

**TEXANS FOR A SOUND ENERGY POLICY'S PETITION TO
HOLD DOCKETING DECISION AND/OR HEARING NOTICE FOR VICTORIA
COMBINED LICENSE APPLICATION IN ABEYANCE
PENDING COMPLETION OF RULEMAKING ON
DESIGN CERTIFICATION APPLICATION FOR
ECONOMICALLY SIMPLIFIED BOILING WATER REACTOR**

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500
FAX 202/328-6918
dcurran@harmoncurran.com

James Blackburn, Jr.
Blackburn Carter, P.C.
4709 Austin St.
Houston, Texas 77004
713/524-1012
713/524-5165 (*fax*)
jbb@blackburncarter.com

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I. INTRODUCTION

Texans for a Sound Energy Policy (“TSEP”) respectfully submits this petition to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) to hold in abeyance the anticipated docketing decision and/or hearing notice regarding Exelon Corporation’s combined construction permit and operating license application (“COLA”) for a new nuclear power plant in Victoria, Texas. The Commission should hold the COLA adjudication for the Victoria plant in abeyance pending the commencement and completion of the design certification rulemaking proceeding for the proposed Economically Simplified Boiling Water Reactor (“ESBWR”) design on which Exelon’s COLA relies.

TSEP asks the Commission to disavow a recent policy statement that would unlawfully remove the COLA’s design-related contents from the scope of issues that may be challenged in the COLA adjudication and refer those issues to be resolved in a separate, parallel rulemaking proceeding that has not been scheduled or commenced. Policy Statement on the Conduct of New Reactor Licensing Proceedings, 72 Fed. Reg. 20,963 (April 17, 2008) (“2008 Policy Statement”). The 2008 Policy Statement – which does not constitute enforceable law -- should be discarded because it violates Section 189a of the Atomic Energy Act (“AEA”), judicial precedents interpreting the AEA, and the NRC’s Part 52 regulations for the conduct of licensing proceedings on COLAs. *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974) (holding that when an agency applies a policy in a particular situation, “it must be prepared to support the policy just as if the policy statement had never been issued.”) By the same token, the

Commission should also reconsider and revoke a recent decision that affirms and applies the unlawful policy, *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15 (July 23, 2008) (“CLI-08-15”).

TSEP further submits that the Commission should grant this petition because the manner in which the NRC is poised to conduct the Victoria licensing proceeding would deprive TSEP of a fair and meaningful opportunity for a hearing on the Victoria COLA, in violation of the AEA, the Administrative Procedure Act (“APA”) and the NRC’s own regulations. As a matter of law, the COLA is incapable of meeting the APA’s requirement for an adequate hearing notice, because one of the chief “issues of . . . law” that must be included in the hearing notice – the content of the ESBWR standard design certification rule – has not been established. By the same token, the application cannot be considered “complete” for purposes of satisfying the docketing standard in 10 C.F.R. § 2.101(a)(2) or § 2.104(b)’s requirement to provide notice of the factual issues subject to a hearing, because the underlying design is not even finished, let alone certified. In addition, the proposed bifurcation of the Victoria licensing proceeding into two overlapping and duplicative subparts – an adjudication and a rulemaking – would violate the NRC’s regulations for separation of hearings in 10 C.F.R. § 2.317(a), by requiring TSEP to grossly waste its resources in order to participate in the Victoria licensing proceeding.

Under the Part 52 regulatory scheme, the Commission has only two choices with respect to the conduct of a licensing proceeding for the proposed Victoria nuclear power plant: either to hold an adjudication on the entire Victoria COLA, including the ESBWR design certification application that is incorporated by reference into the Victoria COLA; or to complete the ESBWR design certification rulemaking before holding an adjudicatory hearing on the Victoria COLA. The Part 52 regulations do *not*, however, give the NRC the option of removing the COLA’s

design-related contents from the scope of the adjudication on the COLA and referring them to a separate rulemaking for resolution.

The NRC has already committed itself to the conduct of a rulemaking on the ESBWR standard design certification application. NRC's New Reactor Licensing Schedule Chart (accessed on November 3, 2008 at <http://www.nrc.gov/reactors/new-reactors/new-licensing-files/new-rx-licensing-app-legend.pdf> (attached as Exhibit 1). In addition, other COLA applicants in addition to Exelon are relying on the ESBWR in pending COLAs. *See* discussion below in Section IV(A). Therefore TSEP respectfully submits that the Commission must complete the ESBWR design certification rulemaking before commencing the Victoria COLA adjudication. Accordingly, TSEP requests the Commission to hold the docketing decision and/or hearing notice for the Victoria COLA in abeyance pending completion of the ESBWR design certification rulemaking.¹

The NRC Staff has stated that it intends to docket the Victoria COLA on November 6, 2008. *See* NRC's Application Review Schedule for Review of the Victoria COLA, (accessed on November 3, 2008 at <http://www.nrc.gov/reactors/new-reactors/col/victoria.html> and attached as Exhibit 2). Therefore TSEP requests the Commission to take expedited action on this petition.

As discussed in the attached Certificate of Counsel Pursuant to 10 C.F.R. § 2.323(b), counsel for TSEP has contacted counsel for Exelon and the NRC Staff in a sincere attempt to

¹ Pursuant to 10 C.F.R. § 52.85, the only other course of action available to the Commission is to offer TSEP an adjudication on the entire Victoria COLA, including the ESBWR design certification application incorporated by reference into the COLA. *See* discussion below in Section V(A). TSEP requests that if the Commission refuses to hold the COLA adjudication in abeyance pending completion of the ESBWR rulemaking, it order that the adjudication on the COLA must cover all issues relevant to the approval of the COLA including ESBWR design issues.

resolve the concerns raised by this Petition without resort to litigation. Counsel for both parties, however, stated that they intend to oppose this petition.

II. DESCRIPTION OF THE PETITIONER

TSEP is a non-profit educational organization based in Victoria, Texas whose purpose is to identify and evaluate energy alternatives and their environmental, social and economic impacts, including but not limited to nuclear power, coal-fired power plants and other energy production facilities. TSEP has standing to represent the interests of its members in ensuring that the NRC's review process for the proposed Victoria nuclear power plant is conducted in a manner that is open and fair and that protects TSEP's members from undue adverse impacts on their health and safety and the integrity of their environment. *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). As demonstrated by the attached Declaration of Ralph R. Gilster, III in Support of Texans for a Sound Energy Policy's Motion to Hold Docketing of Victoria COLA in Abeyance (October 29, 2008) (attached as Exhibit 3) and Declaration of Michael S. Anderson in Support of Texans for a Sound Energy Policy's Motion to Hold Docketing of Victoria COLA in Abeyance (October 29, 2008) (attached as Exhibit 4), TSEP has members who live or own property within a short distance of the proposed plant. These TSEP members are concerned about the safety and environmental risks posed by the proposed plant and have authorized TSEP to represent their interests in this petition.

