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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	)	ASLBP No. 04-821-01-ESP
(Early Site Permit for Clinton ESP Site)	)	August 29, 2005

REPLY BRIEF IN SUPPORT OF 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

Pursuant to 10 C.F.R. 2.341(b)(3), Intervenors hereby reply to the Answers of Exelon and the NRC Staff to the Intervenors' Petition for Review. Intervenors seek review of the Atomic Safety and Licensing Board's ("Board") decision dismissing their Clean Energy Alternatives Contention ("Contention 3.l") and refusing to admit Intervenor's proposed Amended Contention 3.1. In response, Exelon and the NRC Staff largely just reiterate the findings of the Board, and fail to demonstrate that Commission review is not warranted.

I. The Board's Rejection of Energy Efficiency Alternatives Violates NEPA, is Not Supported by Agency Regulations, and is Based on Erroneous Factual Conclusions Regarding Exelon's Ability to Carry Out Energy Efficiency Efforts.

As Intervenors have explained, the Board's exclusion of energy efficiency alternatives conflicts with NEPA's requirement that all reasonable alternatives must be rigorously explored and objectively evaluated, and is based on erroneous factual conclusions regarding the ability of Exelon to arrange to implement energy efficiency programs and projects. (Petition at 10-15). Exelon and the NRC Staff respond primarily that the Board's ruling – which is based on the assertion that the Board must blindly accept Exelon's business goals as the purpose for this

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project – is supported by governing precedent under NEPA. (Exelon Answer at 8-15; NRC Staff Answer at 8-11). Such precedent purportedly demonstrates that the Board's ruling does not raise any important legal or policy issue and is correct as a matter of law.

In reality, however, the Board itself acknowledges that the issue of whether the Commission should blindly defer to the business goals of a for-profit, unregulated energy company is one of first impression for the Commission. (Board Order at 11-12). The fact is that the critical question of the role that NEPA requires the Commission – as an independent regulatory body – to play in today's deregulated energy markets has simply not been addressed.

In addition, the Board's blind deference to Exelon's business goals is not supported by NEPA case law. (Petition at 10-12). While Exelon asserts that courts reverse such deference only when an applicant has defined the purpose of a project so narrowly as to preclude essentially all alternatives (Exelon Answer at 13), a review of the case law demonstrates otherwise. For example, in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 667 (7th Cir. 1997), the Corps considered alternative ways to supply water to the applicant, but limited its consideration to alternatives that satisfied the applicant's purpose of developing a single source for new water. Even though a number of single-source alternatives had been considered, the court rejected the Corps' blind acceptance of the applicant's purpose because it improperly excluded reasonable alternatives involving multiple sources of water. *Simmons*, 120 F.3d at 669.

Similarly, in *Southern Utah Wilderness Alliance v. Norton*, 237 F.Supp. 2d 48, 53 (D.D.C. 2002), the Bureau of Land Management ("BLM") considered various alternatives for a company seeking to engage in gas exploration near a National Park. BLM, however, excluded alternatives that limited operations to existing roads and trails as inconsistent with the applicant's objectives. The court reversed, concluding that BLM should have analyzed alternatives that

limited operations to existing roads and trails. *Southern Utah Wilderness Alliance*, 237 F.Supp. 2d at 53-4. As in *Simmons* and *Southern Utah Wilderness Alliance*, the Board's blind acceptance of Exelon's business goals is improper here because, even while allowing for the consideration of some alternatives, it rules out reasonable energy efficiency alternatives for meeting future energy needs.

Exelon and the NRC Staff also contend that the Board properly rejected the consideration of energy efficiency as the equivalent of a need for power analysis, which is not required by the agency's regulations. (Exelon Answer at 14; NRC Staff Answer at 12-13). As with the Board, however, they have failed to explain why, if the Commission does not need to analyze the need for power before determining whether a new nuclear plant is appropriate, the agency has to consider the need for power before determining whether increased energy efficiency is a more reasonable alternative. (Petition at 13). In addition, Exelon and the NRC Staff continue to ignore the fact that the regulations at issue are discretionary and, therefore, do not conflict with the NEPA-mandated consideration of need in this proceeding. (*Id.*).

Finally, Exelon and the NRC Staff continue to argue that deregulation has placed energy efficiency outside the power of Exelon. Plainly, however, the ability of Exelon's sister, affiliated company Commonwealth Edison to carry out energy efficiency is relevant to the reasonableness of that alternative under NEPA. In addition, NEPA does require the consideration of alternatives even if they are outside the scope of the applicant's authority. (Petition at 14-15).

