

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
)	Docket Nos. 52-031-COL
EXELON NUCLEAR TEXAS HOLDINGS, LLC)	52-032-COL
(Victoria County Station, Units 1 and 2))	November 18, 2008
)	

**ANSWER OF EXELON OPPOSING PETITION TO HOLD
HEARING NOTICE FOR VICTORIA COUNTY STATION IN ABEYANCE**

I. INTRODUCTION

On November 3, 2008, Texans for a Sound Energy Policy (“TSEP”) submitted a Petition to the U.S. Nuclear Regulatory Commission (“Commission” or “NRC”) requesting that the Commission hold in abeyance the anticipated hearing notice for the Victoria County Station, Units 1 and 2 combined license (“COL”) proceeding pending issuance of the design certification rule (“DCR”) for the Economic Simplified Boiling Water Reactor (“ESBWR”).¹ Exelon Nuclear Texas Holdings, LLC (“Exelon”) is submitting this answer in opposition to the Petition pursuant to 10 C.F.R. § 2.323(c) and the Commission’s November 12, 2008 Order.

The Petition claims that the COL application (“COLA”) cannot be considered complete because it references an application for a standard design that has not yet been certified through

¹ “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” (Nov. 3, 2008) (“Petition”). Subsequently, upon learning that the COL application had already been docketed, TSEP modified its Petition to delete the request to hold the docketing decision in abeyance. “Texans for a Sound Energy Policy’s Supplement to 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” (Nov. 4, 2008). Because TSEP has withdrawn its request to hold the docketing decision in abeyance, this aspect of the original Petition is not addressed further.

rulemaking.² The Petition further claims that proceeding to hearing on the COLA under these circumstances would be inconsistent with the governing statutes and regulations, and would deprive TSEP of a fair and meaningful opportunity for hearing.³ As discussed below, the Petition should be denied because those claims have no basis in law and are inconsistent with applicable regulatory requirements and precedents.

II. BACKGROUND

By letter dated September 2, 2008, Exelon filed a COLA with the NRC under Subpart C of 10 C.F.R. Part 52.⁴ Exelon's application requests COLs for two ESBWR units for its Victoria County Station site located in Victoria County, Texas. As authorized by 10 C.F.R. § 52.55(c), the COLA incorporates by reference the application for design certification for the ESBWR and Revision 4 of the associated Design Control Document ("DCD"). Exelon's letter dated September 2, 2008 acknowledges that a future revision to the COLA will incorporate by reference the recently submitted ESBWR DCD Revision 5 and that, after the NRC issues the DCR for the ESBWR, the COLA will be revised to incorporate by reference that rule.⁵

Exelon's COLA was made available through NRC's website and publicly noticed on September 30, 2008.⁶ Based upon its review pursuant to 10 C.F.R. § 2.101, the NRC found that the application is sufficiently complete and acceptable for docketing, and docketed the

² Petition at 2-3.

³ *Id.*

⁴ See Letter from Thomas S. O'Neill, Exelon, to NRC (Sept. 2, 2008), *available at* ADAMS Accession No. ML082540469.

⁵ *Id.* at 2.

⁶ See Exelon Nuclear Texas Holdings, LLC; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 56,867 (Sept. 30, 2008).

application on October 30, 2008.⁷ In accordance with 10 C.F.R. § 2.104(a), the NRC will next issue a hearing notice “as soon as practicable.”

III. DISCUSSION

A. The Petition Should Be Summarily Dismissed on Procedural Grounds

Without needing to reach the merits, the Commission can dismiss the Petition because TSEP has failed to comply with applicable procedural requirements.

The Commission has treated the Petition as a motion in accordance with 10 C.F.R. § 2.323.⁸ The NRC regulations at 10 C.F.R. § 2.323(a) specify that motions “must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” As discussed above, Exelon submitted its COLA on September 2, 2008, and a receipt of the application was noticed in the Federal Register on September 30, 2008. Accordingly, the issue raised by TSEP (*i.e.*, the COLA references the ESBWR design certification application) occurred well before the 10-day period prior to the Petition. Therefore, the Petition is untimely and should be rejected.

B. The Petition Is Legally and Factually Baseless

Even if the Commission were to overlook the procedural defects of the Petition, the Commission should still deny the Petition because TSEP has not provided a sufficient basis for

⁷ See Exelon Nuclear Texas Holdings, LLC; Acceptance for Docketing of an Application for Combined License (Col) for Victoria County Station, Units 1 and 2, 73 Fed. Reg. 66,059 (Nov. 6, 2008).

