UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-031-COL 52-032-COL
EXELON NUCLEAR TEXAS HOLDINGS, LLC	)	
(Victoria County Station, Units 1 and 2)	)	December 15, 2008

ANSWER OF EXELON OPPOSING MOTION
TO REVOKE DOCKETING DECISION AND DISMISS LICENSING PROCEEDING

I. INTRODUCTION

On December 5, 2008, Texans for a Sound Energy Policy ("TSEP") submitted a Motion to the U.S. Nuclear Regulatory Commission ("NRC") requesting that the Commission (1) revoke the NRC staff's decision to docket the combined license ("COL") application for Victoria County Station, Units 1 and 2, (2) return the COL application to Exelon, and (3) dismiss the licensing proceeding.[1] Exelon Nuclear Texas Holdings, LLC ("Exelon") is submitting this answer in opposition to the Motion pursuant to 10 C.F.R. § 2.323(c).

The Motion claims that Exelon's recent decision to consider alternate reactor technologies "eviscerated" the Victoria County Station COL application such that the application should be "considered effectively withdrawn" because it is no longer "complete" or "acceptable for docketing."[2] As discussed below, the Motion should be denied because:

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1 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) ("Motion").

2 *Id.* at 6.

- The Motion should be dismissed on procedural grounds. The NRC staff's decision to docket the COL application is not subject to challenge. Furthermore, it is impermissible for TSEP to file a motion prior to issuance of the notice of hearing.
- The Motion lacks an adequate legal basis. The NRC has found that the COL application is sufficiently complete for docketing. Although Exelon plans to revise its COL application to incorporate the alternate reactor technology, NRC regulations allow a COL application to be revised and do not require that the revision undergo a discrete docketing review.
- A balancing of interests weighs in favor of retaining the COL application on the docket pending its revision. Exelon has informed the NRC staff that it does not desire the notice of hearing to be issued on the COL application until the application is revised to reflect the alternate reactor technology. Therefore, maintaining the COL application on the docket presents no potential harm to TSEP's interests. In contrast, withdrawal of docketing of the application could have significant economic impact on Exelon.
- Retaining the COL application on the docket will promote the efficiency and timeliness of the licensing process. There are large portions of the COL application that will not be materially affected by the revision to reflect the alternate reactor design, and the NRC staff may decide that it can continue with its review of those portions pending the revision.

II. BACKGROUND

By letter dated September 2, 2008, Exelon filed a COL application with the NRC under Subpart C of 10 C.F.R. Part 52.[3] Exelon's application requested COLs for two ESBWR units for its Victoria County Station site located in Victoria County, Texas. 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 application on October 30, 2008.[4] The NRC has not yet issued a notice of hearing for the COL application.

On November 24, 2008, Exelon notified the NRC that it expects to designate another reactor technology as an alternate to the ESBWR.[5] Exelon indicated that it "is considering reactor technologies that have more mature designs, more certain cost structures and better availability of information than the ESBWR," and that it "expects to decide on an alternate reactor technology in early 2009."[6]

Subsequently, TSEP filed a Motion asserting that Exelon's decision to consider alternate reactor technologies "eviscerated" the Victoria County Station COL application such that the application should be "considered effectively withdrawn" pursuant to 10 C.F.R. § 2.107(a).[7] TSEP further claims that the COL application is no longer "complete" or "acceptable for

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

[4] *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). On November 3, 2008, TSEP filed a Petition requesting that the Commission hold in abeyance the anticipated hearing notice. *See* 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"). As Exelon indicated in its November 25, 2008 letter to the Commission, the Petition could now be viewed as moot based upon Exelon's notification; however given the Petition involves a matter that may recur in this proceeding, Exelon indicated that it believes it is appropriate for the Commission to issue a ruling on the Petition in order to provide directions related to the notice of hearing that will eventually be issued in this proceeding. *See* Letter from Steven P. Frantz, Counsel for Exelon, to Commission, at 2 (Nov. 25, 2008).

[5] *See* Letter from Thomas S. O'Neill, Exelon, to NRC (Nov. 24, 2008), *available at* ADAMS Accession No. ML083370296 ("Notification").