II. The Board Ignored Genuine Disputes of Material Issues of Law and Fact Regarding the Comparative Environmental Impacts of Nuclear Power and Clean Energy Alternatives.

As Intervenors have explained, the Board clearly erred in rejecting the Intervenors' showing that the Draft EIS and Exelon filings overestimate the impacts of clear energy

alternatives and/or underestimate the impacts of new nuclear power in key areas. (Petition at 15-17). Exelon and the NRC Staff respond by echoing the Board's conclusion that the mere fact that nuclear power impacts more resources than clean energy alternatives does not mean that nuclear power's overall impact is greater. (Exelon Answer at 18, NRC Staff Answer at 16).

As Intervenors have already noted, this response ignores the fact that both Exelon and the NRC Staff categorized all of the environmental impacts for both nuclear power and the clean energy alternatives as "SMALL." (Petition at 15-16). Therefore, Exelon's and the NRC Staff's hypothetical response that clean energy alternatives might have a single severe impact that outweighs nuclear power's numerous "SMALL" impacts is contrary to their own findings.

III. The Board Improperly Discounted a Genuine Dispute Regarding the Material Issue of the Comparative Costs of Nuclear Power and Clean Energy Alternatives.

As the Intervenors have shown, the Board also erred in rejecting the Intervenors' showing that, contrary to the claims of Exelon and the NRC Staff, new nuclear power would not be economical. (Petition at 17-20). In response, the NRC Staff asserts that the Board has properly delayed the consideration of costs to the next phase of licensing, as called for by NRC regulations. (NRC Staff Answer at 14). This response, however, ignores the fact that: (1) those regulations address only the consideration of "benefits," not costs, (2) those regulations do not foreclose the consideration of benefits, but instead provide only that such consideration is not required, and (3) NEPA clearly does require the consideration of costs as part of the weighing of alternatives that Exelon and the NRC Staff are engaging in here. (Petition at 18-20). While Exelon responds that cost need not be considered when the alternatives have greater environmental impacts, Intervenors have already demonstrated that clean energy alternatives are environmentally preferable to new nuclear power, and that the conclusions of Exelon and the

NRC Staff to the contrary are "inadequate, biased, inaccurate, and based upon out-of-date information." (Biewald Affidavit at §IV).

IV. The Board Ignored Intervenors' Contention that the Consideration of a Combination of Clean Energy Alternatives Overstates the Environmental Impacts of Such Combination.

Finally, the Intervenors have also demonstrated that the Board erred in rejecting the Intervenors' showing that a combination of wind and natural gas (and energy efficiency) would be environmentally preferable and less costly than new nuclear power. (Petition at 20-22). In response, Exelon and the NRC Staff assert that the Board's ruling is correct because, no matter, what combination of alternatives is used, the impacts of the natural gas portion would outweigh the impacts of new nuclear power. (Exelon Answer at 20-22; NRC Staff Answer at 17-18).

This response, however, fails because natural gas would not have greater environmental impacts than new nuclear power. (Petition at 21). In addition, both Exelon and the NRC Staff fail to address the Board's failure to consider the additional benefits that an alternative involving both wind and natural gas (and energy efficiency) would have over new nuclear power. (Petition at 21-22).

CONCLUSION

For the reasons stated in Intervenors' Petition and herein, the Board's granting of Exelon's motion for summary disposition and rejection of Intervenors' proposed Amended Contention 3.1 was legally and factually flawed. Accordingly, the Commission should grant review, reverse the Board's Order dismissing the contested portion of this proceeding, and order the Board to admit and hold a hearing on Intervenors' proposed Amended Contention 3.1.

Dated: August 29, 2005

Respectfully Submitted,

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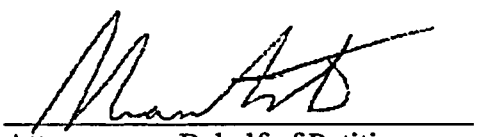

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CERTIFICATE OF SERVICE

I, Shannon Fisk, hereby certify that copies of the Reply Brief in Support of 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 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 29th day of August, 2005.

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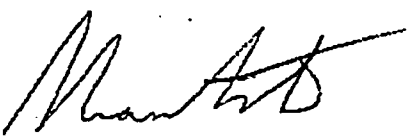

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