

April 6, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO EXELON'S MOTION FOR SUMMARY  
DISPOSITION OF CONTENTION 3.1

INTRODUCTION

On March 17, 2005, Applicant Exelon Generation Company, LLC ("Applicant" or "Exelon") filed a Motion for Summary Disposition of Contention 3.1<sup>1</sup> submitted by the Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, Public Citizen, and Environmental Law and Policy Center (collectively "Intervenors"). Contention 3.1 is the sole contention admitted by the Atomic Safety and Licensing Board ("Board") on August 6, 2004. As revised by the Board, Contention 3.1 asserts that the Applicant's Environmental Report ("ER") "fails to rigorously explore and objectively evaluate all reasonable alternatives."<sup>2</sup> The Board has indicated that this contention is a "contention of omission."<sup>3</sup> Pursuant to 10 C.F.R. § 2.1205(b) and the Board's Order dated March 18, 2005, the Staff of the Nuclear Regulatory Commission ("NRC Staff") herein answers Exelon's Motion for Summary Disposition. The Staff agrees that Exelon has cured the omission and that Contention

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<sup>1</sup> Exelon's Motion For Summary Disposition of Contention 3.1 (March 17, 2005) [hereinafter "Exelon's Motion for Summary Disposition"].

<sup>2</sup> Memorandum and Order (Ruling on Standing and Contentions), LBP-04-17, 60 NRC 229, 252 (2004).

<sup>3</sup> Order (Sept. 30, 2004) at 2; Memorandum and Order (Denying Filing Extension Request) (March 23, 2005) at 1; Memorandum and Order (Denying, Following Reconsideration, Filing Extension Request) (March 30, 2005) at 2.

3.1 is moot. Moreover, Exelon is entitled to summary disposition as a matter of law because there is no genuine issue as to a material fact.

### BACKGROUND

On December 12, 2003, the Commission published a notice announcing the opportunity to petition to intervene in a hearing on an application for an early site permit (“ESP”) submitted by Exelon. Intervenors timely sought to intervene in the hearing on January 12, 2004. On May 3, 2004, Intervenors supplemented their initial request for a hearing by submitting a specification of the contentions that they sought to have litigated.

In its Memorandum and Order (Ruling on Standing and Contentions) of August 6, 2004, the Board ruled that the Intervenors had established the requisite standing to intervene in the proceeding and admitted one contention concerning the ESP application, designated as Environmental Contention (“EC”) 3.1 - The Clean Energy Alternative Contention.<sup>4</sup> Based on Contention 3.1, the NRC Staff issued Request for Additional Information (“RAI”) E9.2-1, which was subsequently answered by Exelon.<sup>5</sup> In its response, Exelon provides a detailed analysis of wind

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<sup>4</sup> As admitted, Contention 3.1 asserts the following:

The Environmental Review fails to rigorously explore and objectively evaluate all reasonable alternatives. In Section 9.2 of the Environmental Report, Exelon claims to satisfy 10 C.F.R. § 51.45(b)(3), which requires a discussion of alternatives that is “sufficiently complete to aid the Commission in developing and exploring” “appropriate alternatives ... concerning alternative uses of available resources,” pursuant to the National Environmental Policy Act. However, Exelon’s analysis is premised on several material legal and factual flaws that lead it to improperly reject the better, lower-cost, safer, and environmentally preferable wind power and solar power alternative, and fails to address adequately a mix of these alternatives along with gas-fired generation and “clean coal” resource alternatives. Therefore, Exelon’s ER does not provide the basis for the rigorous exploration and objective evaluation of all reasonable alternatives to the ESP that is required by NEPA.

LBP-04-17, 60 NRC at 252.

<sup>5</sup> Letter from Marilyn C. Kray, Vice President, Project Development, Exelon Nuclear, to NRC, “Exelon Generation Company, LLC (EGC), Response to Request for Additional Information (RAI) regarding the Environmental Portion of the Application for an Early Site Permit (ESP) (continued...) ”

power and solar power, which includes combinations of these alternatives with coal and natural gas fired power generation. On March 2, 2005, the NRC Staff issued NUREG-1815, "Draft Environmental Impact Statement for an Early Site Permit (ESP) at the Exelon ESP Site" ("DEIS").

