

April 27, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF MOTION FOR RECONSIDERATION

INTRODUCTION

On April 17, 2006, the Atomic Safety and Licensing Board (“Board”) in this proceeding issued an Order requesting documents and briefings (“Order”).¹ On April 21, the Staff filed a motion to stay the effectiveness of the Order to enable the Staff to file a motion for reconsideration.² The Board granted the stay on April 24, 2006.³ Pursuant to 10 C.F.R. § 2.323 and consistent with the Board’s April 24, 2006 Order granting the stay, the NRC Staff (“Staff”) respectfully requests that the Board reconsider its Order for the reasons set forth herein.⁴

BACKGROUND

In its Order, the Board directed the Staff and Exelon Generation Company (“EGC” or “Applicant”), as relevant, to submit hard copies of existing or soon-to-be-completed Staff and Applicant documents regarding the EGC early site permit (“ESP”) application, described in

¹ See Order (Request for Documents and Briefings), unpublished Order, dated April 17, 2006.

² See “NRC Staff Motion for Housekeeping Stay,” dated April 20, 2006.

³ See Order (Granting Motion to Stay), unpublished Order, dated April 24, 2006.

⁴ Pursuant 10 C.F.R. § 2.323, the Staff has contacted the Applicant regarding this Motion and has discussed its position.

Items 1 through 8, on or before May 8, 2006. Order at 2. The Board also directed the Staff to prepare and submit a detailed report described in Item 9, and notify the Board, by April 21, 2006, of the date on which it will deliver documents relevant to that Item, directing, however, that the date should be no later than May 19, 2006. Order at 3. The Board indicated that the purpose of its request is to enable it to commence its review for the safety portion of the Mandatory Hearing. Order at 2.

DISCUSSION

The Staff respectfully requests that the Board reconsider certain aspects of its Order in light of the scope of its review in a mandatory hearing. As further discussed below, the Staff believes that Board review of all the information requested in the Board's Order would involve the Board in unnecessarily repeating the Staff's review of the application. The applicable legal standards with respect to the scope of a Board's review in this context are set forth below.

I. Legal Standards:

The Board's role in an uncontested proceeding has been defined as analogous to "the function of an appellate court, applying the 'substantial evidence' test[.]" *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC 5, 34 (2005) ("Exelon") *citing* *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (1974) ("UCS"). In this role, the Board "looks not only to the information in the record, but also to the thoroughness of the review that the Staff . . . has given it." *Id.* A Board is to determine "whether the findings required by the [Atomic Energy Act of 1954, as amended ("Act")] and the Commission's regulations should be made." *UCS*, 499 F.2d at 1076. The Board is not to make the findings itself. *Id.* Rather, the Board "should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact." *Exelon*, 62 NRC at 39.

Boards should carefully probe the Staff findings by asking appropriate questions and by requiring supplemental information when necessary, and thereby undertake the kind of truly

independent review that Congress anticipated when it established the mandatory hearing requirement. *Id.* at 40. The Board need not demand that all possible views and facts relating in any way to the matters in question must be placed in the evidentiary record. *Id.* at 41-42. Rather, “the [licensing] boards should decide simply whether the safety and environmental record is ‘sufficient’ to support license issuance.” *Id.* at 39.

With regard to uncontested matters, Commission policy leaves to the Staff the “prime responsibility for technical fact-finding on uncontested matters.” *Id.* at 35. Second, “it promotes efficient case management and prompt decision-making by concentrating [the Commission’s] boards’ attention on resolving disputes *rather than redoing NRC staff work.*” *Id.* (emphasis added). While the Board should probe the logic and evidence supporting NRC Staff findings, the Board should give appropriate deference to NRC Staff technical expertise, and should not replicate NRC Staff work. *Id.* at 34.

With respect to environmental matters, Boards must reach independent determinations on the NEPA “baseline” questions, *i.e.*, (1) whether the NEPA process has been complied with, (2) what is the appropriate final balance among conflicting factors, and (3) whether the construction permit should be issued, denied, or appropriately conditioned. *Id.* at 45; 10 C.F.R. §§ 2.104(b)(3), 51.105(a)(1)-(3). In reaching those judgments, the Board should not second-guess underlying technical or factual findings by the NRC Staff. *Exelon*, 62 NRC at 45. The only exceptions to this would be if the Board found the Staff review to be incomplete or the Staff findings to be insufficiently explained in the record. *Id.*

II. Information requested by the Board:

The Staff respectfully submits that with respect to Items 7-9, the scope of the Board’s Order is too broad for the nature of the Board’s review in an uncontested proceeding. In the Staff’s view, the Board’s review will be best served by the submission of limited documents, as

enumerated below, which the Staff ultimately intends to place in evidence in the proceeding.⁵ However, certain other documents requested by the Board need not be submitted for the following reasons: (1) the documents are beyond the scope of the Board's review in an uncontested proceeding as contemplated by the regulations and the Commission;⁶ (2) the documents are not within the Staff's control; or (3) the documents are duplicative in nature as the information requested by the Board is already contained in or will be contained in a Staff document requested by the Board. The Staff responds to each category of documents as enumerated by the Board:

Items 1-4 (Application and related documents): These are applicant documents. Applicant's counsel has indicated to the Staff that the Applicant will provide these documents on or before May 8, 2006, for the Board's use.