⁸ Order (Nov. 12, 2008). Any filing that does not fit within one of the specific forms of pleading specified in the NRC Rules of Practice and that requests the NRC take some action is effectively a “motion,” and should be governed by 10 C.F.R. § 2.323. See *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC __ (Oct. 6, 2008) (slip op. at 17) (treating petitions to suspend several license renewal proceedings “as general motions brought under the procedural requirements of 10 C.F.R. § 2.323” because the “requests do not fit cleanly within any of the procedures described within [NRC] rules of practice”). TSEP concedes this point in the “Certification by Counsel” included in its Petition. See Petition at 33 (“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*.”) (emphasis added).

holding the hearing notice in abeyance. TSEP argues that issuance of the hearing notice prior to issuance of the ESBWR DCR would violate: (1) the Atomic Energy Act (“AEA”) and Part 52 regulations addressing the scope of COL adjudications; (2) the Administrative Procedure Act (“APA”) and NRC hearing notice requirements; and (3) the NRC standards for separation of hearings.⁹

As explained below, the Petition is legally and factually baseless and is inconsistent with regulatory requirements and a long line of precedents: (1) NRC regulations, as well as the Commission’s 2008 Policy Statement and its recent decision in *Shearon Harris*,¹⁰ contemplate that a hearing notice can be issued and hearings can be conducted for a COLA that references a design certification application; (2) the AEA and the APA do not prohibit the issuance of a hearing notice for a COLA that references a design certification application; (3) the claim that it would be unfair and burdensome to proceed to hearing on the COLA is entirely speculative and does not provide sufficient grounds to hold the hearing notice in abeyance; and (4) granting the Petition and holding the hearing notice in abeyance would unduly delay the licensing proceeding and would be unduly burdensome to all parties.

1. Commission Rules, Policy, and Precedent All Permit a Hearing on a COLA That References a Design Certification Application

As noted above, Exelon’s COLA incorporates by reference the ESBWR design certification application, as specifically authorized by 10 C.F.R. § 52.55(c). That provision provides that “[a]n applicant for 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

⁹ Petition at 20-31.

¹⁰ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, 68 NRC __ (July 23, 2008), slip op. at 3-4.

granted.” In addition, in accordance with 10 C.F.R. § 52.85, all COL proceedings are governed by 10 C.F.R. § 2.104(a), which indicates that a hearing “notice must be issued as soon as practicable after the NRC has docketed the application.” These provisions do not restrict the NRC from issuing a hearing notice for a COLA even if NRC has yet to issue a final DCR. By suggesting that the hearing notice be held in abeyance, the Petition constitutes an impermissible attack on § 2.104(a).¹¹ Because TSEP may not use the adjudicatory process to challenge NRC regulations, this attack on 10 C.F.R. §§ 2.104(a), 52.55(c), and 52.85 cannot serve as a basis to hold the hearing notice in abeyance.¹²

TSEP appears to be claiming that 10 C.F.R. § 52.55(c) allows a COLA to reference a design certification application, but does not allow the NRC to docket or conduct hearings on the application.¹³ Such an interpretation of Section 52.55(c) would render the regulation meaningless. There is no reason for a regulation to authorize submission of an application that cannot be processed by the NRC. Section 52.55(c) has meaning only if it is interpreted as authorization for the NRC to process (including holding hearings on) a COLA that references a design certification application. As recognized in Section 52.55(c), such an approach is at the risk of the applicant—the COLA may need to change based upon the results of the design certification rulemaking proceeding and the issuance of the COL may be delayed pending issuance of the DCR.¹⁴

¹¹ See 10 C.F.R. § 2.335(a).

¹² Despite TSEP’s assertion to the contrary (Petition at 10), 10 C.F.R. § 52.55(c) is not a new section that was added in 2007, but instead has been in effect for almost 20 years. See Final Rule, Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372, 15,392 (Apr. 18, 1989).

¹³ See, e.g., Petition at 10-11, 22 n.5.