### DISCUSSION

#### A. Legal Standards for Dismissal of Contentions

The Commission has determined that there is a "difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002); *see also* 10 C.F.R. § 2.309(f)(1)(vi) (stating, as a requirement for an admissible contention, that a proposed contention must provide sufficient information to show that a genuine dispute exists either by information that references specific portions of an application or, if the application fails to contain information, the identification of each failure).

"Where 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." *McGuire*, CLI-02-28, 56 NRC at 383 (citations omitted); *see also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-7, 59 NRC 259 (2004) (holding that because the applicant's response addressed the alleged omission which was the subject of the contention, albeit "minimally," the motion was granted).

#### B. Legal Standards for Summary Disposition

A moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate

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<sup>5</sup>(...continued)  
(TAC NO. MC1125)" (September 23, 2004) ADAMS Accession No. ML042730012. [hereinafter "Exelon's Response to RAI"].

that there is no genuine issue as to any material fact. See 10 C.F.R. §§ 2.1205 and 2.710(d)(2); see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 384 (2001); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio) CLI-93-22, 38 NRC 98, 102-03 (1993). When evaluating summary disposition motions, the Commission has used Rule 56 of the Federal Rules of Civil Procedure as guidance.<sup>6</sup> See *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, slip op. at 8 (Feb. 2, 2005). As such, the party seeking summary disposition bears the burden of demonstrating the lack of a genuine issue of material fact and the evidence submitted must be construed in favor of the non-moving party. See *Sequoyah Fuels Corp. & General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff'd*, CLI-94-11, 40 NRC 55 (1994). For a finding that there is a genuine issue of material fact, “the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue.” *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

C. Contention 3.1

Contention 3.1 is a contention of omission,<sup>7</sup> as it challenges the absence of a discussion of wind and solar power (and a mix of them in combination with other alternatives). Therefore, the single issue to be addressed at this point is whether or not the information supplied by the Applicant cures the omission. The issue is not whether that information is substantively correct.

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<sup>6</sup> In pertinent part, this rule states, “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

<sup>7</sup> See Order (Sept. 30, 2004) at 2; Memorandum and Order (Denying Filing Extension Request) (March 23, 2005) at 1; Memorandum and Order (Denying, Following Reconsideration, Filing Extension Request) (March 30, 2005) at 2.

The NRC Staff issued an RAI regarding clean energy alternatives (and combinations thereof) and Exelon duly submitted its response to the NRC on September 23, 2004. The information supplied by Exelon in its response to the RAI addresses and cures the alleged omission.<sup>8</sup> Contention 3.1 is, therefore, moot.

Moreover, the Staff agrees that there is no genuine issue of material fact remaining with respect to this contention because the applicant has provided the requested information. See Exelon's Response to RAI; see *also* Exelon's Motion for Summary Disposition of Contention 3.1, together with the Statement of Material Facts On Which No Genuine Issue Exists and Joint Affidavit of William D. Maher and Curtis L. Bagnall. As there is no genuine issue of material fact regarding the issue raised by Contention 3.1, Exelon is entitled to summary disposition.

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<sup>8</sup> The Board has indicated that challenges to the substance of the information provided in Exelon's response to RAI are outside the scope of the admitted contention and, therefore, irrelevant for the purpose of answering Exelon's Motion for Summary Disposition. Memorandum and Order (Denying Filing Extension Request) (March 23, 2005) at 2. See *also* Memorandum and Order (Denying, Following Reconsideration, Filing Extension Request) (March 30, 2005) at 5. However, in the DEIS, the Staff reviewed Exelon's analysis regarding clean energy alternatives and determined that its findings and approach are reasonable. The Staff's analysis of wind and solar power alternatives is consistent with Exelon's Response to the RAI. See DEIS Section 8.2, "Energy Alternatives."

CONCLUSION

Based upon the foregoing discussion, the Staff supports Exelon's Motion for Summary Disposition. The Board should grant it because (1) the contention is moot and (2) no genuine issue remains as to any material fact.

Respectfully submitted,

**/RA/**

Ann P. Hodgdon  
Counsel for NRC Staff

**/RA/**

Mauri T. Lemoncelli  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 6th day of April, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO EXELON'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 3.1" in the captioned proceeding have been served on the following through electronic mail, with copies to follow by deposit in the NRC's internal mail system as indicated by a single asterisk, or through electronic mail, with copies to follow by deposit in the U.S. Mail, first class, as indicated by a double asterisk, this 5<sup>th</sup> day of April, 2005:

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