UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC.	)	Docket Nos. 52-007-ESP
	)	
(Early Site Permit for Clinton ESP site)	)	ASLBP No. 04-821-01-ESP

NRC STAFF ANSWER TO INTERVENORS' PETITION FOR REVIEW OF LBP-05-19

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August 23, 2005

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NRC STAFF ANSWER TO INTERVENORS' PETITION FOR REVIEW OF LBP-05-19

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to "Intervenors' Petition for Review of the Atomic Safety and Licensing Board's Dismissal of Contention 3.1 and Rejection of Intervenors' Proposed Amended Contention 3.1" ("Petition") submitted by the Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Energy Information Service, Nuclear Information and Resource Service, and Public Citizen (collectively, "Intervenors") served on August 12, 2005.[1] For the reasons set forth below, the Staff submits that the Intervenors fail to demonstrate that Commission review of the Licensing Board's decision[2] is warranted under 10 C.F.R. § 2.341(b) (4). Accordingly, the Petition should be denied.

BACKGROUND

As relevant to the Petition, the Board, in its Memorandum and Order (Ruling on Standing and Contentions) of August 6, 2004, ruled that the Intervenors had established the

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[1] Because the Intervenors served all parties after 5:00pm EST by electronic mail, the Staff's response date is extended by one (1) business day, pursuant to 10 C.F.R. § 2.306.

[2] *Exelon Generation Co.* (Early Site Permit for the Clinton ESP Site), LBP-05-19, 62 NRC __ , slip op. (July 28, 2005) ("Ruling on Motion for Summary Disposition Regarding Contention 3.1 and Petition for Admission of Amended Contention") [hereinafter "Order"].

requisite standing to intervene in the proceeding and found admissible a portion of one contention concerning the ESP application, designated as Environmental Contention ("EC") 3.1 - The Clean Energy Alternatives Contention.[3] However, the Board rejected portions of the Intervenors' contention pertaining to energy conservation (demand side management) and the need for power as outside the scope of the proceeding and/or an impermissible challenge to the Commission's regulations.[4]

On August 23, 2004, the Intervenors filed a petition for interlocutory review with the Commission challenging the Board's rejection of that portion of Contention 3.1 pertaining to energy efficiency issues.[5] The Commission denied the Intervenors' petition for review and expressed no view on the merits of the claim that the Board incorrectly excluded their energy efficiency issues.[6]

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[3] As admitted, Environmental Contention ("EC") 3.1 states:

> The Environmental Review fails to rigorously explore and objectively evaluate all reasonable alternatives. In Section 9.2 of the Environmental Report, Exelon claims to satisfy 10 C.F.R. § 51.45(b)(3), which requires a discussion of alternatives that is "sufficiently complete to aid the Commission in developing and exploring" "appropriate alternatives ... concerning alternative uses of available resources," pursuant to the National Environmental Policy Act. However, Exelon's analysis is premised on several material legal and factual flaws that lead it to improperly reject the better, lower-cost, safer, and environmentally preferable wind power and solar power alternative, and fails to address adequately a mix of these alternatives along with gas-fired generation and "clean coal" resource alternatives. Therefore, Exelon's ER does not provide the basis for the rigorous exploration and objective evaluation of all reasonable alternatives to the ESP that is required by NEPA.

LBP-04-17, 60 NRC 229, 252 (2004).

[4] *See id*. at 245-46.

[5] *See* Petition of Intervenors Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, and Public Citizen For Interlocutory Review of the Licensing Board Panel's Rejection of Energy Efficiency Alternatives Contention (Aug. 23, 2004).

[6] *See* CLI-01-34, 60 NRC 461 (2004).