¹⁴ TSEP suggests that issuance of the hearing notice would require giving Exelon “special” assistance not anticipated by 10 C.F.R. § 52.55(c) and would require changing the NRC’s “regulatory scheme.” Petition at 22 n.5. This argument ignores the fact that Exelon has referenced the ESBWR design certification application at

Moreover, the Commission explicitly recognized that it is proper for NRC to issue a hearing notice in a proceeding where the COLA references a design certification application. Earlier this year, the Commission issued a Policy Statement on the Conduct of New Reactor Licensing Proceedings.¹⁵ The Policy Statement addresses how licensing boards should address design-related contentions in light of the longstanding principle that a contention that raises a matter that is, or is about to become, the subject of a rulemaking is outside the scope of a COL proceeding. The Commission stated:

With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its 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.” *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). In accordance with these decisions, a licensing board should treat the NRC’s docketing of a design certification application as the Commission’s determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon

its “own risk.” 10 C.F.R. § 52.55(c). See, e.g., Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,973 (Apr. 17, 2008) (“Policy Statement”) (noting that the “license may not issue until the design certification rule is final”).

¹⁵ Policy Statement, 73 Fed. Reg. at 20,973. The Petition states that the Policy Statement is not enforceable law, citing *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Petition at 2, 23. However, that decision is not applicable to the Policy Statement. *Pacific Gas & Electric* involved a claim that a policy statement issued by the FPC was not enforceable, because it was not issued with notice and comment as required by the Administrative Procedures Act, 5 U.S.C. § 553. See 506 F.2d at 36-40. In contrast, the NRC issued the Policy Statement in draft form with public notice and an opportunity to comment. See 72 Fed. Reg. 32,139 (June 11, 2007). Therefore, the Policy Statement complies with the APA formalities for a rule. Furthermore, as discussed throughout this Answer, the Policy Statement is not inconsistent with any statute, and is fully consistent with NRC regulations and precedents.

adoption of a final design certification rule, such a contention should be denied.¹⁶

As this section of the Policy Statement demonstrates, the Commission fully anticipated that the hearing notice in COL proceedings such as this one would be issued *prior* to the promulgation of the final DCR. Furthermore, the Commission indicated that while concerns relating to the proposed design should be addressed in the rulemaking, a petitioner could raise such issues by filing contentions in the COL proceeding. However, consistent with NRC precedent, if a petitioner raises design-related issues in the COL proceeding and, if the contention is otherwise admissible, then the licensing board should refer the issue to the NRC staff to address in the design certification rulemaking and should hold the contention in abeyance pending the conclusion of the rulemaking. Once the design certification rulemaking is complete, there would no longer be grounds to litigate the issue in the COL proceeding because challenges to NRC regulations are impermissible, and thus the licensing board could deny the contention.¹⁷

Not only does the Policy Statement contemplate the issuance of a hearing notice on a COLA that references a design certification application, it also contemplates that a licensing board *will conduct hearings* on the COLA prior to issuance of the DCR. In particular, the Policy Statement states:

A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final.¹⁸

Therefore, the Petition contradicts the Commission's Policy Statement.

¹⁶ Policy Statement, 73 Fed. Reg. at 20,972.

¹⁷ See 10 C.F.R. § 2.335(a).

¹⁸ Policy Statement, 73 Fed. Reg. at 20,973.

The Petition is also inconsistent with the Commission's recent decision in *Shearon Harris*. In that decision, the Commission rejected a motion to suspend an already-issued hearing notice until the NRC staff completed its review of the pending AP1000 design certification amendment application. The Commission stated:

A specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved, and Petitioners may not challenge Commission regulations in licensing proceedings. Thus, although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant - at its own risk - to submit a COL application that does not reference a certified design.

The Commission discussed this very situation in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings. In that policy statement the Commission stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding. When a contention is raised in a COL proceeding that challenges information in the design certification rulemaking, licensing boards "should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible." If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, any admissible issues would have to be addressed in the licensing adjudication.¹⁹

The Petition is also inconsistent with a recent decision by the Licensing Board in *William States Lee*.²⁰ In that proceeding, the petitioner objected to the fact that the COLA for the William States Lee plant references an application for an amendment of the AP1000 design certification. The Licensing Board ruled that:

¹⁹ *Shearon Harris*, CLI-08-15, slip op. at 3-4 (citations omitted).

²⁰ *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, 68 NRC __ (Sept. 22, 2008) (slip op.).

