UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 9660 **DOCKETED 03/30/05**

ATOMIC SAFETY AND LICENSING BOARD

SERVED 03/30/05

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 30, 2005

MEMORANDUM AND ORDER
(Denying, Following Reconsideration, 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"), and on March 23, 2005, we issued a Memorandum and Order denying the subject requested extension of time. On March 28, Intervenors filed with this Board a Motion for Reconsideration of Denial of Motion for Extension of Time and Request for Status Conference ("Second Motion"). We have reconsidered the request in light of the Intervenors' Second Motion and the pleadings therein contained, and, while we again deny the motion for extension of time, we find, based upon prior

agreement among the parties,[1] that challenges to the newly supplied information may be filed based upon the DEIS release date.

1. The Requested Extension of Time. The motion of the Applicant before this Board seemingly contains two material portions: the first is a motion to dismiss Contention 3.1 arguing that because it is a contention of omission which is rendered now moot by newly filed information, there is no longer any genuine issue of material fact regarding wind and solar power and combinations thereof; and the second is a motion that, if the Board dismisses Contention 3.1, it should dismiss the Intervenors from this proceeding.[2] This Motion defines the matters to be addressed by the Parties and the Board at this time.

In our September 23 conference call, and again in the September 30, 2004 Order summarizing that call, the Chairman, speaking for the Board, observed that Contention 3.1 is a contention of omission.[3] Additionally, during the conference call: (a) the parties discussed the process whereby the applicant would respond to the Staff's RAIs with information which would eventually become an amendment to the License Application;[4] (b) the parties noted that the Intervenors had been supplied a copy of those RAIs;[5] (c) the Intervenors pointed out that they would review that new information when they received it and would respond to any motion for summary disposition when they receive such a motion;[6] and (d) the Intervenors noted that they

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[1] Conference Call of Sept. 23, 2004, Tr. at 418-20.

[2] Applicant's Motion at 2.

[3] Conference Call of Sept. 23, 2004, Tr. at 416; Order (unpublished, Sept. 30, 2004) at 2.

[4] Conference Call of Sept. 23, 2004, Tr. at 416-17.

[5] Id. at 418.

[6] Id.

would "have expert testimony at a hearing on the contention . . . after the EIS was issued."[7] We then agreed that a hearing would not be held until after the FEIS was issued,[8] and counsel for the Intervenors advised that they would need two to three weeks to consult with experts in the course of an initial review of the new information in order to be able to discuss scheduling.[9] We contemplated a conference call "a week or two after . . . the response to the RAI."[10] That conference call – which had tentatively been scheduled for October 19, 2004 pending counsel for BREDL (acting on behalf of the Intervenors) notifying the Board that that date was acceptable[11] (such confirmation was not received by us) – never occurred.

Our process provides, as we noted in our March 23, 2005 Memorandum and Order, that where an initial contention is framed to allege generally, as in the instant situation, that certain information is not covered in the applicant's submittals, when such information is supplied which the applicant claims responds to the omission, the applicant is entitled to argue that the omission has been cured and move for summary disposition of that contention. Our process does not, however, end there, for if the party which made the original contention finds the newly supplied information lacking or erroneous, it is entitled to petition the Board for leave to amend its original contention or to file a new contention based upon the perceived shortcomings in the newly filed information. We spelled out this latter process in Section 2 of our March 23, 2005 Memorandum and Order.

Here, it is clear that the Parties and the Board contemplated that when the newly filed

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[7] Id.

[8] Id. at 419.

[9] Id. at 420.

[10] Id.

