

May 23, 2006

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))

NRC STAFF PETITION FOR INTERLOCUTORY
REVIEW OF THE LICENSING BOARD'S MAY 3, 2006 ORDER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f), the staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Commission grant interlocutory review of the Order issued by the presiding Atomic Safety and Licensing Board ("Board") on May 3, 2006, granting in part and denying in part the NRC Staff's Motion for Reconsideration. ("May 3rd Order"). For the reasons more fully discussed below, the Staff believes that the May 3rd Order affects the basic structure of the proceeding in a pervasive or unusual manner. See 10 C.F.R. § 2.341(f)(2)(ii).

BACKGROUND

The instant case arises out of the Exelon Generation Company, LLC ("EGC" or "Applicant") application for an early site permit ("ESP") under 10 C.F.R. Part 52. The Board admitted a single contention regarding the application, Contention 3.1, which challenged EGC's analysis of clean energy alternatives. See *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 252 (2004). Subsequently, the Board granted the Applicant's motion for summary disposition of the contention. See *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 183 (2005). The Commission denied review of the Board's decision. See *Exelon Generation Company,*

LLC (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005). As a consequence, the proceeding is uncontested, involving, nevertheless, a mandatory hearing.

On April 17, 2006, the Board issued an Order requesting documents and briefings (“Order”). In its Order, the Board directed the Staff and EGC, as relevant, to submit hard copies of Staff and Applicant documents regarding the EGC ESP application, described in Items 1 through 8. Order at 2. The Board also directed the Staff to prepare and submit a detailed report described in Item 9. *Id.* 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. *Id.* at 2.

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. See “NRC Staff Motion for Housekeeping Stay,” dated April 20, 2006. The Board granted the stay on April 24, 2006. See Order (Granting Motion to Stay). The Staff, in its Motion for Reconsideration filed on April 27, 2006, did not take issue with the entirety of the Board’s Order. In fact, the Staff did not object to Items 1-5.¹ See NRC Staff Motion for Reconsideration at 4. The Staff did take issue with Items 6-9,² asserting that the Board’s Order would involve the Board in unnecessarily repeating the Staff’s review of the application. See “NRC Staff Motion for Reconsideration,” dated April 27, 2006 (“Motion”) at 2.

¹ Items 1-5 include the Application and related documents, the Final Safety Evaluation Report (FSER), Staff Requests for Additional Information (RAIs) and EGC’s responses.

² Items 6-9 include: documents related to the Advisory Committee on Reactor Safeguards (ACRS) review of the EGC application (Item 6); Staff summaries of telephone calls and meetings between the Staff and the Applicant (Item 7); Staff reports of reviews of documents maintained by the Applicant (Item 8); a detailed report of how Staff guidance was applied to the Application (Items 9a-b); name and job title of each Staff member who participated in reviewing a major subsection and his immediate supervisor (Item 9c); and a list of all areas wherein the project manager disagreed with the Staff reviewer (Item 9d). See Order at 2-3.

On May 3, 2006, the Board issued an Order granting in part and denying in part the Staff's Motion for Reconsideration. The Board ordered that the Staff produce the following: (1) "a detailed report setting out, subsection-by-subsection, the relevant regulatory guidance applied by the Staff in reviewing the Application and a description of each instance where the Staff's review deviated from the guidance" (Items 9a-b) and (2) "a list of all areas of the application review 'wherein the project manager (or supervising staff member) disagreed with the proposed finding of the staff member charged with a portion of the review, setting out the topic at issue, the ultimate resolution, and the rationale for such resolution.'" (Item 9d).³ May 3rd Order at 4-6. The Staff filed a motion to stay the effectiveness of the May 3rd Order. See "NRC Staff Motion for Stay," dated May 8, 2006. The Board granted the Staff's motion. See Order (Granting Motion to Stay), dated May 9, 2006.