[Petitioner] has not identified a dispute with the Application, but rather asserts that requiring petitioners to file contentions at this time is unfair. The Commission has disagreed. The procedure that Duke has followed here—referencing a reactor design for which a design certification application has been docketed but not yet granted—is expressly authorized by the Commission’s regulations.²¹

TSEP argues that issuance of a hearing notice for Victoria County Station would be inconsistent with the requirements of 10 C.F.R. § 52.79 and the structure of Part 52.²² This argument is unavailing. Section 52.79 pertains to the contents of a COLA and does not address notices of hearing.

In any event, while TSEP argues that Exelon’s COLA must comply with 10 C.F.R. § 52.79(a), TSEP does not identify any noncompliance with that section. As is permitted by both 10 C.F.R. § 52.8(b) and Section 161(h) of the Atomic Energy Act, 42 U.S.C. § 2201(h), an application may incorporate by reference information contained in previous applications or reports filed with the NRC. The COLA for the Victoria County Station incorporates by reference the ESBWR DCD. When the COLA and ESBWR design certification application are considered together, TSEP has not identified or even alleged that the combination fails to meet any of the requirements in 10 C.F.R. § 52.79(a).²³ In any event, TSEP’s argument is irrelevant, because neither 10 C.F.R. § 52.79 (nor any other provision in NRC’s regulations) require that the NRC hold in abeyance the hearing on a COLA that references a design certification application. Therefore, TSEP’s assertions related to 10 C.F.R. § 52.79 provide no support for holding the notice of hearing in abeyance until the design certification rulemaking is complete.

²¹ *Id.* at 10-11.

²² Petition at 20-22.

²³ *See id.* at 20-21. Since the COLA references a design certification application, the appropriate subsection is 10 C.F.R. § 52.79(d). Nevertheless, the COLA also would satisfy 10 C.F.R. § 52.79(a) if that subsection were applicable.

TSEP also argues that NRC regulations in 10 C.F.R. § 52.145(b) require a hearing on a COLA that references a standard design approval.²⁴ However, that regulation pertains to a final design approval (“FDA”) in Subpart E of 10 C.F.R. Part 52.²⁵ The ESBWR is not the subject of an application for an FDA under Subpart E. Instead, it is the subject of a design certification application under 10 C.F.R. Part 52, Subpart B. Unlike a design certification, there is no rulemaking proceeding associated with an FDA in which design-related issues may be resolved in a legally binding manner. Therefore, the hearing provisions related to a COLA that references a standard design approval are inapplicable to a COLA that references a design certification or application for a design certification.

TSEP claims that Part 52 does not contain any provisions that permit the NRC to restrict the scope of COL adjudication required by 10 C.F.R. § 52.85.²⁶ However, there is nothing in Part 52 that prohibits the NRC from holding contentions related to a standard design in abeyance pending completion of the design certification rulemaking proceeding. Furthermore, 10 C.F.R. § 52.85 references the Commission’s Rules of Practice in Part 2. As discussed above, the Commission’s longstanding precedents under Part 2 state that a licensing board should not accept in individual licensing proceedings issues that are or are about to become the subject of

²⁴ Petition at 11, 22.

²⁵ Because NRC regulations originally required an FDA as a prerequisite to design certification, the ESBWR design certification application contained a request for an FDA pursuant to Appendix O of 10 C.F.R. Part 52. *See* 10 C.F.R. § 52.43(c) (2004). However, the requirement for an FDA as a prerequisite to a design certification was removed and an applicant now has the option to apply for an FDA, a design certification, or both. *See* Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,379 (Aug. 28, 2007).

²⁶ Petition at 10-11.

rulemaking by the Commission.²⁷ Thus, the Policy Statement and the Commission's decision in *Shearon Harris* are fully consistent with the Commission's regulations in Part 2 and Part 52.

TSEP also claims that the COL hearings must include issues related to the standard design because the design certification application does not qualify for any of the exclusions in 10 C.F.R. Part 52 that provide finality to matters that are resolved in an early site permit, design certification, or manufacturing license.²⁸ Contrary to TSEP's arguments, neither the Policy Statement nor *Shearon Harris* provide finality under 10 C.F.R. § 52.63 or § 52.79(d) to a design certification application. Instead, they simply hold in abeyance COLA contentions related to the design certification application, pending completion of the design certification rulemaking. Therefore, TSEP's references to the finality provisions in Part 52 are not relevant to the relief requested by the Petition.

