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July 21, 2011

Michael M. Gibson, Chair, Administrative Judge *Via NRC's Electronic Information Exchange*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dr. Anthony J. Baratta, Administrative Judge *Via NRC's Electronic Information Exchange*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dr. Mark O. Barnett, Administrative Judge *Via NRC's Electronic Information Exchange*
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

RE: Docket No. 52-042; NRC-2010-0165; *Exelon Nuclear Texas Holdings, LLC, Early Site Permit Application for the Victoria County Station Site, Notice of Hearing, Opportunity To Petition for Leave To Intervene, and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non- Safeguards Information and Safeguards Information for Contention Preparation*, 75 Fed. Reg. 71467 (Nov. 23, 2010).

Dear Judge Gibson, Judge Baratta, and Judge Barnett:

Pursuant to 10 C.F.R. § 2.323(c), enclosed for your consideration is TEXANS FOR A SOUND ENERGY POLICY'S RESPONSE TO EXELON NUCLEAR TEXAS HOLDINGS, LLC'S MOTION FOR CLARIFICATION.

Any question or concern regarding this submission may also be directed to Charles W. Irvine, Blackburn Carter, P.C., 4709 Austin, St., Houston, Texas 77004, (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by s/James B. Blackburn, Jr.
James B. Blackburn, Jr.

Attachments as noted above.

c: Per Certificate of Service
 attached to filing.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

ASLBP No. 11-908-01-ESP-BD01

Michael M. Gibson, Chair	Dr. Anthony J. Baratta	Dr. Mark O. Barnett
Atomic Safety and Licensing Board Panel	Atomic Safety and Licensing Board Panel	Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission	U.S. Nuclear Regulatory Commission	U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001	Washington, D.C. 20555-0001	Washington, D.C. 20555-0001

In the Matter of

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EXELON NUCLEAR TEXAS
HOLDINGS, LLC

Docket No. 52-042

EARLY SITE PERMIT FOR
VICTORIA COUNTY STATION

**TEXANS FOR A SOUND ENERGY POLICY’S RESPONSE TO
EXELON NUCLEAR TEXAS HOLDINGS, LLC’S MOTION FOR CLARIFICATION**

Texans for a Sound Energy Policy (“TSEP”), Petitioner, hereby responds to the Motion for Clarification filed by Exelon Nuclear Texas Holdings, LLC (“Exelon”) on July 11, 2011.

I. INTRODUCTION

The Atomic Safety and Licensing Board (the “Board” or “ASLB”) issued a Memorandum and Order on June 30, 2011 (“Order”) ruling on the admissibility of the contentions proposed by TSEP. It is TSEP’s position that, when viewing the Board’s Order as a whole, the clarification that Exelon seeks is not needed because the Order was sufficiently clear.

II. DISCUSSION

A. **Contention TSEP-SAFETY-1 and 2: Whether “the Board was also ruling that Exelon must design the cooling basin to withstand growth faults”**

In its motion, Exelon states that it is not seeking clarification on “whether growth faults can affect the cooling basin and if so, whether such impact to the cooling basin can affect the safe operation of the plant.” But, Exelon states that it is seeking clarification on whether “the Board was also ruling that Exelon must design the cooling basin to withstand growth faults.” It is TSEP’s position that this point is an outgrowth of the very question that Exelon is not challenging for clarification. In other words, the clarification that Exelon seeks is premature and will be determined as the parties litigate TSEP-SAFETY-1 and 2.

The clarification that Exelon seeks goes to the heart of the purpose for litigating TSEP-SAFETY-1 and 2. Consequently, it is TSEP’s position that the Board need not make a ruling on this specific clarification at this time, because the Board will implicitly or explicitly be making such a determination as these two Contentions are debated and presented to the Board. When issuing a final Early Site Permit, the Commission “must specify the site characteristics, design parameters, and terms and conditions” of the permit. 10 C.F.R. § 52.24(b). Depending on the outcome of the litigation of these contentions, the Commission’s eventual decision may thus impose precisely what Exelon now seeks to preclude, namely design parameters, terms or conditions regarding the cooling pond.

B. Contention TSEP-SAFETY-1 and 2: Application of Appendix A of 10 C.F.R. Part 100

The Board's order clearly states that 10 C.F.R. Part 100 and Appendix A govern the SSAR's analysis faulting in the footprint of the cooling pond.¹ The opening section of 10 C.F.R. § 100.23 provides:

This section sets forth the principal geologic and seismic considerations that guide the Commission in its evaluation of the suitability of a proposed site and adequacy of the design bases established in consideration of the geologic and seismic characteristics of the proposed site, such that, there is a reasonable assurance that a nuclear power plant can be constructed and operated at the proposed site without undue risk to the health and safety of the public.