TSEP also has standing in its own right to bring this petition, because its offices are located in close proximity to the site of the proposed nuclear power plant. *Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities

the association itself may enjoy.”) An accident at the proposed nuclear power plant could result in radiological releases and environmental contamination that would adversely affect the health of TSEP’s employees, the value of its property, and TSEP’s ability to conduct its business. TSEP seeks to avoid or minimize those risks by ensuring that its safety and environmental concerns are fully addressed in the NRC’s licensing proceeding for the proposed Victoria plant.

III. STATUTORY AND REGULATORY FRAMEWORK

A. Atomic Energy Act Requirements for Nuclear Power Plant Licensing

1. General licensing requirements

The Atomic Energy Act provides that NRC may issue licenses for new power plants only to those applicants who demonstrate the ability and willingness “to protect health and to minimize danger to life or property,” and who agree to provide the Commission with any technical information and data “necessary to protect the health and safety of the public.” 42 U.S.C. § 2133(b). The NRC has promulgated safety standards for the licensing of nuclear power plants in 10 C.F.R. Parts 20, 50, 51, 55, 73, 100, and 140.

2. Development of Part 52 regulations for approval of standard designs and COLAs

In its initial regulatory scheme for the licensing of nuclear power plants, the NRC (and its predecessor the Atomic Energy Commission) separated the licensing of new nuclear power plants into two proceedings: a construction permit proceeding and an operating license proceeding. The regulatory scheme for this two-step licensing process was laid out in 10 C.F.R. Part 50. Each set of construction permit and operating license applications for a new plant was evaluated separately from other plants.

In 1987, concluding that this “one-of-a-kind” approach to reactor design, construction, and operation led to “an operating reactor population of great variability and diversity, even

among reactors from the same vendor,” the NRC announced its intention to establish a new regulatory scheme for the licensing of nuclear plants built to pre-approved standardized reactor designs. Policy Statement, Nuclear Power Plant Standardization, 52 Fed. Reg. 34,884 (September 15, 1987) (“1987 Policy Statement”). The new regulatory scheme had two principal components: standardization of reactor designs and the collapse of construction permit and operating license proceedings into a single “combined” licensing proceeding.²

The purpose of the new regulatory scheme was to:

[E]ncourage standardization and to provide information concerning the Commission’s efforts to develop a regulatory framework for the certification of plant designs which:

- Are essentially complete in both scope and level of detail;
- Cover plant design, construction, and quality assurance programs;
- Satisfy regulatory requirements before construction begins; and
- Can be referenced for individual plant applications.

Id. In the Commission’s view, standardization would “allow for a more expeditious and efficient review process and a more thorough understanding of the designs by the industry and the NRC staff.” *Id.*

In 1988, the Commission issued a proposed rule setting forth a new Part 52 licensing scheme for the use of standardization and combined licenses that would “enhance the safety and reliability of nuclear plants” and “enhance public participation in the licensing process while reducing the complexity and uncertainty of that process.” Proposed Rule, Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,061 (August 23, 1988) (“1988 Proposed Rule”). The Commission reasoned that certification of standard designs would allow for “early identification and resolution of safety issues” by affording public participants in the licensing process “an earlier entry into that

² The Commission stated that it was seeking Congressional approval for the aspect the regulatory program that involved the issuance of combined license. 52 Fed. Reg. at 34,885.

process, greatly reduc[ing] the number and importance of safety issues, and permit[ting] a speedy, yet thorough, NRC staff review whenever an application incorporates a certified standard design.” *Id.*

As described in the Final Rule that was promulgated the following year, the “key procedural device” in the new Part 52 scheme for “bringing about enhanced safety and early resolution of licensing issues” was the provision for certification of standard designs in advance of consideration of COLAs. Final Rule, Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372, 15,374 (April 18, 1989) (“1989 Final Rule”). Therefore the new regulations contained provisions for the filing and approval of standard design certification applications in 10 C.F.R. Part 52, Subpart B; and separate provisions for the filing and approval of COLAs in Part 52, Subpart C. 10 C.F.R. § 52.51 (54 Fed. Reg. at 15,391) provided that certified design applications would be subject to a notice-and-comment rulemaking, and 10 C.F.R. § 52.85 (54 Fed. Reg. at 15,394) provided that COLAs would be subject to adjudications.³ For any COLA that referenced a certified design rule, the NRC would consider the design issues resolved in the rule to be final and not subject to further challenge in the COLA adjudication. 10 C.F.R. § 52.63(a)(5), 54 Fed. Reg. at 15,392.

The new regulations also gave COL applicants the option not to reference a certified standard design. 10 C.F.R. § 52.73, 54 Fed. Reg. at 15,393. But the Commission explained that

³ The text of § 52.85 read:

A proceeding on a combined license is subject to all the applicable procedural requirements contained in 10 CFR part 2, including the requirements for docketing (§ 2.101 of this chapter) and issuance of a notice of hearing (§ 2.104 of this chapter). All hearings on combined licenses are governed by the procedures contained in part 2, Subpart G.

this provision was intended to accommodate COL applicants who wanted to rely on new designs for which certification would not be sought:

DOE proposes redrafting § 52.79 to require that no application for a combined license be considered unless it references a certified design. The final rule does not contain this restriction because there may be circumstances in which a combined license would properly utilize a non-standard design, and because such a restriction would mean, among other things, that every prototype would have to be licensed in a fully two-step process.

73 Fed. Reg. at 15,383. Thus, the Commission expected that as a rule, COL applicants would reference design certification rules; and that only in unusual cases would COL applicants reference un-certified designs.

3. Confirmation of Commission intent in 2004 Part 2 rulemaking

Fifteen years after promulgating the 1989 Part 52 regulations, in revising its hearing procedures to replace formal hearings with informal hearings, the NRC provided further confirmation of its intention that standard design certification rulemakings would precede individual licensing hearings:

The first significant move toward deformalization of reactor licensing cases came in 1989, when the NRC completed what a reviewing court described as a ‘bold and creative’ effort to foster standardization of nuclear power plant designs, *as well as the early resolution of key safety issues.*” This was the issuance of a new 10 CFR part 52, which provided for issuance of design certifications and ‘combined licenses’ for construction and operation of nuclear power plants (54 FR 15386; Apr. 18, 1989). The rule provided that standard designs could be approved by rulemaking, with an opportunity for an informal hearing conducted by an Atomic Safety and Licensing Board (this would be a ‘paper’ hearing, unless the Licensing Board requested the authority to conduct a ‘live’ – that is, oral – hearing, and the Commission agreed.) *Subpart G formal hearings would be offered thereafter*, before the issuance of the combined construction permit/operating license for a specific facility.

Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2,182, 2,185 (January 14, 2004)

(emphasis added). The new 2004 rule changed the above-described hearing procedures by eliminating Subpart G formal hearings for COLA proceedings, but it did not change or otherwise

undermine the general principle that standard design certification should precede the adjudication of COLA referencing standard designs.

4. NRC's current Part 52 regulations

In 2007, the NRC promulgated the most current revisions of the Part 52 regulations, without altering the principle expressed in the original Part 52 rulemaking and the 2004 Part 2 rulemaking that standard designs should be certified before they are referenced in COLAs. Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352 (August 28, 2007) (“2007 Final Rule”). The 2007 revised regulations retain the language of 10 C.F.R. § 52.73 stating that “[a]n application for a combined license under this subpart may but need not reference standard design certification . . .” 72 Fed. Reg. at 49,530. In addition, a new Section 52.55(c) states that “an applicant for a construction permit or a combined license may, at its own risk reference in its application a design for which a design certification application has been docketed but not granted.” 72 Fed. Reg. at 49,529. But the revised rules make no changes to the procedural requirements set forth in 1989 Final Rule for adjudicatory hearings on individual COLAs. Like the 1989 Final Rule, the 2007 revised regulations provide that COLAs are subject to adjudications under 10 C.F.R. Part 2. 10 C.F.R. § 52.85, 72 Fed. Reg. at 49,534.

The revised regulations also establish five separate categories of COLAs, with separate sets of requirements for the content of the applications and restrictions on the scope of issues that are litigable in an adjudication of each type of COLA. With respect to the content of COLAs, 10 C.F.R. § 52.79(a)-(e) establishes separate requirements for COLAs referencing early site permits (“ESPs”) (10 C.F.R. § 52.79(b)); standard design approvals (10 C.F.R. § 52.79(c)); certified design rules (10 C.F.R. § 52.79(d)), licensed manufactured nuclear reactors (10 C.F.R. § 52.79(e)); and COLAs that do not reference any of the above pre-issued rules or permits. 10

C.F.R. § 52.79(a). For three of these categories of COLAs – those that reference ESPs, standard design rules and manufactured reactor licenses – other regulations provide that the determinations made in the previous permitting or rulemaking proceedings are considered final and may not be re-visited in individual COLA adjudications. 10 C.F.R. § 52.39(a)(2), 52.63(a)(5), and 52.171(a)(3), respectively. As a result, the scope of the COLA adjudication required by 10 C.F.R. § 52.85 does not extend to any issues previously resolved in an ESP proceeding, a design certification rulemaking, or a manufactured license proceeding.

For any COLA that does *not* reference a previously issued rule, permit or license, the 2007 revisions to the Part 52 regulations do not contain any provision that permits the NRC to restrict the scope of the COLA adjudication required by 10 C.F.R. § 52.85. Even where a standard design has been approved by the NRC Staff, for example, it may nevertheless be challenged in an individual COLA adjudication. 10 C.F.R. § 52.145(b). *Id.*

B. NRC Procedural Regulations for Licensing of New Reactors

1. Statutory hearing requirement

Section 189a of the AEA generally requires that the NRC must provide interested members of the public with a prior opportunity for a hearing on any proposed licensing action for a nuclear facility. 42 U.S.C. § 2239(a)(1)(A). The scope of a licensing hearing must include all matters that are material to the issuance of a license, including compliance with NRC safety regulations and NEPA. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1438 (D.C. Cir.1984), cert. denied, 469 U.S. 1132 (1985).

The opportunity for a hearing offered under Section 189a of the AEA must be “meaningful.” *Id.*, 735 F.2d at 1446. Consistent with this statutory requirement, the Commission has committed to ensure that its hearings are meaningful in numerous policy

statements, including the 2008 Policy Statement regarding the conduct of Part 52 licensing proceedings:

The Commission aims to provide a fair hearing process, to avoid unnecessary delays in its review and hearing processes, and to enable the development of an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.

73 Fed. Reg. at 20,969.

2. Adjudications of individual license applications

a. *Docketing regulations and hearing notice requirements*

Upon receiving a license application, including a COLA for a new plant, the NRC must make an initial determination as to whether the application is “complete and acceptable for docketing.” 10 C.F.R. § 2.101(a)(2). If the agency determines that the application is complete, it assigns a docket number to the application. 10 C.F.R. § 2.101(a)(3). Once the NRC assigns a docket number to a particular application, the agency must then publish both a Notice of Agency Action and a Notice of Opportunity to Request a Hearing in the Federal Register. 10 C.F.R. § 2.104(a). The requirement of a completeness finding as a prerequisite to docketing and the issuance of a notice of hearing is based on the Administrative Procedure Act's requirement that an agency must give notice before conducting a hearing. 5 U.S.C. § 554(b).

The notice of hearing must state, *inter alia*, the nature of the hearing, the authority under which the hearing is to be held, the matters of fact and law to be considered, and the date by which requests for hearing of petitions to intervene must be filed. 10 C.F.R. § 2.104(b).

b. *Threshold requirement to plead admissible contentions*

The scope of material licensing issues that may be litigated in an NRC licensing hearing is determined by the content of the contentions that are admitted to the case. *BPI v. Atomic*

Energy Commission, 502 F.2d 424, 427 (D.C. Cir. 1974). A petitioner who wishes to adjudicate the adequacy of a COLA must raise his or her concerns in contentions that are based on “documents or other information available at the time the petition is to be filed,” such as the application, supporting safety analysis report, and environmental report. 10 C.F.R. § 2.309(c)(2). Contentions must include a specific statement of the law or fact to be raised or controverted, a brief explanation of the basis for the contention, a demonstration that the issue raised by the contention is material and within the scope of the proceeding, a concise statement of the facts or expert opinion on which the petitioner relies, and a demonstration that the petitioner has a genuine dispute with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f).

As a general matter, NRC regulations give interested members of the public only 60 days after the issuance of the hearing notice to submit contentions as of right. 10 C.F.R. § 2.309(b)(3)(i). Beyond the initial 60-day period, contentions may only be submitted as of right if they relate to data or conclusions, presented in an environmental impact statement (“EIS”), environmental assessment, or environmental supplement, that “differ significantly from the data or conclusions in the applicant’s documents.” 10 C.F.R. § 2.309(c)(2). All other new or amended contentions may be filed only “with leave of the presiding officer,” upon a showing that:

- (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.