TSEP states that issuance of the COL hearing notice before the ESBWR design certification rulemaking is complete would violate NRC's separation of hearings regulations.²⁹ This argument is without any merit (or relevance). The regulation cited by TSEP on separation of hearings, 10 C.F.R. § 2.317(a), addresses when the NRC will hold separate hearings in the *same* adjudicatory proceeding. The Victoria County Station COL proceeding and the ESBWR design certification proceeding, however, are two *separate* proceedings. Moreover, 10 C.F.R. § 2.317(a) is found in Subpart C to 10 C.F.R. Part 2, which provides generally applicable hearing procedures for NRC *adjudications*, while the ESBWR design certification proceeding must be

²⁷ The Petition argues that these longstanding precedents are inconsistent with the regulatory scheme in Part 52, claiming that Part 52 allows litigation of material issues when a COLA does not reference a certified design. *See* Petition at 23. However, TSEP has misconstrued the Policy Statement and *Shearon Harris*. Neither prohibits litigation of contentions related to a design certification application. Instead, they hold litigation in abeyance pending completion of the design certification proceeding. If a COL applicant were to decide to request a license prior to issuance of the DCR, such contentions would be litigable in the COL proceeding.

²⁸ Petition at 21-22.

conducted in accordance with the provisions of Subpart H of 10 C.F.R. Part 2, which addresses the procedures for NRC *rulemakings*.³⁰ Therefore, this provision is simply inapplicable to NRC’s decision regarding what issues should be resolved through adjudication and what issues should be resolved through rulemaking.

In sum, the Petition is inconsistent with NRC regulations, policy, and precedent. Although the Petition argues that issuance of a notice of hearing would violate various regulations, the regulations cited by TSEP either are inapplicable or do not address whether NRC may issue a notice of hearing for a COLA that references a design certification application.

2. No Statutory Prohibition Exists Against the Issuance of a Hearing Notice for a COLA that References a Design Certification Application

TSEP argues that issuance of the hearing notice before the promulgation of the ESBWR DCR would deprive TSEP of its statutory hearing rights under the APA and the AEA.³¹ TSEP claims that it has an “unrestricted right to seek the admission of contentions” challenging the Victoria County Station COLA and the ESBWR, and that forcing TSEP to rely on the NRC’s late-filed contention rules to raise issues that may arise if the ESBWR design changes before the DCR is issued would violate those rights. In essence, TSEP is claiming that the NRC may not legally refer issues pertaining to the ESBWR to the design certification rulemaking, and must consider such issues in the COL proceeding or hold the COL proceeding in abeyance pending issuance of the DCR.³²

TSEP has not identified any provision in either the APA or AEA that prohibits the NRC from resolving issues related to a design certification application in the design certification

²⁹ See *id.* at 29-31.

³⁰ See 10 C.F.R. § 52.51(a).

³¹ See Petition at 27-29.

proceeding rather than COL proceedings. To the contrary, there are numerous NRC and federal court cases that allow the NRC to resolve generic issues through rulemaking while allowing related licensing hearings to proceed.³³ As the Appeal Board explained in *Douglas Point*:

The law does not preclude administrative agencies from passing on issues of general applicability in individual adjudications. On the contrary, regulatory agencies may—and many do—decide so-called ‘generic’ issues on a case-by-case basis; the right to do so is well established. So too, when in their informed judgment it seems wiser for the resolution of broad issues of general applicability to proceed via a rulemaking proceeding where all concerned may participate, agencies may elect that course in lieu of adjudication. . . . ‘[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily within the informed discretion of the administrative agency.’ Absent some statutory inhibition - and we find none applicable to the Commission and none has been suggested to us - the Commission and other administrative agencies have the flexibility to defer broad across-the-board issues presented in a multitude of individual adjudicatory proceedings and to consolidate them for consideration in a single rulemaking proceeding, while continuing in the interim to rely on individual adjudications to resolve remaining questions.³⁴

As these cases make clear, NRC has a choice of resolving issues either through rulemaking or adjudication, and NRC is not required to hold licensing hearings in abeyance pending completion of a rulemaking.

³² *Id.* at 27-28.

