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Title: Exelon Generation Company ESP.
Pre-Hearing Conference

Docket Number: 52-007-ESP

Location: (telephone conference)

Date: Monday, April 4, 2005

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
PRE-HEARING CONFERENCE

-----X

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

-----X

Monday,
April 4, 2005

The pre-hearing teleconference came to order at 2:00 p.m. The Honorable Dr. Paul B. Abramson, Chair, presiding.

PRESENT:

- Dr. Paul B. Abramson Administrative Judge
- Dr. Anthony J. Baratta Administrative Judge
- Dr. David L. Hetrick Administrative Judge

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9 ALSO PRESENT:

10 Thomas Kenyon, NRC Staff

11 John Segala, NRC Staff

12 Amy Roma, Law Clerk to the Board

13 Bethany Engel, Law Clerk to the Board

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P R O C E E D I N G S

(2:01:49 p.m.)

JUDGE ABRAMSON: This is Judge Abramson. I'm here with Judge Baratta and Judge Hetrick is on the line from Arizona. We have Amy Roma and Beth Engel with us, our two law clerks. This is a continuation of the hearing for Exelon Generation Company's application for an early site permit.

Let's go through the parties and get everybody to sign in. Let's start with Counsel for the Staff.

MS. LEMONCELLI: Good afternoon. This is Mauri Lemoncelli, Counsel for the NRC Staff. I have with me Ann Hodgdon and Katherine Winsberg. I also have with me Thomas Kenyon, Environmental Project Manager for the Clinton ESP, and John Segala, Safety Project Manager for the Clinton ESP.

JUDGE ABRAMSON: Okay. Perhaps I should have said this earlier. Why don't you spell folks' names so the court reporter can get them.

MS. LEMONCELLI: Sorry, Your Honor. Mauri, M-A-U-R-I, Lemoncelli, L-E-M-O-N-C-E-L-L-I. Ann Hodgdon, H-O-D-G-D-O-N. Katherine with a "K", Winsberg, W-I-N-S-B-E-R-G. Thomas Kenyon, K-E-N-Y-O-N, and John Segala, S-E-G-A-L-A. Thank you, Your

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1 Honor.

2 JUDGE ABRAMSON: Okay. Counsel for the
3 Applicant.

4 MR. FRANTZ: Hello. This is Steve Frantz.
5 My last name is spelled F-R-A-N-T-Z. I have here with
6 me Paul Bessette, B-E-S-S-E-T-T-E.

7 JUDGE ABRAMSON: And Counsel for the
8 Intervenors.

9 MR. FISK: Hello. This is Shannon Fisk,
10 S-H-A-N-N-O-N F-I-S-K from the Environmental Law and
11 Policy Center.

12 JUDGE ABRAMSON: Okay. I think that's
13 everybody. We are on the record. Let me start by
14 apologizing to everybody for my senior moments, lapses
15 of memory. We did, indeed, have the October 19th
16 conference call as all of us now recognize. And with
17 that, let's get on with this.

18 Perhaps we ought to start with just
19 noting, Shannon, for the record that our scheduling
20 order talked about having initial written statements
21 and position and testimony due 45-days following
22 receipt of the FEIS. And what we're now talking about
23 is new information that's been released since the
24 Applicant's ER, some of which came in the form of
25 answers to RAIs, and some of which, in fact, is now

1 embedded in the Staff's DEIS, which has since been
2 released. And what we wanted to do was to make sure
3 you're aware of the requirements of our code; in
4 particular, in Section 2.332, where the Commission was
5 quite clear that where there's an EIS involved, we
6 cannot start hearings on environmental issues before
7 the issuance of the final EIS, so I must advise
8 everybody that there are proceedings going on where
9 the parties have agreed otherwise. And perhaps we can
10 come and talk about that later.

11 And the other thing that I wanted to make
12 sure the Intervenors were aware of is that the
13 provisions of 2.309(f)2 provide that Petitioner is
14 supposed to file initial contentions based on the
15 Applicant's ER, and the Petitioner may amend those
16 contentions, or file new contentions if there are data
17 or conclusions in the NRC draft or final EIS that
18 differ significantly from the data or conclusions in
19 the Applicant's documents.

20 Now the Board has found based on prior
21 agreements among the parties that we would not require
22 timeliness decisions on amendments or new contentions
23 to start running from the date of the Applicant's
24 submission of new information in its answers to the
25 RAIs. Rather, we would trigger that date on the date

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1 of issuance as a DEIS, which as we understand was
2 March 8. Is that right, Counsel Lemoncelli? March 8
3 was the date of the DEIS?

