

March 28, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

March 28, 2005 (1:05pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 52-007

Exelon Generation Company, LLC

ASLBP No. 04-821-01-ESP

(Early Site Permit for Clinton ESP Site)

**INTERVENORS' MOTION FOR RECONSIDERATION
OF DENIAL OF MOTION FOR EXTENSION OF TIME
AND REQUEST FOR STATUS CONFERENCE**

With all due respect, Intervenor hereby move, pursuant to 10 C.F.R. 2.323(e), for reconsideration of the Atomic Safety and Licensing Board Panel's ("Panel") March 23, 2005 Order because that Order is based on a clear and material misunderstanding of the nature of Intervenor's Contention 3.1. Given the pending April 6, 2005 deadline for Intervenor's response to Exelon's motion for summary disposition, Intervenor also request that the Panel hold a telephonic status conference this week for all of the Parties to discuss this matter.

On March 22, 2005, Intervenor filed a motion for an extension of time to respond to Exelon's motion for summary disposition of Contention 3.1. On March 23, 2005, this Panel denied the Intervenor's Motion on the ground that an extension of time is not needed because Intervenor purportedly cannot challenge the substance of the additional information regarding alternatives that Exelon relies on in its summary disposition motion.¹ The Panel's Order asserts that Contention 3.1 is a "contention of omission," and that, therefore, Intervenor can only

¹ While the Panel's March 23, 2005 Order states that it was sent by e-mail to counsel for the Intervenor, undersigned counsel for the Environmental Law and Policy Center, who has been serving as lead counsel for the Intervenor in this proceeding, did not receive such e-mail and, instead, first received the Panel's Order via U.S. Mail on Friday, March 25, 2005.

dispute whether the additional information provided by Exelon addresses the alleged omission, not whether that information is substantively correct.

With all due respect, Intervenor believe that the Panel has misconstrued the Contention, which is substantive in nature. Intervenor asserted (and continue to assert) that Exelon's discussion of alternatives is "premised on several material legal and factual flaws that lead it to improperly reject better, lower-cost, safer, and environmentally preferable" clean energy alternatives. Intervenor Supplemental Request for Hearing and Petition to Intervene, at 2. Certainly, a contention that details how a particular analysis is flawed cannot be considered a contention that such analysis has been omitted.

Reconsideration is appropriate because Contention 3.1 is not a contention of omission but rather challenges the substance of the consideration of clean energy alternatives in this proceeding. The NRC distinguishes "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." *In re Duke Energy Corp.*, 2004 N.R.C. LEXIS 82, at *7-*8 (2004); *In re Duke Energy Corp.*, 56 N.R.C. 373, 383 (2002). Intervenor's Contention 3.1 plainly falls within the latter, substantive category as it did not assert that Exelon omitted a discussion of alternatives.

The March 23 Order is also invalid because it is based on the erroneous conclusion that the Panel has "previously held" that Contention 3.1 is a contention of omission. In fact, the Panel's August 6, 2004 Order admitting Contention 3.1 never refers to that contention as one of "omission," though it specifically refers to a different, rejected Contention 2.1 (regarding Exelon's failure to discuss safety concerns related to the co-locating of a new reaction with an older reactor) as a "contention of omission." Memorandum and Order, Aug. 6, 2004, at 14, 16-

17, Appx. A. A September 30, 2004 scheduling order does state that "we discussed the fact that Contention 3.1. is a contention of omission . . .". That order, however, simply summarizes a September 23, 2004 conference call at which the only relevant "discussion" was a reference by one of the Panel Judges that Contention 3.1 is a "contention of omission." Transcript of Sept. 23, 2004 Conference Call, at 416, line 9. Certainly, an isolated statement by one Panel Judge at a prehearing conference call cannot be considered a holding, especially where the Panel Order admitting Contention 3.1 and the Intervenor's intervention papers make clear that Contention 3.1 challenges the substance of Exelon's alternatives analysis.


Intervenors have demonstrated that they are entitled to file a substantive response to Exelon's motion for summary disposition, and that good cause exists for providing Intervenors with a 45-day extension for filing such response. Because the Panel's March 23, 2005 Order denying such extension was based on a clear and material misunderstanding of the substantive nature of Contention 3.1, Intervenors respectfully request that the Presiding Officer of the Panel reconsider that Order and grant the requested extension. In addition, to ensure that all Parties have a chance to respond and that this issue is resolved in advance of the current April 6, 2005 deadline for Intervenors' response to Exelon's motion, Intervenors request that the Panel hold a status conference call this week to discuss this issue.

Dated: March 28, 2005

Respectfully Submitted,

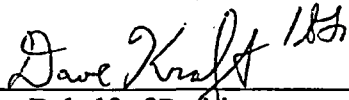
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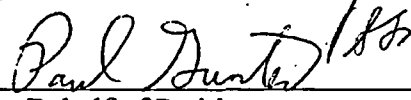
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NUCLEAR REGULATORY COMMISSION

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Exelon Generation Company, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

ASLBP No. 04-821-01-ESP

CERTIFICATE OF SERVICE

I, Shannon Fisk, hereby certify that copies of the Intervenor's Motion for Reconsideration of Denial of Motion for Extension of Time and Request for Status Conference in the above captioned proceeding have been served on the following via electronic mail and by deposit in the U.S. mail, first class, on this 28th day of March, 2005:

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