

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. William E. Kastenber

In the Matter of EXELON GENERATION COMPANY, LLC (Limerick Generating Station, Units 1 and 2)
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Docket Nos. 50-352-LR, 50-353-LR

ASLBP No. 12-916-04-LR-BD01

July 12, 2013

MEMORANDUM AND ORDER
(Ruling on Resubmission of Contentions)

Before this Atomic Safety and Licensing Board (Board) is a motion by the Natural Resources Defense Council (NRDC) to resubmit a number of contentions.¹ Essentially, these contentions are identical to contentions previously proffered in this proceeding, but they are directed toward the Nuclear Regulatory Commission's (NRC) Draft Supplemental Environmental Impact Statement (DSEIS) rather than Exelon Generation Company, LLC's ("Exelon") Environmental Report (ER). NRDC does not seek to litigate the admissibility of these contentions at this juncture, but simply asks that the Board "accept" these contentions.² For the reasons discussed below, the Board does not "accept" these new contentions, but tolls the deadline for NRDC to resubmit these contentions pending resolution of a waiver proceeding currently pending before the Commission.

¹ [NRDC's] Resubmission of Contentions in Response to Staff's Supplemental Draft Environmental Impact Statement (May 30, 2013) [hereinafter "Motion"].

² See id. at 9.

I. BACKGROUND

The history of this proceeding is somewhat convoluted, and need not be fully recounted here, as we have adequately explained it elsewhere.³ It is sufficient here simply to note that NRDC has submitted a waiver petition pursuant to 10 C.F.R. § 2.335(b) in order to litigate its original contentions. This Board ruled on that waiver petition in LBP-13-01, finding that NRDC had not met the standards for waiver of a regulation, and referring our ruling to the Commission pursuant to 10 C.F.R. § 2.323(f)(1) because NRDC's petition presented a novel issue of law that deserved the Commission's immediate attention.⁴ Our referral of LBP-13-01 is presently pending before the Commission.

On April 30, 2013, the NRC published the DSEIS for Limerick Generating Station, Units 1 and 2 ("Limerick").⁵ NRDC filed the instant motion on May 30, 2012. Exelon and the NRC Staff filed answers opposing the motion on June 24, 2013.⁶ NRDC filed a reply to these answers on July 8, 2013.⁷

³ See LBP-13-01, 77 NRC ___, ___-___ (slip op. at 1-5) (Feb. 6, 2013).

⁴ Id. at 13.

⁵ See Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supp. 49, Regarding Limerick Generating Station, Units 1 and 2, Draft Report for Comment (Apr. 2013) (ADAMS Accession No. ML13120A078).

⁶ See Exelon's Answer Opposing [NRDC's] Resubmission of Contentions in Response to Staff's Supplemental Draft Environmental Impact Statement (June 24, 2013) [hereinafter "Exelon Answer"]; NRC Staff Answer to [NRDC's] Resubmission of Contentions in Response to Staff's Supplemental Draft Environmental Impact Statement (June 24, 2013) [hereinafter "NRC Staff Answer"].

⁷ See [NRDC's] Reply in Support of Resubmission of Contentions (July 8, 2013) [hereinafter "Reply"].

II. ANALYSIS AND RULING

A. Positions of the Parties

NRDC states that “the purpose of the update is to simply direct the original Contentions to the DSEIS rather than the [ER], since the bases for the Contentions has not changed.”⁸ That is, NRDC does not appear to argue that there is some new and significant information within the DSEIS that makes its previously inadmissible⁹ contentions admissible. Indeed, NRDC states that “[o]ther than accepting these updated Contentions NRDC seeks no action from the Board at this time.”¹⁰ Both Exelon and the NRC Staff oppose this request.

Exelon contends that NRDC’s motion is “without legal basis,” and argues that “the Board should reject the Resubmitted Contentions.”¹¹ Exelon claims that this Board lacks jurisdiction to “accept” these resubmitted contentions because NRDC’s waiver petition (which seeks a waiver in order to litigate an essentially identical set of contentions) is currently pending before the Commission.¹² Exelon also contends that the motion is untimely and fails to satisfy the Commission’s contention admissibility requirements.¹³

The NRC Staff argues that “[t]he Board should not accept or admit any of NRDC’s resubmitted contentions because NRDC has not demonstrated that its contentions meet” the

⁸ Motion at 2.