4 MS. LEMONCELLI: Your Honor, the Staff
5 issued the DEIS on March 2nd. A copy of the DEIS was
6 sent to Mr. Fisk. The Staff notified the Board and
7 parties that the DEIS was available in its March 8th
8 letter, and also supplied a hard copy of the DEIS
9 pursuant to that letter.

10 JUDGE ABRAMSON: Okay. So we've used
11 March 8 as our trigger date. Mr. Fisk, do I
12 understand correctly that what you've asked for now is
13 that the time for you to file, if you wish to, any
14 amendment or new contention based on this new
15 information would be 45 days after that March 8 date?

16 MR. FISK: Yes, Your Honor. We believe
17 based on the prior discussion that basically
18 established that we needed 45 days to do substantive
19 responses. I understand that the prior discussion was
20 about the final EIS, but we believe the same logic
21 applies here that we're having to do substantive
22 responses in support of our contention, and we would
23 like the 45 days to do that.

24 MR. FRANTZ: Judge Abramson, this is Steve
25 Frantz. Could I raise an issue regarding the nature

1 of the agreement among the parties last fall?

2 JUDGE ABRAMSON: Sure.

3 MR. FRANTZ: The only agreement that we
4 reached was that the hearing should begin after
5 issuance of the final EIS. That agreement did not at
6 all pertain to the timing of new or amended
7 contentions, or the timing of motions for summary
8 disposition.

9 As I think you earlier indicated, hearings
10 are required to have as evidence the final EIS; and,
11 therefore, we thought it would be impractical to have
12 a hearing prior to the issuance of the FEIS. That was
13 the sole basis for our agreement. The parties never
14 discussed, as I said, timing for new contentions or
15 timings for motions for summary disposition.

16 MS. LEMONCELLI: Your Honor, if I may;
17 this is Mauri Lemoncelli for the Staff. We agree with
18 Mr. Frantz, and that in terms of any agreement made by
19 the parties, we did not contemplate challenges to new
20 information. We were only contemplating procedural
21 items in terms of the hearing after issuance of the
22 FEIS.

23 JUDGE ABRAMSON: Okay. We understand
24 that.

25 MR. FISK: Your Honor, this is Shannon

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1 Fisk for the Intervenor. I mean, we do believe that
2 the discussions in October and September were pretty
3 clear that the no response to the RAIs or to Exelon's
4 response to the RAI were required at that time, and
5 that it was going to be held off until the EIS had
6 come out, so we believe the record is pretty clear
7 that we weren't expected to respond then.

8 MS. LEMONCELLI: Your Honor, this is Mauri
9 Lemoncelli again for the NRC Staff. It would be
10 helpful if Mr. Fisk could point out specifically in
11 the record where he's referring in terms of any
12 agreement made in response to the Staff's RAIs.

13 MR. LEARNER: Your Honor, this is Howard
14 Learner also for the Intervenor, while Mr. Fisk is
15 going through the records here and pulling the lines.
16 I'm somewhat puzzled in all this, because this is not
17 a case that's on an emergency fast-track basis where
18 parties would normally be haggling about 30 days
19 versus 45 days. This is a case we all -- nobody is
20 trying to stall this case or keep it from moving.
21 We're talking about in a long-term case going on now
22 for a while, will be going for a while further, where
23 we don't expect an application initial decision until
24 sometime in the spring of 2006 for 15 days. So, I
25 mean, this is not a case where we're talking about

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1 it's an emergency, and where 15 days is going to make
2 the difference between when something goes forward and
3 when it doesn't. It's a matter of an accommodation of
4 a little bit of time for us to file something that's
5 right.

6 If this were an emergency case, that's a
7 different story, but this case has not been and is not
8 on a fast-track emergency basis. We're not asking for
9 150 days. We're asking for 45 days.

10 JUDGE ABRAMSON: This is Judge Abramson.
11 Let's just dispense with fussing about this. The way
12 we read 2.309(f)2, the Petitioner has a right to amend
13 or file new contentions when there are data or
14 conclusions in the DEIS that differ from what's in the
15 Applicant's documents. The Applicant's documents
16 include what's in the responses to the RAIs, so while
17 one could make an argument and fuss a lot about
18 whether this was timely or not, the Board has already
19 determined that it'll be timely, that the timeliness
20 will start to run from March 8th. The Board is
21 comfortable with 45 days so let's get on with it, and
22 we will grant Mr. Fisk and the Intervenors' request
23 that it will not be deemed untimely — I'm sorry, let
24 me say this more succinctly.

