RAS 8425

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 52-007
EXELON GENERATION COMPANY, LLC	)	ASLBP No. 04-821-01-ESP
(Early Site Permit for the Clinton ESP Site)	)	August 31, 2004

EXELON GENERATION COMPANY'S ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

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EXELON GENERATION COMPANY'S ANSWER IN OPPOSITION TO PETITION FOR INTERLOCUTORY REVIEW

On August 23, 2004, the Intervenors filed a "Petition of Intervenors Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen for Interlocutory Review of the Licensing Board Panel's Rejection of Energy Efficiency Alternatives Contention" ("Petition"). Exelon Generation Company, LLC ("EGC") hereby files its Answer in opposition to the Petition.

I. Background

As stated in the application for the early site permit ("ESP") for the Clinton site, the purpose of the application is to reserve a site "for a nuclear facility to be operated as a merchant generator plant." The Clinton ESP application is predicated upon construction

and operation of a facility that would primarily serve as a large base-load generator. Power from the nuclear facility would be sold on the wholesale energy market.[1]

The applicant for the Clinton ESP is Exelon Generation Company. As explained in the ESP application, Exelon Generation Company is a wholly owned subsidiary of Exelon Ventures Company. In turn, Exelon Ventures is wholly owned by Exelon Corporation. Exelon Corporation is a public utility holding company. Exelon Ventures and its subsidiaries conduct non-regulated activities, such as power generation and marketing.[2]

Section 9.2 of the Environmental Report ("ER") in the Clinton ESP application contains a discussion of alternatives to a new nuclear plant, including alternatives such as coal and gas-fired generating plants. Section 9.2.1 of the ER includes a discussion of alternatives that do not require new generating capacity, such as energy efficiency and conservation. ER Sections 9.2 and 9.2.1 note that, in 1997, Illinois deregulated the generation and sale of wholesale electric power in the state, and that merchant generating plants are not required to show that there is a need for power from the plants. These sections further state that conservation is traditionally connected with regulated electric utilities, and not merchant generators whose revenue is derived from the sale of electricity in the wholesale market. Therefore, the ER concludes that alternatives that do not require additional generating capacity, such as energy conservation and demand side management, are not reasonable alternatives to a merchant generator.

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1 *See* Section 1.1 of the Administrative Information, and Sections 9.2 and 9.2.2 of the Environmental Report included as part of the application for the Clinton ESP.

2 *See* Section 3.3 of the Administrative Information in the ESP application.

On May 3, 2004 Intervenors submitted Contention 3.1,[3] arguing that certain energy alternatives were preferable to a new nuclear power plant, including wind and solar power, energy efficiency alternatives, and various combinations of these alternatives. In particular, Basis D of Contention 3.1 argued that the ER improperly concluded that energy efficiency is an unreasonable alternative to a new nuclear plant. EGC and the NRC staff each opposed admission of Contention 3.1 as it pertained to energy efficiency, on the grounds that there was no genuine dispute of material fact that energy efficiency would not serve the purpose of a merchant generator and therefore was not a reasonable alternative to a nuclear facility at the Clinton site.[4]

In its Memorandum and Order, LBP-04-17, dated August 6, 2004, the Licensing Board admitted a portion of Contention 3.1 dealing with wind and solar power and combinations of certain alternatives. However, the Board rejected those portions of Contention 3.1 that pertained to energy efficiency (also referred to as energy conservation and demand side management). *See* Memorandum and Order, pp. 16-17. The Board gave the following two grounds for rejecting this part of Contention 3.1:

- Consideration of energy conservation "essentially equates to a 'need for power' analysis that is outside the scope of this proceeding and/or an impermissible challenge to the Commission's regulations" in 10 CFR §§ 52.17(a)(2) and 52.18.
- It was appropriate for Exelon Generation Company "to consider its own business objectives and status as an independent power provider - - as opposed to a public utility - - as it analyzes alternatives."

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3 "Supplemental Request for Hearing and Petition to Intervene by Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen" (May 3, 2004).

4 "Exelon Generation Company's Answer to Proposed Contentions" (May 28, 2004, pp. 22-26); "NRC Staff's Response to Petitioners' Contentions Regarding the Early Site Permit Application for the Clinton Site" (May 28, 2004), pp. 26-27.

Intervenors' Petition seeks interlocutory review of the Licensing Board's ruling dealing with energy efficiency. As demonstrated below, the Intervenors have not satisfied the standards for interlocutory review, and the Petition for interlocutory review should be denied. If the Commission nevertheless accepts review, the Licensing Board's ruling on energy efficiency is correct and should be affirmed.

II. Intervenors Have Not Satisfied the Standards for Interlocutory Review.

Intervenors are seeking Commission review of the Licensing Board's decision to exclude part of their clean energy alternatives contention. (Petition, p. 1). Licensing Board rulings limiting contentions, however, are considered interlocutory. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-339, 4 NRC 20 (1976). There is a long-standing Commission policy disfavoring interlocutory review of a licensing board order, and review will only be undertaken as a discretionary matter in the most compelling circumstances. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994). Also, interlocutory review is not favored on the question of whether a contention should have been admitted into a proceeding. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 94 (1994).

This policy is intended to avoid piecemeal interference in ongoing licensing board proceedings, and the Commission typically denies petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002).

Although interlocutory review is disfavored and generally is not allowed as a right under NRC rules of practice, there are limited circumstances in which interlocutory review may be appropriate. Discretionary interlocutory review will be granted if the licensing board's action either (1) threatens the party adversely affected with immediate and serious irreparable harm that could not be remedied by a later appeal or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 CFR § 2.341(f)(2).[5] In other words, the Commission may grant interlocutory review in situations where the order must be reviewed "now or not at all." *Hydro Resources*, CLI-98-8, 47 NRC 314, 321 (1998).

