



As discussed in the attached Certificate of Counsel Pursuant to 10 C.F.R. § 2.323(a), counsel for TSEP was unable to obtain the consent of opposing counsel to the filing of this motion.

## **II. FACTUAL BACKGROUND**

On September 2, 2008, Exelon submitted to the NRC a COLA for a two-unit nuclear power plant in Victoria, Texas. The application incorporates by reference the economic simplified boiling water reactor (“ESBWR”) design certification application (“Design Control Document” or “DCD”) that was submitted by GE-Hitachi Nuclear Energy Americas, L.L.C. to the NRC on September 28, 2007. Each section of the COLA’s Final Safety Analysis Report (“FSAR”) incorporates by reference a corresponding section of the ESBWR application.<sup>1</sup>

Following submission of the Victoria COLA, the NRC conducted an acceptance review of the application and ultimately accepted the Victoria COLA for docketing. Acceptance for Docketing of an Application for Combined License for Victoria County Station, Units 1 and 2, 73 Fed. Reg. 66059 (Nov. 6, 2008). The docketing decision was based upon the Staff’s determination that the Victoria COLA was “sufficiently complete and acceptable for docketing” pursuant to 10 C.F.R. 2.101(a)(3). *Id.*

On November 3, 2008, TSEP filed with the Commission a 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 Economic Simplified Boiling Water Reactor (“TSEP’s Petition”). The crux of TSEP’s argument was that, under the Atomic Energy Act, NRC’s Part 52 Regulations and the Administrative Procedure Act, the NRC may not conduct concurrent reviews of the ESBWR design certification application and

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<sup>1</sup> See COLA at 1.1-3, § 1.1.1.7, which explains the rubric used by Exelon to incorporate the ESBWR application by reference.

the Victoria COLA that references the uncertified DCD. Rather, the ESBWR design must be certified *before* NRC begins its review of the Victoria COLA. On November 18, 2008, Exelon and the NRC Staff responded to TSEP's Petition. TSEP filed a Reply to Exelon's and NRC's Answers on November 25, 2008.

On November 24, 2008, Exelon submitted a letter to the NRC in which it notified the agency of its intention "to designate an alternate reactor technology for the Victoria County Station (VCS), Units 1 and 2 COLA project." Letter from Thomas S. O'Neill, Exelon, to U.S. Nuclear Regulatory Commission re: Exelon Nuclear Texas Holdings, LLC, Victoria County Station, Units 1 and 2, Notification to Designate Alternate Reactor Technology for Victoria County Station, Units 1 and 2 Combined License Application (COLA), NRC docket Nos. 52-031 and 52-032. Exelon explained that discussions with other reactor manufacturers, as well as its own internal analysis, showed that "technologies other than the ESBWR provide the project greater commercial and schedule certainty." Therefore Exelon is "considering reactor technologies that have more mature designs, more certain cost structures and better availability of information than the ESBWR." *Id.* Exelon stated that it "expects to decide on an alternate reactor technology in early 2009, and will develop a revision to the VCS Units 1 and 2 COL Application to reflect the new technology selected." *Id.*

On November 25, 2008, Exelon's counsel forwarded the O'Neill Letter to the NRC Commissioners, suggesting that TSEP's Petition "could now be viewed as moot based upon Exelon's notification" but urging the Commission to decide it. Letter from Steven P. Frantz, Counsel for Exelon, to NRC Chairman Dale E. Klein et al., re: Exelon Nuclear Texas Holdings, LLC (Victoria County Station, Units 1 and 2), Docket Nos. 52-031 and 52-032 ("Frantz Letter").

On November 28, the Wall Street Journal (“WSJ”) published an article reporting that Exelon had decided to “drop” the ESBWR design from the Victoria COLA. Rebecca Smith, *Nuclear Project Hits Obstacle as Exelon Balks*, Wall St. J., Nov. 28, 2008, at B2 (Attachment 2). The WSJ quoted Exelon spokesman Craig Nesbitt for the explanation that Exelon had “no chance of getting federal loan guarantees” if it continued to rely on the ESBWR design. *Id.*

### **III. REGULATORY FRAMEWORK**

Docketing of a license application is a prerequisite for the commencement of the NRC Staff’s safety review, the initiation of a licensing proceeding, and the issuance of a hearing notice. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 2), CLI-04-12, 59 NRC 237, 241-42 (2004) (“CLI-04-12”). NRC regulations prohibit the NRC from docketing a license application, including a COLA, unless and until it has determined that the application is “complete and acceptable for docketing.” 10 C.F.R. § 2.101(a)(3). As the Commission explained in CLI-04-12:

An application is neither accepted for full review by the NRC Staff nor automatically noticed for a possible hearing when it is submitted; instead, the Staff reviews it to ensure it contains the information and analyses required in a proper application to allow the Staff’s full review of the proposed licensing action. If the application does not provide the necessary content, it is returned to the applicant for appropriate changes and possible resubmission. Until an application has been accepted by the NRC Staff, there is not certainty that there will be a proceeding in which a hearing may be requested.

