

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 08/02/06

SERVED 08/02/06

Before Administrative Judges:

Dr. Paul B. Abramson, Chairman
Dr. Anthony J. Baratta
Dr. David L. Hetrick

In the Matter of

EXELON GENERATION COMPANY, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

ASLBP No. 04-821-01-ESP

August 2, 2006

ORDER

(Addressing:

- (a) Commission Order dated 7/26/06;
- (b) requiring briefings in preparation for a public hearing;
- and (c) establishing a preliminary schedule)

On April 17, 2006, this Board issued an order requesting documents and briefings from the NRC Staff¹ to assist the Board in the performance of its duties with respect to the mandatory proceeding for the Application of Exelon Generation Company, LLC (EGC) for a 10 C.F.R. Part 52 early site permit (ESP), seeking approval of the site of the existing Clinton nuclear power station in DeWitt County, Illinois, for the possible construction of one or more new nuclear reactors.

On April 27, 2006, the Staff filed a request for reconsideration,² to which the Board

¹ See Licensing Board Order (Request for Documents and Briefings) (April 17, 2006) (unpublished) [hereinafter April 17, 2006 Order]. Those documents and briefings were requested to expedite and aid the Board's review of the Application and of the Staff's review of the Application as mandated by the Atomic Energy Act, 10 C.F.R. § 52.21, and the Notice of Hearing and Opportunity To Petition for Leave To Intervene Early Site Permit for the Clinton ESP Site. See 68 Fed. Reg. 69,426 (2003).

² See NRC Staff Motion for Reconsideration (April 27, 2006).

responded on May 3, 2006,³ and, on May 23, 2006, the Staff filed a petition seeking Commission review of the Board's order.⁴ On July 26, 2006, the Commission issued its ruling on that appeal, directing the Board to modify certain portions of its order and upholding other portions thereof.⁵ This order revises our April 17, 2006 Order to reflect the Commission's July 26 Order, directs the Staff and the Applicant to provide further briefing in accordance with the Board's obligations in this mandatory hearing, and establishes a schedule for the remainder of this proceeding.

A. Revisions to this Board's April 17 Order. This portion of this order responds to the Commission's requirement that we modify or eliminate certain portions of our April 17 Order.

The requested narrative report (and for that matter, our request for information described in Item 9(a) of our April 17 Order) has been supplanted by the Order issued by this Board on July 20, 2006,⁶ posing 88 specific queries reflecting the detailed intensive review conducted, during the period of the Staff's appeal, by this Board of the FSER and the Applicant's submittals. Therefore, our request for the material to have been covered by item 9(a) of our April 17 order is withdrawn. We received, on July 31, the Staff's response to our

³ See Licensing Board Order (Denying in Part and Granting in Part Staff Motion for Reconsideration) (May 3, 2006) (unpublished) [hereinafter Board's May 3, 2006 Order].

⁴ See NRC Staff Petition for Interlocutory Review of the Licensing Board's May 3, 2006 Order (May 23, 2006).

⁵ See Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC _ (July 26, 2006).

⁶ While this review is consistent with the Commission's view that "it is appropriate for the Board to review the Staff documents . . . and then tailor its request for additional information," CLI-06-20, 64 NRC at _ (slip op. at 10), we note that, as was concluded by Commissioner Jaczko, our review would have been materially quicker (and our task much more easily focused) and more efficient had the Staff provided the tabular road map we permitted, as an alternative to the detailed narrative, in issuance of our Order of May 3 in response to the Staff's initial request for reconsideration. See id. at 18 (Commissioner Jaczko, dissenting); Board's May 3, 2006 Order at 5-6.

July 20 Order, which provides answers to 84 of the 88 queries posed, requests an extension of time with respect to three queries and reconsideration of one other.⁷ The Board hereby grants the requested extension of time until August 18 for filing of responses to queries 43, 49, and 50. The Board is in the process of considering the Staff's request to withdraw or amend query 88.