As demonstrated below, Intervenors have not satisfied either of the Commission's standards for interlocutory review as defined in 10 CFR § 2.341(f)(2).[6]

A. Intervenors Have Not Demonstrated Immediate or Serious Irreparable Harm.

Intervenors assert that interlocutory review is appropriate at this time because delaying review until after the Board's final decision would lead to unnecessary delay and a waste of time and resources. (Petition, p. 2) Intervenors explain that if they have to wait and appeal the final decision by the Licensing Board and they prevail, then a "whole new licensing process would have to be held in which the energy efficiency alternatives would then be considered in combination with clean energy alternatives." (Petition, p. 2)

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[5] The criteria for interlocutory review under 10 CFR § 2.341 are the same criteria formerly contained in 10 CFR § 2.786. Therefore, NRC precedents under 10 CFR § 2.786 are equally applicable here.

[6] As the Petition itself acknowledges at page 3, under 10 CFR § 2.311, Intervenors do not have a right to an appeal of a denial of some but not all of their contentions.

Intervenors' argument regarding the potential for an additional hearing does not provide an adequate basis for a claim of irreparable harm. It has long been held that an increase in the burden of litigation does not constitute serious and irreparable harm. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001). The risk of further proceedings due to a possibly erroneous Board interlocutory ruling is assumed by the parties to the proceeding. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984).

The few cases where the Commission granted interlocutory review based on serious and irreparable harm generally involved exceptional circumstances. For example, in *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995), the Commission found that improper disclosure of privileged material would likely result in irreparable harm. Also, in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-839, 24 NRC 45, 50-51 (1986), the Commission found that a board's denial of an intervenor's motion to correct an official transcript could result in serious and irreparable harm because intervenor's ability to file an appeal would be compromised. Clearly, Intervenors' complaint regarding the potential for additional hearings does not rise to this level of serious and irreparable harm. Instead, this case no different from any other case in which some but not all of the proposed contentions are rejected; the Commission's regulations are designed to preclude interlocutory review in these situations.

In summary, Intervenors have not satisfied the immediate or serious irreparable harm standard specified in 10 CFR § 2.341(f)(2)(i). Therefore, the Petition does not provide a sufficient basis for interlocutory review under this criterion.

B. Intervenors Have Not Demonstrated a Pervasive or Unusual Impact on the Proceeding.

Intervenors assert that the Board's interlocutory decision regarding clean energy alternatives will have a pervasive effect on the proceeding because it may result in "duplicative administrative processes later." (Petition, p. 12) This argument fails to satisfy the pervasive or unusual impact standard defined in 10 CFR § 2.341(f)(2)(ii).

Initially, we note that a mere claim of error by a licensing board does not *per se* justify interlocutory review by the Commission. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n. 11 (1983). This is because interlocutory errors are correctable on appeal from final board decisions and a legal error alone does not alter the basic structure of an ongoing proceeding in a pervasive or unusual manner. *Haddam Neck Plant*, CLI-01-25, 54 NRC at 374; *In re. Dr. James E. Bauer*, CLI-95-3, 41 NRC 245, 246 (1995). Under the Commission's rules, there is always the potential for additional hearings following an appeal to the Commission after a hearing, and such a potential does not constitute a pervasive or unusual impact upon the proceeding.

Furthermore, contrary to Intervenors' assertions, there would be no duplication of hearings should they eventually prevail on appeal in this proceeding. Per the Board's August 6, 2004 ruling on the Clinton ESP, the hearing will consider wind and solar power and combinations of certain alternatives. It may be expected that these hearings will address a variety of issues related to wind and solar power, including their technical feasibility, their availability in Illinois, their environmental impacts, and their costs. Findings on these issues would be unrelated to and unaffected by any subsequent hearings on energy efficiency. Therefore, such issues would not be subject to

reconsideration in any further hearings that may be required on energy efficiency. *At most*, there would be a need for additional hearings related to combinations of wind and solar and energy efficiency, but these hearings would not need to duplicate or reconsider the issues decided in the prior hearings. Instead, they would address viable new combinations not previously considered. Thus, contrary to the claims of the Intervenors, there would be no duplication of effort and therefore no pervasive impact on the proceeding. As a result, Intervenors have not established a basis for interlocutory review under Section 2.341(f)(2)(ii).

In any event, Intervenors' claim regarding the potential for a rehearing of issues related to combinations of alternatives is not sufficient to constitute a pervasive or unusual impact upon this proceeding. Prior Commission decisions governing discretionary interlocutory reviews provide guidance on the types of issues the Commission considers to affect the basic structure of a proceeding. For example:

- In *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992), the Commission reviewed a Licensing Board decision to consolidate a Subpart L proceeding into a Subpart G proceeding. The Commission held that the Board's decision affected the Subpart L proceeding in a pervasive and unusual manner by converting it into a more formal Subpart G proceeding. *Id.* at 85-86.

- In *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998), the Commission accepted interlocutory review of an unusual licensing board order that created two licensing board panels to hear one case.

- In *Mixed Oxide Fuel Fabrication Facility*, the Commission accepted interlocutory review when the intervenors challenged the very nature of the two-step licensing process for the facility. 55 NRC at 214.

Intervenors' concerns in this proceeding do not rise to this level of impact and therefore do not provide a basis for interlocutory review. In fact, a potential for rehearing always

exists whenever the Commission reverses a licensing board order after hearings have been completed. Such a potential impact is neither unusual nor pervasive.

For example, in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1111-14 (1982), a petitioner for interlocutory review argued that the licensing board's erroneous admission of a contention would lead to unnecessary hearings, "unwarranted delay, increased expense to the parties, and wasteful duplication of effort" given an ongoing rulemaking on the same topic. The Appeal Board rejected this argument, holding that it failed to explain how there would be a pervasive or unusual impact on the proceeding:

> the obvious fact that "once the hearing is held[,] the time and money expended in the trail of an issue cannot be recouped by any appellate action." The same is true, however, any time a contention is admitted over a party's objections and the hearing proceeds. The added delay and expense occasioned by the admission of Sunflower's contention – even if erroneous – thus does not alone distinguish this cases so as to warrant interlocutory review.

