UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
	)	
Exelon Nuclear Texas Holdings, L.L.C.	)	Docket Nos. 52-031 COL
	)	52-032 COL
	)	
(Victoria County Station, Units 1 and 2)	)	

ANSWER TO 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

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November 18, 2008

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INTRODUCTION

Pursuant to the Commission's Order dated November 12, 2008, the Nuclear Regulatory Commission Staff (NRC Staff) hereby responds to the "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" (Petition) filed on November 3, 2008, and supplemented on November 4, 2008. As discussed below, the NRC Staff opposes the Petition because Texans for a Sound Energy Policy (TSEP) has failed to identify any valid basis to support their requested remedies.

BACKGROUND

On September 3, 2008, Exelon Nuclear Texas Holdings, L.L.C. (Exelon) submitted an application dated September 2, 2008, for a combined license (COL) for two Economic Simplified Boiling Water Reactors (ESBWRs) to be located at a site in Victoria County, Texas (Victoria County COLA). These two reactors were designated as Victoria County Station, Units 1 and 2. On September 30, 2008, the Nuclear Regulatory Commission (NRC) published a notice of the

receipt and availability of the Victoria County COLA in the *Federal Register*. "Exelon Nuclear Texas Holdings, LLC; Notice of Receipt and Availability of Application for a Combined License," 73 Fed. Reg. 56,867 (Sept. 30, 2008). On October 30, 2008, the Staff completed its acceptance review of the Victoria County COLA and determined that it was acceptable for docketing. *See* Letter to Kenneth A. Ainger, (Oct. 30, 2008), ADAMS Accession No. ML082381261. This letter was accompanied by a *Federal Register* notice of acceptance for docketing, which was subsequently published on November 6, 2008. 73 Fed. Reg. 66,056 (Nov. 6, 2008).

On November 3, 2008, the NRC web site related to the Victoria County COL application was updated to reflect the docketing decision made on October 30. On the same day, TSEP filed its Petition requesting that the docketing decision and notice of hearing for the Victoria County COL be delayed until rulemaking on the design certification application for the ESBWR is complete. The following day, on November 4, 2008, TSEP filed a supplement to the Petition reflecting its awareness that the docketing decision had already been made. On November 12, 2008, the Commission issued an order directing that answers to the Petition be filed by November 18, 2008.

DISCUSSION

The Petition filed by TSEP is an indirect objection to the long-standing NRC policy that litigation based on a license application commences at the start of the Staff review, rather than after the Staff review is completed. *See* 10 C.F.R. §§ 2.104; 2.309. The motion further objects to NRC's regulation, found in 10 C.F.R. § 52.55(c), that allows a COL applicant to reference a design for which a design certification has been docketed but not yet granted.[1] There is nothing unique about the Victoria County COLA that would require departure from current policies and

[1] Of the seventeen COL applications currently pending before the Staff, ten take advantage of this provision and reference design certification applications rather than certified designs. A further six reference a design that has been certified in the past, but is currently subject to a revision process. Only one references a design that has been certified and that is not currently undergoing revision. *See* http://www.nrc.gov/reactors/new-reactors/col.html.

regulations, and TSEP has not justified reversing previous decisions in this matter. The Staff will nonetheless address several of the issues contained therein. The Staff will show that TSEP's Petition reflects an incorrect view of the design certification process, that Commission policy complies with legal requirements and provides TSEP with the opportunity for a fair and meaningful hearing, and that the Petition should be rejected as an impermissible challenge to the Commission's rules requiring petitioners to file their contentions at the beginning of the Staff's review process.

A. The Petition Reflects an Incorrect View of the Nature and Purpose of a Design Certification Process.

The NRC follows a policy of resolving generic issues common to many nuclear power plants through the rulemaking process rather than through litigation of individual cases, an approach that has been upheld in Federal courts over the course of several decades.[2] The purpose of this procedure is to increase efficiency and consistency in Commission decision-making by resolving issues common to many facilities at the same time, and members of the public have, and frequently make use of, the opportunity to participate in the rulemaking process by offering comments on proposed rules. Because generic issues are resolved in this way, administrative litigation is reserved for site-specific issues and for issues for which a waiver of a general rule is obtained. *See* 10 C.F.R. § 2.335. A design certification rulemaking is not treated differently from any other rulemaking on issues common to many plants, and the use of the rulemaking process to resolve design certification issues has been upheld in Federal court.[3]

With limited exceptions, Commission rules and regulations are not subject to challenge by any party in NRC adjudicatory proceedings. 10 C.F.R. § 2.335(a). The Commission's Policy

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[2] *See, e.g.*, *Baltimore Gas & Elec. Co. v. NRDC*, 46 U.S. 87, 101 (1983) ("Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event."). *See also Massachusetts v. United States*, 522 F.3d 115, 119 (1st Cir. 2008); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

[3] *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1171-72 (D.C. Cir. 1992).