DISCUSSION

I. Interlocutory Review of the Board's May 3rd Order is Appropriate Because the Order Affects the Basic Structure of the Proceeding in a Pervasive and Unusual Manner

In accordance with 10 C.F.R. 2.341(f)(2)(ii), interlocutory review is appropriate if a particular ruling "affects the basic structure of the proceeding in a pervasive or unusual manner." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). The instant case warrants interlocutory review of the Board's May 3rd Order because, as established below, the Order affects the basic structure of the mandatory proceeding, specifically, by expanding the scope of the Board's review beyond that called for by

³ With respect to Item 6 (ACRS documents), the Board indicated that it would contact the ACRS directly to acquire documents solely within the ACRS's possession. See May 3rd Order at 3. On May 8, 2006, the Staff provided to the Board a copy of the ACRS letter and the Staff's response to the ACRS letter, pursuant to 10 C.F.R. § 2.337(g). See Letter from Mauri T. Lemoncelli, Counsel for NRC Staff, to Administrative Judges, dated May 8, 2006.

With respect to Items 7-8 (Staff summaries of telephone call and meetings; Staff reports of reviews of documents maintained by the Applicant) and Item 9c (name and job title of Staff member and his/her immediate supervisor), the Board withheld its request pending further review. See May 3rd Order at 4, 6. Thus, the Staff does not address these items at this time.

the Commission's regulations.⁴ See 10 C.F.R. § 2.104; see also *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC 5, 39 (2005) ("Exelon"), citing *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (1974) ("UCS"). In its request for information, the Board oversteps its role in the mandatory hearing and, in effect, assumes a supervisory role over the Staff that is not within the Board's purview.

II. The Board's May 3rd Order Is Contrary to the Proper Role of the Board in an Uncontested Mandatory Proceeding

A. Legal Standards

The Commission has defined the board's role in an uncontested proceeding as analogous to "the function of an appellate court, applying the 'substantial evidence' test[.]" *Exelon*, 62 NRC at 34. 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, citing *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971) (emphasis added). 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

⁴ Because this hearing is the first to implement the ESP and combined operating license processes in 10 C.F.R. Part 52, the Staff notes that the conduct of this proceeding will have precedential value and could affect the basic structure of all future mandatory hearings.

record. See *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. See *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.*

B. Information Requested by the Board

As indicated above, in its May 3rd Order, the Board directs the Staff to produce the following: (1) “a detailed report setting out, subsection-by-subsection, the relevant regulatory guidance applied by the Staff in reviewing the Application and a description of each instance where the Staff’s review deviated from the guidance” (Items 9a-b) and (2) “a list of all areas of the application review ‘wherein the project manager (or supervising staff member) disagreed with the proposed finding of the staff member charged with a portion of the review, setting out

the topic at issue, the ultimate resolution, and the rationale for such resolution.” (Item 9d). May 3rd Order at 4-6. The Staff believes that the Board’s May 3rd Order portends an expectation of its role in an uncontested proceeding beyond that envisioned by the Commission in *Exelon*. Furthermore, the Board’s Order demonstrates that the Board misapprehends the distinction between its function, the Staff’s function, and the Commission’s.

1. Board Request Items 9a-b (Detailed report of how Staff guidance was Applied to the Application)

In its Motion for Reconsideration, the Staff contended that the Board’s review of information of the level of detail requested would be tantamount to redoing the Staff’s work. See Motion for Reconsideration at 5. The Board disagreed, explaining that the report “will enable the Board to ... ‘probe the logic and evidence supporting the NRC Staff findings’ envisioned by the Commission.” May 3rd Order at 4, citing *Exelon*, CLI-05-17, 62 NRC at 34. Further, the Board indicated that in order to determine whether the Staff analysis in the Final Safety Analysis Report (FSER) is supported in logic and fact, the Board “must comprehend the factual basis for these decisions and the logical process employed in reaching them so as to ensure *that the process is ‘rigorous and prudent [in its] approach.’*” *Id.* at 5, citing International Atomic Energy Agency, “Safety Culture: A Report by the International Nuclear Safety Advisory Group,” SAFETY SERIES No.75-INSAG-4, 13 (1991) (emphasis added).