25 An amended contention or a new contention

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1 challenging the substance of the new information
2 provided since the ER by the Applicant, or what's in
3 the DEIS that differs from the original ER will not be
4 considered untimely if it's submitted within 45 days
5 of the March 8th date.

6 Now that doesn't mean that if it's later
7 than that we wouldn't consider it. It just means that
8 it wouldn't be entitled to a safe harbor. What we're
9 saying is it's a safe harbor up until the 45 days,
10 which Mr. Fisk, am I right, is April the 22nd?

11 MR. FISK: Yes. April 22nd, Your Honor.

12 JUDGE ABRAMSON: Okay. So that's where we
13 come out as a Board on that. We discussed it among
14 ourselves before the conference call.

15 MR. FRANTZ: Thank you, Your Honor.

16 MR. FISK: Your Honor, just to clarify; we
17 believe that it would be most efficient to also
18 respond to Exelon's motion for summary disposition at
19 the same time, in that same 45-day filing period. So
20 would request that the deadline for that response be
21 on April 22nd also.

22 JUDGE ABRAMSON: Would you like to explain
23 to us why, and then we'll hear from Counsel for the
24 Applicant and the Staff as to that?

25 MR. FISK: Well, we believe that clearly

1 both -- that the response to Exelon's motion and any
2 amended contention we might file both clearly address
3 the issue of the clean energy alternatives contention;
4 and, therefore, are closely related to each other.
5 There's, I guess, a dispute over -- we still, I guess,
6 would like to make the argument regarding the
7 contention of omission, whether it's a contention of
8 omission or not. We believe that should all be made
9 in one filing rather than two separate ones.

10 JUDGE ABRAMSON: Let me make sure I
11 understand. The original contention was that they
12 hadn't addressed specific alternatives as we amended.
13 Is it your view that they had addressed them, and that
14 what was in there was insufficient, or that they had
15 not addressed them at all? What was lacking?

16 MR. FISK: Our view was that we were
17 challenging the sufficiency and substance of the
18 alternatives discussion provided by the Applicants in
19 their application.

20 JUDGE ABRAMSON: Right. But remember that
21 that contention was narrowed considerably by the
22 Board.

23 MR. FISK: Yes. You're correct, Your
24 Honor, but we still believe that -- let me find the
25 specific language. As the amended contention that was

1 admitted states, that Exelon's analysis is premised on
2 some material legal and factual flaws it needed to
3 improperly reject alternatives, so we believe that's
4 an attack on the substance of what Exelon provided;
5 and, therefore, is not a contention of omission, but
6 rather a contention challenging the substance of their
7 analysis. And now that they've provided new analysis,
8 we would like to be able to challenge the substance of
9 that.

10 JUDGE ABRAMSON: It's not appropriate for
11 us to get into a substantive argument now about the
12 motion itself. Let's hear from the Applicant and the
13 Staff on this request.

14 MR. FRANTZ: This is Steve Frantz. I
15 think the Board has already ruled twice that the
16 timing for filing responses to our motion for summary
17 disposition is April 6th. I don't think there's
18 anything new that Mr. Fisk is raising today that would
19 change that.

20 I might also add that this should not have
21 been a surprise to the Intervenors. They've had the
22 RAI response now for six months. Our motion is
23 largely based upon the RAI response. They were on
24 notice that we were going to be filing a motion for
25 summary disposition. They should have been collecting

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1 all of their expert information and reports long
2 before now. There just is no basis for an extension
3 of time on the motion for summary disposition.

4 JUDGE ABRAMSON: Staff.

5 MS. LEMONCELLI: Yes, Your Honor. This is
6 Mauri Lemoncelli for the Staff. And we would agree
7 with Mr. Frantz. Pursuant to 2.1205, responses to
8 motions for summary disposition are due within 20
9 days, as the Board has noted. The Board has asked
10 that responses be filed by noon on April 6th. The
11 Intervenors have on two occasions asked for an
12 extension of time, and the Board has responded in kind
13 denying both motions. The Staff maintains that the
14 Intervenors should not be granted any extension.

15 MR. FISK: Your Honor, this is Shannon
16 Fisk for the Intervenors again. I would just note
17 once again that a final initial decision on the
18 application here isn't due until March of 2006, so an
19 additional 15 days to respond to the motion for
20 summary disposition creates no delay in this
21 proceeding.