*Id.* See also 10 C.F.R. § 2.104(a), which requires the NRC to publish a hearing notice “as soon as practicable after the NRC has docketed the application.” In addition, docketing of a license application is a prerequisite for the statutorily required referral of the application to the Advisory Committee on Reactor Safeguards (“ACRS”). 10 C.F.R. § 2.102(b).

Completeness of a COLA that references an un-certified standard design, such as Exelon’s COLA, may be judged against the general requirements for the contents of a COLA

that are set forth in 10 C.F.R. § 52.79(a). The introductory paragraph of § 52.79 establishes that the design of a proposed facility is an elemental part of a COLA by requiring that:

The application must contain a final safety analysis report that describes the facility, *presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems and components of the facility as a whole.*

*Id.* (emphasis added). As further explained in the introduction to the NRC's General Design Criteria in Appendix A to 10 C.F.R. Part 50, under 10 C.F.R. § 52.79, a COLA "must include the principal design criteria for a proposed facility." These principal design criteria:

establish the necessary design, fabrication, construction, testing, and performance requirements for structures, systems, and components important to safety; that is, structures, systems, and components that provide reasonable assurance that the facility can be operated without undue risk to the health and safety of the public.

Thus, the design of a proposed facility is the principal basis by which the NRC judges the safety of operation under its regulations. Not surprisingly, therefore, of the 46 specific COLA requirements which are contained within 10 C.F.R. § 52.79, virtually every one calls for design information.<sup>2</sup> In fact, only 6 of those requirements -- §§ 52.79(a)(1), (21), (22), (25), (26) and (44) -- potentially could be satisfied without discussing the proposed reactor design. Lyman Declaration, par. 5.

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<sup>2</sup> For just a few examples, *see* 10 C.F.R. § 52.79(a)(1) (requiring an analysis of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site . . .), § 52.79(a)(2) (calling for sufficient information to "permit understanding of the system designs and their relationship to safety evaluations"), § 52.79(a)(4) (requiring a description of the "design of the facility"), § 52.79(a)(5) (requiring an accident analysis of the proposed facility design), § 52.79(a)(6) (requiring a description and analysis of the "fire protection design features"), § 52.79(a)(7) (requiring a description of "protection provided against pressurized thermal shock events . . ."), § 52.79(a)(8) (requiring a description of "equipment and systems for combustible gas control . . ."), § 52.79(a)(9) (requiring a description of features necessary to address station blackout"), and § 52.79(a)(10) (requiring a description of the environmental qualification program for equipment important to safety). *See also* Lyman Declaration, par. 4.

The NRC may allow an applicant to withdraw its combined license application at any time. 10 C.F.R. § 2.107(a). If the application is withdrawn prior to issuance of a notice of hearing, the Commission “shall dismiss the proceeding.” *Id.*

#### **IV. ARGUMENT**

As demonstrated above in Section III, a description of the design of a proposed nuclear plant is the key feature of any COLA. Now that Exelon has eviscerated its own COLA by dropping the ESBWR design, Exelon no longer has any basis for seeking a license from the NRC. Therefore the application must be considered effectively withdrawn pursuant to 10 C.F.R. § 2.107(a). By the same token, the COLA may no longer be considered “complete” or “acceptable for docketing” pursuant to 10 C.F.R. § 2.101(a)(3), because it is now missing the key information required by 10 C.F.R. § 52.79(a). Therefore the NRC’s October 30 docketing decision should be revoked and the NRC should return the COLA to Exelon. *See* 10 C.F.R. § 2.107 and CLI-04-12.<sup>3</sup>

The Frantz Letter states that Exelon plans to “revise” its COLA in the future, thus implying that Exelon does not plan to withdraw the COLA that it submitted in September 2008. But Exelon has no valid COLA that could remain on the NRC docket. There is no complete or acceptable application that could be referred to the ACRS or noticed for a hearing. Thus, the NRC has no rational basis for continuing to retain the Victoria COLA on its docket. Lyman Declaration, par. 6.