[6] *Id.* at 1.

[7] Motion at 6.

docketing," contrary to the requirements of 10 C.F.R. §§ 2.101(a)(3) and 52.79(a).[8] Based on these arguments, TSEP maintains that the NRC staff's docketing decision should be revoked, the COL application should be returned to Exelon, and the proceeding should be dismissed.[9]

III. DISCUSSION

A. The Motion Should Be Summarily Dismissed on Procedural Grounds

The Commission should dismiss the Motion because it is procedurally inconsistent with NRC regulations and precedent.

TSEP asserts that Exelon's decision to consider alternate reactor technologies should result in revocation of the NRC staff's decision to docket the COL application.[10] This claim constitutes an impermissible attack on the staff's docketing of the COL application. As provided in 10 C.F.R. § 2.101(a)(3), the determination of whether a COL application is complete and acceptable for docketing is solely within the authority of the NRC staff—the Director of the Office of New Reactors in this case. As the Commission recently stated in the *Shearon Harris* proceeding, the "docketing decision is not challengeable in an adjudicatory proceeding."[11] Therefore, TSEP's challenge to the docketing of the COL application should be dismissed as contrary to applicable procedural requirements and Commission precedent.

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8 *Id.*

9 *Id.*

10 *Id.*

11 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-08-15, 68 NRC __ (July 23, 2008), slip op. at 2 n.2. *See also Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Plant, Units 1 & 2), LBP-98-26, 48 NRC 232, 242 (1998) ("As the Commission has made clear, how thoroughly the staff conducts its preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in this adjudicatory proceeding."); *New Eng. Power Co.* (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 280 (1978) ("[T]he question of whether or not an application is acceptable for docketing is a determination to be made by the Staff."); *Phil. Elec. Co.* (Fulton Generating Station, Units 1 & 2), LBP-79-23, 10 NRC 220, 223 (1979).

TSEP also asserts that the COL application "must be considered effectively withdrawn" pursuant to 10 C.F.R. § 2.107(a) because of Exelon's decision to consider alternate reactor technologies.[12] The regulation cited by TSEP, 10 C.F.R. § 2.107, provides no support for its request that the COL application be considered withdrawn. That provision provides that "[t]he Commission may permit an *applicant* to withdraw an application."[13] Based on the clear language of this regulation, the Commission authorizes an "applicant" to request withdrawal of its application. Exelon has not requested a withdrawal of its application.[14] Section 2.107 does not allow a member of the public to request withdrawal of an application. In summary, Section 2.107 provides NRC's procedures and practice governing the applicant's withdrawal of an application, and does not provide a mechanism for members of the public to challenge an application. Therefore, to the extent that the Motion cites Section 2.107, it is legally baseless and should be dismissed.

Furthermore, issuance of a notice of hearing is a prerequisite to the initiation of an adjudicatory proceeding. Prior to issuance of the notice of hearing, members of the public are not permitted to submit petitions to intervene (or, by implication, motions).[15] As the Commission ruled in another proceeding:

> When, as here, the hearing process has not even commenced . . . it is not a sensible use of Commission resources to evaluate the petitioners' legal and factual challenges to the application now.

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[12] Motion at 6.

[13] 10 C.F.R. § 2.107(a) (emphasis added).

[14] Exelon's Notification did *not* withdraw its COL application. To the contrary, the Notification explains that Exelon expects to designate an alternate reactor technology and to revise its currently docketed COL application once it makes that decision. Notification at 1.

[15] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-12, 59 NRC 237, 240 (2004).

These challenges are premature.[16]

Therefore, TSEP's Motion should be dismissed, because there is no proceeding in which the Motion can be heard.

B. <u>There Is No Legal Basis for Revocation of Docketing</u>

Exelon has submitted an application, which the NRC staff has found sufficiently complete for docketing. Although Exelon plans to revise the COL application in the future to use an alternate reactor technology, the COL application as it currently stands has not been revised and remains complete. Therefore, there is no basis for revoking docketing of that application.

