

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
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)
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 MOTION TO REVOKE
DOCKETING DECISION AND DISMISS LICENSING PROCEEDING FOR EXELON'S
VICTORIA COMBINED LICENSE APPLICATION

INTRODUCTION

The Nuclear Regulatory Commission Staff (NRC Staff) hereby responds to the filing captioned "Texans for a Sound Energy Policy's Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding For Exelon's Victoria Combined License Application," filed on December 5, 2008. As discussed below, the NRC Staff does not believe that this issue is an adjudicatory matter, and does not believe it should be resolved in the adjudicatory process. For that reason, and the absence of any prejudice to Texans for a Sound Energy Policy's (TSEP) ability to seek a hearing pursuant to a future notice of hearing, the NRC Staff requests that the Commission reject or dismiss the subject filing from the adjudicatory process.

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 from Mark E. Tonacci to Kenneth A. Ainger, "Acceptance for Docketing of the Exelon Application for a Combined License for Victoria County Station, Units 1 and 2 and Associated Federal Register Notice" (Oct. 30, 2008) (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). No notice of hearing and opportunity to petition for leave to intervene has been issued.

In a letter dated November 24, 2008, Exelon notified the Staff that it expects to designate an alternate reactor technology for the Victoria County project. See Letter from Thomas S. O'Neill to the NRC, "Notification to Designate Alternate Reactor Technology for Victoria County Station, Units 1 and 2 Combined License Application" (Nov. 24, 2008) (ML083370296). The letter further stated that Exelon anticipated deciding on an alternate reactor technology in early 2009 and would then develop a revision to the Victoria County COLA to reflect the new design. See *Id.*

On December 5, 2008, TSEP filed a document requesting that the Commission revoke the docketing decision and dismiss the licensing proceeding. See "Texans for a Sound Energy Policy's Motion to Revoke Docketing Decision and Dismiss Licensing

Proceeding for Exelon's Victoria Combined License Application." (Dec. 5, 2008) (ML083400447).¹

DISCUSSION

As indicated, the Staff does not view TSEP's extra-procedural motion to be an adjudicatory matter. Issuance of notice of hearing is a prerequisite to the initiation of an adjudicatory proceeding. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 240 (2004). No notice of hearing has been issued for the Victoria County COLA. No notice of hearing will issue prior to the resolution by the Staff of the issues raised by Exelon's announcement.

The Staff views the decision to docket, and the subsequent handling of an application to be within the discretion of the Staff, See *U.S. Department of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-20, 67 NRC __ (2008). The Staff is examining the range of options in order to determine an appropriate course of action in light of Exelon's announcement. The Staff has stopped its work on the Victoria County COLA pending a decision on how to proceed. The Staff anticipates engaging with the Commission on this topic outside of the adjudicatory process.²

¹ There is a currently pending petition from TSEP to hold the notice of hearing in abeyance pending the completion of the rulemaking on the design certification application for the Economic Simplified Boiling Water Reactor (ESBWR). In light of Exelon's announcement that it was pursuing alternate reactor design technologies, the Staff views the Petition as moot, and sees no need for a further Commission ruling on that matter in light of previous Commission adjudicatory and policy guidance on the subject. See e.g. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 67 NRC __ (2008); Conduct of New Reactor License Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963 (Apr. 16, 2008).

² Pursuant to 10 CFR § 2.348(d), separation of functions applies after a notice of hearing is issued. Since no notice of hearing has issued there is no separation of functions limitations on the exchange of information between the Staff and the commission.

CONCLUSION

Since no notice of hearing has issued, the issues regarding Exelon's COLA application should not be treated as an adjudicatory matter. There is no prejudice to TSEP's ultimate opportunity to request a hearing in response to any future notice of such opportunity on an Exelon application. Therefore, the Staff respectfully requests that the Commission dismiss or reject this filing as beyond the scope of the adjudicatory process.

Respectfully Submitted,

/signed (electronically) by/

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Dated at Rockville, MD
This 12 day of December, 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 MOTION TO REVOKE DOCKETING DECISION AND DISMISS LICENSING PROCEEDING FOR EXELON'S VICTORIA COMBINED LICENSE APPLICATION" has been served upon the following persons by Electronic Information Exchange this 12th day of December, 2008:

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