Statement on new reactor licensing proceedings affirms that individual adjudicatory proceedings are not the appropriate venue for resolving issues "which are (or are about to become) the subject of general rulemaking by the Commission."[4] The Policy Statement further states that the decision to docket a design certification application serves as the Commission's determination that the design is subject to a general rulemaking, and that any contentions challenging such a design that is submitted in a COL adjudicatory proceeding should be referred for resolution in the rulemaking process and held in abeyance until either the rulemaking is complete or the applicant chooses to proceed in the absence of a final rule on the issue. *Id.* Such contentions would eventually be denied if a final design certification rule is adopted, but could become active litigation issues in the event that the applicant chose to proceed with an uncertified design (for example if the design certification were delayed or denied), or if an exemption to relevant elements of the certified design were requested. *Id.* at 20,972-73.

TSEP's characterization of this policy is mistaken. As a preliminary matter, TSEP's statement that even a standard design *approved* by the NRC Staff must be submitted to an adjudicatory hearing when it is referenced in a COL application is simply irrelevant. *See* Petition at 22. The statement is based on a failure to note the difference between the finality provisions for standard design *certifications*, which are covered by Subpart B of 10 C.F.R. Part 52, and the much less stringent rules related to the finality of standard design *approvals* under Subpart E of Part 52. TSEP cites 10 C.F.R. § 52.145(b) in support of its argument. *Id.* This regulation is part of the standard design approval process in Subpart E and therefore irrelevant to any consideration of the Subpart B standard design certification process that applies to the ESBWR. The parallel finality provision of Subpart B, 10 C.F.R. § 52.63(a)(5), states that "[e]xcept as

[4] "Conduct of New Reactor Licensing Proceedings; Final Policy Statement," 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 345 (1999); *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)).

provided in 10 C.F.R. § 2.335, in making the finding required for issuance of a combined license, . . . the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule." Contrary to TSEP's argument, issues resolved in standard design certifications under Subpart B – which, unlike standard design approvals, are adopted following full notice-and-comment rulemaking – are ordinarily treated as final and not subject to litigation at the COL stage.

With respect to the status of a design certification application, as opposed to a final rule, TSEP argues that "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." As stated above, standard design issues are resolved by rulemaking rather than adjudication not because they may be arbitrarily listed in one document or another, but rather because they are generic to multiple facilities. The Commission's policy is to resolve generic issues by means of general rules binding on all affected facilities, rather than to conduct multiple adjudicatory proceedings that might lead to contradictory, non-binding results.

B. The Policy Adopted By the Commission Complies With All Legal Requirements and Provides Intervenors With the Opportunity for a Fair, Meaningful, and Not Overly Burdensome Hearing.

TSEP argues that the Commission policy is unacceptable, and that the NRC is limited by statute and by its own regulations to following one of two courses of action:

> (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.

Petition at 20. Any other course of action, TSEP claims, would deprive TSEP of the opportunity for a fair and meaningful hearing and would result in "duplicative litigation and a gross waste of resources by TSEP." *Id.* at 20, 25

The arguments presented by TSEP are incorrect with respect both to the legal status of NRC policy and to the likely effects of conducting a hearing under the current policy. The Commission's Policy Statement complies with all applicable legal requirements, including those of the Administrative Procedure Act (APA), the Atomic Energy Act (AEA), the NRC's licensing regulations, and previous precedent. Furthermore, a hearing conducted under the provisions of this Policy Statement would not necessarily be any more burdensome than the alternatives TSEP proposes.

1. The procedure set forth in the Commission's Policy Statement complies with all applicable legal requirements.

The Staff disagrees with TSEP's assertion that the Commission's Policy Statement violates the APA requirements for fair hearings, the AEA, and the NRC's own licensing regulations in 10 C.F.R. Part 52. The APA clearly permits resolution of certain issues by rulemaking, and the AEA does not define the scope of hearings that must be applied in reactor licensing proceedings. In addition, the Commission has previously ruled that NRC regulations permit a design certification rulemaking and an adjudicatory proceeding for a COL that references that design to proceed simultaneously.

