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OFFICE OF SECRETARY
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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))	September 17, 2004

**JOINT RESPONSE OF EXELON GENERATION COMPANY AND THE NRC
STAFF TO LICENSING BOARD REQUEST REGARDING MANDATORY
HEARING PROCEDURES FOR THE CLINTON EARLY SITE PERMIT**

In the August 6, 2004 and September 2, 2004 Orders of the Atomic Safety and Licensing Board ("Licensing Board") in the Clinton Early Site Permit ("ESP") proceeding, the Licensing Board requested that Exelon Generation Company ("EGC") and the U.S. Nuclear Regulatory Commission ("NRC") staff provide the Licensing Board with their views regarding conduct of the Clinton ESP mandatory hearing and the matters to be considered in that hearing. EGC and the NRC staff hereby file this joint response to the Board's request.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its August 31, 2004 Notice of Hearing, the Licensing Board listed six matters that it is required to consider or determine during the hearing. Specifically, the Licensing Board will:

- (a) Consider whether issuance of the ESP will be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1);

(b) Determine whether, taking into consideration the site criteria contained in 10 C.F.R. Part 100, a reactor or reactors having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the public health and safety (Safety Issue 2);

(c) Consider whether in accordance with the requirements of 10 C.F.R. Part 51, Subpart A, the ESP should be issued as proposed;

(d) Determine whether the requirements of sections 102(2)(A), (C), and (E) of the National Environmental Policy Act of 1969 and 10 C.F.R. Part 51, Subpart A, have been complied with in the proceeding;

(e) Consider the final balance among conflicting factors contained in the record of proceeding with a view to determining the appropriate action to be taken; and

(f) Determine, after considering reasonable alternatives, whether a license should be issued, denied, or appropriately conditioned to protect environmental values.

The first two issues pertain to safety, and the last four pertain to environmental matters.

These issues are generally consistent with the requirements in 10 C.F.R. § 2.104(b) for notices of hearings for Construction Permit proceedings and the "Conclusions of Law" made in initial nuclear power plant Construction Permit proceedings. *See generally Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-72-26, 5 AEC 120 (1972); *Georgia Power Co.* (Edwin I. Hatch Nuclear Plant, Unit 2), LBP-72-36, 5 AEC 242 (1972); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-4, 7 NRC 92 (1978).

There is no direct NRC regulation or precedents governing the conduct of the mandatory hearing for ESP proceedings. However, under 10 C.F.R. § 52.21, an ESP is considered to be a partial Construction Permit and is subject to the applicable procedural requirements in Part 2 related to Construction Permits. Therefore, mandatory Construction Permit hearings provide relevant guidance for mandatory ESP hearings.

As with Construction Permit proceedings, the Findings of Fact and Conclusions of Law in the Clinton ESP proceeding should be based on the entire record of the proceeding, including pre-filed written testimony, other documentary evidence, and oral evidence. As exemplified by decisions such as *Shearon Harris*, LBP-78-4, the Findings of Fact should be separated into three principal areas:

- (1) Radiological Health and Safety Issues (Issues (a) and (b) above),
- (2) Environmental Issues (Issues (c), (d), (e), and (f) above), and
- (3) Matters in Controversy (Contention 3.1)

In making its Findings of Fact on uncontested issues, the Licensing Board should rely on information provided in the application, the safety evaluation report (“SER”) and environmental impact statement (“EIS”) prepared by the NRC Staff, the Advisory Committee on Reactor Safeguards (“ACRS”) report on the application, and the supporting testimony. *See generally Fermi, Hatch, and Shearon Harris, supra.* The Licensing Board is not required to conduct a *de novo* review. Instead, as provided in the Notice of the Clinton ESP proceeding (68 Fed. Reg. 69426, 69427 (Dec. 12, 2003)) and 10 C.F.R. § 2.104(b), the Board should consider the findings made by the NRC staff, determine whether the application and record contain sufficient information, and determine whether the staff’s review has been adequate. As stated in Section V(f) of Appendix A to 10 C.F.R. Part 2 (2004) with respect to contested construction permit proceedings:¹

As to matters pertaining to radiological health and safety which are not in controversy, boards are neither required nor expected to duplicate the review

¹ Appendix A was deleted by the recent revision to Part 2. *See* 69 Fed. Reg. 2182, 2274 (Jan. 14, 2004). However, Appendix A still provides useful guidance on the scope of mandatory Construction Permit proceedings.

already performed by the staff and ACRS, and they are authorized to rely upon the testimony of the staff, the applicant, and the conclusions of the ACRS, which are not controverted by any party. . .