Based on Contention 3.1, the NRC Staff issued Request for Additional Information ("RAI") E9.2-1, which was subsequently answered by Exelon.[7] In its response, Exelon provided a detailed analysis of wind power and solar power, which included combinations of these alternatives with coal and natural gas fired power generation. On March 2, 2005, the NRC Staff issued NUREG-1815, "Draft Environmental Impact Statement for an Early Site Permit (ESP) at the Exelon ESP Site" ("DEIS"). Subsequently, on March 17, 2005, Exelon moved for summary disposition of Contention 3.1, arguing that (1) Contention 3.1 is a contention of omission, which the Applicant cured in its answer to the Staff's RAI and (2) even if the contention were not one of omission, the Intervenors did not demonstrate any genuine issue of material fact regarding alternative energy sources or combinations thereof.[8] The Intervenors opposed the Applicant's motion; the Staff supported it.[9]

On April 22, 2005, the Intervenors filed a motion to amend Contention 3.1, asserting that: (1) the Applicant and Staff discussions regarding energy alternatives were flawed because they wrongly accepted a project purpose (i.e the creation of baseload power) that improperly excluded reasonable energy efficiency alternatives; (2) the Applicant and the Staff underestimated the environmental impacts of a new nuclear unit and overestimated the impacts of clean energy alternatives, thereby erroneously concluding that those alternatives were not environmentally preferable to nuclear power; (3) the Applicant's filings, on which the DEIS heavily relied, improperly concluded that new nuclear power would be less costly than clean energy alternatives; and (4) that the Applicant and the Staff failed to adequately analyze

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[7] Letter from Marilyn C. Kray, Vice President, Project Development, Exelon Nuclear, to NRC, "Exelon Generation Company, LLC (EGC), Response to Request for Additional Information (RAI) regarding the Environmental Portion of the Application for an Early Site Permit (ESP) (TAC NO. MC1125)" (September 23, 2004) ADAMS Accession No. ML042730012.

[8] *See generally* Exelon's Motion for Summary Disposition of Contention 3.1 (March 17, 2005).

[9] *See* Intervenors' Response to Exelon's Motion for Summary Disposition of Contention 3.1; NRC Staff's Answer to Exelon's Motion for Summary Disposition of Contention 3.1 (April 6, 2005).

alternative clean energy sources in combination and provided an analysis that unfairly favored nuclear power.[10]

The Applicant and the Staff responded to the Intervenors' motion on May 6, 2005. The Applicant argued that the amended contention should be rejected because Intervenors (1) failed to satisfy the general and late-filed contention criteria; (2) raised issues that had previously been rejected by the board; (3) improperly challenged various Commission regulations; and (4) failed to demonstrate the existence of a genuine dispute on material issues of law or fact.[11] The Staff asserted that the amended contention failed to meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f).[12]

The Licensing Board issued its Memorandum and Order on July 28, 2005. In LBP-05-19, the Board held that: (1) Intervenors' proposed amendment to the contention was inadmissible; (2) no genuine issue of material fact remained regarding the contention as admitted, and the contention was resolved in favor of Exelon as moot; and (3) because no outstanding contention remained to be litigated in the proceeding, the contested portion of the proceeding was terminated. LBP-05-19, 62 NRC __ , slip op. at 4-5. Subsequently, on August 12, 2004, the Intervenors filed the instant Petition, in which they now seek review of the Licensing Board's summary disposition of their original contention and rejection of their amended contention.

As set forth below, the Staff submits that the Board correctly resolved Contention 3.1 and amended Contention 3.1 discussed in the Intervenors' Petition, and the Intervenors have not shown that Commission review of the Licensing Board's decision is warranted under any of

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[10] *See* Intervenors' Motion to Amend Contention 3.1 at 2-3 (April 22, 2005).

[11] *See* Exelon's Answer to Intervenors' Motion to Amend Contention 3.1 at 1-2 (May 6, 2005).

[12] *See* NRC Staff Answer to Intervenors' Motion to Amend Contention 3.1 (May 6, 2005).

the criteria set forth in 10 C.F.R. § 2.341(b)(4). For these reasons, as more fully discussed below, the Intervenors' Petition should be denied.

DISCUSSION

I. Applicable Legal Standards

A. Standards Governing Petitions for Review

Pursuant to 10 C.F.R. § 2.341(b)(4), Commission review of a licensing board decision may be undertaken in accordance with the following principles:

> (4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:
>
> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
> (ii) A necessary legal conclusion is without governing precedent or is a departure from the established law;
> (iii) A substantial and important question of law, policy, or discretion has been raised;
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
> (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b)(4). *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 422 (2003).