As discussed above, it is routine for the NRC to address generic issues by means of the notice-and-comment rulemaking process rather than through site-specific adjudications. As indicated earlier, this procedure has been upheld in Federal courts for several decades.[5] Rulemakings are conducted under the APA provisions set forth in 5 U.S.C. § 553, and under the NRC regulations contained in 10 C.F.R. Part 2, Subpart H. In contrast, adjudicatory proceedings are conducted pursuant to the NRC regulations in 10 C.F.R. Part 2, Subparts C

[5] This procedure is not intended to penalize potential petitioners, and may indeed work to their benefit by creating binding rules applicable to all plants rather than requiring site-by-site litigation. *See Ecology Action*, 492 F.2d at 1002 ("Rather the idea that a licensing agency should endeavor to identify environmental issues common to many applications and handle them in 'generic' proceedings would seem to benefit all parties, particularly the poorly-financed environmental groups.").

and L.[6] TSEP has not disputed the availability of these two procedural approaches, the NRC policy of resolving generic issues by means of rulemaking rather than adjudication, or those sections of the NRC's regulations that provide for review of design certification applications through the rulemaking process and COL applications by means of adjudicatory proceedings. *See* 10 C.F.R. §§ 52.51, 52.85.

TSEP's challenge is instead directed at a much narrower question – that of the status of a design certification application which has been docketed but for which no final rule has yet been issued. The APA itself contains no provisions that resolve this issue, and TSEP does not allege that any specific statutory provision is violated by the Commission's policy.

Similarly, the AEA states only that, in licensing cases, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C § 2239. The scope, procedures, and general nature of the hearing are not set forth in detail in the statute, and TSEP does not argue that Commission policy violates any specific statutory provision.

The Staff disagrees with TSEP's claim that NRC regulations require that any COL application which does not reference a final certified design rule must be treated as one that does not reference a certified design at all. Petition at 23. The Staff does not dispute that a COL application which does not incorporate any certified design or docketed design certification application must include the level of detail that might otherwise be contained in the standard design documents and incorporated by reference into the COL application. *See* 10 C.F.R. § 52.79(a), (d). The Victoria County COLA does incorporate the ESBWR design certification by reference, and reprinting it in its entirety in the COL application would be duplicative and wasteful . Furthermore, the ESBWR design certification application itself is not an amorphous

[6] The APA's sections governing adjudicatory proceedings are found in 5 U.S.C. §§ 554, 556, and 557. Procedural rules for NRC hearings comply with these statutory provisions to the extent required. *See* "Changes to the Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2192 (Jan. 14, 2004). *See also Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338, 347-51 (1st Cir. 2004).

concept about which nothing is known. Rather, it is a series of extensive, detailed, publicly available documents that set forth design elements to be reviewed under notice-and-comment rulemaking procedure and to be incorporated by reference into COL applications. *See* http://www.nrc.gov/reactors/new-reactors/design-cert/esbwr.html. Like all applications pending before the NRC, it is subject to amendment and revision – perhaps as a result of public comments received during the rulemaking – before a final rule is issued. If any of these changes require the COL applications referencing the ESBWR to be amended, Exelon will have to amend the Victoria County COLA accordingly. However, whether this will happen, and the magnitude of any effect it might have on the petitioner's interests, are entirely speculative at this point. TSEP's request to have the notice of hearing postponed is therefore unsupported by this claim.

TSEP's Petition is not the first time this issue has been presented to the Commission, and the Commission has previously held that the hearing process on COL applications should proceed under circumstances analogous to those here. *See Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), CLI-08-15, 67 NRC __ (July 23, 2008). In the *Shearon Harris* case, review of the COL application and associated litigation are proceeding in parallel with the certified design review that is underway. Such proceedings are the norm and do not justify the remedy that TSEP requests.

2. Hearings conducted under Commission policy would not necessarily be more burdensome than the alternatives TSEP proposes.

TSEP's claim that following NRC policy would be a "gross waste of resources" for potential intervenors does not withstand scrutiny. Generic resolution of issues by the Commission through the rulemaking process is meant, ultimately, as a way to make the regulatory oversight more efficient and more consistent. Although NRC rulemakings and adjudications can involve complex technical issues, the Victoria County COLA does not present any unique procedural problems that would prevent it from being reviewed under the

procedures specified in the Commission Policy Statement. The situation under consideration in this case is hardly unique, and procedural matters are addressed routinely on a case-by-case basis in NRC proceedings. It must be noted that even designs that have been certified in a final rulemaking are subject to revision,[7] that applications may be revised while under review as a result of the interactions between applicant and the NRC Staff,[8] and that designs at all stages of the certification process present similar issues at the interface between the standard design and the site-specific elements contained in the COL application. The Victoria County COLA is not unique merely because the application may be revised at some future date, and TSEP presents no compelling reason to alter the usual approach in this case.