[T]he board will, as to environmental impact matters, (a) determine whether the requirements of section 102(2) (A), (C), and (E) of the National Environmental Policy and subpart A of part 51 of this chapter have been complied with; (b) independently consider the final balance among conflicting factors contained in the record with a view to determining the appropriate action to be taken; and (c) determine whether the construction permit should be granted, denied, or appropriately conditioned to protect environmental values.

See also, Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10, 13 (2004) (with respect to matters that are not subject to admitted contentions in a mandatory hearing for an enrichment facility, the licensing board shall make its determinations on safety and environmental issues “without conducting a de novo evaluation of the application”);² *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 774 (1977) (on uncontested safety issues, a licensing board need not duplicate the staff’s review but must pass judgment on whether the review has been adequate).

The Licensing Board members should review and become familiar with the application, SER, EIS, and ACRS report prior to the hearing.³ If the Board has any questions regarding the adequacy of EGC’s application or the staff’s review or the matters discussed therein, we would expect that the Board would pose questions in a written order or during a prehearing conference. Those questions would then be

² We believe that the Commission’s directions in Section II.D, E, and F in *Louisiana Energy Services*, 59 NRC at 12-13, on the scope and content of the mandatory hearing are equally appropriate for this proceeding (after accounting for the fact that the ESP proceeding is conducted under Part 52 rather than Part 70).

³ *See, e.g.*, Section I(d) of Appendix A to 10 C.F.R. Part 2 (2004).

addressed in a written filing or as part of its pre-filed testimony, as appropriate. *See, e.g., Hatch*, 5 AEC at 244.

As exemplified in decisions such as *Shearon Harris*, licensing board Findings of Fact on uncontested safety and environmental issues tend to have a uniform format and content. In general, EGC and the NRC staff recommend that the Licensing Board in the ESP proceeding use this same format and content for its Findings of Fact, modified to reflect that an ESP proceeding has a narrower scope than a Construction Permit proceeding. The format and content of the principal Findings of Fact are discussed in further detail below.

A. Radiological Health and Safety Issues

EGC will introduce into evidence the Site Safety Analysis Report (“SSAR”) and Emergency Plan,⁴ which are part of the ESP application. The NRC staff will introduce the SER, but does not plan to prepare and submit an executive summary of the SER. Based upon the application and SER, and accompanying testimony, the Board should determine whether the application has provided sufficient information relative to the radiological health and safety of the proposed site, and whether the staff’s consideration, review, and evaluation of that information has been satisfactorily performed. *See generally Washington Public Power Supply System (WPPSS Nuclear Project, Nos. 3 and 5), LBP-78-14, 7 NRC 599, 604 (1978); Shearon Harris, LBP-78-4.* To do so, the Licensing Board should make the following findings:

⁴ As allowed by 10 C.F.R. § 52.17(b)(2), EGC has not provided a complete Emergency Plan but instead has described the major features of the Emergency Plan. A complete Emergency Plan will need to be included as part of the combined license application.

- The Application and Its Review: The Licensing Board should make a finding on whether the SSAR adequately describes the proposed site and reactor facility in accordance with the Commission's regulations, and whether the staff and ACRS have found that there is reasonable assurance that a facility (having the characteristics that fall within the parameters for the site) can be constructed and operated at the site without undue risk to the health and safety of the public.
- The Site: The Licensing Board should make a finding on whether the SSAR contains adequate information on the physical characteristics of the site, including its geology, seismology, hydrology, and meteorology, and whether this information conforms to the Commission's reactor site criteria in 10 C.F.R. Part 100 and 10 C.F.R. § 50.34(a)(1).
- Common Defense and Security: The Licensing Board should make a finding on whether the application contains information sufficient to demonstrate that (1) the activities to be conducted are within the jurisdiction of the United States; (2) EGC is not owned, dominated, or controlled by an alien, a foreign corporation, or a foreign government, and (3) the application does not involve any restricted data.
- Emergency Plans: The Licensing Board should make a finding on whether there are any significant impediments to the development of complete emergency plans, and whether the major features of the Emergency Plan as described in the application are acceptable.