In summary, an argument that there may be wasteful or duplicative hearings due to an purportedly erroneous ruling on a contention is not a sufficient basis for a claim of a pervasive or unusual impact on a proceeding.

As another basis for interlocutory review, Intervenors assert that the Commission has never addressed energy efficiency alternatives in a deregulated electric market and therefore that the Board's ruling presents a "significant and novel legal issue" that warrants interlocutory review. (Petition, p. 13). However, the Board's ruling on energy efficiency does not raise any novel issues. It simply applies well-established Commission and judicial precedents. As discussed more fully in Section III.A.1 of this Answer, the Board held that energy efficiency is not a reasonable alternative because it would not serve EGC's business purposes for the Clinton project. The Board's decision

is fully in accord with the Commission's prior decision in *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 55 (2001) where the Commission held that agencies need only discuss alternatives that are reasonable and "will bring about the ends" of the proposed action. The Board's decision is also fully consistent with decisions in *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991) and *City of Grapevine, Texas v. Department of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). Therefore, there are no significant or novel legal issues raised by the Board's consideration of the economic goals of EGC in the ruling on the reasonableness of energy efficiency alternatives.

In any event, even if the Board's decision on this issue were novel, it does not justify interlocutory review. As the Commission has held, a novel ruling, without more, does not change the basic structure of a proceeding. *Sequoyah Fuels Corp.* (Gore Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000). Therefore, Intervenors' argument does not provided a sufficient basis for interlocutory review.

In summary, Intervenors have not provided a sufficient basis for the Commission to take the extraordinary step of taking interlocutory review at this time. Accordingly, as provided in cases such as *Vogtle Electric Generating Plant*, CLI-94-15, 40 NRC at 321, their Petition should be summarily denied.

III. The Licensing Board's Ruling Was Correct and Should Be Affirmed.

As discussed above, the Intervenors have not satisfied the standards for interlocutory review, and therefore their Petition should be denied. If the Commission

nevertheless decides to accept interlocutory review, the Commission should affirm the Licensing Board's rejection of the contention on energy efficiency.

A. The Licensing Board Correctly Ruled that EGC Could Limit its Evaluation to Alternatives that Would Accomplish its Business Purpose

As discussed above, the Licensing Board ruled that it was appropriate for Exelon Generation Company "to consider its own business objectives and status as an independent power provider - - as opposed to a public utility - - as it analyzes alternatives." The Intervenors offer two grounds for contesting this ruling. First, they argue that, under the National Environmental Policy Act ("NEPA"), the NRC is required to consider all reasonable alternatives to a proposed project, including energy efficiency. (Petition, pp. 7-9). Second, they argue that Exelon can carry out energy efficiency efforts, and therefore energy efficiency should be considered a reasonable alternative to a new nuclear power plant. (Petition, pp. 10-11). Neither of these arguments can withstand scrutiny.

1. Reasonableness of Energy Efficiency

Intervenors assert that energy efficiency is a reasonable alternative to a new nuclear power plant at the Clinton site. The basis for their assertion appears to be that further energy efficiency is possible in the state of Illinois.[7] However, such an allegation is not sufficient to demonstrate that energy efficiency is a reasonable alternative to the proposed Clinton project.

As discussed in detail below, under NEPA, the reasonableness of an alternative is judged by whether the alternatives will accomplish the goals or purpose of the project.

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7 *See* Petition, p. 9.

The Commission has held that agencies need only discuss alternatives that are reasonable and "will bring about the ends" of the proposed action. *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 55 (2001). Similarly, the courts have held that "the goals of an action delimit the universe of the action's reasonable alternatives." *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991). Furthermore, where a federal agency is not the sponsor of a project, the "consideration of alternatives may accord substantial weight to the preferences of the applicant . . . in the . . . design of the project." *City of Grapevine, Texas v. Department of Transportation*, 17 F.3d 1502,1506 (D.C. Cir. 1994). In this regard, an agency is allowed to consider the economic goals of the project's sponsor in determining the scope of alternatives to be evaluated. *Id.*

As noted above, the stated purpose of the Clinton project is to be a base load merchant generator to produce electricity for sale on the wholesale market. Therefore, in accordance with the above-cited precedents regarding the scope of appropriate alternatives to a proposed action, EGC considered in detail base load electric generators that could serve as an alternative to a new nuclear plant.[8] Neither energy conservation nor energy efficiency meets the goals of this project, because they do not supply electrical power for sale on the wholesale market. Therefore, they are not reasonable alternatives to a new nuclear power plant at the Clinton site and may be properly excluded from consideration.

Intervenors argue that the purpose of the Clinton project is to meet the energy needs of Illinois. Supplying energy needs is obviously an important benefit of the

[8] *See* Section 9.2.2 of ER.

project, and consideration of need for power from the project is required to be addressed as part of a combined license proceeding for the project. (*See* Section III.B below). However, the purpose of the Clinton project, as stated in the ESP application, is much more specific than simply supplying regional energy needs. The ESP application explicitly states that the purpose of the project is to produce electricity from a merchant generator for sale on the wholesale market. Intervenors are not allowed to redefine EGC's purpose for the project. As stated in *Citizens Against Burlington*, 938 F.2d at 380:

> An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.