[11] Id. at 423-24.

information was received and reviewed by the Intervenors, it was possible that the Applicant would indeed file a motion for summary disposition (as it has done) and that the Intervenors would respond at the time thereof, AND that the Parties would address any shortcomings in the RAI responses and other new information appearing in the DEIS and the FEIS after issuance. Such an approach is fully consistent with the fact that the responsibility for NEPA evaluation rests with the U.S. Nuclear Regulatory Commission, not with the Applicant, and that an Intervenor's challenge to NEPA compliance should be made with respect to the Agency's actions. As we noted, however, our procedures, in an effort to keep the process expeditiously moving, require an Intervenor to raise environmental issues first with respect to the Applicant's ER and permit amendment or the filing of new contentions when issues arise in further filings by the Applicant and/or in the Agency's documents when they are released, in each case to the extent they contain information not contained in the Applicant's previous filings or in the Agency's previously released documents. Nonetheless, it is apparent that the Board and the Parties contemplated that this new information would be addressed in depth, not promptly upon its release in responses to the RAIs, but after an EIS was released.

Given this situation, we find:

A. The Board stated in the September conference call, and subsequent Order, that Contention 3.1 is a contention of omission and no Party has suggested otherwise until the Intervenors' Second Motion.[12] Without now ruling on the second part of the Applicant's Motion

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[12] The statement by the Board Chairman was not, as alleged by the Intervenors in their Second Motion, merely a statement of one Judge, it was the statement of the Board Chairman speaking for the Board. If Intervenors had wished to challenge whether Contention 3.1 is a contention of omission, the proper time was during the September 23 conference call or within a short time after receipt and review of the transcript thereof.

In ruling on the admissibility of Contention 3.1, we explicitly narrowed it as follows:

> This contention is, however, admitted as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry to the degree it alleges (a) a failure by EGC in its evaluation of the alternatives that could be used by an independent power provider in its

wherein it sought to dismiss the Intervenors from the proceeding, all that is at issue at this point regarding the motion to dismiss Contention 3.1 is whether the omission has in fact been cured. Challenge to this motion does not, as we said in previous orders, require detailed technical analysis, therefore Intervenors request for an extension of time is again denied.

B. Regarding challenges to the substance of the information which allegedly cures the omission, the parties have agreed that such challenges would be litigated after release of the EIS. Since the DEIS has now been released, we hold that, based upon the Parties' prior agreement and because of the Applicant's Motion, it is now appropriate to address all additional information provided since release of the ER, and any timeliness determinations related to challenges to the substance of the "curing" information provided since filing of Contention 3.1 (even that information supplied during September 2004 in response to the RAIs) will be based upon the release date of the DEIS. We gave explicit guidance to the Parties regarding such challenges in our earlier orders issued in respect of the Applicant's Motion. As we therein (and herein) mentioned, the Board will entertain petitions from the Intervenors in respect thereof.

> power generation mix adequately to address a combination of wind power, solar power, natural gas-fired generation and "clean coal" technology (Basis C); and (b) the Applicant's use of potentially flawed and outdated information regarding wind and solar power generation methods (Bases E1 and E2).

LBP-04-17, 60 NRC 229, 246 (2004). The Intervenors will not be precluded, if we ultimately find that the alleged omission has been cured, from petitioning to submit a new contention or amending the original contention on the basis of the newly supplied information, arguing that the substantive content of the newly supplied information has specific flaws or omissions. Such proposed amendments or new contentions, must be filed in accordance with the code provisions described in our earlier rulings.

Regarding the Intervenors' request for a status conference call, we ask the Parties to promptly contact our law clerk Amy Roma, at 301-415-7451 to advise her of their availability for such a call on Monday, April 4. If the parties are not available on Monday, then they are to advise Ms. Roma of their availability on Tuesday, April 5 and Wednesday, April 6.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[13]

/RA/
Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/
Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by P. Abramson for/
David L. Hetrick
ADMINISTRATIVE JUDGE

Rockville, MD
March 30, 2005

[13] 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING, FOLLOWING RECONSIDERATION, 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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LB MEMORANDUM AND ORDER
(DENYING, FOLLOWING RECONSIDERATION,
FILING EXTENSION REQUEST)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of March 2005