Although Exelon is planning to revise its application, the NRC is not required to revoke docketing of an application and to conduct a new docketing review when an application is revised. In fact, NRC regulations explicitly contemplate that an application may be revised after docketing, and the regulations do not require another docketing review for the revision.[17]

In summary, it is expected that a COL application will undergo a series of revisions. NRC regulations allow a COL application to be revised, without revoking or reperforming the original docketing review. Therefore, there is no legal requirement for the NRC to revoke the COL application for Victoria County Station merely because Exelon plans to revise the application.

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[16] *U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-20, 68 NRC __ (Aug. 22, 2008), slip op. at 3.

[17] *See* 10 C.F.R. §§ 2.101(a)(3)(iii), 52.3(b)(2).

C. A Balancing of Interests Weighs in Favor of Retention of the Application on the Docket

Even if the Commission overlooks the legal deficiencies of the Motion and considers TSEP's argument, it should reject the Motion based upon a balancing of interests.

1. There will be no harm to TSEP if docketing is not revoked.

Retention of the application on the docket will not harm TSEP. The hearing notice has not been issued. Furthermore, Exelon has informed the NRC staff that it does not desire the NRC to issue the hearing notice until Exelon revises its application to incorporate the selected reactor technology, and it is our understanding that the NRC does not intend to issue a notice of hearing until that time. This course of action will ensure that TSEP and other members of the public will be informed of the reactor design proposed for the Victoria County Station and that the COL application will reflect the new reactor design before petitions to intervene are due. Therefore, TSEP's rights and interests will be fully protected through this course of action, and they will not suffer any cognizable harm from retention of the COL application on the docket.

TSEP claims that Exelon "would be able to unlawfully evade the regulatory requirement for a completeness review, which is only required when an application is initially filed," if Exelon is permitted to revise its COL application after it selects an alternate reactor technology.[18] This argument overlooks the fact that the initial acceptance "review is part of a continuous licensing process, not a single discrete step which requires complete and final design and technical information when an application is tendered."[19] It is not unusual for a license application to be revised during the course of a proceeding. As the Commission recently ruled in

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[18] Motion at 7.

[19] *NEP*, LBP-78-9, 7 NRC at 281.

the *Bellefonte* COL proceeding, if an applicant provides new and materially different information after submission of its application, petitioners will not be harmed because they will have an opportunity to proffer contentions based upon that new information.[20] This ruling is even more applicable in the case of the COL application for the Victoria County Station, since the notice of hearing will not be issued until the application is revised to reflect the new reactor technology.

TSEP claims that the revision of the COL application to incorporate the alternate reactor technology would evade acceptance review, which in turn would deprive TSEP "of a basic level of procedural protection" because "[t]he 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."[21] This claim ignores that NRC rules provides TSEP with adequate "procedural protection" with respect to the completeness of Exelon's COL application. As the Commission explained in *Shearon Harris*:

> 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.[22]

Accordingly, TSEP's ability to file a contention challenging the completeness of Exelon's COL application provides it with adequate "procedural protection."

In summary, since TSEP will not need to file a petition to intervene until after the COL application is revised to incorporate the new reactor technology, its interests will not be harmed

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[20] *Tenn. Valley Auth'y* (Bellefonte Nuclear Power Plants Units 3 & 4), Order at 2 (Apr. 7, 2008) (unpublished order).

[21] Motion at 7.

[22] *Shearon Harris*, CLI-08-15, slip op. at 2-3.

by retaining the application on the docket pending the revision.[23]

2. Exelon will suffer significant harm if docketing is revoked.

Exelon would suffer significant economic harm if docketing of the COL application were revoked.

If docketing of the COL application were revoked, Exelon would need to file a new COL application, which realistically could not occur before 2009. However, only new nuclear power plants with COL applications filed before December 31, 2008 are eligible for production tax credits of up to 1.8 cents per kilowatt-hour pursuant to the Energy Policy Act of 2005.[24] Therefore, if docketing of its application were revoked, Exelon could lose the opportunity to receive production tax credits for the Victoria County Station.