Intervenors argue that an applicant cannot define the purpose of a project so narrowly that it excludes reasonable alternatives, citing cases such as *Colorado Environmental Coalition v. Dombeck*, 185 F. 3d 1162, 1174-75 (10th Cir. 1999); *Simmons v. U.S. Army Corps of Engineers*, 120 F. 3d 664, 669 (7th Cir. 1997); *Sylvester v. U.S. Army Corps of Engineers*, 882 F. 2d 407, 409 (9th Cir. 1989); and *Southern Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 53 (D.D.C. 2002). However, the Intervenors have misapplied those cases to the Clinton ESP proceeding. A close reading of cases such as *Simmons*, *Sylvester*, and *Colorado Environmental Coalition* demonstrates that the courts were concerned about agencies that defined the purpose of a project so narrowly that ***no*** alternatives would be reasonable.[2]

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[2] In *Southern Utah Alliance*, the court focussed on whether a particular alternative would achieve the applicant's purpose. 237 F. Supp 2d at 52-54. Thus, *Southern Utah Alliance* does not support Intervenors' argument that NRC should disregard EGC's purpose for the Clinton project.

For example, the court in *Colorado Environmental Coalition*, 185 F.3d at 1174-75 evaluated relevant case law and drew the following conclusions:

> The Seventh Circuit, and other courts, have interpreted this requirement [to consider reasonable alternatives] to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative (*i.e.*, the applicant's proposed project). Agencies are also precluded from completely ignoring a private applicant's objectives. We do not perceive these authorities as mutually exclusive or conflicting. They simply instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes. (Citations omitted).

The court went on to conclude that the Forest Service had considered four alternatives for expanding terrain for ski trails, and was reasonable in declining to consider an alternative that would not add terrain, given that the purpose of the proposed project was to add terrain for skiing. Thus, contrary to the argument of Intervenors, the holding in *Colorado Environmental Coalition* is fully in accord with (and, in fact, supports) the Licensing Board's ruling in the Clinton ESP proceeding.

Similarly, in *Sylvester*, opponents of a resort sought to require the Corps of Engineers to consider the alternative of constructing a golf course outside of the resort, rather than at the resort as proposed by the applicant. The court upheld the decision of the Corps not to consider the alternative of an offsite golf course because it would not meet the project's needs. As the court stated at 882 F.2d at 409:

> In evaluating whether a given alternative site is practicable, the Corps may legitimately consider such facts as the cost to the applicant and logistics. In addition, the Corps has a duty to consider the applicant's purpose. As the Fifth Circuit observed: "[T]he Corps has a duty to take into account the objectives of the applicant's project. Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable."
>
> Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable. . . . Yet, in determining whether an alternative site is practicable,

> the Corps is not entitled to reject [applicant's] genuine and legitimate conclusion that the type of golf course it wishes to construct is economically advantageous to its resort. (Citations omitted).

Thus, contrary to the argument of Intervenors, the holding in *Sylvester* is also fully in accord with the Licensing Board's ruling in the Clinton ESP proceeding.

The situation involving the Clinton ESP is not remotely comparable to the concerns of the courts in the cases cited by Intervenors. The courts were concerned about agencies that defined a project's purpose so narrowly that no alternatives were reasonable. This concern is not applicable to the Clinton ESP. Section 9.2 of the ER for Clinton ESP does identify and evaluate reasonable energy generation alternatives, such as coal and natural gas plants. Additionally, as admitted by the Licensing Board, Contention 3.1 will require an expanded evaluation of the alternatives of wind and solar power, and combination of alternatives. Thus, unlike the concerns expressed in the cases cited by the Intervenors, EGC has not defined the purpose of the Clinton project so narrowly as to render all alternatives unreasonable.

The ER for the Clinton ESP reasonably rejected alternatives that would not involve the generation of base load power for sale on the wholesale market. The purpose of a merchant generating plant (such as proposed for the Clinton site) is to *generate revenue for EGC from the sale of electricity.*[10] Alternatives involving conservation do not involve the sale of electricity, and therefore will not serve EGC's economic purpose for the Clinton project. As a result, as stated on pages 9.2-2 and 9.2-3 of the ER, conservation is not a reasonable alternative to the Clinton project because it will not serve

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[10] *See* ER at 9.2-2 (emphasis added).

EGC's economic goals. As the Commission has recently stated in *Hydro Resources, Inc.*, 53 NRC at 55-56, with respect to another project sponsored by a private applicant:

> The Intervenors entirely ignore the nature of the ISL project — it is a project proposed by a private applicant, not the NRC. "Where the Federal government acts, not as a proprietor, but to approve . . . a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited." Citizens Against Burlington, 938 F.2d at 197. The NRC is not in the business of crafting broad energy policy involving other agencies and non-licensee entities. Nor does the initiative to build a nuclear facility or undertake ISL uranium mining belong to the NRC.
>
> When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately "accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project." *Id.* The agency thus may take into account the "economic goals of the project's sponsor." City of Grapevine v. U.S. Dept. of Transportation, 17 F.3d 1502, 1506 (D.C. Cir.), *cert. denied,* 513 U.S. 1043 (1994); see also Citizens Against Burlington, 938 F.2d at 196 ("the agency should take into account the needs and goals of the parties involved in the application").

Since Intervenors do not dispute that conservation will not serve the economic goals of the Clinton project, the Licensing Board properly rejected Intervenors' contention on energy efficiency in this proceeding.

2. Ability of Exelon Generation Company to Carry Out Energy Efficiency

Intervenors argue that energy efficiency is a reasonable alternative because Exelon Generation Company can carry out energy efficiency. As a basis for this argument, Intervenors cite an unpublished decision in Illinois, which purportedly states that Exelon is a public utility. Intervenors also argue that Commonwealth Edison is an affiliate of Exelon Generating Company, and that Commonwealth Edison is a utility that

is able to carry out energy efficiency. However for several reasons, these arguments are unavailing.[11]

First, the Intervenors have mischaracterized the Illinois decision in *Abbott Laboratories, Inc. v. Illinois Commerce Commission*, Nos. 4-00-0922, 4-01-0034, unpublished Order (Ill. App. Ct. Oct 4, 2001). The case involved the transfer of nuclear plants by Commonwealth Edison, which is a public utility. Contrary to the assertions of the Intervenors, the court in that case did not state that Exelon is a public utility. We are attaching that decision for the convenience of the Commission.

