

RAS 9721

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/06/05

ATOMIC SAFETY AND LICENSING BOARD

SERVED 04/06/05

Before Administrative Judges:

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

In the Matter of

EXELON GENERATION COMPANY, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

ASLBP No. **04-821-01-ESP**

April 6, 2005

MEMORANDUM

(Clarifying March 30 Memorandum and Order;
Memorializing April 4 Conference Call)

This Board issued a Memorandum and Order on March 30, 2005¹ addressing several matters related to the Applicant's motion to dismiss Contention 3.1, including granting Intervenors' request for a status conference call.² That same day, the Board received a letter from counsel for the Intervenors³ which raises one important question.⁴ The Intervenors

¹ Licensing Board Order (Denying, Following Reconsideration, Filing Extension Request) (Mar. 30, 2005) (unpublished) [hereinafter March 30 Order].

² The conference call was later scheduled for April 4, 2005. See Licensing Board Order (Scheduling a Teleconference) (Mar. 31, 2005) (unpublished).

³ Letter from Shannon Fisk, Environmental Law and Policy Center, to Licensing Board (Mar. 30, 2005) [hereinafter Intervenor Letter].

⁴ In addition to raising the relevant question, Intervenors point out that the Board's recollection that an October 19, 2004 conference call never occurred, see March 30 Order at 3, was erroneous. We note that in fact we did receive notice from counsel to ELPC, who was acting for the intervenors (not counsel for BREDL, as erroneously noted in the March 30 Order), and that the subject call was held; therefore our March 30 Order is hereby amended by deleting the last sentence of the second paragraph of Section 1 thereof.

request that, because our Scheduling Order dated October 27, 2004⁵ requires that initial written statements be filed within 45 days of issuance of the Staff FEIS, the Board clarify its March 30 Order to allow this same 45 day filing period for substantive challenges to the DEIS.

The purpose of the instant memorandum is to: (1) clarify certain matters arising, in part, from the March 30 Order; (2) memorialize certain matters discussed in the April 4 Conference Call; and (3) memorialize certain Board rulings made during the April 4 Conference Call with regard to scheduling matters.

1. Clarification of Hearing Schedule. As an initial matter, the Board notes that its Scheduling Order established a hearing schedule for this proceeding pursuant to 10 C.F.R. §§ 2.332(d) and 2.1207(a), and in part pursuant to the parties' agreement to a certain filing schedule.⁶ That schedule requires, among other things, the parties to file initial written statements of position and written testimony within 45 days of issuance of the Staff's FEIS.⁷ Our March 30 Order did not contemplate changing that schedule; rather, in Section 1.B., the Board simply contemplated that whether or not Contention 3.1 is dismissed as moot, Intervenors at this point have the opportunity, based upon information first revealed in the recently-issued DEIS and information supplied by the Applicant since submitting its ER, to petition to amend Contention 3.1 or file new contentions.

⁵ Licensing Board Order (Establishing Hearing Schedule) (Oct. 27, 2004) (unpublished) [hereinafter Scheduling Order].

⁶ Id. at 2-3; Tr. at 440-43.

⁷ Scheduling Order at 2.

2. Timing and Substance of Any Petition to Amend or File a New Contention. As to Intervenor's request that we provide 45 days from the issuance of the DEIS⁸ for the filing of any petition regarding such an amendment or new contention, the Board ruled, in the April 4 Conference Call, that such a petition will not be deemed untimely if it is filed within 45 days of the issuance of the DEIS (i.e., on or before April 22, 2005).⁹ Should the Intervenor file such a petition after the expiration of the 45 day "safe harbor," the Intervenor must make a sufficient showing pursuant to 10 C.F.R. § 2.309(c) criteria for nontimely filings. In any event, as we noted in several earlier orders,¹⁰ a newly-filed contention or an amendment to an existing contention must satisfy the 10 C.F.R. § 2.309(f) general contention admissibility standards. Finally, the Intervenor should note that this "safe harbor" is a special occurrence to accommodate the particular circumstances of this case at this time, and that all future filings must be submitted in accordance with the filing deadlines set forth in the NRC's procedural rules at 10 C.F.R. Part 2.