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<sup>3</sup> As recognized in the Frantz letter, Exelon’s decision to drop the ESBWR design may moot TSEP’s Petition. TSEP believes that dismissal of this licensing proceeding will indeed moot its Petition. TSEP is aware, however, that intervenors in other COLA adjudications have requested the Commission to consider the applicability of the claims raised in TSEP’s Petition.

Moreover, it is not possible to “revise” the Victoria COLA without effectively replacing it, because any design that Exelon may substitute for the ESBWR design in its COLA will change the COLA in every fundamental respect. Lyman Declaration, par. 7.

Most importantly, if Exelon were allowed to maintain its COLA before the NRC, and if it were subsequently allowed to merely revise the COLA by substituting a new design, Exelon would be able to unlawfully evade the regulatory requirement for a completeness review, which is only required when an application is initially filed. 10 C.F.R. § 2.101(a)(3). Exelon’s evasion of a completeness review would detrimentally affect TSEP, by depriving TSEP of a basic level of procedural protection in the licensing process. The completeness review requirement serves to ensure that the fundamental elements of a license application are present before a licensing proceeding may commence and the application may be noticed for a hearing. CLI-04-12, 59 NRC at 241-42. TSEP is entitled to that procedural protection in order to ensure that its opportunity to request a hearing as of right during the first 60 days after publication of a hearing notice is a meaningful one.<sup>4</sup> The opportunity to request a hearing on an incomplete license

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<sup>4</sup> 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.

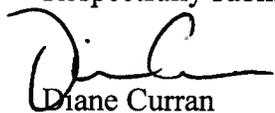
10 C.F.R. § 2.309(f)(2)(i)-(iii). *See also* TSEP’s Petition at 13.

application cannot be considered meaningful, because it is not possible to challenge a permit application effectively if one has not been notified of the contents of the application.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should revoke the Staff's October 30, 2008 decision to docket the Victoria COLA, return the COLA to Exelon and dismiss this licensing proceeding.

Respectfully submitted,



Diane Curran

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December 5, 2008

**CERTIFICATE OF COUNSEL PURSUANT TO 10 C.F.R. § 3.323(a)**

I certify that on December 4, 2008, I spoke with counsel for Exelon and the NRC Staff, in a sincere attempt to obtain their consent to TSEP's motion to revoke the Victoria docketing decision and dismiss the licensing proceeding. Counsel for Exelon stated that Exelon would oppose the motion. Counsel for the NRC Staff said that the Staff is still formulating its position and will respond to the motion.



Diane Curran

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

**EXPERT DECLARATION BY DR. EDWIN S. LYMAN IN SUPPORT OF  
TEXANS FOR A SOUND ENERGY POLICY'S MOTION TO REVOKE  
DOCKETING DECISION AND DISMISS LICENSING PROCEEDING**

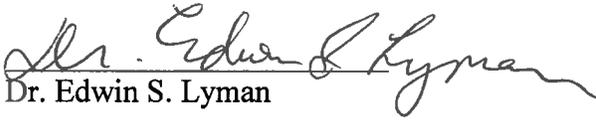
Under penalty of perjury, I, Dr. Edwin S. Lyman, declare as follows:

1. I am a Senior Staff Scientist with the Global Security Program at the Union of Concerned Scientists, 1825 K Street, NW, Suite 800, Washington, D.C. 20006.
2. On October 31, 2008, I prepared an expert declaration 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. My education and experience are described in the curriculum vitae, which is included as Attachment 1 to that declaration.
3. The purpose of this declaration is to address the significance of Exelon's recent decision to drop its reliance on the economic simplified boiling water reactor ("ESBWR") design in the combined license application ("COLA") for the Victoria, Texas site.
4. The design of a proposed facility is the principal basis by which the NRC judges the safety of operation under its regulations. Not surprisingly, therefore, of the 46 specific COLA requirements which are contained within 10 C.F.R. § 52.79, nearly every one calls for design information. For just a few examples, *see* 10 C.F.R. § 52.79(a)(1) (requiring an analysis of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site . . ."), § 52.79(a)(2) (calling for sufficient information to "permit understanding of the system designs and their relationship to safety evaluations"), § 52.79(a)(4) (requiring a description of the "design of the facility"), § 52.79(a)(5) (requiring an accident analysis of the proposed facility design), § 52.79(a)(6) (requiring a description and analysis of the "fire protection design features"), § 52.79(a)(7) (requiring a description of "protection provided against pressurized thermal shock events . . ."), § 52.79(a)(8) (requiring a description of "equipment and systems for combustible gas control . . ."), § 52.79(a)(9) (requiring a description of features necessary to address station blackout"), and § 52.79(a)(10) (requiring a description of the environmental qualification program for equipment important to safety).
5. In fact, only six of 46 specific requirements of 10 C.F.R. § 52.79(a) for the content of a COLA -- §§ 52.79(a)(1), (21), (22), (25), (26) and (44) -- could be satisfied without discussing the proposed reactor design.

