

November 12, 2004 (10:28am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 52-007

EXELON GENERATION COMPANY, LLC

ASLBP No. 04-821-01-ESP

(Early Site Permit for the Clinton ESP Site)

November 12, 2004

EXELON GENERATION COMPANY'S ANSWER IN
OPPOSITION TO INTERVENORS' MOTION TO SUSPEND PROCEEDING
PENDING REINSTATEMENT OF AGENCYWIDE DOCUMENT ACCESS AND
MANAGEMENT SYSTEM

On November 4, 2004, the Environmental Law and Policy Center, Blue Ridge Environmental Defense League, Nuclear Energy Information Service, Nuclear Information and Resource Service, and Public Citizen (collectively, "Intervenors") filed a joint motion in the Clinton Early Site Permit ("ESP") proceeding requesting that the ESP proceeding be suspended until 30 days after the Nuclear Regulatory Commission's ("NRC") Agencywide Document Access and Management System ("ADAMS") is restored in its entirety ("Suspension Request").¹ Intervenors' justification for the Suspension Request is that without such access, they are deprived of a meaningful opportunity for a hearing.²

¹ On October 25, 2004, the NRC temporarily restricted public access to documents on ADAMS, including Exelon and Staff-generated documents pertaining to this proceeding, pending completion of an additional security review. Counsel for the NRC staff informed the Atomic Safety and Licensing Board ("ASLB") in this proceeding of this action in a letter dated October 25, 2004.

² Suspension Request at 3.

As explained in more detail below, the published hearing schedule for this proceeding does not require Intervenor to take any action for at least one year.³ Further, Exelon is willing to provide Intervenor directly with copies of relevant documents or correspondence in its possession that Intervenor may request during any period in which ADAMS is unavailable. Therefore, Intervenor's assertions that it will suffer "grave prejudice"⁴ by this temporary delay is both unsupported and premature.

For these and other reasons discussed below, Intervenor's request for suspension should be denied.

**The Temporary Suspension of Access to Documents on ADAMS at
This Stage in the Clinton ESP Proceeding Does Not Deprive Intervenor of the
Ability to Meaningfully Participate in This Proceeding**

Exelon filed its ESP application on September 25, 2003, and the notice of this proceeding was issued on December 12, 2003. Therefore, the Intervenor have had access to the ESP application for about one year.

The Intervenor filed their petition to intervene on January 12, 2004. The petition was granted and one contention (Contention 3.1 pertaining to the alternatives of wind and solar power) was admitted in the ASLB's Memorandum and Order dated August 6, 2004. Following the admission of this contention, both Exelon and the NRC filed their initial discovery disclosures under 10 CFR § 2.336 on September 7, 2004. Therefore, the Intervenor have had two months to obtain documents identified in these disclosures, and Exelon has provided the Intervenor with all of the documents they have requested.

³ See Order Establishing Hearing Schedule in this proceeding, dated October 27, 2004.

⁴ Suspension Request at 4.

It is not apparent that the Intervenor is in need of any more documents from either the NRC staff or Exelon, and Intervenor's Suspension Request does not identify any document that Intervenor currently need and have been unable to obtain.⁵ If the Intervenor need a document, they should identify it and Exelon will exercise its best efforts to obtain a copy for the Intervenor. Absent identification of any needed document, Intervenor's allegation that they cannot meaningfully participate in this proceeding rings hollow.

Furthermore, given the current status of this proceeding, there is no ongoing activity to suspend. On October 27, 2004, the Board issued an Order Establishing a Hearing Schedule in this proceeding. The following milestones are provided in that Order: (1) Staff issuance of the draft environmental impact statement ("DEIS") in approximately March 2005; (2) Staff issuance of the final environmental impact statement ("FEIS") in approximately October 2005; and (3) submission of Intervenor's initial written statements of position and written testimony 45 calendar days following receipt of the FEIS.⁶

As seen from the above hearing schedule, this proceeding has essentially just begun. There are no near-term actions pending in this proceeding. The earliest milestone is Staff issuance of the DEIS in approximately March 2005 -- almost four months away.⁷

⁵ The Suspension Request, p. 3, claims that "Intervenor has no access to generic NRC documents regarding advanced reactor siting and design issue." This claim is simply incorrect. Although NRC did remove public access to ADAMS, it did not remove public access to the NRC web page which includes numerous generic documents related to advanced reactor siting and design issues (including regulatory guides and the standard review plan).