Other radiological health and safety findings normally required for Construction Permits, including technical and financial qualification of the applicant, detailed design information, research and development activities, conduct of operations, organization and

management, and security (except for security issues specified in 10 C.F.R. § 100.21(f)) are not within the scope of the ESP proceeding. Therefore, the Licensing Board need not and should not make findings on such issues.

B. Environmental Issues

EGC will introduce into evidence the Environmental Report (“ER”) and the Site Redress Plan, which are part of the ESP application. The NRC staff will introduce the EIS, but does not plan to prepare and submit an executive summary of the EIS. Based upon the application and EIS, and accompanying testimony, the Board should determine whether the application has provided sufficient information relative to the environmental impacts of construction and operation of a facility at the proposed site, and whether the Staff’s consideration, review, and evaluation of that information has been satisfactorily performed. *See generally Shearon Harris, LBP-78-4.* To do so, the Licensing Board should make the following findings:

- **Environmental Report and Impact Statements:** The Licensing Board should make a finding on whether the ER and EIS contain an adequate review and evaluation of the environmental impacts resulting from plant construction and operation, and whether the ER and EIS set forth a reasonable evaluation of alternative sites and generating sources.
- **Impacts of Construction:** The Licensing Board should make a finding on whether the ER and EIS adequately consider the environmental impacts during construction, and whether EGC has identified appropriate measures as necessary to mitigate them given the current state of design information available.

- Impacts of Operation: The Licensing Board should make a finding on whether the ER and EIS adequately consider the environmental impacts of operation, and whether EGC has identified appropriate measures to mitigate them given the current state of design information available.
- Monitoring Programs: The Licensing Board should make a finding on whether the ER and EIS describe adequate radiation and environmental monitoring programs.
- Alternative Sites: The Licensing Board should make a finding on whether the ER and EIS consider a reasonable set of alternative sites and demonstrate that there is no alternative site within that set that is obviously superior to the Clinton site.
- Alternative Methods of Generation: The Licensing Board should make a finding on whether the ER and EIS consider a reasonable set of alternative generating sources and demonstrate that there is no alternative source that is preferable to the proposed Clinton facility. This Finding should be in addition to the Board's Findings on Contention 3.1, which are discussed in the following section.
- Site Redress Plan: The ESP application for the Clinton site includes a Site Redress Plan. The Licensing Board should make a finding on whether site preparatory activities identified in the Plan would result in no significant adverse environmental impact which cannot be redressed, and whether there is reasonable assurance that redress carried out under the Plan will achieve an environmentally stable and aesthetically acceptable site suitable for existing NRC-approved nuclear uses and whatever non-nuclear use may conform with local zoning laws. See 10 C.F.R. §§ 52.17(c) and 52.25(a).

- Input to the Cost-Benefit Balance: As allowed by 10 C.F.R. §§ 52.17(a)(2) and 52.18, the application does not include an assessment of the benefits of a proposed facility at the Clinton ESP site, and therefore does not include a cost-benefit analysis. Such an analysis will be included as part of the combined license (“COL”) proceeding for the facility. Therefore, the Licensing Board need not and should not make a finding regarding the cost-benefit of a proposed facility at the Clinton ESP site. However, as input for the cost-benefit analysis to be performed in the COL proceeding, the Licensing Board should determine whether the ER and EIS contain a systematic, interdisciplinary review of the proposed site, whether environmental factors have been given appropriate consideration in the decision making along with technical and other considerations, and whether reasonable evaluations of alternative sites and energy generating sources have been performed.