Second, the applicant in this proceeding is Exelon Generating Company, not Commonwealth Edison. Therefore, it is legally irrelevant whether Commonwealth Edison can promote energy efficiency, since Exelon Generating Company has no control over Commonwealth Edison. As stated in 83 Ill. App. Code § 452.30(a) of the regulations of the Illinois Commerce Commission:

> Except as necessary under Section 452.50 of this Part [pertaining to emergencies] or required by an order of a state or federal court or administrative agency, an electric utility's transmission and distribution function and its generation function providing generation to Illinois customers shall operate independently of each other.

Finally, even if it were assumed *arguendo* that Exelon Generating Company were able to carry out energy efficiency efforts, such a capability would not render energy efficiency a reasonable alternative to a new nuclear power at the Clinton site. The

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[11] Intervenors also claim that EGC is required to consider alternatives that are outside the scope of its authority to implement. The Intervenors cite no authority for that proposition, except for guidance issued by the Council on Environmental Quality in 1981. Suffice it to say, that guidance is not binding upon the NRC. In any event, that guidance does not reflect more recent rulings in cases such as *Citizens Against Burlington* and *Hydro Resources*, which directly hold that the applicant's purpose for the project should be afforded substantial weight in determining the reasonableness of alternatives.

standard under NEPA is not whether the applicant is able to implement an alternative; instead, the standard is whether the alternative is reasonable in light of the applicant's purpose for the proposed project. As indicated above, the purpose of the Clinton project is to generate base-load power for sale on the wholesale market. That purpose would not be served by energy efficiency, regardless of EGC's authority to implement energy efficiency measures. As stated by the Court of Appeals in *Citizens Against Burlington*, 938 F.2d at 195, and as reiterated by the Commission in *Hydro Resources*, 53 NRC at 55: "When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another might be achieved."[12]

B. The Licensing Board Correctly Ruled that Consideration of Energy Efficiency Is Equivalent to a Need for Power Analysis that is Not Required for an ESP under NRC Regulations

As discussed above, the Licensing Board ruled that consideration of energy efficiency is equivalent to a need for power analysis. As a result, the Board held that Intervenors' contention on energy efficiency was outside the scope of the ESP proceeding and represents a challenge to the regulations in 10 CFR §§ 52.17(a)(2) and 52.18. As discussed below, Intervenors have not identified any legitimate grounds for challenging this ruling.

Under the Commission's regulations in 10 CFR §§ 52.17(a)(2) and 52.18, an assessment of the benefits of a project (such as need for power) need not be included as part of an ESP proceeding. Instead, under 10 CFR § 52.79(a)(1), any environmental

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12 Intervenors cite *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 295-96 (D.C. Cir. 1988) for the proposition that NEPA requires a consideration of energy conservation. However, that case involved a five-year plan by a federal agency, not a project proposed by a private company. Therefore, it is not applicable to the Clinton ESP.

issues not considered in the ESP proceeding must be considered in the combined license ("COL") proceeding for the facility. Therefore, prior to commencement of construction of the facility, the benefits of the project (*e.g.*, need for power) will be considered.

The Licensing Board was clearly correct in ruling that consideration of energy efficiency is equivalent to a need for power analysis. For example, the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 552 (1978) stated that energy conservation is a means of reducing "projected demands for electricity from a particular proposed plant." Similarly, NUREG-1555, *Environmental Standard Review Plan*, Section 9.2.1, p. 9.2.1-6, states that "in the process of analyzing and evaluating need for the plant, [NRC reviewers] should make a determination that conservation is or is not a practical alternative to the proposed plant." Intervenors do not appear to challenge this aspect of the ruling by the Licensing Board.

Instead, Intervenors argue that energy efficiency and nuclear power are simply two ways of meeting future energy needs. Intervenors then state that "If the Commission does not need to analyze the need for power before determining in this proceeding whether a new nuclear plant is appropriate, the agency does not have to consider the need for power before determining whether increased energy efficiency is appropriate." (Petition, p. 11). However, Intervenors are incorrect in asserting that an ESP proceeding determines "whether a new nuclear plant is appropriate." Instead, as clearly reflected in 10 CFR §§ 52.17(a)(2), 52.18, and 52.79(a)(1), consideration of the benefits of a new nuclear plant (including need for the plant) may be deferred until the COL proceeding. In such an event, the ESP proceeding does not determine "whether a new nuclear plant is appropriate." Instead, it merely evaluates the environmental impacts of the plant and

considers various alternatives to the plant, without reaching any conclusions regarding the overall balance of costs and benefits of the plant. Thus, Intervenors' argument is based upon a faulty premise and should be rejected.

Intervenors also argue that the ER for the Clinton ESP in fact considers need for power, and therefore that need for power (and thus energy efficiency) is within the scope of this proceeding. However, Intervenors have misinterpreted the ER, and their argument is contrary to explicit statements in the ER.

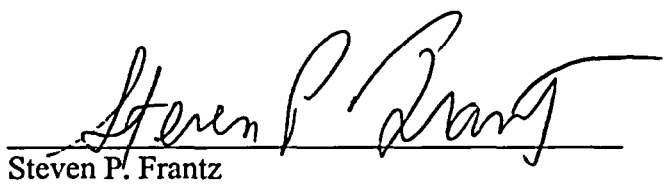
In particular, Intervenors argue that the ER includes an evaluation of need for power because it rejects various clean energy resources on the ground that they are not suitable for base load capacity. However, contrary to Intervenors' arguments, such a statement does not constitute an assessment that base-load power is needed in Illinois. To the contrary, the ER (p. 9.1-1) for the ESP application explicitly states that "the need for power will not be evaluated as part of this ESP." Similar statements appear on page 8-1 of the ER and page 1-2 of the Administrative Information for the application. Therefore, Intervenors are factually incorrect in stating that the ER includes an assessment of need for power. Accordingly, their agreement provides no basis for challenging the decision of the Licensing Board.