B. Standards Governing the Admission of Amended Contentions

Commission regulations provide that a contention may be amended after the initial filing only in two circumstances. First, a contention may be amended "if there are data or conclusions in the NRC draft or final environmental impact statement [("EIS")], environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Alternatively, 10 C.F.R. § 2.309(f)(2)(i)-(iii) provides that a contention may be amended only with leave granted by the presiding officer upon a showing that the following criteria have been met:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2), a petitioner must also show that the late-filed contention meets the Commission's contention admissibility requirements of 2.309(f)(1)(i-vi). *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993).[13] Pursuant to the regulation, a petitioner must:

(i) provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) provide a brief explanation of the basis for the contention;

(iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for

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[13] The Staff notes that the standards governing the admissibility of contentions remain substantively unchanged from those that existed before the effective date of New Part 2. *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2220-21 (Jan.14, 2004).

> each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). The Commission has emphasized that its rules on admission of contentions establish an evidentiary threshold more demanding than a mere pleading requirement and are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Under the rule, a petitioner "must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant." *Id.* Rather, the petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view." *Id.* Moreover, a petitioner must provide a "clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources which establish the validity of the contention." *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

II. The Intervenors' Petition Fails to Demonstrate that Commission Review is Warranted in Accordance With the Requirements of 10 C.F.R. § 2.341(b).

A. The Licensing Board Properly Applied Established Case Precedent Arising Under NEPA.

The Intervenors assert that, as a consequence of its denial of their contention and rejection of their request to amend it, the Licensing Board "failed to provide for the rigorous exploration and objective evaluation of better, lower-cost, safer, and environmentally preferable energy efficiency and clean energy (wind, solar, and natural gas) alternatives that is required by the National Environmental Policy Act (NEPA).[14] Petition at 1. In support of this assertion, the Intervenors argue that the "primary error in the Board's rejection of energy efficiency [and clean

[14] In support of this proposition, the Intervenors cite to regulations adopted by the Council on Environmental Quality. *See* Petition at 1. As the Board indicates in its Order, CEQ regulations are not binding on the Staff and serve only as guidance. *See* Order at 15.

energy alternatives] is that the Board violated NEPA by simply deferring to Exelon's purpose of creating baseload power." *Id.* at 10.

The Intervenors maintain that the Board and the Commission have "blindly adopted" the Applicant's business goal, *i.e* creating baseload power, thus, limiting consideration of reasonable alternatives.[15] *Id*. at 11. The Commission, Intervenors assert, is an independent regulatory body, and, as such, "must independently define its own purpose and range of alternatives, rather than simply deferring to Exelon's purpose for submitting an ESP application." *Id*. at 12. Intervenors urge that because of the recent deregulation of the electrical power industry, the Commission should maintain the degree of oversight envisioned by NEPA through an independent selection of alternatives. *Id*.

The Intervenors' arguments are without merit. In its Order, the Licensing Board applied clear and long-standing legal precedent regarding narrowing the scope of alternatives to baseload generation. *See* Order at 18-20. In ruling on the Intervenors' claim, the Board found that "the Staff should take into account the Applicant's business purpose (goals and needs) of owning and operating baseload power plants at the Clinton Site." Order at 19 (emphasis in original).

The Board's analysis begins with the tenets of NEPA. NEPA requires that "federal agencies, when considering the environmental impacts of their proposed actions in their decision-making process, must take a 'hard look' at the environmental impacts of a proposed action, and at reasonable alternatives to that action." Order at 18 (emphasis in original), *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998). However, the Board, notes that "the Agency need only discuss those alternatives that are reasonable and will bring about the ends of the proposed action." Order at 18 (internal

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[15] In support of its argument, the Intervenors cite to an Illinois statute concerning the energy policy of Illinois regarding energy efficiency. *See* Petition at 11. Illinois State law and policy do not bind the Commission. *See* LBP-04-17, 60 NRC at 248.

quotations omitted), *citing Hydro Resources, Inc.,* CLI-01-04, 53 NRC 31, 55 (2001), *quoting Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). In determining the purpose of the proposed action, the Board held that the Agency should take into account the goals and needs of the Applicant.[16] Because the Applicant's proposal is the production of baseload power via nuclear generation, the Board finds that the only reasonable alternatives that need to be considered are those that generate baseload power. Order at 19-20.