This discussion sets forth the purpose of the provisions of 10 C.F.R. § 100.23 and what follows, including Appendix A. As stated in this opening section, the “geologic and seismic considerations” serve as a “guide” to the Commission for the bigger picture, which is to ensure that a power plant is not constructed or operated in a manner that causes undue risk to the health and safety of the public. In light of this, it would appear Appendix A must be used to buttress the Board's understanding of the geologic and safety considerations in order to ensure that the power plant will be constructed and operated without undue risk.

Moreover, the “geologic and seismic considerations” were precisely what TSEP challenged in TSEP-Contentions 1 and 2. It is unclear to TSEP what is gained by the clarification that Exelon seeks (with respect to the Application of Part 100), given the fact that the scope of the Contentions 1 and 2 has been delineated by the Board and is not unclear. In other words, to TSEP, the reason for this legal ruling that Exelon seeks seems superfluous.

In the alternative, to the extent that Exelon requests a legal interpretation of specific provisions of 10 C.F.R. § 100.23(a) and the applicability of Appendix A, it is TSEP's position

¹ *Exelon Nuclear Tex. Holdings, LLC* (Victoria County Station Site), LBP-11-16, 74 NRC ___, slip op. at 15 (June 30, 2011) (“LBP-11-16”).

that the agency itself must interpret its own regulations. It is up to the Commission to make a legal interpretation of its own rules.

C. Contention TSEP-ENV-16: Water Availability

TSEP does not believe the Order was unclear with respect to the water availability component of TSEP-ENV-16, particularly when the Order is considered as a whole and in light of the alternative analysis issue that TSEP raised.

With respect to the alternatives analysis of TSEP-ENV-16, TSEP maintained that there is an “obviously superior” site at Matagorda Bay. As part of this, TSEP described how the water source for a nuclear plant at the Matagorda location would be either from the unlimited supply of Gulf of Mexico seawater, or from Matagorda Bay. The bay is connected to the Gulf by Pass Cavallo and by a ship channel at Port O’Connor, so is also an unlimited supply of water. By contrast, the water for the proposed Victoria site comes from the freshwater of the Guadalupe River. This source of water is finite, highly variable from year to year, and most likely declining due to climate change.

There is a tremendous and important distinction to be discussed and litigated between a river as a water source and a bay/seawater as a water source for a nuclear power plant. Exelon appears to be attempting to narrow the scope of the contention that the Board has ruled on by suggesting that TSEP can only discuss this fundamental distinction of a river or bay system in terms of climate change. However, such a narrowing of scope would be contrary to the purpose of the alternative analysis, which is to engage in a rigorous exploration of the environmental differences between two sites. It would also be contrary to the Board’s ruling in its Order. Indeed, the Council on Environmental Quality (CEQ) refers to the alternatives analysis section as the “heart of the EIS.” 40 C.F.R. § 1502.14.

The Board was clear that safety concerns were not be a part of the alternative analysis. However, the environmental concerns clearly are part of the scope of this contention. An alternatives analysis directly speaks to better choices and better site suitability. Even though the Board ruled that TSEP did not meet the threshold criteria for admissibility of certain of the environmental contentions, the Board did admit the alternatives analysis contention; this Contention would be minimized in importance if one of the crucial metrics for the environmental concerns—water availability—is only talked about in terms of climate change. Of course TSEP believes that climate change is a part of the water availability issue, but TSEP urges that the inquiry must be broader.

In order to discuss water availability in way that is meaningful and not nonsensical, TSEP must be able to discuss the fundamental and crucial differences between a bay versus a river system without being constrained by the focus of only climate change. TSEP maintains that the Board’s ruling contemplates this more general inquiry about water availability. As Exelon acknowledged in its motion, the Board included “endangered species” and “downstream ecological impacts” in its ruling as part of the environmental concerns to be included for the alternatives analysis.² These issues, like water availability, are also water supply issues. In short, the crux of the environmental concerns raised by the alternatives analysis is about water, which the Board acknowledged and explicitly took into account in admitting the sub-issues of “water availability”, “endangered species” and “downstream ecological impacts.”

Any narrowing of the environmental concerns within the alternatives analysis is contrary to the Board’s ruling. A meaningful discussion of the alternatives, when comparing the Victoria site and the Matagorda Bay site, must include a broader construction of water availability than proposed by Exelon. It must include water availability more generally as it relates to the two

² LBP-11-16, slip op. at 69.

very different ecosystems (river system versus bay system). Climate change is a part of this discussion, but the contention should not be so narrowly circumscribed as to be limited to climate change.

III. CONCLUSION

TSEP does not believe any clarification is necessary or required by the Board because the Order was clear. Nonetheless, TSEP did not oppose the motion, in the event the Board desires to provide clarification.

Dated: July 21, 2011.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by: s/ James B. Blackburn, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2011, copies of the foregoing TEXANS FOR A SOUND ENERGY POLICY'S RESPONSE TO EXELON NUCLEAR TEXAS HOLDINGS, LLC'S MOTION FOR CLARIFICATION has been served upon the following persons by Electronic Information Exchange.

s/ James B. Blackburn, Jr.

James B. Blackburn, Jr.

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