Additionally, the Energy Policy Act of 2005 established a loan guarantee program applicable to construction of new nuclear power plants, which is implemented by the Department of Energy ("DOE").[25] Pursuant to the program, DOE has solicited applications for loan guarantees for new nuclear power plants. To be eligible pursuant to that solicitation, Part I of the application to DOE must have been submitted by September 29, 2008 and Part II must be submitted by December 19, 2008.[26] To be eligible for a loan guarantee pursuant to this solicitation, a COL application must be submitted to the NRC by December 31, 2008.[27] Exelon

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[23] In fact, allowing the application to remain on the docket can, in the end, enhance public knowledge about the application and, as a consequence, the public's eventual participation.

[24] *See* Rev. Notice 2006-40, 2006-18 I.R.B. 855, 855-56, §§ 2.04(1), 3.01(1).

[25] *See* 10 C.F.R. Part 609.

[26] DOE Loan Guarantee Solicitation Announcement for Federal Loan Guarantees for Nuclear Power Facilities, Solicitation Number DE-PS01-08LG00002 (June 30, 2008).

[27] *Id.*, Attach. A3, Tab 1, ¶ 1.

has submitted an application for a loan guarantee for the Victoria County Station.[28] If docketing of Exelon's COL application were revoked and Exelon were to resubmit an application in 2009, it would likely no longer be eligible for a loan guarantee under DOE's solicitation and its financing costs for Victoria County Station would be substantially higher.

3. Balancing of Interests

In summary, if the COL application is retained on the docket, TSEP will incur no harm to its interests. In contrast, if docketing were revoked, Exelon would suffer significant economic harm. Therefore, a balancing of the interests supports retention of the COL application on the docket.

This result applies, regardless of whether the NRC staff decides to continue with its review during the period prior to revision of the COL application. However, as discussed below, Exelon believes that large portions of the COL application could be fruitfully reviewed by the NRC staff pending the revision, which provides an additional benefit to retention of the COL application on the docket.

D. Much of the COL Application Can Still Be Effectively Reviewed by the NRC Staff Pending Revision of the COL Application.

As discussed above, the NRC should decide to retain the COL application on the docket. The NRC staff could defer its review of the application pending the revision to incorporate the alternate reactor technology. However, as discussed below, Exelon believes that large portions of the COL application could be fruitfully reviewed by the NRC staff pending revision of the application.

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[28] Letter from Thomas S. O'Neill, Exelon, to David G. Frantz, DOE (Sept. 26, 2008).

A number of the Parts of the COL application will experience little or no material change following the change in reactor technology. For example, most of the General and Administrative Information and the Emergency Plan, and portions of the Security Plan are unlikely to require significant revision. Additionally, although there will likely be numerous minor changes in the Environmental Report (*e.g.*, changes in the name of the reactor, slight changes in power levels), these changes will not likely have any material effect on the analyses or conclusions in the Report.

Exelon acknowledges that large portions of the Final Safety Analysis Report ("FSAR") are likely to need revision following the selection of an alternate reactor technology. However, there are significant portions of the FSAR that could be reviewed, including most of Chapter 2 related to Site Characteristics, the organizational information in Chapter 13 related to the Conduct of Operations, and the Quality Assurance Program description in Chapter 17.[29]

If the NRC staff decides that it could proceed with its review of portions of the COL application for Victoria County Station, such a review would provide an additional benefit to retention of the COL application on the docket.

IV. CONCLUSION

As set forth above, the Motion is inconsistent with procedural and legal requirements, which do not allow members of the public to challenge docketing of an application. Additionally, TSEP has not provided a sufficient basis for revoking the NRC staff's docketing decision or for dismissing this COL proceeding. To the contrary, a balancing of its interests

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[29] In addition, many of the changes to the FSAR will likely involve adding standardized information that is already included in the "reference" COL application for the design that will be selected. Therefore, the NRC will still be able to take advantage of the "design-centered" approach in reviewing Exelon's COL application.

supports retention of docketing, given the absence of any impact to TSEP and the substantial economic injury to Exelon if docketing were revoked. Furthermore, there may be efficiencies gained if the NRC staff moves forward with the review of those portions of the COL application that are not materially impacted by the selection of an alternate design technology. Accordingly, the Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2008 a copy of the "Answer of Exelon Opposing Motion to Revoke Docketing Decision and Dismiss Licensing Proceeding" was filed electronically with the Electronic Information Exchange.

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