Clearly, the Board's ruling regarding treatment of the Applicant's purpose is within governing precedent. Despite Intervenors' claims to the contrary, Intervenors have failed to demonstrate that the Board's Order warrants review under 10 C.F.R. § 2.341(b)(4)(ii). *See* Petition at 2.

B. The Licensing Board Properly Applied Commission Regulations Governing Early Site Permits.

1. Demand Side Management (Energy Efficiency)

Intervenors repeat their challenge to the Board's earlier ruling[17] that energy efficiency need not be considered by the Applicant or the Staff. *See generally* Petition at 13-15.

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[16] In support of its ruling, the Board cites the *Busey* decision:

> In commanding agencies to discuss "alternatives to the proposed action," however, NEPA plainly refers to the alternatives to the "major *Federal* actions significantly affecting the quality of the human environment," and not to alternatives to the applicant's proposal. An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate the alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.

Order at 19 n.75, citing *Busey*, 938 F.2d at 199 (emphasis in original) (citation omitted).

[17] LBP-04-17, 60 NRC at 245-46.

Intervenors take issue with the Board's equating demand side management with an examination of the need for power. *See* Petition at 13. Intervenors maintain that the Commission's regulations "do not foreclose an analysis of the need for power, but rather simply provide that an application and EIS 'need not include' an assessment of benefits such as the need." Petition at 13, *citing* 10 C.F.R. §§ 52.17(a) & 52.18.

Despite the Intervenors' repeated claims to the contrary, the Board has correctly applied the regulations governing early site permits. To that end, the Board determined that "demand side management, no matter how it is characterized, remains an alternative to generation of power, and examination of such an option is nothing more than a surrogate for examination of the 'need' for power which is expressly not required pursuant to Sections 52.17(a) and 52.18 . . . ." Order at 21-22. Further, the Board ruled that because the Applicant has no ability to implement demand side management, it is not a "reasonable alternative" under NEPA. *Id.*[18] Intervenors have failed to show that the Board's Order is based on legal or factual error; therefore, Commission review is not warranted. *See* 10 C.F.R. § 2.341(b)(4)(ii).

2. Cost-Benefit Analysis

Intervenors further challenge the Board's ruling that a cost-benefit analysis need not be considered for the purpose of an early site permit application. *See* Petition at 17-18. According to the Intervenors, the Board's decision to exclude the consideration of economics violates NEPA. Intervenors claim that the Board "attempts to excuse this violation of NEPA by stating that the exclusion of cost considerations is 'an exclusion that is unique to applications for ESPs,' and that costs and benefits will be considered during any construction or combined

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[18] The Applicant has demonstrated, as the Board found, that Exelon Generation Company is an independent power producer (IPP) whose sole business purpose is to generate and sell electricity at wholesale. Order at 12, *citing* Environmental Report for the Exelon Generation Company, LLC, Early Site Permit (Sept. 25, 2003) at 9.2-1, ADAMS Accession No. ML032721602. The Applicant has no link to the ultimate consumer. *Id., citing* DEIS at 8-2 to 8-3.

operating licensing permit proceedings." *Id.* at 18, *citing* Order at 33 n.124. Intervenors assert - without citing any legal authority - that "NEPA . . . does not make special exception for certain federal agency actions, such as the ESP process, by exempting them from economic analysis." *Id.*

Throughout its Order, the Board explains the Agency's obligations under the regulations to perform a cost-benefit analysis, specifying the appropriate stage of the licensing process when such an analysis would be performed. *See generally* Order at 17, 32-33, 37, 45-46. The Board held that the regulations governing early site permits expressly provide that the ER and EIS need not consider an assessment of the costs and benefits of the proposed action, pursuant to 10 C.F.R. § 52.17(a) and 52.18(b). *Id.* at 32-33. As the Board ruled, "there may be no legal foundation for a challenge to an alleged error in [a] cost-related analysis." *Id.* at 33. The Board noted, however, that a cost-benefit analysis would be included in any EIS for a construction permit or combined license application referencing an ESP. *Id*. at 33 n.124.