Furthermore, TSEP's assertion that the issues in this case require the ESBWR rulemaking to be complete before the COL adjudication commences is not supported by the examples they provide. TSEP presents a long list of issues in support of this assertion, but the list itself would seem to contradict the argument in which it is presented. A number of issues do seem to deal specifically with detailed technical issues presented in the Victoria County COLA. Petition at 16. The procedure for submitting contentions on such matters (and for filing amended contentions if the COL application is amended) is not ambiguous. However, TSEP lists an even greater number of safety issues that appear to be strictly internal to the ESBWR design itself. *Id.* at 16-18. To the extent TSEP wishes to challenge elements of the ESBWR design certification application directly, participation in the rulemaking process is clearly the proper approach. There is no reason to imagine that any systematic, pervasive problem in distinguishing between these two categories of issues would hamper TSEP's participation in either the COL adjudication or the rulemaking process on the ESBWR design certification. This

[7] *See* http://www.nrc.gov/reactors/new-reactors/design-cert/amended-ap1000.html for a discussion of the amendment process for the AP1000 certified standard design.

[8] The Commission has consistently held that an application may be modified or improved as the Staff's review goes forward. *See, e.g.*, *Curators of the University of Missouri* (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247), CLI-95-08, 41 NRC 863, 395 (1995).

is true regardless of whether the two proceedings are sequential, as TSEP requests, or concurrent, as Commission policy clearly permits.

Even more important, the other approach listed as acceptable by TSEP would impose a far greater burden on TSEP and any other potential intervenors than the approach adopted by the NRC. Considering the entire ESBWR application as part of the litigation of the Victoria County COLA would make all contentions related to the design certification application active litigation issues throughout the course of a multi-year proceeding, thereby imposing extensive procedural burdens on all parties when the issues themselves are to be subject to resolution elsewhere. Holding contentions related to the design certification rulemaking in abeyance was viewed by the Commission as the appropriate compromise between imposing this ongoing litigation burden and denying contentions outright at the beginning of the proceeding, a procedure that would require petitioners to resubmit their contentions if, for some reason, the applicant chose to proceed with a custom design.[9]

Accordingly, the Staff disagrees with TSEP's claim that following NRC policy would either waste resources or prevent TSEP from obtaining a fair and meaningful hearing. Using the rulemaking process to resolve generic issues and the adjudicatory process for site-specific issues is not unusually complex, and opportunities for public participation exist in both processes. Furthermore, one of the options TSEP proposes would clearly be more burdensome that the approach outlined in the Commission's Policy Statement. For these reasons, TSEP's Petition should be denied.

C. The Petition is an Impermissible Challenge to the Commission's Rules Requiring Petitioners to File Their Contentions at the Commencement of the Staff's Review Process.

The Petition also presents an impermissible, if somewhat indirect, challenge to NRC regulations which require petitioners to submit their contentions at the beginning of adjudicatory

[9] This procedure of rejecting contentions outright was proposed by industry during the comment period on the Commission's Policy Statement. 73 Fed. Reg. at 20,966. The Commission rejected this approach on the grounds of inefficiency and duplication of effort.

proceedings in licensing cases, rather than months or even years later. In most NRC proceedings for which a notice of hearing in the *Federal Register* is issued, petitions to intervene and contentions are to be filed sixty days following that notice. 10 C.F.R. § 2.309(b)(3). Contentions can then be amended, and new contentions filed, pursuant to the provision of 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1).

The possibility of changing this policy was considered, and rejected, as part of the 2004 revisions to NRC's procedural rules. *See* 69 Fed. Reg. at 2197. Procedural rules such as these are the same as any other NRC regulations in the sense that they are not subject to challenge in adjudicatory proceedings. 10 C.F.R. § 2.335(a). *See also supra* note 3 and accompanying text.

TSEP argues that the critical period for submitting contentions in any adjudication of the Victoria County COLA is too early and should be delayed. Petition at 19. It is not clear whether this is meant as a general challenge to the structure of the regulations, or whether it is meant as a request that generally applicable regulations be waived in this particular case. To the extent that it is meant to be the former, it is clearly impermissible and should be rejected. To the extent that it is the latter, it does not conform to the requirements of 10 C.F.R. § 2.335(b) with respect to petitions for waivers of particular regulations in specific proceedings. In either case, TSEP has failed to make a showing that would support the requested remedy.

CONCLUSION

TSEP has failed to proffer any basis for their request to delay the notice of hearing in this case. They have failed to demonstrate that Commission policy violates legal requirements and or denies TSEP the opportunity for a fair and meaningful hearing. Therefore, their Petition should be denied.

Respectfully submitted,

/signed (electronically) by/
Sara E. Brock
Marcia Carpentier
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of November, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's ANSWER TO 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 has been served upon the following persons by Electronic Information Exchange this 18th day of November, 2008:

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