22 JUDGE ABRAMSON: Mr. Fisk, I think we've
23 ruled on this request twice, and I don't see any
24 reason for us to - unless Judge Hetrick or Judge
25 Baratta has any --

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1 JUDGE BARATTA: No. This is Judge
2 Baratta. I think we've addressed it already.

3 JUDGE HETRICK: I agree.

4 JUDGE ABRAMSON: So we will not grant any
5 further extensions or any extensions on anything else
6 other than -- I'm sorry. We will not grant any
7 extension on the filing for responses to the summary
8 dismissal motion. We have told you where we come out
9 on a safe harbor for the timing of a new contention or
10 amended contention based on the substance of the new
11 information. And that's, I think, going to be the
12 final rule for us on these.

13 MR. FISK: Okay. Thank you, Your Honor.
14 We will file based on that schedule then.

15 JUDGE ABRAMSON: Okay. Is there anything
16 else we need to be considering on this, Mr. Fisk, that
17 you want to discuss in this conference call?

18 MR. FISK: We didn't have anything else,
19 Your Honor.

20 JUDGE ABRAMSON: Does either the Staff or
21 the Applicant have anything else they want to discuss?

22 MS. LEMONCELLI: This is Mauri Lemoncelli
23 for the Staff, Your Honor. We have nothing further.
24 Thank you.

25 JUDGE ABRAMSON: Applicant?

1 MR. FRANTZ: And this is Steve Frantz. We
2 have nothing further.

3 JUDGE ABRAMSON: Okay. Well, given that,
4 let me -- Judge Baratta.

5 JUDGE BARATTA: I just wanted to -- maybe
6 we'll get to this, but I wanted the Staff if they
7 could to reconfirm what they think the schedule is for
8 the final EIS. I notice that you did make your
9 previous commitment to the draft EIS, and thank you
10 very much for that. I was just curious as to whether
11 or not you think you're on schedule for issuing the
12 FEIS, I think was what, December of this year, if I
13 recall.

14 MS. LEMONCELLI: Your Honor, it looks like
15 at this time the current target date is October of
16 this year.

17 JUDGE ABRAMSON: And while we're on the
18 topic, counselor, what is the schedule for receipt of
19 comments on the DEIS? When does the comment period
20 close?

21 MS. LEMONCELLI: Your Honor, the comment
22 period commenced on, I believe it's March 11th. And
23 the comment period, it's a 75-day comment period, Your
24 Honor. That period will end on May 25th of this year.

25 JUDGE ABRAMSON: And what's the normal

1 process for the Staff once they've received those
2 comments? Do you then meet and weigh them? How does
3 that work its way into the FEIS?

4 MS. LEMONCELLI: That's correct, Your
5 Honor. The Staff will start to read and consider all
6 of the comments received, and incorporate the comments
7 accordingly into the final Environmental Impact
8 Statement.

9 JUDGE ABRAMSON: Is there any way for us
10 or for the other parties to know which of those
11 comments the Staff intends to incorporate in the FEIS,
12 or in what manner, any time before the issuance of the
13 FEIS?

14 MS. LEMONCELLI: Your Honor, the Staff
15 will consider all of the comments received. In
16 addition, we will be making the comments available via
17 the hearing file, so as the comments come in pursuant
18 to our responsibility to update the hearing file,
19 those comments will be added.

20 JUDGE ABRAMSON: Where the Board is going
21 with all this is, as I mentioned at the outset, in a
22 hearing that's going on concurrent with this on
23 another application, the parties had agreed after the
24 DEIS was issued and the comment period has closed that
25 they would hold a substantive hearing on the merits of

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1 the environmental contentions with a view that after
2 those hearings were held that would aid in development
3 of the FEIS, rather than waiting until the FEIS came
4 out, and then having a hearing. And we would like to
5 hear the parties' views on that sort of a process
6 here.

7 MS. LEMONCELLI: Your Honor, if I may, for
8 the sake of clarification, are you referring to a
9 hearing after the DEIS, the draft Environmental Impact
10 Statement, or a hearing after the final Environmental
11 Impact Statement is issued?

12 JUDGE ABRAMSON: We're advising you that
13 in another proceeding which is governed by the same
14 regulations, with the same prohibition against having
15 a hearing on environmental matters prior to the
16 issuance of the final EIS, the parties agreed that it
17 was expeditious to hold a hearing on the merits on
18 environmental contentions prior to issuance of the
19 final Environmental Impact Statement, but it was after
20 the draft Environmental Impact Statement, and after
21 the comments had been received and weighed.