In summary, the Licensing Board correctly ruled that consideration of energy efficiency is equivalent to a need for power analysis, and therefore need not be included as part of the ESP proceeding.

IV. Conclusions

The Intervenors have not satisfied the standards for interlocutory review. Therefore, the Petition should be denied. If the Commission nevertheless decides to accept interlocutory review, the Commission should affirm the Licensing Board's decision, because it is in accordance with precedents and is consistent with NRC's regulations.

Respectfully submitted,



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NOS. 4-00-0922, 4-01-0034 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ABBOTT LABORATORIES, INC.; A. FINKL and SONS CO., INC.; CATERPILLAR, INC.; DAIMLER CHRYSLER CORPORATION; FORD MOTOR COMPANY; MODERNDROP FORGE COMPANY; MONSANTO COMPANY; MOTOROLA, INC.; NABISCO BRANDS, INC.; NORTHWESTERN STEEL and WIRE COMPANY; VISKASE CORPORATION OWENS-ILLINOIS, INC.; and ACME STEEL COMPANY, Petitioners, v. (No. 4-00-0922) THE ILLINOIS COMMERCE COMMISSION; COMMONWEALTH EDISON COMPANY; CITIZENS UTILITY BOARD; CITY OF CHICAGO; COOK COUNTY STATE'S ATTORNEY; and THE PEOPLE OF STATE OF ILLINOIS, Respondents.	)	Administrative Review from the Illinois Commerce Commission Nos. 00-0369 00-0394
THE CITY OF CHICAGO, a Municipal Corporation, Petitioner-Appellant, v. (No. 4-01-0034) THE ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON COMPANY, Respondents-Appellees.	)	

ORDER

In case No. 4-00-0922, petitioners, Abbott Laboratories, Inc.; A. Finkl and Sons Co., Inc.; Caterpillar, Inc.; Daimler Chrysler Corporation; Ford Motor Company; ModernDrop Forge Company; Monsanto Company; Motorola, Inc.; Nabisco Brands, Inc.; Northwestern Steel and Wire Company; Viskase Corporation Owens-Illinois, Inc.; and Acme Steel Company, bring this statutory direct review under the Illinois Public Utilities Act (Act) (220 ILCS 5/10-113, 10-201(a) (West 1998)) and Supreme Court Rule 335 (155 Ill. 2d R.

335) from a decision of the Illinois Commerce Commission (Commission). The petitioners in this case are collectively referred to as the Illinois Industrial Energy Consumers (IIEC). Named respondents are the Commission, Commonwealth Edison Company (ComEd), Citizens Utility Board, City of Chicago, Cook County State's Attorney, and the People of the State of Illinois. In case No. 4-01-0034, petitioner City of Chicago seeks statutory direct review of the same Commission decision identifying the Commission and ComEd as respondents. These review proceedings have been consolidated in this court. The City of Chicago, although being named a respondent in case No. 4-00-0922, has adopted the brief of the IIEC. The Commission and ComEd have each filed a brief standing as the responsive brief for both cases, and the IIEC has filed a reply brief.

The issues are whether (1) this court has jurisdiction of these review proceedings and (2) the Commission properly approved the transfer of ComEd's nuclear decommissioning trust funds under sections 16-111(g) of the Act (220 ILCS 5/16-111(g) (West Supp. 1999)) and 8-508.1 of the Act (220 ILCS 5/8-508.1 (West 1998)). We affirm.

ComEd's brief raised the issue of this court's jurisdiction, and the reply brief of IIEC and the City of Chicago responded to that argument. On June 6, 2001, this court directed the Commission to address the issue of this court's jurisdiction. On June 21, 2001, the Commission filed its response. On June 25, 2001, the IIEC and the City of Chicago filed a motion for leave to

file a response to the Commission's jurisdictional filing, along with a copy of that response. We now grant the IIEC and the City of Chicago's motion to file their response, and we have considered all of these documents.

This court has jurisdiction. The record reflects that the Commission issued its decision on August 17, 2000. On August 28, 2000, applications for rehearing were timely filed by IIEC and the City of Chicago (220 ILCS 5/16-111(g)(vi) (West 1998) (10-day limit for filing an application for rehearing)). August 27, 2000, was a Sunday (5 ILCS 70/1.11 (West 1998)). On September 14, 2000, the Commission filed a notice of action stating that the Commission "has entered an order to deny" the motion to stay filed by IIEC, the application for rehearing filed by IIEC, the application for rehearing filed by the City of Chicago, the application for rehearing filed by the County of Cook, and a motion for leave to file instanter on behalf of Cook County. The record does not contain any specific order referred to in the notice. On September 21, the Commission issued a corrected notice stating the Commission had, on September 13, entered an order as stated in its September 14 notice except that no order was entered in the application for rehearing filed by Cook County. The record suggests that the correction merely showed that because Cook County's motion for leave to file instanter was denied, there was no reason to rule on Cook County's application for rehearing. Section 10-113(a) grants the Commission authority at any time, upon notice and an opportunity to be heard, to "alter or amend any *** decision made by it."

220 ILCS 5/10-113(a) (West 1998). The corrected notice of action filed on September 21, 2000, substantially complied with section 10-113(a). The Act requires the appearing party to file its petition for review within 35 days of the date of service of a copy of the decision denying the rehearing on the effected party. 220 ILCS 5/10-201(a) (West 1998). The appealing parties filed their petitions for review on October 26, 2000, the 35th day after the date of service of the corrected notice of denial of the applications for rehearing. The petitions for review were timely filed.