The Board's application of the regulations is correct and has been affirmed in a recent Commission decision.[19] In CLI-05-17, the Commission addressed the licensing boards' responsibility under NEPA to weigh costs and benefits. CLI-05-17, slip op. at 27-28. The Commission held the following:

> By contrast, the Licensing Boards in our three currently pending ESP cases cannot perform cost-benefit "weighing" -- because an ESP is only a "partial" construction permit and 10 C.F.R. § 52.21 explicitly exempts both the NRC Staff and the applicant from assessing the ESP's benefits. Because the environmental report will lack such an assessment, neither the NRC staff nor the Licensing Boards can conduct the "weighing" in its EIS ordinarily required under NEPA. This does not equate to evading the NEPA cost-benefit analysis, but merely postpones the analysis until the next (combined operating license) phase of licensing. At that time, the NRC staff and ESP applicants will have much more

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[19] *See Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC __ , slip op. (July 28, 2005).

> cost-benefit information to provide reviewing licensing boards. Postponing the NEPA cost-benefit balancing simply reflects the limited scope of an ESP proceeding, as compared with that of a full construction permit case (addressing both site and plant design) or a combined license proceeding (such as *LES* and *USEC*).

(footnotes omitted) *Id*. at 29. Accordingly, to the extent that it seeks review of the Board's cost-benefit ruling, the Petition should be rejected.

C. The Licensing Board Properly Ruled That No Genuine Dispute of Material Issue of Law or Fact Exists Regarding Environmental Impacts of Nuclear Power and Clean Energy Alternatives

Intervenors take issue with the Board's ruling that Intervenors had failed to demonstrate any genuine dispute regarding the conclusion in the Applicant's filings and the Staff's DEIS that clean energy alternatives are not environmentally preferable to nuclear power. Petition at 15. In particular, Intervenors continue to assert that both Exelon and the Staff "overestimate the impacts of clean energy alternatives and/or underestimate the impacts of nuclear power . . . ." *Id.* To support their claim, Intervenors once again assert that nuclear power would impact more resources than clean energy alternatives (or alternatives in combination), thus making clean energy alternatives preferable. *Id.* Intervenors argue, "[I]t is clear that the *number* of resources impacted is the relevant factor for determining the total environmental impact of the proposed project versus alternatives." *Id.* at 16.

The Board correctly ruled that the portions of the Intervenors' contention regarding the comparative impacts of nuclear power and clean energy alternatives fails to raise a genuine dispute of a material issue of law or fact; therefore, it is inadmissible. Order at 40.[20] Specifically, with regard to the number of impacts of nuclear power versus those of clean energy alternatives, the Board found that "Intervenors have presented no impact analyses

[20] In support of this ruling, the Board cited 10 C.F.R. §§ 2.309(f)(1)(v)-(vi) and LBP-04-17, 60 NRC at 241-42.

whatsoever to support their proposition that because one or another alternative has numerically more areas impacted, the overall environmental impact is greater." *Id*. The Board ruled that this portion of the Intervenors' contention amounts to nothing more than a bare assertion. *Id.*

The Board's ruling is correct. Intervenors confuse the *number* of impacts in the nuclear power and alternatives categories with the *significance* of impacts. The fact that there are a larger number of impact categories associated with nuclear power does not lead to the conclusion that the impacts of nuclear power generation are greater than those of the alternatives or alternatives in combination.[21] Because the Board has not erred in its ruling that Intervenors fail to raise a genuine dispute with regard to material issue of law or fact, review is not warranted.

Second, Intervenors argue that the Board holding "ignores the evidence submitted by Intervenors" in support of their assertion that both the Applicant and the Staff use flawed information in comparing the impacts of clean energy alternatives with nuclear power. Petition at 16. Intervenors maintain that the Board ignores the Intervenors' evidence on the resources impacted by clean energy alternatives and nuclear power, such as land use, birds, noise, air quality, radioactive waste exposure, and accident risk.