10 C.F.R. § 2.309(f)(2)(i)-(iii).

c. Procedural requirements for conduct of adjudicatory hearings

NRC adjudications on the proposed issuance of nuclear power plant licenses are conducted under the informal hearing procedures in Subpart L of 10 C.F.R. Part 2, as supplemented by the NRC's general procedural rules in Subpart C. 10 C.F.R. §§ 2.310 and 2.1200. Applicable procedures for an informal hearing include the exchange of relevant documents under a general discovery provision (10 C.F.R. § 2.336), creation of a hearing file by the NRC Staff (10 C.F.R. § 2.1203), a process for the submission of written initial and rebuttal evidence (10 C.F.R. § 2.1207), the opportunity to proposed questions for the presiding officer to propound to witnesses in an oral hearing. 10 C.F.R. § 2.1207(a)(3), and the opportunity to submit proposed findings of fact and conclusions of law. 10 C.F.R. § 2.1209.

3. NRC procedures for design certification rulemakings

A standard design certification is a "rule" that must be promulgated in accordance with the NRC's standards in 10 C.F.R. Part 2, as supplemented by the Part 52 regulations. 10 C.F.R. § 52.51. As further explained in Section 52.51:

The Commission shall initiate the rulemaking after an application has been filed under § 52.45 and shall specify the procedures to be used for the rulemaking. The notice of proposed rulemaking published in the Federal Register must provide an opportunity for the submission of comments on the proposed design certification rule.

Id.. Under 10 C.F.R. §§ 2.804 and 2.805, the NRC must publish a notice of proposed rulemaking in the Federal Register and take public comments on the proposed rule.

C. 2008 Policy Statement Regarding Conduct of COLA and Design Certification Proceedings

Although the 2007 revisions to the Part 52 regulations did not include any changes to the NRC's Part 2 procedural regulations for the scope or conduct of COLA adjudications, the revised regulations were followed by a new policy statement limiting the scope of adjudications

regarding COLAs that referenced un-certified standard designs. 2008 Policy Statement, 73 Fed. Reg. 20,963. Based on the expectation that applicants would shortly file COLAs that referenced un-approved design certification applications (*id.* at 20,969), the Commission instructed licensing boards that they “should not accept” contentions that challenged un-certified standard designs in the individual licensing proceedings, but should instead refer them to the NRC Staff for resolution in the design certification rulemaking. *Id.* (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)). If the contentions were otherwise admissible, the licensing boards should hold them in abeyance. *Id.*

IV. FACTUAL BACKGROUND

A. Exelon’s License Application for the Victoria Site

On September 2, 2008, Exelon submitted a COLA for a two-unit nuclear power plant at the Victoria site. The application, which is nearly seven thousand pages in length, incorporates by reference Revision (“Rev.”) 4 of the ESBWR design certification application (also called the Design Control Document or “DCD”), which is also thousands of pages long.⁴ Each section of the COLA’s Final Safety Analysis Report incorporates by reference a corresponding section of the ESBWR application. *See* COLA at 1.1-3, § 1.1.1.7, which explains the rubric used by Exelon to incorporate the ESBWR application by reference.

Rev. 4 of the ESBWR design certification application, upon which the Victoria COLA relies, is not even the most current version of the ESBWR application. GE-Hitachi submitted Rev. 5 of the ESBWR application on June 1, 2008 and GE-Hitachi has since informed the NRC

⁴. GE-Hitachi submitted Rev. 4 to the NRC on September 28, 2007. Rev. 0 of the ESBWR design certification application was submitted on August 24, 2005.

that it intends to submit a sixth revision at some time in the future. *See* GE Hitachi Presentation, DCD Tier 1 Meeting (August 27, 2008) (ML082410433). Because each revision of the ESBWR necessitates corresponding revisions to a dependent COLA, Exelon has informed the NRC that it plans to submit a new revision of the COLA (Rev. 1) that references Rev. 5 of the ESBWR design certification application. *See* Viewgraphs, “ESBWR DCD Rev. 5 Impacts on COLAs,” ESBWR DCGW-NRC Meeting (Aug. 7, 2008) (ML082330240). Rev. 5 of the ESBWR application will cause a broad range of changes to the Victoria COLA, including changes to the plant plan that would affect COLA flooding calculations, changes to the stacks that would affect COLA calculations for offsite doses, changes to heat load calculations that would affect plant service water system tables, changes to source terms and dose calculations that would affect site specific dose calculations, the addition of new COL items regarding security, changes to accident analysis results that would affect Section 7.1 of the Environmental Report, and other changes to the ESBWR application that affect the technical specifications in the COLA. *Id.*

The Victoria COLA is one of four COLAs that reference the ESBWR application. Other ESBWR-based COLAs have been submitted for new plants at the sites of the North Anna, Grand Gulf, River Bend, and Fermi nuclear power plant sites.

B. Novelty of ESBWR Design

GE-Hitachi boasts that the ESBWR design is an “innovative solution” that integrates 50 years of experience operating BWR plants with “next generation technology.” GE-Hitachi Nuclear Energy ESBWR Fact Sheet, (accessed on November 3, 2008 at http://ge.ecomagination.com/site/downloads/esbw/ESBWR2007Fact_Sheet_Final.pdf and attached as Exhibit 5). According to GE-Hitachi, the ESBWR design “utilizes a number of new

features to provide better plant security; improved safety; more location options; excellent economics; and operational flexibility that ultimately increases plant availability.” *Id.*

One of the asserted “primary benefits and features” of the ESBWR design is its “simplified design features.” *Id.* According to GE-Hitachi, the ESBWR “passively removes decay heat directly to the atmosphere.” *Id.* In other words, the ESBWR design relies on natural forces such as gravity to provide emergency water in the event of a loss of coolant instead of on “active” equipment such as motor-driven pumps. *See* Expert Declaration of Dr. Edwin S. Lyman in Support of Texans for a Sound Energy Policy’s Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance, par. 4 (October 31, 2008) (“Lyman Declaration”), attached as Exhibit 6.