A decision of the Commission is considered prima facie reasonable, its findings of fact are deemed prima facie true, and the party appealing bears the burden of "proof" on all issues raised on review. 220 ILCS 5/10-201(d) (West 1998). The scope of review of this court is limited to determining whether (1) the Commission had "jurisdiction," meaning it acted within the scope of its authority; (2) it made adequate findings in support of its decision; (3) its decision was supported by substantial evidence in the record; and (4) constitutional rights were not violated. 220 ILCS 5/10-201(e)(iv)(A) through (e)(iv)(C) (West 1998); Lakehead Pipeline Co. v. Illinois Commerce Comm'n, 296 Ill. App. 3d 942, 949, 696 N.E.2d 345, 350 (1998); Central Illinois Public Service Co. v. Illinois Commerce Comm'n, 268 Ill. App. 3d 471, 476, 644 N.E.2d 817, 821 (1994). Commission decisions are entitled to great deference because it is an administrative body possessing expertise in the field of public utilities, but the Commission's determinations of questions of law are not binding on this court. Archer-

Daniels-Midland Co. v. Illinois Commerce Comm'n, 184 Ill. 2d 391, 397, 704 N.E.2d 387, 390 (1998).

The petitioners challenge the Commission's authorization of the transfer of funds in ComEd's nuclear decommissioning trusts. Petitioners make the seemingly incongruous argument that (1) the Commission had no authority to transfer the trust funds and (2) the Commission abrogated its authority over the funds. To the extent that the question of the Commission's authority over the trusts involve statutory construction, a question of law exists that this court considers de novo. Branson v. Department of Revenue, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995). The question of whether the trust funds were assets of ComEd could be a question of fact, but we find the question is settled satisfactorily by reference to the trust agreements and the controlling statutes. An equally significant question is whether ComEd and the Commission can utilize section 16-111(g) of the Act or whether the subject transfer is governed by section 16-114.1 of the Act (220 ILCS 5/16-114.1 (West Supp. 1999)).

The cardinal rule of statutory construction is to ascertain and give effect to the intent and meaning of the legislation, and the statutory language is the best indication of legislative intent. Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc., 158 Ill. 2d 76, 81, 630 N.E.2d 820, 822 (1994). In determining legislative intent, courts look to the evils sought to be remedied and the purposes to be achieved. American Stores Co. v. Department of Revenue, 296 Ill. App. 3d 295,

299, 694 N.E.2d 644, 647 (1998). If the statute is ambiguous, substantial weight is given to the interpretation of the agency charged with its administration. Freeman United Coal Mining Co. v. Industrial Comm'n, 317 Ill. App. 3d 497, 503, 739 N.E.2d 1009, 1014 (2000). While deference is generally accorded the construction placed on a statute by the agency granted the authority to administer that statute, the courts are not bound by an agency's erroneous construction of the statute. Taylor v. Cook County Sheriff's Merit Board, 316 Ill. App. 3d 574, 579, 736 N.E.2d 673, 677 (2000).

This proceeding was initiated by ComEd on May 22, 2000, seeking the Commission's approval of its intent to transfer to its affiliate, Exelon Genco, all nuclear electric generating assets, together with certain related assets and obligations, and its wholesale marketing business, including any and all real and personal property used to conduct the business, in exchange for ComEd common stock. To implement the transfer and posttransfer operations, ComEd expressed its intent to enter into various agreements with Exelon Genco, including a "Contribution Agreement," used to transfer various assets and obligations. In this transaction, ComEd would transfer all six of its nuclear stations and all assets, including investments, held in ComEd's decommissioning trusts. Pursuant to a Commission order entered December 7, 1988 (docket No. 88-0298), ComEd established two trusts, a nontax-qualified decommissioning trust and a tax-qualified decommissioning trust. Although the numbers of the specific provisions differ

slightly in each trust agreement, article II of each trust agreement provides that (1) ComEd's interests in the trusts are not transferrable, voluntarily or involuntarily; (2) the trusts may be terminated to the extent "allowed or provided under the Illinois Statute, the NRC Rule or any Future Order" upon ComEd disposing of any interest in the subject plant; and (3) upon termination, the trustee shall distribute the entire remaining assets of the trust to ComEd, provided that there is to be no such distribution without either (a) "an order of the ICC or NRC specifically authorizing such distribution" with all necessary consents and approvals to distribution obtained or (b) ComEd furnishing an opinion of legal counsel to the effect that no such order is necessary and all necessary consents and approvals have been obtained.

The Commission relied on ComEd's accounting treatment of the funds in determining whether the trust funds were assets of ComEd. Petitioners argue that the law of trusts governs. It is not that simple. The decommissioning trusts in this case are governed by statutes. See, e.g., 26 U.S.C.A. §468A (West Supp. 2001) (setting out special rules for taxation of nuclear decommissioning costs).

Section 8-508.1(b) of the Act requires a public utility to establish two decommissioning trusts, one tax qualified and one nontax qualified, for each nuclear power plant. 220 ILCS 5/8-508.1(b) (West 1998). Section 8-508.1(c) of the Act provides for funding and maintenance of the trusts. 220 ILCS 5/8-508.1(c) (West 1998). Distribution may be made from a nuclear decommissioning

trust only (1) to pay administrative costs, income tax, and other incidental expenses of the trust; (2) to satisfy the utility's liabilities for nuclear decommissioning costs; and (3) as a refund to the utility of trust assets in excess of nuclear decommissioning costs provided however that the utility use those refunded amounts for the purpose of refunds or credits to the utility's customers as soon as practicable. 220 ILCS 5/8-508.1(c)(3)(i), (c)(3)(ii) (West 1998). Income earned on the trust fund is accumulated in the trust. 220 ILCS 5/8-508.1(c)(3)(vii) (West 1998). Section 8-508.1(c)(3)(iii) provides:

> "In the event a public utility sells or otherwise disposes of its direct ownership interest, or any part thereof, in a nuclear power plant with respect to which a nuclear decommissioning fund has been established, the assets of the fund shall be distributed to the public utility to the extent of the reductions in its liability for future decommissioning *** of such nuclear power plant and the liabilities that have been assumed by another entity. The public utility shall, as soon as practicable, provide refunds or credits to its customers representing the full amount of the reductions in its liability for future decommissioning." (Emphasis added.) 220 ILCS 5/8-508.1(c)(3)(iii) (West 1998).