The Intervenors mischaracterize the Board's ruling. The Board in no way ignores the Intervenors' purported evidence regarding the impacts to resources from nuclear power as compared with those of clean energy alternatives. In fact, the Board provides a thorough explication of its review of the Intervenors' claims regarding the impacts on resources. *See* Order at 42-45. For each resource that the Board analyzed,[22] the Board found that portion of

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[21] See NRC Staff Answer to Intervenors' Motion to Amend Contention 3.1 at 13.

[22] The Board analyzed information regarding the impacts of nuclear power and clean energy alternatives on all the resources discussed by the Intervenors: land use, birds, noise, air quality, radioactive waste exposure, and accident risk. *See generally* Order at 42-46.

the contention inadmissible for failing to demonstrate a genuine dispute of a material issue of law or fact,[23] failing to provide adequate support or expert opinion,[24] or as outside the scope of the proceeding.[25] The Board carefully weighed all the evidence presented by the Intervenors and ruled accordingly. The Board did not commit error and review is not warranted.

Finally, Intervenors argue that the Board ignored the Intervenors' claim that the Staff and the Applicant overstate the environmental impacts of clean energy alternatives in their analysis of alternatives in combination. Petition at 20. Intervenors challenge assumptions made by the Staff and Applicant for determining the impacts of clean energy alternatives in combination, specifically the capacity factor that wind provides and the impacts of clean energy alternatives in combination. *Id.* at 21. Intervenors contend that a larger portion of wind energy should have been considered in the combination of alternatives. If more wind power were added to the combination, Intervenors claim, then the impact of the alternatives in combination would be reduced. *Id.*

The Board once again ruled that this portion of the contention failed to raise a material legal or factual issue. The Board agreed with the Staff[26] and determined that the DEIS had not

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[23] 10 C.F.R. § 2.309(f)(1)(vi).

[24] 10 C.F.R. § 2.309(f)(1)(v).

[25] 10 C.F.R. § 2.309(f)(1)(iii).

[26] In its Answer to the Intervenors' Motion to Amend Contention 3.1, the Staff argued the following:

> Intervenors baldly assert that wind power should play a larger role in the combination of alternatives without discussing the extent to which wind power should be considered. Moreover, Intervenors again fail to appreciate that the DEIS *assumes no* impacts from clean energy alternatives in combination with natural gas. DEIS at 8-22, 8-23. Increasing the wind power component from 60 MW(e) to the full 550 MW(e) (the number assumed for all clean energy alternatives in combination) would not change the environmental impacts associated with natural gas power generation. Answer at 13-14.

overstated the impacts of wind power in favor of nuclear power. Order at 37. The Board found that "if anything, [the DEIS] did just the opposite because the DEIS found the nuclear option to be environmentally preferable even though it both assumed *no* adverse environmental impact from . . . wind generation and minimized the contribution from the natural gas component by assuming that it would run only when necessary to bring the total generation at any time up to the 2180 MW [assumed by the Staff] . . . ." *Id.* (emphasis added). No matter what portion of the clean energy alternatives the Staff attributed to wind, the environmental impacts of clean energy alternatives would remain unchanged. Therefore, the Licensing Board correctly determined that this portion of the contention should be rejected, and the Intervenors have failed to show that Commission review of this decision is warranted.

CONCLUSION

For the reasons set forth above, the Staff submits that the Intervenors' Petition fails to demonstrate that Commission review of any of the Licensing Board's rulings on this contention is warranted under 10 C.F.R. § 2.341(b)(4). The Petition should, therefore, be denied.

Respectfully submitted,

/RA/
Mauri T. Lemoncelli
Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of August, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC.	)	Docket No. 52-007-ESP
	)	
(Early Site Permit for Clinton ESP Site)	)	ASLBP No. 04-821-01-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO INTERVENORS' PETITION FOR REVIEW OF LBP-05-19," in the captioned proceeding have been served on the following through electronic mail, with copies to follow by deposit in the NRC's internal mail system as indicated by a single asterisk, or through electronic mail, with copies to follow by deposit in the U.S. Mail, first class, as indicated by a double asterisk, this 23rd day of August, 2005:

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