⁹ In addition to finding NRDC’s waiver petition lacking in LBP-13-01, this Board earlier found a number of NRDC’s contentions inadmissible in its initial ruling on NRDC’s initial petition to intervene in LBP-12-08. 75 NRC 539, 570-71 (2012).

¹⁰ Motion at 9.

¹¹ Exelon Answer at 3.

¹² Id. at 10.

¹³ Id. at 10-18.

Commission's timeliness and contention admissibility requirements.¹⁴ The NRC Staff does note, however, that it "is not opposed to tolling the deadline for NRDC to file updated SAMA contentions based on the Staff's DSEIS until the Commission rules on NRDC's pending Waiver Petition."¹⁵

B. Analysis

It appears to us that Exelon and the NRC Staff have built up and burned down a "straw man" version of NRDC's request. Despite NRDC's explanation that its motion is "not intended to litigate any issue not yet ripe for resolution"¹⁶ and does not seek any action from the Board other than "acceptance" of its new contentions,¹⁷ both Exelon and the NRC Staff stress that NRDC has not satisfied the Commission's contention admissibility criteria.¹⁸ As NRDC states in its reply, "each of Exelon and Staff's arguments ignore that NRDC is not asking the Board to admit Contentions previously rejected, but simply to accept that NRDC has directed them to the DSEIS so they are preserved for further review."¹⁹ We agree with NRDC and therefore do not analyze the admissibility of these new contentions.

Some confusion on the part of Exelon and the NRC Staff is surely understandable, though, as it is unclear what, if any, regulatory basis NRDC has for asking this Board to "accept," but not admit, new contentions. Despite this regulatory ambiguity, NRDC's intent in filing this motion is clear – it simply wishes to preserve its right to litigate these contentions

¹⁴ NRC Staff Answer at 2.

¹⁵ Id. at 5.

¹⁶ Motion at 2.

¹⁷ Id. at 9.

¹⁸ Exelon Answer at 12-18; NRC Staff Answer at 2-3.

¹⁹ Reply at 6.

directed at the DSEIS should the Commission rule in its favor on the pending waiver petition. In other words, it seems that NRDC is reasonably concerned that if it had waited to submit these new contentions until after a potential ruling in its favor by the Commission on the pending waiver petition, Exelon and/or the NRC Staff would have opposed the contentions on the grounds that they are untimely – that is, that they were filed too late after the publication of the DSEIS.²⁰

We believe that the NRC Staff's proposal of tolling the deadline to submit DSEIS-related contentions (or, we might add, Final SEIS-related contentions, should the NRC issue the FSEIS prior to a Commission ruling on the waiver petition) pending Commission action on the waiver petition is a reasonable approach to addressing NRDC's concerns. Indeed, NRDC states in its reply that "if the Board is not inclined to [accept the contentions], at minimum it should adopt the Staff's suggested approach."²¹ Because we are unaware of any regulatory authority for licensing boards to "accept," but not admit, contentions (and indeed, because we are unaware what such "acceptance" would even entail, from an administrative perspective), we do not do so here. Rather, we will toll the deadline for NRDC to resubmit these contentions after the Commission rules on the pending waiver petition, should NRDC deem it appropriate to do so.

²⁰ See Reply at 6.

²¹ Id. at 2.

III. CONCLUSION

For the reasons discussed above, NRDC's motion for the Board to "accept" its new contentions is DENIED. However, consistent with the approach advanced by the NRC Staff, we hereby toll the deadline for NRDC to re-file these DSEIS-related contentions.²² NRDC may re-submit these contentions within 30 days of the issuance of any Commission order granting the currently pending waiver petition.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William E. Kastenber
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 12, 2013

²² Should the NRC issue the Limerick FSEIS prior to ruling on the waiver petition, NRDC's deadline to update these contentions to challenge the FSEIS will be tolled as well. The NRC Staff currently projects that the FSEIS will be issued in November 2013. See <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/limerick.html>.

UNITED STATES OF AMERICA
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In the Matter of)
)
Exelon Generation Company, LLC) Docket Nos. 50-352-LR and 50-353-LR
(Limerick Generating Station, Units 1 and 2))
) ASLBP No. 12-916-04-LR-BD01
(License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Resubmission of Contentions)** have been served upon the following persons by Electronic Information Exchange.

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Limerick Generating Station, Units 1 and 2, Docket Nos. 50-362-LR and 50-363-LR
MEMORANDUM AND ORDER (Ruling on Resubmission of Contentions)

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[Original signed by Clara I. Sola _____]
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Dated at Rockville, Maryland
this 12th day of July 2013