3. Timing of Response to Applicant's Summary Disposition Motion. The Board has on two prior occasions denied Intervenor's request for an extension of time to file a response to Applicant's Motion for Summary Disposition of Contention 3.1.¹¹ During the April 4

⁸ Though the DEIS was released by the Staff on March 2, 2005, it was not circulated to the Intervenor until March 8, 2005; therefore, we held the 45 day clock began on March 8. See March 30 Order at 5.

⁹ To this end, the Intervenor must nevertheless make a showing that the petition is "timely" based on the date of issuance of the DEIS and the Board's above ruling regarding a "safe harbor" for timeliness.

¹⁰ See, e.g., Licensing Board Order (Denying Filing Extension Request) (Mar. 23, 2005) at 2-3 (unpublished).

¹¹ Id.; March 30 Order at 5.

Conference Call, counsel for the Intervenor again sought an extension of time to file a response, this time requesting an April 22 filing deadline.¹² The Board denied Intervenor's request, reconfirming that all responses are due to the Board on or before noon EDT, April 6, 2005.¹³

4. Timing of Merits Hearing on Any Amended or Late-Filed Contention. During the April 4 Conference Call, the Board noted that although 10 C.F.R. § 2.332(d) states that “[w]here an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS,” it may be possible, should all the parties agree, to hold a hearing on the merits of any amended or late filed contentions prior to the issuance of the FEIS. Such a hearing might be held after the Parties have had time to digest comments submitted on the DEIS (i.e., at some reasonable time after the end of the DEIS comment period, which we are advised by the Staff is May 25, 2005¹⁴), but sufficiently prior to the issuance of the FEIS to enable the Staff to consider the results of such a hearing in development of the FEIS. The Board asked that the Parties consider this possibility, and be prepared to discuss the issue at a future conference call (date and time to be set at a later time).

¹² Tr. at 460. While we expect the page numbering of the electronic version of the transcript of the April 4 Conference Call to mirror that found in the hard copy transcript (as well as the transcript available on ADAMS), we note that all references in this Order to the April 4 Conference Call transcript are to the electronic version provided to the Board by the court reporter.

¹³ Id. at 464.

¹⁴ Id. at 465.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE, CHAIRMAN

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by PBA for/

David L. Hetrick
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 6, 2005

¹⁵ Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) applicant EGC; (2) the Intervenor; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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EXELON GENERATION COMPANY, LLC) Docket No. 52-007-ESP
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CLARIFYING MARCH 30 MEMORANDUM AND ORDER; MEMORIALIZING APRIL 4 CONFERENCE CALL) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Dr. Paul B. Abramson, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Dr. David L. Hetrick
8740 E. Dexter Dr.
Tucson, AZ 85715

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Ann P. Hodgdon, Esq.
Mauri T. Lemoncelli, Esq.
Darani M. Reddick, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dave Kraft, Executive Director
Nuclear Energy Information Service
P.O. Box 1637
Evanston, IL 60204-1637

Paul Gunter, Director
Reactor Watchdog Project
Nuclear Information and Resource Service
1424 16th St., NW, Suite 404
Washington, DC 20036

Michele Boyd
Public Citizen
215 Pennsylvania Ave., SE
Washington, DC 20003

Docket No. 52-007-ESP
LB MEMORANDUM (CLARIFYING MARCH 30
MEMORANDUM AND ORDER; MEMORIALIZING
APRIL 4 CONFERENCE CALL)

Howard A. Learner, Esq.
Ann Alexander, Esq.
Shannon Fisk, Esq.
Environmental Law and Policy Center
35 E. Wacker Dr., Suite 1300
Chicago, IL 60601

Thomas S. O'Neill, Esq.
Associate General Counsel
Exelon Nuclear
4300 Winfield Rd.
Warrenville, IL 60555

Steven P. Frantz, Esq.
Paul M. Bessette, Esq.
Alex S. Polonsky, Esq.
Annette M. Simon, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

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