opportunity to Petition for Leave to Intervene; Early Site Permit for the Clinton ESP Site," 68 Fed. Reg. 69,426 (Dec. 12, 2003).

² The Applicant's citation to a motion filed by Dominion Nuclear to apply New Part 2 in the North Anna ESP proceeding (Docket No. 52-008) is inappropriate because that is a separate proceeding. A party's motion in a separate proceeding provides no legal support for the Applicant's position in the instant proceeding.

Part 2 would not apply to this proceeding. *Id.*³ The Commission, however, allowed for application of the New Part 2 prior to the effective date: “The rules of procedure in the final rule apply to proceedings noticed on or after the effective date, *unless otherwise directed by the Commission.*” *Id.* (emphasis added). As set forth below, the Staff does not oppose the Applicant’s motion.

The Commission has the authority to establish new, case-specific procedures, and has done so in the past. See *National Whistleblower Center v. Nuclear Regulatory Commission*, 208 F.3d 256, 262 (D.C. Cir. 2000). See also *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983), *citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). The Commission’s *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC18, 19 (1998), sets forth the agency objectives to “provide a fair hearing process, to avoid unnecessary delays in the NRC’s review and hearing processes, and to produce an informed adjudicatory report that supports agency decision making on matters related to the NRC’s responsibilities for protecting public health and safety, the common defense and security, and the environment.” *Id.* at 19. As the Statements of Consideration for the New Part 2 note, “[o]ne of the cornerstones of the NRC’s regulatory approach has always been ensuring that its review processes and decision making are open, understandable, and accessible to all interested parties.” 69 Fed. Reg. 2182.

Application of the New Part 2 as proposed by the Applicant is intended to achieve these long-standing agency goals without prejudice to the substantive opportunity of any person to participate in this proceeding.⁴ As the Statements of Consideration to the final rule summarize:

The Commission believes that there is a need to take some action to improve the management of the adjudicatory process to avoid needless delay and unproductive

³ As a general proposition, proceedings noticed before February 13, 2004 are to be conducted under the currently applicable Part 2 Rules of Practice. See *Id.*

⁴ If the Applicant’s motion is granted, Subpart L of the New Part 2 would apply to this proceeding. Pursuant to § 2.309 of New Part 2, in addition to proffering contentions, petitioners may address the selection of hearing procedures. See § 2.309(g) of New Part 2, 69 Fed. Reg. at 2240.

litigation. Using less formal hearing processes with simplified procedures for most types of proceedings along with the requirement for well-supported specific contentions in all cases can improve NRC hearings, limit unproductive litigation, and at the same time ease the burdens in hearing preparations and participation for all participants.

Id. at 2188. The Petitioners in this case, Environmental Law & Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen (collectively, “Petitioners”), argue, in their answer,⁵ without elaboration, that due to the complex issues involved, “a formal hearing will be a more effective and efficient means of resolving the parties’ disputes.” Answer at 2. This argument fails to demonstrate how Petitioners’ substantive rights will be adversely impacted by applying New Part 2. In addition, Petitioners do not identify a current procedure necessary to resolve any complex issues of which they would be deprived using New Part 2.⁶

Finally, Petitioners maintain that because New Part 2 is being challenged in the U.S. Court of Appeals for the First Circuit, “it makes no sense for the Commission to proceed under [New Part 2] and risk the possibility that it will be required later to repeat the hearing under the old rules.”⁷ Answer at 3. New Part 2 was promulgated by the Commission through an appropriate notice-and-comment rulemaking.⁸ Accordingly, the fact that New Part 2 is being challenged in federal court is insufficient basis to conclude that it should not be applied in this proceeding.

⁵ “Petitioners’ Opposition to Exelon’s Application For New Adjudicatory Process,” filed February 6, 2004.

⁶ Petitioners fail to acknowledge that New Part 2 permits the use of more traditional Subpart G-type processes if the need can be demonstrated. See New 10 C.F.R. § 2.310, 69 Fed. Reg. at 2240.

⁷ It should be noted that the Petitioner in the First Circuit challenge itself did not ask the Court to enjoin immediate implementation of New Part 2.

⁸ It should also be noted that the Petitioners’ reliance on a 1989 memorandum authored by the Commission’s General Counsel is misplaced in this proceeding.

CONCLUSION

For the foregoing reasons, the Staff does not oppose Exelon's motion to apply New 10 C.F.R. Part 2 rules of adjudication to the Clinton ESP proceeding.

Respectfully submitted,

/RA/

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of February, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO APPLY NEW 10 C.F.R. PART 2 RULES OF ADJUDICATION" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with courtesy copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with courtesy copies by electronic mail this 12th day of February, 2004.

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