GE claims in its Fact Sheet that it has been able to eliminate “eleven systems” from previous designs,” and that the ESBWR design has “25 percent fewer pumps, valves, and motors.” According to GE, the design’s passive safety systems “reduce the number of active systems, increasing safety” to the point that “[i]t is 11 times more likely for the largest asteroid near the earth to impact the earth over the next 100 years than for an ESBWR operational event to result in the release of fission products to the environment.” *Id.* However, the “passive” safety systems used by the ESBWR design are based on largely unproven technologies and are more complex and problematic than represented by GE-Hitachi in its public relations materials. Lyman Declaration, par. 5. While such systems may sound good in theory because passive safety systems can work without AC electric power or operator intervention, in reality they are not that simple. One problem is that gravity provides a much weaker driving force for coolant flow than the suction provided by pumps. This means that that it is harder to predict whether a

passive system will work as well as an active system under the full range of potential dangers, including a terrorist attack or severe weather event. *Id.*

It is also misleading to refer to the ESBWR as a “passively safe” design because operator intervention is sometimes needed. *Id.*, par. 5. For instance, the NRC’s draft safety evaluation report of Rev. 4 of the ESBWR design certification application points out that “during shut-down, the plant relies on operator actions for accident mitigation more than it does during power operation. Several systems have no automatic actuation and rely on operators to initiate. . .” Safety Evaluation Report, Chapter 19, Probabilistic Risk Assessment and Severe Accident Evaluation at 19-91 (May 11, 2008) (ADAMS Accession No. ML081400527). Lyman Declaration, par. 9.

Another potential problem with the ESBWR design is that it has a relatively small and weak pressure suppression containment, which are more vulnerable to failure than large-volume containments in the event of ex-vessel steam explosions or accumulation of non-compressible gases during an uncontrolled core-melt. Lyman Declaration, par. 6.

A third safety concern with the ESBWR is that none of the active backup safety systems are required to be “safety-grade,” *i.e.*, they do not have to meet the same rigorous reliability standards set by the NRC for primary safety systems. *Id.*, par. 7. While this may effectively cut costs, it also increases the chance that backup systems will not work when they are needed. This is a problem because the ESBWR may actually violate the NRC’s severe accident safety goals if these backup systems are not available. *Id.*

As Dr. Lyman points out, given the uncertainties associated with these novel and largely untested safety features, many questions remain concerning the safety of the ESBWR design. *Id.*, par. 8. For example, in the realm of severe accidents and PRA alone, several dozen open

items remain unresolved in the NRC staff's ESBWR design certification review, many related to risk-important issues such as the regulatory treatment of non-safety related systems and the effectiveness of the Basemat Internal Melt and Coolability (BiMAC) device, which is intended to stabilize reactor core debris during a severe accident in which the core melts and breaches the reactor vessel. NRC Staff Presentation to the Advisory Committee on Reactor Safeguards, ESBWR Design Certification Review, Chapters 19 and 19A (October 2, 2008).

D. NRC Proposed Schedules for Hearing on Victoria COLA, ESBWR Design Review, and Design Certification Rulemaking for ESBWR Design

Despite the fact that the ESBWR design certification application has been pending with the NRC for three years (it was docketed in September of 2005), the NRC has not established any schedule for review and approval of the ESBWR application or a notice-and-comment rulemaking to support design certification. *See* NRC Design Certification Review – ESBWR, <http://www.nrc.gov/reactors/new-reactors/design-cert/esbwr.html> (accessed on November 3, 2008). However, the NRC's New Reactor Licensing Schedule Chart (Exhibit 1) shows that the NRC expects the ESBWR application to be completed in late 2009, and that the NRC expects to conduct a rulemaking proceeding between late 2009 and late 2010.

Similarly, the NRC's webpage for the Victoria application has no schedule for the adjudication of the application. However, the partial schedule for review of the Victoria COLA that is posted on the NRC's website states that the NRC expects to docket the COLA on November 6, 2008, which is likely to trigger the issuance of a hearing notice shortly thereafter. Thus, the critical period for submitting contentions as of right is likely to fall between late 2008 and early 2009, long before the ESBWR rulemaking has finished, and possibly before it has even started.

V. ARGUMENT: THE MANNER IN WHICH THE NRC PROPOSES TO CONDUCT THE LICENSING PROCEEDING FOR THE VICTORIA NUCLEAR POWER PLANT VIOLATES THE AEA, NRC'S PART 52 REGULATIONS AND APA REQUIREMENTS FOR FAIR HEARINGS.

Under the NRC's Part 52 regulations and its Part 2 regulations for the implementation of Part 52, the NRC has two choices with respect to the conduct of the licensing proceeding for the Victoria COLA: (a) it can offer an opportunity to request an adjudicatory hearing on the entire COLA, including the ESBWR design certification application that is incorporated into the COLA; or (b) it can postpone the adjudication on the Victoria COLA until it completes the rulemaking on the ESBWR design certification application. The regulations do *not* allow the NRC to exclude un-certified ESBWR design issues from the scope of the adjudication on the Victoria COLA and defer them to a future rulemaking, as suggested in the NRC Staff's proposed licensing schedule, the 2008 Policy Statement and CLI-08-15. These recent pronouncements violate the AEA and NRC's Part 52 regulations. Moreover, if implemented, the NRC's proposed procedures for the conduct of the adjudication of the Victoria COLA would deprive TSEP of a fair and meaningful hearing, in violation of the AEA, the APA, and the NRC's regulations for fair hearing notice and separation of hearings.

A. The NRC Staff's Proposed Manner for Conducting the Licensing Proceeding for the Victoria Nuclear Power Plant Violates the AEA and the Part 52 Regulations Regarding the Scope of COLA Adjudications.

1. The NRC is required to offer an adjudication on all aspects of the Victoria COLA, including the adequacy of the ESBWR design.

As discussed above in Section III(B)(1), in licensing a new nuclear power plant, the NRC must offer a hearing on all issues that it considers material to the granting of a license. *Union of Concerned Scientists*, 735 F.2d at 1443. The NRC's own licensing regulations constitute the best indication of what issues the NRC considers to be material to its licensing decision. *Id.*, 735

F.2d at 1445. In the case of the Victoria COLA, the scope of hearing is determined by such requirements as 10 C.F.R. § 52.79(a), which lists 46 separate requirements for Exelon’s final safety analysis report (“FSAR”). Those 46 requirements include the instruction to describe various aspects of the facility design which are addressed in the ESBWR application referenced by the COLA. *See, e.g.*, 10 C.F.R. §§ 52.79(a)(4)-(6).

Moreover, the Part 52 regulations leave no question that the COLA hearing is to be an adjudication, not a rulemaking. Under 10 C.F.R. § 52.85, a COLA must be the subject of a “notice of hearing,” which triggers the requirement for an informal or formal hearing under 10 C.F.R. § 2. 10 C.F.R. § 2.310. A rulemaking, in contrast, is not the subject of a “notice of hearing” but of a “notice of proposed rulemaking.” 10 C.F.R. § 2.804.

