

May 18, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

May 18, 2005 (4:34pm)

In the Matter of)
)
EXELON GENERATION COMPANY, LLC)
)
(Early Site Permit for Clinton ESP Site))
)

Docket No. 52-007-ESP

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
DOMINION NUCLEAR NORTH ANNA, LLC)
)
(Early Site Permit for North Anna ESP Site))
)

Docket No. 52-008-ESP

In the Matter of)
)
SYSTEM ENERGY RESOURCES, INC.)
)
(Early Site Permit for Grand Gulf ESP Site))
)

Docket No. 52-009-ESP

In the Matter of)
)
LOUISIANA ENERGY SERVICES, L.P.)
)
(National Enrichment Facility))
)

Docket No. 70-3103-ML

In the Matter of)
)
USEC Inc.)
)
(American Centrifuge Plant))
)

Docket No. 70-7004

INTERVENORS' RESPONSE TO CERTIFIED QUESTIONS (CLI-05-09)

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INTERVENORS' RESPONSE TO CERTIFIED QUESTIONS (CLI-05-09)

Intervenors in the Exelon Generation Company ESP (Clinton ESP), Dominion Nuclear North Anna ESP (North Anna ESP), and Louisiana Energy Services (National Enrichment Facility) proceedings, and Petitioner in the USEC (American Centrifuge Plant) proceeding (collectively, "Intervenors"), hereby submit this joint response to the Nuclear Regulatory Commission's April 20, 2005 Memorandum and Order (CLI-05-09), 61 NRC ____, regarding certified questions from the Atomic Safety and Licensing Board on its mandatory review of uncontested issues in these proceedings. LBP-05-07, 61 NRC ____ (March 18, 2005) ("Board Memorandum").

At the outset, Intervenors emphasize that, regardless of whether or not a proceeding or issue is contested, the Commission has the fundamental responsibility for protecting the health and safety of the public in any licensing proceeding. In particular, the Commission must carry out its duties in a manner that is consistent with its "responsibility as an independent regulatory agency for protecting the radiological health and safety of the public," 10 C.F.R. 51.10(b), and must ensure that its licensing decisions are not "inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d); 10 C.F.R. 50.40(c). Therefore, it is the duty of the Commission (and its Licensing Boards), not potential intervenors, to ensure that licensing decisions are based on objective and independently verified information that is sufficient to demonstrate that the public will be protected. It is this fundamental duty to protect the public that should guide the Commission and Board as the various licensing applications at issue here are analyzed.

I. Intervenor's Position on Certified Questions

A. Scope of Licensing Board Review of Uncontested Issues and De Novo Licensing Board Review of Applications

With regards to certified questions A and C (Board Memorandum at 9-10, 11-12), Intervenor's agree that the Board does not conduct a *de novo* review of uncontested issues or license applications. However, the Board must conduct some substantive review of such issues. 10 C.F.R. § 2.104(b)(2) requires the Board to conduct a genuine examination of the uncontested issues and ensure that the review conducted by the Staff has been adequate. Although the Board is not required to duplicate the review already performed by the Staff or to perform a *de novo* evaluation of the application, it should nonetheless determine whether further examination of the uncontested issues is warranted. In the context of an operating license proceeding, the Atomic Safety and Licensing Board has stated:

Taking into account the scope of review appropriate for an uncontested issue in an operating license proceeding, we have examined whether the generic safety issues have been taken into account in a manner that is at least plausible and that, if proven to be of substance, would be adequate to justify operation.

Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ASLBP 79-421-07-OL, 24 N.R.C. 295 (1986). It follows that in these proceedings, which are subject to the procedural requirements in 10 C.F.R. Part 2 that are applicable to construction permits, the Board must ensure that the Staff's review took the uncontested issues into account in a manner which would be adequate to justify issuing the permit.

In making mandatory findings on an array of uncontested issues, therefore, the Board should utilize a slightly deferential standard of review that still entails a detailed analysis of

issues and proposed findings submitted by the Staff. In carrying out such a review, the Board should keep two additional points in mind. First, in instances where the Staff has merely adopted or deferred to applicant information to support a proposed finding, the Board should scrutinize such information and finding much more closely than normal. In such instances, there is little evidence that the Staff engaged in an independent analysis, and therefore, the Board must take a closer look to ensure that applicant information is actually reviewed and evaluated.

Second, the Board's review would likely be aided by comments and expertise from the public and outside agencies. Therefore, Intervenor recommend that the Board allow for submission of oral and written comments or statements by local, state and federal agencies and the public, including Intervenor, at any public hearing, and for limited appearance statements at the hearing on the application, 10 C.F.R. 2.315(a). The Board should consider such comments and statements in reviewing the Staff's analysis and proposed findings. Indeed, to the extent that the Board's determination in this proceeding constitutes a Record of Decision on the Final Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. 4332, such public statements could be viewed as comments on the Final EIS (see, e.g., comments on final EIS allowed by Council on Environmental Quality NEPA regulations, 40 C.F.R. § 1503.1(b)). In addition, to the extent that the Board lacks expertise relevant to reviewing a particular issue, the Board should consult with independent outside experts to aid in such review.