The Board’s logic would impermissibly broaden the parameters of a mandatory hearing established by the Commission. As *Exelon* made clear, the Board is not to conduct a *de novo* review. See *Exelon*, 62 NRC 39. Consequently, the Board is tasked with evaluating whether the Staff performed an adequate review, not whether it has utilized an adequate process. See *id.* The Staff maintains that in order to determine “whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact,” the Board need look no further than the Staff’s review document, namely the FSER. *Id.* Then, as the

Commission contemplated, the Board can probe the Staff's findings by asking appropriate questions and by requiring supplemental information, *when necessary*.⁵ *Id.* at 40. Should the Board need clarification or additional information regarding specific areas of the Staff review after reviewing the evidence in the proceeding,⁶ the Staff will make every effort to provide that information. By ordering the Staff to produce a detailed report of how Staff guidance was applied to the ESP application, the Board is, in effect, altering the depth of the Board's review contemplated by the Commission.

In its Order, the Board not only misconstrues the mandatory hearing process, it also intrudes on the Commission's inherent supervisory authority over the Staff. *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 541, 516 (1980). The Board does not have the authority to direct the Staff in its independent, administrative function, including its application review process. *See id.*; *see also 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). Ordering additional documents to be prepared before the Staff has completed its review of the application and requiring the creation of such documents before the Board has determined that such supplemental information is, in fact, necessary intrudes on the

⁵ The Board members did not receive a copy of the FSER until May 8, 2006. *See* Letter from Mauri T. Lemoncelli, Counsel for NRC Staff, to Administrative Judges, dated May 8, 2006.

⁶ 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. Because the Staff has not yet entered evidence on the record, the Board's May 3rd Order is wholly anticipatory.

Staff's review function.⁷ Moreover, by directing that the Staff create an otherwise unnecessary document, the Board calls for diverting Staff resources necessary to finalize its review.⁸

2. Board Request Item 9d (List of areas wherein the Project Manager disagreed with the Staff reviewer)

In its Motion for Reconsideration, the Staff argued that pre-decisional matters are not subject to the Board's review. See Motion for Reconsideration at 6. The Board noted that the Staff's objection is misdirected because the mandatory hearing is not litigative in nature. See May 3rd Order at 7. According to the Board, for purposes of the mandatory hearing, the Board "stands in the shoes of the Commission, performing a review of Staff work." *Id.* To support its proposition, the Board notes that the Commission has delegated its authority under section 189a of the Atomic Energy Act to licensing boards. *Id.*

The Board conflates two separate and distinct functions of the Commission and assumes authority for both: While the Commission has delegated its adjudicatory authority to the licensing boards, it has not delegated its supervisory authority.⁹ In connection with the

⁷ The Staff does note that the Board indicated that it had reviewed the draft SER and the supplemental draft SER and speculated that it would not have the information necessary to review the Staff's determinations. May 3rd Order at 5. However, as discussed above, the Staff believes that any such determination concerning the need for further clarification of particular areas of the Staff's review should await the Board's review of the Staff's FSER.

⁸ The Staff believes that providing clarifying information, as necessary, is more efficient than providing the information requested by the Board before the Board has had an opportunity to review the FSER. This should allay the Board's concern regarding delay. See May 9th Order at 2. As indicated by the Board in its May 3rd Order, the FSER may reveal the information the Board is seeking, thus rendering the provision of the requested information unnecessary. May 3rd Order at 5. In the event that the Board has questions after it has reviewed the FSER, the Board's questions and the Staff's responses will be more focused on the specific information the Board requires to make its finding, resulting in a more efficient use of Staff and Board resources.

⁹ See *Shearon Harris*, CLI-80-12, 11 NRC at 516.

former, it might be appropriate for the Staff to inform the Board of differing professional views.¹⁰ *Cf. Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 143-144 (1994). As regards the latter, it is not appropriate to provide information regarding all more routine disagreements that may have arisen among the Staff. In any event, as explained above, the Board does not need this level of detailed information regarding Staff discussions to make its required finding regarding whether the Staff's review of the application is sufficient.

CONCLUSION

For the foregoing reasons, the Staff submits that the Commission should take review of the Board's Order of May 3, 2006.

Respectfully submitted,

/RA/

Mauri T. Lemoncelli
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of May, 2006

¹⁰ The Staff notes, however, as it did in its Motion for Reconsideration, that it is not aware of any differing professional views among its members. See Motion for Reconsideration at 6.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF PETITION FOR INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S MAY 3, 2006 ORDER" 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 May, 2006:

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