Although the Commission has found over-burdensome our requirement that the Staff provide "a complete narrative report" as required by our April 17 Order, it supported the portion of our Order requiring the Staff to indicate, in tabular form, "instance[s] wherein the License Application deviated from NRC guidance."⁸ Therefore, in accordance with that guidance, the Staff is directed to provide, in tabular form, a list of all sections of the FSER wherein the applicable regulatory guidance documents were not expressly followed by the Applicant or the Staff, together with brief explanations of how the Staff addressed those failures and its logic for its elected review process.⁹ That information shall be delivered to the Board by August 18, 2006, along with the responses to queries 43, 49, and 50.

In further accord with the Commission's July 26 Order, Items 9(c) and 9(d) of our April 17, 2006 Order are withdrawn, it being noted that the topical matters covered thereby will be the subject of future inquiries by this Board to the extent necessary to understand the facts supporting, and the logic of, the Staff decisions, as they become more clear to us.

Finally, regarding the Board's request for ACRS-related documents, the Board has, as

⁷ See NRC Staff Response to Licensing Board's Order of July 20, 2006, Requiring Answers to Inquiries and the Provision of Documents; Motion to Extend Time for Answering Certain Inquiries and For Reconsideration Regarding One of the Inquiries (July 31, 2006). The board notes, with appreciation, the fact that this response was provided well in advance of the August 11 deadline established in our July 20 Order.

⁸ April 17, 2006 Order at 3; see May 3, 2006 Order at 6; CLI-06-20, 64 NRC at _ (slip op. at 11).

⁹ As noted by the Commission, the Board in its May 3, 2006 Order addressing the Staff's Motion for Reconsideration stated that the information could be provided in the form of a table. See CLI-06-20, 64 NRC at _ (slip op. at 11); Board's May 3, 2006 Order at 6.

we indicated we would, obtained transcripts from ACRS meetings on the topic of the Clinton ESP. It is evident from our initial review of those transcripts that the Staff used slides and other presentation materials in those hearings, and Staff is hereby, consistent with the Commission's July 26 Order, directed to deliver to the Board, also by August 18, four copies of all such presentation materials.

B. Briefings from Staff and Applicant.

The Atomic Energy Act requires the Commission to hold a hearing on each application for a construction permit for power facilities.¹⁰ The legislative history of that provision, enacted at a point when only a few licenses had been granted by the Atomic Energy Commission (acting both as promoter and regulator) and none had involved any intervention by interested parties, makes clear that the primary, and perhaps sole, objective of that provision is to require a public hearing on the issuance of such a license. Therefore, in fulfillment of this requirement, this Board intends to conduct a hearing at which the Applicant and the Staff will make on-the-record formal presentations regarding those particular matters which this Board is required by Commission Regulations to determine in fulfillment of its mandatory hearing obligations.

In the uncontested mandatory hearing proceeding, the Board is charged, under 10 C.F.R. § 2.104(b)(2) and (b)(3), and 10 C.F.R. § 52.21, to determine, "without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate"¹¹ to support a negative finding as to:

- (1) "Whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1);"¹²

¹⁰ See AEA, §189(a), Pub. L. No. 87-615, § 2, 76 Stat. 409, 409 (1962).

¹¹ 10 C.F.R. § 2.104(b)(2)(i).

¹² 68 Fed. Reg. at 69,427; see 10 C.F.R. § 2.104(b)(1)(iv); see also 10 C.F.R. § 52.21.

and a positive finding as to:

- (2) “Whether, taking into consideration the site criteria contained in 10 CFR Part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the health and safety of the public (Safety Issue 2).”¹³

Further, with regard to NEPA, the Board is to:

- (3) Determine whether the requirements of section 102(2)(A), (C), and (E) of [NEPA] and subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding;
- (4) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and
- (5) Determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.¹⁴

To enable the Board to address these specific issues, and in preparation for the public hearing required under the AEA, the Parties are hereby directed to file briefs as follows:

B.1 Applicant Briefs. The Applicant shall file a brief expressly indicating how the Application and the record of this proceeding support: (a) a negative finding as to whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public; and (b) a positive finding as to whether, taking into consideration the site criteria contained in 10 C.F.R. Part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the health and safety of the public.