B. Contested Proceeding v. Contested Matter

With regards to certified question B (Board Memorandum at 10-11), Intervenor believe that the resolution of this question should not materially affect the type of review provided for contested and uncontested issues. In particular, for contested issues (for example, the Clean

Energy Alternatives contention in the Clinton ESP proceeding), the Board should make de novo findings on the basis of the testimony and evidence provided at the mandatory hearing required for those issues. For uncontested issues, the Board should engage in the type of substantive but slightly deferential review that considers input from the public, other agencies, and outside experts, as described in Section I.A above. In any proceeding, of course, the Commission and Board have the responsibility for making sure that the public health and safety are protected. So long as these standards are met, Intervenor's see no distinction between whether a proceeding as a whole should be considered "contested" or "uncontested," or whether a single proceeding should be bifurcated into "contested" or "uncontested" portions.

C. NEPA Requirements

1. Scope of Board Review Responsibility Regarding Three NEPA "Baseline" Findings

As for the three "baseline" NEPA issues identified by the Board (Board Memorandum at 12-13) and set forth in 10 C.F.R. 51.105(a)(1)-(3), Intervenor's believe that (to the extent that such issues are not contested) the Board may engage in a slightly deferential review of the information regarding these NEPA issues provided by the Staff and applicant, but must engage in an independent analysis in actually resolving those issues. In particular, Intervenor's agree that the Board need not duplicate the efforts of the Staff and applicant in compiling information regarding the baseline NEPA issues. Instead, the Board should, as described in Section I.A., engage in the slightly deferential review of the information provided in order to determine whether further examination of such NEPA issues is needed.

With regards to actual findings on these baseline NEPA issues, however, the NRC regulations are clear that, unlike with uncontested issues, the Board must reach independent conclusions and not simply review the Staff's conclusions. With regards to uncontested issues, the Board is required only to review the application and the record and determine if the Staff's review has been adequate to support the Staff's findings on those issues. With regards to the baseline NEPA issues, however, 10 C.F.R. 51.105(a)(1)-(3) requires that the Board "independently weigh" conflicting factors, weigh environmental and economic costs and benefits, and consider reasonable alternatives in order to "determine" whether NEPA has been complied with and whether the license should be issued, denied, or conditioned. Plainly, the regulatory language regarding the baseline NEPA issues requires the Board to go beyond merely reviewing the Staff's and applicants' conclusions and to, instead, independently decide those critical issues.

2. Scope of NEPA "Baseline" Finding Three

The NRC regulations governing compliance with NEPA plainly require the Board to determine whether a permit should issue only after "weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives." 10 C.F.R. 51.105(a)(3). The Board questions whether such weighing and/or consideration of alternatives should not occur in at least some of these proceedings because the LES hearing notice does not mention either the weighing or alternatives requirement, and the ESP hearing notices mentions only the alternatives requirement. See Board Memorandum at 12-13. Those omissions appear to result from similar omissions in 10 C.F.R. 2.104(b)(3)(iii). That regulation, however, states that the required NEPA analysis is to be carried out pursuant to

Subpart A of part 51 of the NRC regulations and, therefore, it is clear that the standards set forth in 10 C.F.R. 51.105(a)(3), and not the hearing notices, govern these proceedings.

3. NEPA Review is Improperly Constrained

Intervenors also note that regardless of the type of review engaged in by the Board, the NRC regulations in many of these proceedings have been interpreted in a way that improperly constrains the analysis and therefore prevents full compliance with NEPA. In particular, the Licensing Boards in these proceedings have interpreted the NRC rules and precedents to foreclose the consideration of certain critical NEPA issues, such as the need for a facility and compliance with the Clean Water Act. While Intervenors continue to believe that the exclusion of the consideration of such issues is a violation of NEPA, at a minimum the terminology attached to the decision and documentation in this proceeding should reflect the fact that important NEPA issues have not been included in this review.

For example, the Board has determined in the Clinton ESP proceeding that the “need for power” need not be considered. See Memorandum and Order (Ruling on Standing and Contentions), LB-04-17, Aug. 6, 2004, at 16. The identification and discussion of the need for a project, however, is a required and critical component of the NEPA-required alternative analysis because the need forms the baseline by which the reasonableness of various alternatives and the benefits and costs of the proposal can be measured. 40 C.F.R. 1502.13; City of Carmel-By-The-Sea v. U.S. Dep’t of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997). Thus, the Board should either require an analysis of the need for power as part of any of the ESP proceedings at issue here, or expressly

recognize that not all of the issues intended to be covered in a NEPA analysis have been addressed.