6. Now that it has decided not to use the ESBWR application in the Victoria COLA, Exelon has no valid COLA that could remain on the NRC docket. There is no complete or acceptable application that could be reviewed by the NRC Staff, referred to the Advisory Committee on Reactor Safeguards, or noticed for a hearing. Thus, the NRC has no rational basis for continuing to retain the Victoria COLA on its docket.

7. Moreover, it is not possible to “revise” the Victoria COLA without effectively replacing it, because any design that Exelon may substitute for the ESBWR design in its COLA will change the COLA in nearly every fundamental respect.

I declare, under penalty of perjury, that the factual statements above are true and correct to the best of my knowledge, and the expressions of opinion stated above are based on my best professional judgment.

  
Dr. Edwin S. Lyman

December 4, 2008

# Nuclear Project Hits Obstacle As Exelon Balks

BY REBECCA SMITH

GE Hitachi Nuclear Energy has a problem with its latest nuclear reactor: getting someone to build it.

A decision by Exelon Corp. to drop the next-generation GE Hitachi reactor at the Chicago firm's proposed Texas nuclear project casts a shadow over the design that, so far, exists only on paper and is mired in a difficult certification process at the Nuclear Regulatory Commission.

Exelon said this week it no longer intends to build GE Hitachi's ESBWR reactor—short for “economic simplified boiling water reactor”—if it proceeds with its project because it has concluded the reactor can't clear regulatory hurdles fast enough for Exelon to qualify for federal loan guarantees. The decision is significant because Exelon is the largest operator of nuclear reactors in the U.S.

Several makers of nuclear reactors are trying to get their designs approved by the Nuclear Regulatory Commission. That approval process has become part of a high-stakes game as utilities across the U.S. push forward with plans to build new nuclear reactors. Plants are expected to cost anywhere from \$5 billion to \$12 billion apiece. But plants can't be built until reactors get NRC certification and utilities get licenses to proceed.

Of the five reactor designs being seriously considered, only two have thus far been certified for U.S. use. One is by Westinghouse Electric Co., a unit of Toshiba Corp., and the other is based on a design by General Electric Co. The reactor types built first could have an advantage over other designs by securing supplier networks and honing construction techniques that will allow subsequent units to be built at lower cost.

Because the costs are so high, many utilities are counting on federal subsidies in order to make the plants economically viable. But in order to obtain subsidies, such as federal loan guarantees, utilities must move forward on projects by certain dates. That is prompting utilities such as Exelon to consider reactor designs that have the best chance of getting early NRC approval.

GE began the certification

GE began the certification process for the ESBWR three years ago. In 2007, it formed a joint venture with Hitachi Corp. to pursue nuclear development opportunities together.

NRC staff has at times been unhappy with the quality of information provided by GE Hitachi, which has caused delays in the review for the ESBWR, a person close to the review process at the NRC said.

A spokeswoman for GE Hitachi said her firm has approached Exelon to see if it would be interested in an older design, the ABWR—short for advanced boiling water reactors—since it's ruled out the ESBWR.

Exelon decided to drop the ESBWR after it learned in October “we had no chance of getting federal loan guarantees,” said Exelon spokesman Craig Nesbit.

INDEX TO BUSINESSES

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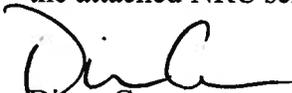
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UNITED STATES OF AMERICA  
THE UNITED STATES NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

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

**CERTIFICATE OF SERVICE**

I certify that on December 5, 2008, I submitted the foregoing motion to the NRC by posting it on the NRC's Electronic Information Exchange system. It is my understanding, based on the service list posted on the NRC's website at <https://eie.nrc.gov/cgi-bin/eieone.exe?f=boardpost&hearing=Victoria+County+52-031+and+52-032-COL&pof=no>, that the motion was sent by e-mail to the individuals on the attached NRC service list.

  
Diane Curran

# NRC Service List for Victoria COLA Adjudication

(12/5/08)

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\* Note: All EIE submittals are sent to the Office of the Secretary, the Atomic Safety and Licensing Board associated with this case, and the NRC's Document Processing Center

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Unknown Zone

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