³³ *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345-46 (1999) (upholding a decision to reject a contention related to the transportation of spent fuel because it would be governed by a pending rule) (citing *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1979)); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1308-09 (D.C. Cir. 1984), *reh'g denied*, No. 84-1410, 1985 U.S. App. LEXIS 31609 (D.C. Cir. May 1, 1985) (upholding NRC decision to treat generic seismic issues through rulemaking rather than in individual adjudications); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974) (upholding decision to exclude issues relating to the emergency core cooling system (“ECCS”) criteria because efforts to improve the criteria were being addressed in a pending rulemaking); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974) (“*USC P*”) (rejecting due process claim based on AEC’s refusal to allow challenges to ECCS criteria while a simultaneous rulemaking was underway).

³⁴ *Douglas Point*, ALAB-218, 8 AEC at 84 (citations omitted).

This principle has not only been accepted by the NRC, it has also been accepted by the U.S. Court of Appeals. For example, in *Massachusetts v. NRC*,³⁵ the NRC denied a petition to intervene in a license renewal proceeding that raised generic environmental issues that were the subject of a rulemaking petition to amend Table B-1 to 10 C.F.R. Part 51 governing environmental reviews in license renewal proceedings. In doing so, the Court of Appeals stated that:

In sum, the NRC acted reasonably when it invoked a well-established agency rule to reject the Commonwealth's requests to participate as a party in individual re-licensing proceedings to raise generic safety concerns and required that the Commonwealth present its concerns in a rulemaking petition.³⁶

Additionally, in *UCS I*, the petitioner claimed that issuance of an operating license for the Pilgrim plant prior to resolving the petitioner's ECCS concerns, which were then the subject of rulemaking, violated due process and the Commission's regulations and was an abuse of discretion.³⁷ The petitioner claimed that it was deprived of an opportunity to be heard by "being shunted over to the simultaneous rule making."³⁸ The Court rejected that claim, ruling:

If the agency could not consolidate the challenges to its rules into rule making, and meanwhile proceed with adjudications, UCS and other intervenors in other cases would effectively be able to impose a moratorium on licensing, despite the Commission's judgment that it is prompt action that is called for.³⁹

In summary, there is no legal prohibition to processing a license application while referring generic issues related to the license to a pending rulemaking proceeding.

³⁵ 522 F.3d 115, 127-130 (1st Cir. 2008).

³⁶ *Id.* at 129-30.

³⁷ 499 F.2d at 1080-82.

³⁸ *Id.* at 1081.

³⁹ *Id.* at 1081-82.

In addition, there is no basis for TSEP's claim that the hearing notice will not offer a hearing on all issues material to the granting of a COL.⁴⁰ The hearing notices in other proceedings involving a COLA that references the ESBWR design have not narrowed the issues that are included within the scope of the hearing.⁴¹ To the contrary, such notices include a reference to the ESBWR design certification application, which provides ample notice for petitioners to formulate contentions on the ESBWR.⁴² Furthermore, as discussed above, the Commission's Policy Statement acknowledges that a petitioner may proffer contentions on a standard design that is subject to a design certification application. However, such contentions will be held in abeyance until issuance of the DCR or unless the COL applicant decides to proceed without the DCR.

TSEP cites to *Union of Concerned Scientists v. NRC* ("UCS I")⁴³ for the proposition that the NRC must offer a hearing on all issues that it considers material to a license.⁴⁴ However, *UCS II* is inapposite. That case involved exclusion of plant-specific issues relating to emergency planning from adjudicatory proceedings.⁴⁵ That case does not address whether the NRC may resolve generic issues in a rulemaking proceeding rather than a licensing proceeding. In this COL proceeding, the findings relating to the ESBWR design will be made in the design

⁴⁰ See Petition at 20-21, 28-29. TSEP appears to argue that a hearing notice cannot be adequate, because the final design of the ESBWR will not be known until the completion of the design certification rulemaking. However, that claim is nothing more than a variation of TSEP's argument that it should not be required to file contentions now because the COLA might change due to changes in the design certification application. That argument is inconsistent with 10 C.F.R. § 2.309(f)(2), as discussed in the following section.

⁴¹ See, e.g., Entergy Operations, Inc.; Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Grand Gulf Unit 3, 73 Fed. Reg. 37,511 (July 1, 2008).

⁴² See, e.g., *id.*

⁴³ 735 F.2d 1437, 1443 (D.C. Cir. 1984).

⁴⁴ Petition at 20.

⁴⁵ See *UCS II*, 735 F.2d at 1442-44.

certification rulemaking proceeding and those generic findings will then be applied to the COL proceeding. Thus, there is no need to adjudicate ESBWR design issues on a case-by-case basis, and it would be contrary to NRC regulations, policy, and precedent to do so.