Therefore, the scope of the adjudicatory hearing on the Victoria COLA must include the adequacy of the ESBWR design features that are incorporated into the COLA and that are listed in 10 C.F.R. § 52.79(a) to satisfy the NRC’s safety and environmental regulations. The hearing must be subject to all of the procedural protections of Subparts C and L of 10 C.F.R. Part 2, including the right to discovery, the right to present direct and rebuttal evidence, and the right to propose questions to be asked by the presiding officer at a hearing. *See* discussion above in Section III(B)(2)(c).

2. The only exceptions to the requirement that the COLA hearing must encompass all material licensing issues do not apply here.

As discussed above in Section III(A)(4), the Part 52 regulations make only three exceptions to the requirement that a COLA must comprehensively describe all aspects of a facility’s design and operation and those aspects must be offered for adjudication in a COLA licensing proceeding. First, for a COLA submitted under 10 C.F.R. § 52.79(b) that references an ESP, the issues resolved in the ESP proceeding need not be described in detail in the COLA and

are excluded from consideration in the COLA adjudication under 10 C.F.R. § 52.39(a)(2).

Second, for a COLA submitted under 10 C.F.R. § 52.79(d) that references a certified design rule, the issues resolved in the rulemaking proceeding need not be described in detail in the COLA and are excluded from consideration in the COLA adjudication under 10 C.F.R. § 52.63(a)(5).

Third, for a COLA submitted under 10 C.F.R. § 52.79(e) that references a licensed manufactured nuclear reactor, the issues resolved in the licensing proceeding for the manufactured reactor need not be described in detail in the COLA and are excluded from consideration in the COLA adjudication under 10 C.F.R. § 52.171(a)(3).

Exelon's COLA does not qualify for any of these exceptions; and there is no other provision in NRC regulations which allows the Commission to remove material licensing issues from the scope of the COL adjudication. Even where the COLA references a design that has received *approval* from the NRC Staff, the entire COLA must nevertheless be offered as the subject of an adjudicatory hearing. *See* 10 C.F.R. § 52.145(b), which provides that:

The determination and report by the NRC staff [approving a standard design] do not constitute a commitment to issue a permit or license or in any way affect the authority of the Commission, Atomic Safety and Licensing Board Panel, or presiding officers in any proceedings under Part 2 of this chapter.

Thus, design issues raised by the Victoria COLA may not be shunted into a separate rulemaking simply because they appear in the ESBWR standard design certification application that is referenced in the COLA.⁵

⁵ In CLI-08-15, the Commission assigns significance to the fact that Section 52.55(c) warns COL applicants that they reference un-certified design certification applications at their "own risk." *Id.*, slip op. at 3. But that statement does not show that the Commission intended to change the regulatory scheme in 10 C.F.R. § 52.79 regarding the types of issues that must be addressed in a COLA that fails to reference a certified design, or the scope of the adjudicatory hearing on those issues. To the contrary, it demonstrates that the Commission did not plan to make any special provisions to assist COL applicants who referenced un-certified applications. And a warning about a risks to applicants can hardly be squared with the establishment of new

3. The cases cited in the 2008 Policy Statement do not support the Commission's claim of authority to remove design-related issues from COLA adjudications.

In the 2008 Policy Statement, the Commission cites, as authority for its position that it may remove design-related issues from the scope of a COLA adjudication, “longstanding precedent that ‘licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’” 73 Fed. Reg. at 20,972, citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59 (1985), *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79 (1974). But the Commission already rejected this very approach in the Part 52 rulemaking, when it allowed COL applicants to reference un-certified designs *without* also changing the procedures which required the NRC to hold adjudications on COLAs that did not reference certified designs. The Part 52 regulatory scheme specifically prevents the Commission from restricting the scope of material issues that can be litigated in a COLA adjudication to exceptions for already-issued ESPs, manufactured nuclear plant licenses, and standard design rules. The Commission may not, through a policy pronouncement, modify its own regulations for the licensing of new nuclear power plants. *Pacific Gas & Electric Co.*, 506 F.2d at 38-39.

In any event, the cases cited in the Policy Statement are inapposite to these circumstances. In both cases, the issue removed from an adjudication and referred to a rulemaking was discrete and easily separable from the other issues raised in the hearing. For instance, in *Potomac Electric Power Co.*, the Appeal Board held that contentions regarding the

procedures that make it faster for those applicants to get through the licensing process at the expense of other parties. Under those circumstances, such a warning would be more appropriately issued to TSEP and other members of the affected public.

adverse environmental impacts of the uranium fuel cycle need not be considered in the adjudication because they were being addressed in a rulemaking. Similarly, In *Duke Energy Corporation*, the Commission held that contentions regarding the environmental impacts of transporting high-level waste to a high-level waste repository site need not be addressed in an adjudication because transportation of spent fuel rods to an offsite repository was subject of pending NRC rulemaking. The Commission's Policy Statement, in contrast, would take the whole set of design-related issues covered by 10 C.F.R. § 52.79(a)(4) through (6), which undergird the Victoria COLA, and create a new category in which those issues could be dealt with in a parallel or subsequent rulemaking. As Dr. Lyman points out, many of his concerns regarding the impact of the proposed Victoria plant on public health and safety are integrally related to questions of fundamental plant design and the details of the PRA based on that design. Lyman Declaration, par. 9. What's more, the outcome of the rulemaking with respect to fundamental design questions could lead to additional design changes that could have a significant impact on contentions challenging the adequacy of aspects of the COLA itself, including operational procedures, technical specifications, and the physical security plan. *Id.* Thus, ESBWR design issues are neither conceptually nor procedurally separable from issues regarding the adequacy of the COLA. Finally, as discussed in Section V(C) below, the Commission's proposal to divide the COLA into an adjudication and a rulemaking is inconsistent with the NRC's own regulations for the separation of hearings because it is efficient and illogical.

4. The proposed hearing schedule would defeat the purposes of Part 52.

In both the 1988 Proposed Rule and the 1989 Final Rule, the Commission discussed its expectation that the effect of the Part 52 regulations on intervenors would be

“neutral.” 53 Fed. Reg. at 32,069; 54 Fed. Reg. at 15,385, respectively. As the Commission explained:

For the most part, the proposed rules will affect the timing of hearings rather than the scope of issues to be heard. For example, many site and design issues will be considered earlier, in connection with the issuance of an early site permit or standard design certification, rather than later, in connection with a facility licensing proceeding. Similarly, a combined license proceeding will include consideration of many of the issues that would ordinarily be deferred until the operating license proceeding. Thus, the timing rather than the cost of participating in NRC licensing proceedings will be affected. Intervenor may experience some increased preparation costs if they seek to reopen previously decided issues because of the increased showing that will be required. Once a hearing commences, however, an intervenor’s costs should be decreased because the issues will be more clearly defined than under existing practice.

