UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 9606 **DOCKETED 03/23/05**

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/23/05

Before Administrative Judges:

Dr. Paul B. Abramson, Chairman
Dr. Anthony J. Baratta
Dr. David L. Hetrick

In the Matter of	Docket No. 52-007-ESP
EXELON GENERATION COMPANY, LLC	ASLBP No. 04-821-01-ESP
(Early Site Permit for Clinton ESP Site)	March 23, 2005

MEMORANDUM AND ORDER
(Denying Filing Extension Request)

On March 18, 2005, we issued an order requiring the NRC Staff and the Intervenors, Environmental Law and Policy Center, Blue Ridge Environmental Defense League ("BREDL"), Nuclear Energy Information Service, Nuclear Information and Resource Service, and Public Citizen to file a response (due in our offices on or before noon on April 6, 2005) to the March 17, 2005 Exelon Generation Co., LLC (EGC) Motion for Summary Disposition of Contention 3.1 ("Applicant's Motion). On March 22. 2005, the Intervenors filed with this Board a Motion for extension of time to make the required responsive filing ("Intervenors' Request"). For the reasons set out below, we deny that motion for an extension of time.

1. The Requested Extension of Time. The Motion before this Board is a motion to dismiss Contention 3.1 because it is now moot. This Board has previously held that Contention 3.1 is a contention of omission. As counsel for BREDL should be well aware (as she has practiced before numerous Licensing Boards for many years), our practice with respect to these situations is crystal clear: once information has been supplied which addresses the alleged

omission, the omission no longer exists, and it is appropriate for a party to move to have that contention dismissed. The Commission has expressed this principle as follows: "[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot." [1] Thus the single question to be addressed at this point is whether or not the information supplied addresses the alleged omissions, not whether or not that information is substantively correct. Detailed technical evaluation is not necessary for the Intervenors to address whether or not information has been supplied which addresses the omission alleged by Contention 3.1 (as opposed to generating a challenge to the substance of that information). Since the principal basis for the Intervenors request for an extension of time is their asserted need to "collect the information and expert testimony necessary to fully reply to Excelon's Motion,"[2] and we do not believe such a technical effort is required, Intervenors' motion for the requested extension of time is denied.

2. Challenges to the Substance of the Curing Information. If the party which originally submitted a contention of omission which has become moot wishes to challenge the substance of the information which fills the alleged gap, that party must, in a timely manner, either amend an existing contention or file a new (late filed) contention.[3] To do so, a party must, as we noted

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[1] Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

[2] Intervenors' Request at 1

[3] In the absence of such a requirement, contentions of omission "could readily be transformed – without basis or support – into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing parties of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims which have been alleged; and (3) ensuring there exists an actual "genuine dispute" on a material issue of law or fact." Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 56 NRC at 383.

in our March 18, 2005 order, address the factors in sections 2.309(c) and (f). The provisions of Section 2.309(c) relate to all nontimely filings; *i.e.*, any filing not made within the timeframes established for filing of original contentions.[4] As counsel for the Intervenors have apparently recognized, one of the most important (perhaps dominant) factors determining admissibility is whether or not the party making a nontimely filing has "good cause". In addition, the provisions of 2.309(f)(2) apply in this instance, and provide, in relevant part, that: "contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that -

> (i) The information upon which the amended or new contention is based was not previously available;
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information."

Any effort to amend or file a new contention must, therefore, focus upon whether the information was "previously available," is "materially different" from earlier information AND the proposed amendment or new contention was filed "in a timely fashion." The third of these factors interplays with those of 2.309(c), and Licensing Boards have consistently found that the period of time which has elapsed between availability of new information upon which a filing is predicated is a crucial factor in determining good cause, and have generally held that filings made within a month or so after availability satisfy this criterion, but filings made considerably later do not. Here, the information filling the alleged gap was submitted by the Applicant in late

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[4] Commission regulations require that requests for hearing and proposed contentions must be filed within specified time frames, e.g., 60 days after publication of notice in the Federal Register. 10 C.F.R. § 2.309(b)(3)(iii). A request that should have been filed within the notice period, but was not, is deemed "nontimely" and its admissibility is governed by 10 C.F.R. § 2.309(c)

September 2004,[5] and any motion to amend Contention 3.1 or to file a new contention, arguably should address why a filing made in March 2005 is timely when the information upon which it is based was delivered to the Intervenors on September 24, 2004. Additionally, while 2.309(f)(2) requires petitioners to file contentions for issues arising under NEPA based upon the applicant's ER, when the DEIS is released, it expressly permits a petitioner to "amend . . . contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . that differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2) . As we noted in our March 18, 2005 Order, the DEIS (NUREG 1815 DRAFT) is now available as it was issued by the staff under cover letter dated March 8, 2005. Any timely challenge to the DEIS must, as noted above, address alleged "material differences" between information in the DEIS and that previously available in the Applicant's filings (which, in this instance, seemingly includes not only the information in the ER but the September 2004 responses to the Staff's RAIs).

3. Administrative Matters Any motions for leave to file an amended contention or a new contention should be combined with a detailed statement addressing the factors set out in Sections 2.309(c) and 2.309(f), including the specific facts and factors set out above. This Board would consider, in connection therewith, any request for an extension of time to make such filings.

Finally, to make future document organization easier for the Board and the other participants, the Parties are directed to identify the date of each filing on the upper right portion

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[5] The Applicant's Motion states, in footnote 3, that this information was attached to a 9/23/04 letter to the NRC and that counsel for EGC served a copy of this letter upon the Board and other parties by letter dated September 24, 2004. The copy of that letter received by the Board did have attached to it the information responding to the RAIs.

of the front page of each filing made after the date hereof.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[6]

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, MD
March 23, 2005

[6] Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) applicant EGC; (2) the Intervenors; and (3) the NRC Staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING FILING EXTENSION REQUEST) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of March 2005