22 And the point that the Board felt in that
23 case, and that the parties felt was that expedited
24 getting the FEIS right. And the question is, is that
25 something that the parties would like to consider now?

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1 Do you want to think about it and we'll have another
2 conference call to discuss it. Obviously, it's very
3 premature since the comment period doesn't close for
4 two months. Maybe what I should do is ask you to all
5 think about that, and we can have another conference
6 call after the April 22nd date.

7 MS. LEMONCELLI: Your Honor, this is Mauri
8 Lemoncelli again for the Staff. May I ask the
9 proceeding to which you're referring in which the
10 Board and parties have made this arrangement?

11 JUDGE ABRAMSON: Yes, I think it's no
12 secret. It's Louisiana Enrichment Services.

13 MS. LEMONCELLI: Okay. Thank you, Your
14 Honor.

15 JUDGE ABRAMSON: Well, does anybody have
16 any comment on the thought, or shall we just think
17 about it and reconvene to talk about it later in
18 April?

19 MR. FRANTZ: This is Steve Frantz.
20 Obviously, we're hoping the Board grants our motion
21 for summary disposition; therefore, there would be no
22 reason to have any hearing on Contention 3.1, or the
23 alternatives of wind and solar. If the Board were to
24 deny our motion, we would certainly considering moving
25 up the hearing schedule if the other parties agree.

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1 JUDGE ABRAMSON: Mr. Frantz, let me just
2 make sure that we're all on the same page here. Even
3 if we should grant the motion for summary disposition
4 on the basis that it was a contention of omission, as
5 to which the omission has been satisfied, that would
6 not somehow eliminate the Intervenor's right to file
7 new or amended contentions on the basis of new
8 information. And we've agreed as a Board and ruled
9 that the timeliness for that starts to run on March
10 8th.

11 MR. FRANTZ: I'm not contesting that, Your
12 Honor. All I'm saying is that once the Board grants
13 our motion, and if another contention has not been
14 admitted, then the Intervenors are no longer parties
15 and should be dismissed. That would not be preclude
16 the Board, of course, from ruling on any late filed
17 contentions by the Intervenors.

18 JUDGE ABRAMSON: We understand your
19 position. Staff have any comments, or the
20 Intervenors? Staff?

21 MS. LEMONCELLI: Your Honor, this is Mauri
22 Lemoncelli once again. On that issue, at this time
23 the Staff has no comment. There's just one additional
24 item that I'd like to mention. On April 19th we have
25 scheduled a public meeting in Clinton, Illinois to

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1 accept comments on the DEIS. And on the record, I
2 just wanted to make the Board and parties aware; and
3 certainly extend the invitation to Mr. Fisk. I
4 believe that he's planning on being there.

5 JUDGE ABRAMSON: That's a one-day event?

6 MS. LEMONCELLI: That's correct, Your
7 Honor.

8 MR. FISK: Yes. This is Shannon Fisk for
9 the Intervenors. I do intend to be there, and thank
10 you for the reminder. And I guess we would like time
11 to think about the hearing schedule, and we can
12 address that at a future conference call.

13 JUDGE ABRAMSON: Okay. Well, being that,
14 does anybody have any further comments? Judge
15 Hetrick, anything to add here?

16 JUDGE HETRICK: No, sir.

17 JUDGE BARATTA: We will make sure we
18 marked on our calendar that we had this
19 teleconference. Is that correct, Judge Abramson?

20 JUDGE ABRAMSON: Yes. I'm going to put a
21 big red sticker.

22 JUDGE HETRICK: Judge Abramson, are you
23 planning to issue a correction to the order of March
24 30 regarding that October —

25 JUDGE ABRAMSON: What I thought we would

1 do is issue a memorandum and order documenting the
2 substance of this conference call, and observing,
3 comments, apologizing, however we want to phrase it,
4 correcting our error in the last one as to the October
5 19th conference call.

6 JUDGE HETRICK: Okay.

7 JUDGE ABRAMSON: In the meantime, however,
8 let the parties proceed on the basis of the rulings
9 that we've announced today. If there's nothing
10 further, we'll close the hearing. Thank you very
11 much.

12 (Whereupon, the proceedings in the above-
13 entitled matter went off the record at 2:28 p.m.)
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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Exelon Generation Company

Early Site Permit

Pre-Hearing Conference

Docket Number: 52-007-ESP

Location: teleconference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Eric Hendrixson
Official Reporter
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