Irrespective of how ComEd's accountant characterizes the trust fund in the company's books, it is clear that section 8-508 places obligations on ComEd. We particularly note that this section is included in article VIII of the Act encompassing service obligations and conditions. An obligation is a duty imposed by law. Black's Law Dictionary 1102 (7th ed. 1999). Section 8-508 obligates ComEd to create and fund the trusts to pay the decommissioning costs and to refund the excess to the customers. On the other hand, it does authorize the use of the trust funds for payment of the liabilities incurred by ComEd for decommissioning costs. One ordinary definition of the term "assets" is property of a person or entity subject to the payment of the person's or entity's debts. See Webster's Third New International Dictionary 131 (1993).

The distinction in these terms is important because ComEd and the Commission chose to proceed in this matter under section 16-111(g) of the Act. As the Commission decision readily notes, section 16-111(g) provides the electric utility with authority to engage in certain types of transactions, including the right to "sell, assign, lease or otherwise transfer assets *** and as part of such transaction enter into service agreements, power purchase agreements, or other agreements with the transferee." 220 ILCS 5/16-111(g)(3) (West Supp. 1999). The Commission, in determining the trust funds to be assets of ComEd, relied on the language in section 8-508.1 that the trusts "shall be separate from all other accounts and assets of the public utility." 220 ILCS 5/8-

508.1(a)(3) (West 1998).

The transfer of trust funds in this case involves as much the assumption of a legal obligation by Exelon Genco as the transfer of assets to it by ComEd. In this case, we must determine whether the Commission choosing simply to apply section 16-111(g) of the Act ignored sections 8-508.1(c)(3)(iii) and 16-114.1. We read the emphasized language in section 8-508.1(c)(3)(iii) quoted above to demonstrate the legislature's intent and expectation that another party may assume liabilities for nuclear decommissioning costs.

Section 16-114.1 specifically provides for the recovery of decommissioning costs in connection with a nuclear power plant sale agreement. Generally, where there is an irreconcilable conflict, specific statutes take precedence over general statutes. See In re Tiney-Bey, 302 Ill. App. 3d 396, 400, 707 N.E.2d 751, 755 (1999). However, it is clear from its terms that section 16-114.1 does not apply to this case.

Section 16-114.1 only applies to an electric utility that enters into an agreement to sell a nuclear power plant and, as part of the agreement, agrees to (1) make contributions to a decommissioning trust in specific amounts for a specific period of time after the sale is consummated or (2) purchases an insurance instrument to provide for the payment of decommissioning costs. 220 ILCS 5/16-114.1(a) (West Supp. 1999). ComEd's application elected for neither of these options, choosing instead to ask the Commission to authorize Exelon Genco to take over the decommission-

ing obligations and undertake to continue funding and maintain the trusts for these nuclear power plants. The Commission could reasonably find that section 16-114.1 did not set out the exclusive options available when a nuclear power plant is sold. The major purpose for these statutes is to ensure that funds are available to pay the decommissioning costs when a nuclear power plant is closed. Petitioners' position would require ComEd to immediately refund to consumers the funds currently in the trusts because the transactions in this case do not, in themselves, amount to closing of any nuclear station, although one of the six stations involved is already retired. However, the Act would require Exelon Genco to maintain decommissioning trusts, and the only way it could adequately fund those trusts to cover decommissioning costs for these nuclear power plants, some of which might be imminent in light of the age of the stations, is to increase rates. The purpose of the Act is to ensure the providing of reliable energy services to the citizens of the State "at the least possible cost." 220 ILCS 5/1-102(a) (West 1998). Were we to adopt the petitioners' interpretation of the statutes, ComEd would be required to refund funds to customers and the Commission would be required to authorize increased electrical rates by Exelon Genco. This giving with one hand and taking away with the other is an absurd result not intended by the legislature. The courts construe statutes so as to avoid absurd, unjust, or unreasonable results. In re County Collector of Du Page County for Judgment for Taxes for Year 1993, 187 Ill. 2d 326, 332, 718 N.E.2d 164, 168 (1999).

The Commission's finding that the decommissioning trust funds are assets to the public utility is supported by substantial evidence and is not contrary to law. The Commission has the authority under section 16-111(g) to authorize the transfer of the trusts as it did in this case, and the Commission did not abrogate its authority over the trusts.

The order of the Commission is affirmed.

Affirmed.

McCULLOUGH, J., with MYERSCOUGH and KNECHT, JJ., concurring.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket No. 52-007
EXELON GENERATION COMPANY, LLC	)	ASLBP No. 04-821-01-ESP
(Early Site Permit for the Clinton ESP Site)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Exelon Generation Company's Answer in Opposition to Petition For Interlocutory Review" in the captioned proceeding have been served as shown below by deposit in the United States mail, first class, this 31st day of August, 2004. Additional service has also been made this same day by electronic mail as shown below.

Office of the Secretary* U.S. Nuclear Regulatory Commission Attn: Rulemakings and Adjudication Staff Washington, DC 20555-0001 email: hearingdocket@nrc.gov	Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, DC 20555-0001
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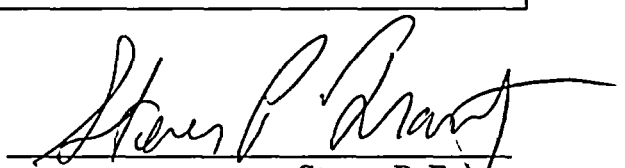

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