

RAS 9932

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 05/04/05
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ATOMIC SAFETY AND LICENSING BOARD

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**

May 4, 2005

MEMORANDUM

(Clarifying the Board's April 25, 2005 Order)

On May 2, 2005, we received a Motion from the NRC Staff requesting clarification of our April 25, 2005 Order regarding the timing for responses to intervenors Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen (collectively, the "Intervenors") Motion to Amend Contention 3.1.¹ In our April 25 Order, we directed that any party responses to the Intervenors' Motion must be filed by May 6, 2005, which was 14 days after the Intervenors' Motion was filed.² The Staff asserts in its Motion that the time for responses to the Intervenors' Motion is governed by 10 C.F.R. § 2.309(h)(1), and therefore the Staff should have been given 25 days from the date of the Intervenors' Motion, or until May 17, 2005, to respond.³

The 10 C.F.R. Part 2 procedural rules vest in this Board the duty and authority to take all

¹ See NRC Staff Motion for Clarification (May 2, 2005) [hereinafter Staff Motion].

² See Licensing Board Order (Schedule for Responses to Motion To Amend Contention 3.1) (Apr. 25, 2005) (unpublished).

³ See Staff Motion at 2.

appropriate action to control this proceeding to avoid delay and maintain order.⁴ To that end, our April 25 Order establishing the time for party responses was an exercise of our discretion under 10 C.F.R. § 2.307(b) to set time limits in the conduct of a proceeding.

Contrary to the Staff's assertion, the plain language of Section 2.309(h) (taken as a whole) reveals that it applies only to "requests for a hearing" and "petitions for leave to intervene." While the Staff correctly notes that our April 6, 2005 Memorandum advised that any newly-filed contention or amendment to an existing contention by the Intervenors must satisfy the 10 C.F.R. § 2.309(f) general contention admissibility requirements,⁵ the mere fact that the Intervenors complied with this requirement in their Motion does not make that Motion either a "request for hearing" or a "petition to intervene" sufficient to place it within the purview of Section 2.309(h).

Nor, however, can the April 22 filing by the Intervenors be properly considered a "motion" as contemplated by 10 C.F.R. § 2.323, and the fact that the Intervenors filed their amended contention under a document entitled "Motion to Amend" does not force that filing within the purview of Section 2.323. The choice of title for a particular filing cannot be determinate of which specific rule governs the process.

In this instance, the Intervenors filed an amended contention, which by its very nature does not accompany any "request for hearing" or "petition to intervene." While permission to file such an amendment⁶ is customarily obtained by the filing of a motion which would itself be

⁴ See 10 C.F.R. §§ 2.319, 2.321(c).

⁵ See Licensing Board Memorandum (Clarifying March 30 Memorandum and Order; Memorializing April 4 Conference Call) (Apr. 6, 2005) at 3 (unpublished) [hereinafter April 6 Memorandum].

⁶ See, e.g., the last sentence of Section 2.309(f)(2), requiring leave of the Board to file certain amended or new contentions.

governed by Section 2.323, once that permission is granted,⁷ the filing of the amended contention falls under neither Section 2.309(h) nor Section 2.323.

In the absence of a regulatory provision explicitly prescribing a time limit for the responses to an amended contention, the Board has discretion, under Section 2.307(b), to select an appropriate period for the Staff and Applicant Exelon Generation Company, LLC to file a response to the Intervenors' Motion.⁸ The choice of fourteen days was particularly appropriate in the current circumstance where the Applicant and the Staff essentially had knowledge of the likely substance of the Intervenors' amendment on April 6, 2005 when the Intervenors filed their response to the Applicant's Motion for Summary Disposition,⁹ and where the substance of the amendment in essence consists of a small number of discrete allegations of erroneous data or assumptions.

⁷ We granted such permission with regard to this filing during our April 4, 2005 Conference Call, see Tr. at 459-60, as memorialized in our April 6 Memorandum. See April 6 Memorandum at 3.

⁸ In any event, even if we were to find that either Section 2.309(h)(1) or Section 2.323(c) governed the time period for responses in the instant circumstance, both of those sections allow the Board discretion to establish a time for filing other than that provided for in the rule.

⁹ See Intervenors' Response to Exelon's Motion for Summary Disposition of Contention 3.1 (Apr. 6, 2005); see also Licensing Board Order (Denying, Following Reconsideration, Filing Extension Request) (Mar. 30, 2005) at 5 (unpublished); Licensing Board Memorandum and Order (Denying Filing Extension Request) (Mar. 23, 2005) at 2-4 (unpublished).

The foregoing clarifies, to the degree the Board feels necessary, our April 25, 2005 Order as requested by the Staff; any request for additional time in which to file a party response to the Intervenors' April 22, 2005 Motion to Amend Contention 3.1 must be submitted in accordance with the 10 C.F.R. Part 2 rules and the requirements set forth in the Initial Prehearing Order for this proceeding.¹⁰

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹¹

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 4, 2005

¹⁰ See Licensing Board Memorandum and Order (Initial Prehearing Order) (Mar. 8, 2004) at 8 (unpublished).

¹¹ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant EGC; (2) the Intervenors; and (3) the NRC Staff.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CLARIFYING THE BOARD'S APRIL 25, 2005 ORDER) 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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Docket No. 52-007-ESP
LB MEMORANDUM (CLARIFYING THE BOARD'S
APRIL 25, 2005 ORDER)

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Dated at Rockville, Maryland,
this 4th day of May 2005