3. TSEP's Claims of Unfairness and Excessive Burdens Are Speculative and Do Not Provide Grounds to Hold the Hearing Notice in Abeyance

TSEP asserts that issuance of the hearing notice before the ESBWR design certification rulemaking is completed would be inefficient and unfair.⁴⁶ This claim is based on nothing but speculation and is essentially nothing more than an objection to the longstanding requirement that petitioners propose contentions based on the license application at the commencement of the NRC staff review rather than after completion of the staff review.

First, TSEP identifies several concerns related to the design of the ESBWR.⁴⁷ NRC regulations, however, make clear that TSEP will have an opportunity to submit those concerns to the NRC for resolution during the design certification rulemaking proceeding.⁴⁸ Issuance of the hearing notice for this proceeding will not deprive TSEP of any rights to contest the ESBWR during the design certification rulemaking.

Furthermore, as discussed above, the Commission's Policy Statement explicitly allows petitioners to submit contentions on a design certification application that is referenced in a COL proceeding.⁴⁹ Similarly, in *Shearon Harris*, the Commission restated this position and indicated that petitioners may submit contentions challenging information in the design certification application.⁵⁰ Despite TSEP's assertion to the contrary, the Policy Statement and the

⁴⁶ See Petition at 24-27.

⁴⁷ *Id.* at 16-19, 24, 30-31.

⁴⁸ 10 C.F.R. § 52.51(a).

⁴⁹ Policy Statement, 73 Fed. Reg. at 20,972.

⁵⁰ *Shearon Harris*, CLI-08-15, slip op. at 3-4.

Commission decision in *Shearon Harris* do not restrict the scope of contentions that may be submitted in a COL proceeding, but only address the timing of the litigation of such contentions.⁵¹ To avoid potentially duplicative hearings on design-related issues, the Policy Statement provides for holding such *contentions* in abeyance, not for holding the entire COL proceeding in abeyance, as requested by TSEP.

Next, TSEP states that the design certification rulemaking is integrally related to the COLA, and that the outcome of the rulemaking could have a significant impact on contentions challenging the COLA. TSEP also claims that requiring it to file contentions based on the current version of the ESBWR DCD will result in unfairness or inefficiencies.⁵² This assertion is nothing but a thinly-veiled attack on the requirement in 10 C.F.R. § 2.309(f)(2) that contentions “be based on documents or other information available at the time the petition is to be filed.” TSEP’s assertion that it would rather not have to submit contentions until there is a final version of the COLA or until the NRC staff has completed its review of the ESBWR design⁵³ is in direct contravention with this provision and NRC precedent.⁵⁴ As the Commission explained in

⁵¹ See Policy Statement, 73 Fed. Reg. at 20,972; *Shearon Harris*, CLI-08-15, slip op. at 3-4.

⁵² Petition at 24-27. In this regard, TSEP argues that the COL applicant will need to expend huge amounts of money revising its application, and that pressure will therefore mount on the NRC to accept the ESBWR design even if it does not satisfy NRC’s safety standards. *Id.* at 27. This claim is entirely speculative and baseless. In any event, licensing proceedings are not an appropriate forum for attacking the NRC staff. See, e.g., Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan 14, 2004); see also *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 170-71 (2000) (rejecting a contention regarding the performance of the NRC staff in overseeing the plant).

⁵³ *Id.* at 26-27.

⁵⁴ See, e.g., *Oconee*, CLI-99-11, 49 NRC at 338 (“The Petitioners’ demand that initiation of the NRC hearing process await completion of NRC Staff reviews would turn our adjudicatory process on its head.”). See also *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990) (“*USC III*”) (“We see nothing in the statute that guarantees all private parties the right to have the staff studies as a sort of pre-complaint discovery tool.”). See also the Commission’s Order in *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), at 2 (April 7, 2008) (unpublished order), stating that if during the course of a licensing proceeding the applicant provides new and materially different information, petitioners will not be harmed because they will have an opportunity to proffer contentions based upon that new information under 10 C.F.R. § 2.309(f).

rejecting an argument that a hearing notice must be suspended due to the purported incompleteness of the COLA:

If the Petitioners believe the Application is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications. Accordingly, this claim does not provide a basis for suspending the hearing notice.⁵⁵