Need for power and need for the facility are not required to be addressed in this proceeding. Additionally, there are other environmental analyses that are heavily dependent upon plant-specific features, such as the analyses of severe accident mitigation design alternatives (“SAMDA”) and alternative facility systems. The Licensing Board should explicitly note that these issues are not within the scope of the ESP and will need to be considered in the COL proceeding under 10 C.F.R. §§ 52.79(a)(1) and 52.89.

C. Findings of Fact – Matters in Controversy

The Board should determine whether, based on the record and evidence presented at the hearing, wind and solar power and combinations involving wind and solar power are preferable to the proposed facility for supplying baseload power in Illinois.

In summary, the Licensing Board should determine whether the review of the ESP application by the staff has been adequate and that the application and record of the proceeding contain sufficient information to support the Findings of Fact and the Conclusions of Law. See, e.g., *WPPSS Nuclear Project*, 7 NRC at 639.

II. CONDUCT OF THE MANDATORY HEARINGS

For the uncontested portion of the hearing, EGC proposes to assemble a panel of witnesses to address the Findings of Fact in the radiological health and safety area and a panel of witnesses to address the environmental area. Appropriate written testimony would be provided for each panel, relying heavily upon the ESP application. The NRC staff will also file written testimony on these matters, relying heavily upon its SER and EIS.

For the contested portion of the hearing involving alternative energy sources, EGC proposes to rely on both experts and a panel of witnesses, as appropriate, to sponsor written testimony to address Contention 3.1. The NRC staff will also rely upon expert witnesses to sponsor written testimony related to Contention 3.1. EGC and the NRC staff expect that the Intervenors will offer expert witnesses and written testimony on Contention 3.1.

As noted in the Licensing Board's August 31, 2004 Notice of Hearing, the Clinton ESP hearing will be governed by the hearing procedures set forth in 10 C.F.R. Part 2, Subparts C and L (10 C.F.R. §§ 2.300-390, 2.1200-1213). EGC and the NRC

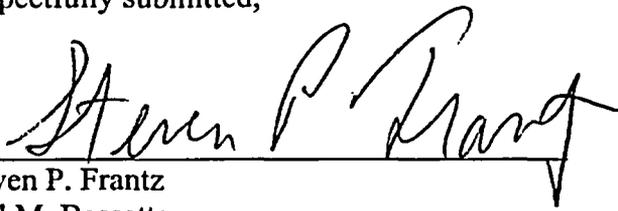
staff respectfully request that the Licensing Board conduct the hearings in accordance with the following guidelines, as authorized by Subparts C and L.

- As there is only one common contention admitted in this proceeding, Intervenors should consolidate all actions associated with this proceeding, including the presentation of evidence, briefs, proposed findings of fact, and conclusions of law. Intervenors should also designate one lead party to represent all of the intervenors for all matters associated with this proceeding. *See* 10 C.F.R. § 2.309(f)(3).
- Initial written statements of position and written testimony should be filed by the parties prior to the scheduled hearing date (we recommend 30 days prior to the hearing). Written testimony by the Intervenors shall be limited to the area of the admitted contention. *See* 10 C.F.R. § 2.1207(a).⁵
- The hearing will consist of the introduction of written testimony and exhibits, and oral questions from the Licensing Board. Prior to the hearing, the parties may submit proposed oral questions to the Licensing Board related to Contention 3.1. *See* 10 C.F.R. § 2.1207.

In summary, the Intervenors' participation in the hearing will be limited to Contention 3.1, whereas EGC and the NRC staff will need to address not only Contention 3.1 but also all of the Findings of Fact and Conclusions of Law that need to be made by the Licensing Board.

⁵ Section 2.1207(a)(1) states that the written testimony may be filed "on the admitted contentions." The testimony by the applicant and NRC staff will necessarily be broader in order to address the Findings of Fact and Conclusions of Law that need to be made by the Licensing Board on uncontested issues.

Respectfully submitted,



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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

I hereby certify that copies of "Joint Response of Exelon Generation Company and the NRC Staff to Licensing Board Request Regarding Mandatory Hearing Procedures for the Clinton Early Site Permit" in the captioned proceeding have been served as shown below by deposit in the United States mail, first class, this 17th day of September 2004. Additional service has also been made this same day by electronic mail as shown below.

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