⁶ The Board's October 27, 2004 Order includes additional milestones, all of which are keyed to Staff issuance of the FEIS.

⁷ The ASLB does not have the authority to suspend the NRC staff's review of the ESP application. See *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978).

Intervenors themselves are not required to take any action until after October 2005 at the earliest – almost 12 months away. In summary, none of the parties is required to take any action in this proceeding until late next year (except for filing updates to their discovery disclosures under 10 CFR § 2.336). There simply are no actions to be suspended.

The NRC has recently stated that the restrictions on public access to ADAMS are only temporary and are expected to be removed within the next few weeks.⁸ In fact, the NRC has already restored access to certain references applicable to the proposed spent fuel repository and expects to restore access to remaining documents over the next few weeks, with a priority placed on hearing-related documents such as those in the Clinton ESP proceeding.⁹ Given the absence of any pending or even near-term actions or milestones in this proceeding and the expected restoration of ADAMS within the next few weeks, Intervenors simply have no legitimate basis to assert that they may be prevented from “making an effective case on admitted issues or raising new issues in a timely way.”¹⁰ Intervenors have also not cited any prior cases in which licensing proceedings were suspended based on the temporary unavailability of relevant documents.

We are not aware of any prior instances in which an ASLB suspended a licensing proceeding based on the temporary unavailability of potentially relevant documents. When the NRC previously removed public access to ADAMS to conduct a similar

⁸ See NRC Press Release, “NRC Restores Various Documents Removed From Web Site for Security Review,” November 4, 2004.

⁹ *Id.*

¹⁰ Suspension Request at 4.

security review in response to the September 2001 terrorist attacks, the ASLB in the *Duke Energy Corp. (McGuire and Catawba Nuclear Stations) License Renewal Proceeding* granted Intervenor's an additional three weeks to submit petitions and contentions due to "unavoidable and extreme circumstances."¹¹ In that case, access to ADAMS was suspended during the period in which proposed contentions were to be submitted. No such circumstances currently exist in this case.

Furthermore, the type of indefinite suspension requested by the Intervenor's would be inconsistent with the Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). As provided in that Policy:

the Commission's objectives are to provide a fair hearing process, *to avoid unnecessary delays in the NRC's review and hearing processes*, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. (48 NRC at 19) (emphasis added).

The Commission's policy of avoiding unnecessary delays in hearing proceedings is especially apropos to the Intervenor's Suspension Request, given that the Intervenor's have not identified any documents that they need but are unable to obtain.

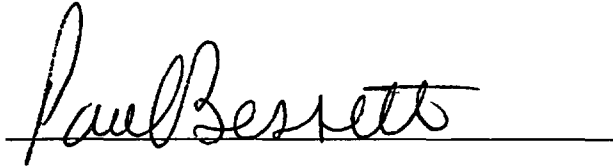
In summary, the Intervenor's have not identified any need for any specific documents from ADAMS. To the extent that Intervenor's may have a need in the future, they have not shown why they would be unable to gain access to the documents through the discovery process provided in 10 CFR § 2.336 and Exelon's offer to provide documents to the Intervenor's. In the absence of such a need or showing, there is no reason to suspend this proceeding.

¹¹ *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, LBP-01-31, 54 NRC 242 (2001).

Conclusion

For the reasons stated above, Exelon respectfully requests that Intervenor's

Suspension Request be denied.

A handwritten signature in dark ink, reading "Paul Bessette", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Exelon Generation Company's Answer in Opposition to Intervenor's Motion to Suspend Proceeding Pending Reinstatement of Agencywide Document Access and Management System" in the captioned proceeding have been served as shown below by deposit in the United States mail, first class, this 12th day of November, 2004. Additional service has also been made this same day by electronic mail as shown below.

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