As the Commission also ruled in *Duke Power Co.*, the possibility that the staff's review might lead to a change in the Final Safety Analysis Report (FSAR) "does not provide a reasonable basis for deferring the filing of safety-related contentions."⁵⁶

Moreover, if information in the COLA changes as a result of modifications to the ESBWR DCD, Commission regulations provide TSEP with an adequate opportunity to submit late-filed contentions on new material.⁵⁷ As the U.S. Court of Appeals for the D.C. Circuit explained in upholding the NRC's late-filing contention standard, "[w]hatever the statutory restraints on the NRC's authority to exclude material *issues* from its hearings, the Commission can certainly adopt a pleading schedule designed to expedite its proceedings."⁵⁸

4. Granting the Petition Would Unduly Delay the COL Proceeding and Would Be Burdensome

Granting the Petition would result in a lengthy delay to the COL proceeding and would place a large burden on Exelon and the NRC staff, and would likely increase the burden on public participants, such as TSEP.

⁵⁵ *Shearon Harris*, CLI-08-15, slip op. at 2-3.

⁵⁶ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

⁵⁷ See 10 C.F.R. § 2.309(c), (f)(2).

⁵⁸ *UCS III*, 920 F.2d at 55 (emphasis in original).

The Petition requests, in part, that TSEP be allowed to litigate the merits of the ESBWR DCD in the COL proceeding.⁵⁹ For example, the Petition states that if the Commission does not complete the ESBWR rulemaking prior to adjudicating the COLA, then the Commission must “hold an adjudication on the entire Victoria COLA, including the ESBWR design certification application that is incorporated by reference into the Victoria COLA.”⁶⁰ TSEP’s position would significantly increase the burden on the participants while providing no corresponding benefits. Under TSEP’s proposed approach, it would be necessary to litigate any admitted contentions that are within the scope of the ESBWR design certification rulemaking, which could require mandatory disclosures, pleadings, and hearing preparations. All of this significant effort would become moot when the rulemaking for the ESBWR design certification is completed. In short, litigating ESBWR standard design issues in the COL proceeding would be a meaningless exercise, because the litigation would be superseded once the DCR is issued.

TSEP’s alternative, holding the entire COL proceeding in abeyance until issuance of the ESBWR DCR, would impose years of delay in the COL proceeding, to the detriment of both the NRC and Exelon, because it would postpone litigation of all issues. Since the ESBWR design will likely not be certified until at least 2010, granting TSEP’s Petition would delay litigation related to the COLA for years.

In sum, aside from the numerous legal and factual deficiencies in the Petition discussed above, the actions requested by TSEP would impose substantial delays and other burdens on the parties to this proceeding. The Commission has stated that it has a “long-standing commitment

⁵⁹ See Petition at 3, 20-27.

⁶⁰ *Id.* at 3.

to the expeditious completion of adjudicatory proceedings”⁶¹ and that it “aims . . . to avoid unnecessary delays in its review and hearing processes.”⁶² Granting the Petition would be inconsistent with those commitments.

IV. CONCLUSION

As set forth above, the Petition is inconsistent with a number of procedural and legal requirements and precedents. Additionally, the arguments made by TSEP do not provide a sufficient basis for holding the hearing notice in abeyance. In essence, TSEP is requesting the Commission to violate its own rules, policy, and precedent, and to ignore its long-standing practices regarding licensing proceedings. Accordingly, the Petition should be denied.

Respectfully submitted,

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⁶¹ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (July 28, 1998); *see also Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 38 (2001).

⁶² Policy Statement, 73 Fed. Reg. at 20,969.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket Nos. 52-031-COL
EXELON NUCLEAR TEXAS HOLDINGS, LLC)	52-032-COL
(Victoria County Station, Units 1 and 2))	November 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2008 a copy of the "Answer of Exelon Opposing Petition to Hold Hearing Notice for Victoria County Station in Abeyance" was filed electronically with the Electronic Information Exchange.

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¹ Mr. Blackburn has entered a notice of appearance in this proceeding, but his name does not appear in NRC's Electronic Service List Recipients for this proceeding. The name of Mr. Irvine (who has not entered a notice of appearance), who is from the same law firm, does appear on NRC's Electronic Service List Recipients for this proceeding. Mr. Blackburn has informed us that service on Mr. Irvine will be sufficient to constitute service on Mr. Blackburn.