Similarly, the fundamental issue of compliance with the federal Clean Water Act was held in the North Anna ESP proceeding to be beyond the scope of these proceedings. See Memorandum and Order (Ruling on Standing and Contentions), LB-04-18, Aug. 6, 2004, at 19-20. The result of that decision is that one of the most important site suitability determinations will not be included in reviewing the ESP applications. The ESP, if issued, should reflect that reality. Section 401 of the Clean Water Act, 33 U.S.C. § 1341, requires that applicants for federal permits which may result in discharges into navigable waters shall provide federal permitting agencies a certification from the State that discharges that result from the activity authorized by the federal agency will comply with state water quality standards.¹

Typically, the 401 certification is obtained before federal permits are issued. Indeed, it was required to be obtained before NRC issuance of construction permits under prior rules. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 N.R.C. 503, ___ , 1977 NRC LEXIS 144, *14 (1977) (“Furthermore, before we may issue a construction permit we must receive a certificate from state authorities certifying that proposed operations at the proposed site will meet applicable Federal water quality standards, and any additional standards which state law may impose.”). Though the ESP in the North Anna ESP case will not authorize any direct discharge to Lake Anna, neither would the construction permit at issue in the Seabrook case above. Intervenors submit that it would be highly inappropriate to

¹ “Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.” 33 U.S.C. § 1341(a)(1). See also, Va. Code Ann. § 62.1-44.15:5 re Virginia Water Protection Permits (state version of 401 certification); 9 Va. Admin. Code § 25-210-10 et seq. (2004).

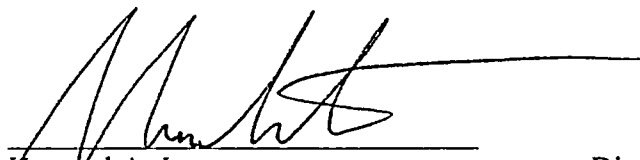
issue an Early Site Permit when one of the most critical site suitability issues remains undetermined. Thus, the Board should either require the ESP applicants to obtain any necessary 401 certification from the State in advance of ruling on the ESP or expressly state that the ESPs that are issued are conditional.

Finally, impacts on cultural resources should be thoroughly evaluated as part of the mandated NEPA review. Where applicable, issues relating to compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.*, and related legislation should be independently evaluated under Section 106 of the NHPA itself, 16 U.S.C. 470f, as part of the licensing process, both as admitted contentions where appropriate and as uncontested issues where not. NHPA issues should be folded into the NEPA review only as specifically provided in the NHPA, and should be considered outside of the NEPA process where necessary.

CONCLUSION

The Commission and Board have the fundamental duty in these proceedings to ensure that the public health and safety are protected. The questions certified to the Commission by the Board should be addressed in a manner that recognizes this fundamental duty, and that is consistent with the important role that the Board plays in reviewing the data and analysis provided by the Staff and applicants and in independently deciding baseline NEPA issues. While the Board need not engage in *de novo* review of uncontested issues, it should engage in a substantive and slightly deferential review that considers additional information from the public, other agencies, and outside experts, and ensures that information presented by applicants has been adequately reviewed by the Staff. As for the baseline NEPA issues, the Board need not duplicate the efforts of the Staff and applicant in compiling information relevant to those issues, but must make an independent determination regarding the resolution of those issues.

Respectfully submitted,



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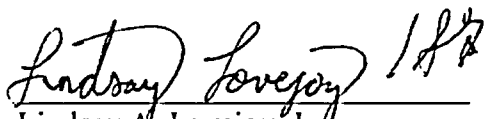
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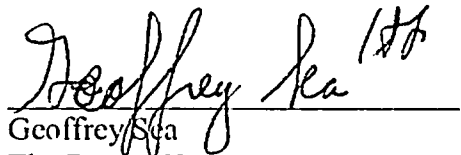
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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DOMINION NUCLEAR NORTH ANNA, LLC) Docket No. 52-008-ESP
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(Early Site Permit for North Anna ESP Site))
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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2005, copies of the foregoing Intervenor's Response to Certified Questions (CLI-05-09) were served on the following by first-class mail and, where indicated by an asterisk, by electronic mail.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

Docket No. 70-3103

Louisiana Energy Services, L.P.
National Enrichment Facility

CERTIFICATE OF SERVICE

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

Docket No. 52-007-ESP

Exelon Generation Company, LLC

(Early Site Permit for Clinton ESP Site)

CERTIFICATE OF SERVICE

I, Shannon Fisk, hereby certify that copies of the Intervenors' Response to Certified Questions (CLI-05-09) 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 18th day of May, 2005.

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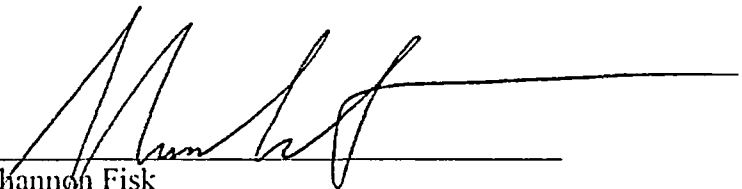
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
USEC, Inc.) Docket No. 70-7004
)
(American Centrifuge Plant)) May 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of INTERVENORS' RESPONSE TO CERTIFIED QUESTIONS (CLI-05-09) have been served on the following by deposit in the United States mail, and as indicated by an asterisk (*) by electronic mail on this 18th day of May, 2005.

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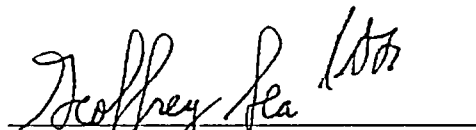
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