Id. If anything, the Commission predicted that licensing proceedings would become more efficient:

Although a pre-approved cite and certified standard design need not be referenced for the combined license, maximum efficiency will result if site-related issues, as well as design-related issues, have been resolved before commencement of the combined license proceeding.

72 Fed. Reg. at 49,446.

Contrary to these expectations, however, the hearing procedures envisioned in the NRC Staff’s proposed licensing schedule and the 2008 Policy Statement virtually guarantee the *inefficiency* of the licensing proceeding for the Victoria COLA, including duplicative litigation of issues and a gross waste of resources by TSEP. As demonstrated in the NRC’s Partial Schedule for Review of the Victoria COLA (Exhibit 2) and the NRC’s New Reactor Licensing Schedule Chart (Exhibit 1), TSEP will have to submit contentions well before the ESBWR rulemaking is completed or even begun. Because the health and safety impacts of the Victoria nuclear plant are dependent on the design of the plant, and because the design of the plant may change during the ESBWR design certification rulemaking, it can be expected that the content of the Victoria COLA may also change after the completion of the rulemaking. This result is made

all the more likely by the fact that the ESBWR is not complete *now*. Exelon has already conceded that the COLA it submitted in September is out of date because it incorporates Rev. 4 of the ESBWR application, that that the COLA must be revised to incorporate Rev. 5. And GE-Hitachi has already announced that it will be submitting a sixth revision. *See* discussion above in Section IV(A).

As a result, contentions filed now with respect to the Victoria COLA may need to be changed, or new contentions submitted, with each succeeding update of the COLA and also after completion of the certified design rulemaking. As Dr. Lyman states, additional design changes that could have a significant impact on contentions challenging the adequacy of aspects of the COLA itself, including operational procedures, technical specifications, and the physical security plan. *Id.*, par. 9.

By requiring TSEP to submit contentions on the COLA without any knowledge of whether the NRC Staff will ultimately even approve the ESBWR design, the NRC will likely force TSEP to formulate incomplete, uninformed, and potentially unnecessary arguments. Entire contentions – each of which requires a substantial investment of resources to develop -- may well turn out to have been a waste of time if the ESBWR design changes significantly.⁶ Such an outcome is all the more conceivable in light of the novelty of the ESBWR design. *See* Section IV(c) above. Thus, instead of the efficiency planned by the Commission in Part 52 and relied on by the Commission to state that the impacts of the rule would be neutral, the procedures set out

⁶ The burden of keeping up with successive changes to the Victoria COLA and modifying contentions or submitting new contentions is likely to be significant. The NRC's standards for the admissibility of contentions require that new or amended contentions that are filed after the first 60 days must be "timely," based on "the availability of subsequent information." 10 C.F.R. § 2.309(f)(2)(iii). Therefore, each revision of the Victoria COLA that is prompted by a revision to the ESBWR certified design application will need to be reviewed immediately to determine whether it warrants the submission of new or amended contentions, whether or in what form the NRC eventually approves the ESBWR design.

in the NRC's licensing schedule and the 2008 Policy Statement would insert gross inefficiency into the process. As the Commission has previously recognized, it is unfair to force members of the public to waste limited resources on issues that are clearly premature. *Hydro Resources, Inc.* (P.O. Box 15910), CLI-01-04, 53 NRC 31, 43 (2001) (finding "not unreasonable" Intervenor's concern that expert affidavits which had to be prepared years before they might be used in a hearing would become "stale and dated with time.")

The Commission also intended that the Part 52 regulatory scheme would "bring[] about enhanced safety and early resolution of licensing issues." 54 Fed. Reg. at 15,374. The very design of the proposed schedule for the Victoria licensing proceeding will undermine this goal, by forcing ESBWR-based COL applicants to expend huge amounts of money preparing and revising their applications, and by requiring a significant investment of NRC Staff time to review the COLAs. As expenditures on individual COLAs mount by the thousands of dollars into the millions, pressure will mount correspondingly on the NRC to accept the underlying ESBWR design, even if it does not satisfy the NRC's safety standards. Thus, the proposed procedures for this licensing case would undermine the Commission's purpose of enhancing safety through the Part 52. regulations.

B. To Commence a Hearing on the Victoria COLA Before Issuance of the ESBWR Rule or Even a Completed Application and a Proposed Rule Would Violate APA and NRC Hearing Notice Requirements and Thereby Deprive TSEP of its Statutory Hearing Right.

As discussed above in Section III(B)(2), TSEP has a statutory right to a request a hearing on the Victoria COLA, if it does so within the limited time permitted by the NRC and according to the NRC's standards for the admission of contentions into the proceeding. As a practical matter, under the NRC's regulations, TSEP has an unrestricted right to seek the admission of contentions related to the safety of the proposed Victoria nuclear power plant only within the

first 60 days after the NRC's issuance of a hearing notice. While a limited category of environmental contentions may be submitted as of right after conclusion of the initial 60-day period, no safety-related contentions may be submitted without leave of the presiding officer. 10 C.F.R. § 2.309(f)(2)(i)-(iii). Thus, after the expiration of the first 60 days following issuance of a hearing notice, admission of additional safety-related contentions is no longer a matter of right but lies within the discretion of the NRC.

In evaluating the adequacy of a hearing notice in any particular case, a reviewing court must evaluate the notice with “due regard for the practicalities and peculiarities of the case.” *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 (5th Cir. 1978) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In NRC practice, given the strict limitation on the time when a hearing may be requested as of right under the AEA, it is imperative that a hearing notice provide sufficient notice of the “matters of fact and law to be considered” (10 C.F.R. § 2.104(b)) in order to allow a meaningful opportunity for the formulation of contentions. *See also* 5 U.S.C. § 554(b).⁷

Here, the NRC proposes to issue a notice of hearing that omits a description of one of the most fundamentally important “matters of . . . law” at issue in the hearing: the content of the ESBWR design certification rule. Under the currently proposed schedule, that law will not be

⁷ While Section 554(b) nominally applies to formal hearings only, the Supreme Court has ruled that due process in the informal hearing setting requires notice that is essentially the same as notice for formal hearings. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978) (“An elementary and fundamental requirement of due process in *any* proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”) A party to an administrative proceeding “is entitled . . . to know the issues on which [the agency’s] decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.” *Williston Basin Interstate Pipeline Co. v. Federal Energy Reg. Comm’n*, 165 F.3d 54, 63 (D.C. Cir. 1999) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974)).

known until almost the end of the adjudication, sometime in 2010. *See* discussion in Section IV(D) above. As a matter of law, therefore, the issuance of a hearing notice before completion of the NRC's design certification rule is not permitted by either the AEA or the APA.