¹³ 68 Fed. Reg. at 69,427; see 10 C.F.R. § 52.21; see also 10 C.F.R. § 2.104(b).

¹⁴ 68 Fed. Reg. at 69,427; 10 C.F.R. § 2.104(b)(3). With regard to the final NEPA determination, the regulations make clear that at the ESP stage a discussion of the benefits, including need for power, is not necessary. See 10 C.F.R. § 52.17(a)(2). Further, the Commission has made clear that “the board’s ‘reasonable alternatives’ responsibilities are limited” and focus on the consideration and comparison of alternative sites only. Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 48 (2005).

B.2 Staff Briefs. The Staff shall file a brief expressly indicating how the Application and the record of this proceeding support: (a) a negative finding as to whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public; and (b) a positive finding as to whether, taking into consideration the site criteria contained in 10 C.F.R. Part 100, a reactor, or reactors, having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the health and safety of the public; and (c) a finding that the requirements of section 102(2)(A),(C), and (E) of [NEPA] and subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding; and (d) its view of the balance among conflicting environmental factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (e) its view (and that of the Applicant) of the consideration of reasonable alternatives (within the constraints of Commission guidance on this matter), and how that affects the determination regarding whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.

Each such brief shall be limited to no more than twenty pages per item being addressed; except that, to the extent that either party finds that the record needs to be supplemented, it shall so supplement the record and such supplemental materials shall not be subject to this page limitation. These briefs may be in outline form and may reference relevant material in the record without regurgitating it *in toto*; provided that such briefs shall be comprehensible without the necessity for the reader to interrupt review to read the referenced material.

The parties shall file their briefs and any supporting supplement by noon (EDT) on September 14, 2006.

C. Schedule for the Remainder of the Proceeding.

The Board sets the following preliminary schedule for the remainder of this proceeding:

August 18, 2006	NRC Staff responses due to the Board's July 20, 2006 inquiries numbers 43, 49, and 50, and to the information requested in Section A of this Order.
September 8, 2006:	Board to issue written questions to the NRC Staff relating to the Clinton ESP Environmental Impact Statement.
September 14, 2006:	Staff and Applicant briefs due regarding the required mandatory hearing findings.
September 29, 2006:	Staff responses due to the Board's questions relating to the FEIS.
October 3, 2006:	Prehearing teleconference or conference at NRC Headquarters to discuss hearing schedule and identify any additional specific issues the parties will address in prefiled testimony.
October 17, 2006:	Staff and Applicant to submit prefiled direct testimony addressing the matters subject of their briefs and any additional issues identified at the prehearing conference.
November 7-9, 2006	Hearing and Limited Appearances.

The parties should discuss this proposed schedule, provide at their earliest convenience comments to the Board regarding any material difficulties that it presents, and otherwise be prepared to discuss it in depth with the Board on October 3, 2006. The Board has established this preliminary schedule with the goal of issuance of its final Order in this proceeding during the month of December 2006.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/RA/

Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by P. Abramson for/

Dr. David L. Hetrick
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 2, 2006

¹⁵ Copies of this order were sent this date by Internet e-mail transmission to: (1) Counsel for EGC, and (2) Counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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EXELON GENERATION COMPANY, LLC) Docket No. 52-007-ESP
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **LB ORDER (Addressing: (a) Commission Order dated 7/26/06; (b) requiring briefings in preparation for a public hearing; and (c) establishing a preliminary schedule)** have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 52-007-ESP

LB ORDER (Addressing: (a) Commission Order dated 7/26/06; (b) requiring briefings in preparation for a public hearing; and (c) establishing a preliminary schedule)

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[Original signed by Adria T. Byrdsong]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of August 2006