Item 5 (FSER and RAIs): As the Board acknowledged in its Order, the Staff's FSER has not yet been released. See Order at 2. The Staff plans to publish this document on or about May 1, 2006, and upon its release will promptly furnish a copy of the FSER to each Board member.

Regarding the RAIs and answers to RAIs, Applicant's counsel has indicated to the Staff that the Applicant will provide its responses to the RAIs, which include the RAIs asked, on or before May 8, 2006.

⁵ The Board makes its decision based on the record, and not on evidence not in the record. See *Exelon*, 62 NRC at 41, citing *Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy*, 87th Cong. 313 (1961) (Statement of AEC Commissioner Loren K. Olson). The Staff submits that it is up to the Staff (and Applicant) in the first instance to request admission into the record of evidence, including the report of the ACRS on the application, the SER, and the FEIS. See 10 C.F.R. § 2.337(g). The Board need only ensure that the evidentiary record contains evidence sufficient to allow it to make a decision on the ultimate question of safety. *Exelon*, 62 NRC at 42.

⁶ See generally *Exelon*, 62 NRC at 37; 10 C.F.R. 2.104(b)(2)(i).

Item 6 (ACRS documents): Regarding the transcripts, reports, memoranda, and other official records of the ACRS, the ACRS is an independent federal advisory committee, which advises the Commission; it is not part of the NRC Staff. See Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972). The Staff is not in possession or control of ACRS records. The Staff will provide a copy of the ACRS letter to the Staff regarding its review of the FSER and the Staff's response to the ACRS on or before May 8, 2006, in keeping with 10 C.F.R. § 2.337(g).

Items 7-8 (Staff summaries of telephone calls and meetings; Staff reports of reviews of documents maintained by the Applicant): These documents set forth information not warranting discussion in the FSER, and not necessary for the Board's development of findings in an uncontested proceeding. The Board's consideration of such information would amount to repeating the Staff's review. Furthermore, the Board does not have supervisory authority over the application review that has been entrusted to the Staff. See *Arizona Public Service Co.*, (Palo Verde Nuclear Generating Station, Units 2 & 3), LBP-83-36, 18 NRC 45, 49 (1983), citing *New England Power Co.*, (NEP Units 1 & 2), LBP-78-9, 7 NRC 271 (1978). Should the Board need clarification or additional information regarding specific areas of the Staff review in making its findings, the Staff will make every effort to provide that information.

Item 9a-b (Detailed report of how Staff guidance was applied to the Application): As indicated above, in an uncontested proceeding, licensing boards are charged with evaluating the sufficiency of the record, not with redoing the Staff's work. See *Exelon*, 62 NRC at 39. The Board's review of information at the level of detail requested would be tantamount to redoing the Staff's work. Nonetheless, the Staff expects that the FSER will satisfy the Board's request for a "detailed report setting out, subsection-by-subsection, how the relevant Standard Review

Plan (SRP)⁷ was applied to this application[.]” (Order at 3) to the extent the information requested is relevant to the Board’s decision. The FSER will contain subsections entitled “regulatory evaluation,” each of which will identify the relevant regulation(s) and guidance document(s) used by the Staff to evaluate that portion of the application. For cases in which the applicant did not identify the applicable regulatory guidance or did not utilize the applicable regulatory guidance, the Staff discusses what guidance or methodology the applicant did use, including whether and why the applicant’s approach was acceptable to the Staff.

Item 9c (Name, job title of Staff member and his/her immediate supervisor): The Staff respectfully maintains that this information is not needed for the Board to make its findings in an uncontested proceeding.⁸ In addition, for purposes of the uncontested proceeding, Staff testimony will be presented only by persons designated by the Executive Director for Operations. See 10 C.F.R. § 2.1207(b)(4).

Item 9d (List of areas wherein the Project Manager disagreed with the Staff reviewer): The Staff respectfully maintains that this information is also not needed for the Board to make its findings in an uncontested proceeding. Furthermore, communications among the Staff on pre-decisional matters are not subject to the Board’s review.⁹

Finally, regarding the Staff’s environmental review, the Board requested that the Staff provide its estimate of the availability date of the Final Environmental Impact Statement (FEIS).

⁷ The SRP is not the relevant document governing the Staff’s review of the ESP applications; the relevant document is RS-002, “Processing Applications for Early Site Permits.”

⁸ As discussed above, the Board is charged with determining whether the safety record is sufficient to support license issuance. See *Exelon*, 62 NRC at 39.

⁹ Nevertheless, at this point, the Staff is not aware of any differing professional views among its members.

Order at 4. The Staff expects that the FEIS will be published on or about July 28, 2006. As with the FSER, upon its publication, the Staff will promptly furnish a copy of the FEIS to each Board member.

CONCLUSION

For the reasons set forth herein, the Staff respectfully requests that the Board reconsider its Order.

Respectfully submitted,

/RA/
Mauri T. Lemoncelli
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of April, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION FOR RECONSIDERATION" 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 27th day of April, 2006:

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