The COLA is also incomplete with respect to its factual content. While the COLA must address the application of the ESBWR design to the individual plant and the Victoria site, the ESBWR design is not complete, nor have all existing revisions of the ESBWR design been incorporated into the Victoria COLA. *See* discussions above in Section IV(A) and V(A)(4). Thus, as a general matter, it is not possible to assess the safety of the proposed ESBWR at the Victoria site until numerous fundamental design questions have been resolved. Lyman Declaration, par. 9. TSEP should not be required to go ahead with the submittal of contentions where it does not "know the issues on which [the agency's] decision [to issue the COLA] will turn" nor "the factual material on which the agency relies for decision." *Williston Basin, supra*, at 63.

C. To Commence a Hearing on the Victoria COLA Before Issuance of the ESBWR Rule Would Violate NRC's Standards for Separation of Hearings.

The NRC's proposal to commence the Victoria COLA adjudication before certification of the ESBWR design certification rulemaking violates NRC's regulation for the separation of hearings, which provides that:

On motion by the parties or upon request of the presiding officer for good cause shown, or on its own initiative, the Commission may establish separate hearings in a proceeding if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.

10 C.F.R. § 2.317(a). Section 2.317(a) is comparable to F.R.C.P. 42(b), which allows a court to bifurcate (*i.e.*, conduct separate trials on) any issues within a single case if it determines that such

bifurcation would be more convenient, avoid prejudice, or be conducive to expedition and economy.

Courts have generally found, however, that bifurcation is “the exception, not the rule,” and will not order separate trials “unless such a disposition is clearly necessary.” *Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 618, 620 (N.D. Ill. 2000). The potential for prejudice resulting from the Court’s decision whether to bifurcate is the court’s “most important consideration.” *Id.* at 621. Even if the court determines that bifurcation would increase judicial economy, it “should not order separate trials when bifurcation would result in unnecessary delay, additional expense, or some other form of prejudice.” *Id.* at 620. Ultimately, the use of such a procedure “must be grounded upon a clear understanding between the court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next.” *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976). The use of bifurcation is thus based upon a logical progression through the issues of the case that is designed “to avoid prejudice, not to create it.” *United States Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172, 181 (3rd Cir. 1981).

Contrary to the principles of sound case management established in the NRC regulations, the federal rules, and cases interpreting them, the NRC has proposed to structure this licensing proceeding in a way that defeats any logical progression through the issues of the case. As Dr. Lyman points out, it is illogical to require TSEP to formulate contentions on the Victoria COLA before the ESBWR design is finalized and certified. Lyman Declaration, par. 9. This is because it is impossible to assess the safety of the use of the proposed ESBWR design at the Victoria site until numerous fundamental design issues have been resolved. *Id.* And given the extensive list of staff open items on the ESBWR design certification application, it is likely that the ESBWR

design will undergo several further iterations before the design certification rulemaking is initiated.⁸

In addition, as discussed in more detail in Section (V)(A)(4) above, the separation of the COLA hearing into an adjudication and a separate rulemaking would be inefficient as a general matter, and would prejudice TSEP by requiring a wasteful and duplicative use of TSEP's resources. Thus, it fails to meet the regulatory requirements that the separation of a hearing into subparts must be determined to be "conducive to the proper dispatch of its business and to the ends of justice." 10 C.F.R. § 2.317(a).

VI. CONCLUSION

For the foregoing reasons, the Commission should hold in abeyance the docketing decision and/or the hearing notice for the Victoria COLA, pending completion of the NRC's rulemaking proceeding regarding the ESBWR standard design certification application. In the alternative, the Commission should rule that TSEP is entitled to an adjudication on the entire Victoria COLA, including the ESBWR design certification application referred to in the COLA.

⁸ *Id.* For instance, important questions remain regarding the impact of severe hurricane-force winds on the currently proposed ESBWR design. The vulnerability of the plant at the Victoria site to such events will depend on whether and how the final design is modified to address the risk of severe hurricane-force winds. Similarly, the ESBWR design certification application has unresolved issues regarding the regulatory treatment of non-safety systems. Until those open issues are resolved, it will be difficult to assess whether the site-specific procedures for operations such as outage management will be adequate. Finally, the physical protection plan for the proposed Victoria nuclear plant depends on the designation and protection of target sets, which in turn depend on the PRA for the ESBWR design. To attempt to formulate contentions on security-related features of the COLA that have a significant dependence on ESBWR design features, at this very early stage in the process for approval of the ESBWR design, is akin to shooting at a moving target. Lyman Declaration, par. 9.

Respectfully submitted,

/s/

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/328-3500
FAX 202/328-6918
dcurran@harmoncurran.com

/s/

James Blackburn, Jr.
Blackburn Carter, P.C.
4709 Austin St.
Houston, Texas 77004
713/524-1012
713/524-5165 (*fax*)
jbb@blackburncarter.com

November 3, 2008

**CERTIFICATION BY COUNSEL
PURSUANT TO 10 C.F.R. § 2.323(b)**

Pursuant to 10 C.F.R. § 2.323(b), I certify that on October 27, 2008, I contacted counsel for Exelon and the NRC Staff in a sincere attempt to resolve the issues raised by this petition, but neither party would consent to the motion.

/s/
Diane Curran

November 3, 2008

CERTIFICATE OF SERVICE

I certify that on November 3, 2008, I submitted the foregoing Petition to the NRC by posting it on the NRC's Electronic Information Exchange system. It is my understanding, based on a conversation with Emile Julian of the NRC Secretary's Office, that the following individual or entities were served as a result:

Steven P. Frantz, Esq. Morgan, Lewis & Bockius, LLP 1111 Pennsylvania Ave. N.W. Washington, D.C. 20004	Office of the Secretary Rulemakings and Adjudications Staff U.S. Nuclear Regulatory Commission Washington, D.C. 20555
Kathryn Winsberg, Esq. Office of the General Counsel U.S. Nuclear Regulatory Commission Washington, D.C. 20555	NRC Commissioners c/o Office of the Secretary Rulemakings and Adjudications Staff U.S. Nuclear Regulatory Commission Washington, D.C. 20555

/s/
Diane Curran