

August 29, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S UNOPPOSED RESPONSE TO THE BOARD'S NOTICE

INTRODUCTION

On August 22, 2012, the Atomic Safety and Licensing Board ("Board") notified the parties that the NRC amended its Part 2 regulations related to adjudicatory proceedings.¹ The Notice described some of the Part 2 amendments and stated that the parties should inform the Board by August 29, 2012 if they believe the amendments require any changes to the Initial Scheduling Order ("ISO").² The NRC staff ("Staff") believes that the Part 2 amendments warrant the following changes to the ISO.

¹ Notice (Advising Parties of Amendments to 10 C.F.R. Part 2), at 1 (Aug. 22, 2012) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML12235A265) ("Notice").

² *Id.* at 2; Initial Scheduling Order (May 7, 2012) (ADAMS Accession No. ML12128A295) ("ISO").

DISCUSSION

A. Additional Contentions

The amendments made several changes to Part 2 which impact the ISO's section on additional contentions. Prior to the amendments, NRC regulations contained two provisions potentially applicable to contentions filed after the initial filing period: 10 C.F.R. § 2.309(c)(1), governing nontimely filings, and 10 C.F.R. §2.309(f)(2), governing new or amended contentions. The Part 2 amendments eliminate the provisions on nontimely filings, currently in 10 C.F.R. § 2.309(c)(1), and move the provisions on new or amended contentions currently in § 2.309(f)(2) to §2.309(c)(1).³

Additionally, the Part 2 amendments clarify that 10 C.F.R. § 2.323, the provision normally governing motions in NRC practice, does not apply to motions for new or amended contentions under the new § 2.309(c).⁴ Moreover, the Part 2 amendments provide that the time periods for answers and replies concerning initial contentions in new 10 C.F.R. §2.309(i) also apply to answers and replies on new or amended contentions.⁵

As a result, the new rules eliminate the need for parts of sections 5 and 6 of the ISO, which govern new and amended contentions. Those sections currently read:

5. Timeliness of New and Amended Contentions

NRC regulations state that new or amended contentions may be filed after new information becomes available provided that, among other requirements, the contentions are "submitted in a timely fashion based on the

³ Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46562, 46566-67, 46571-72, 46582-83, 46,591(Aug. 3, 2012).

⁴ *Id.* at 46,567, 46,574, 46,583, 46,593.

⁵ *Id.* at 46,592.

availability of the subsequent information.” The regulations do not define the phrase “timely fashion.”

For purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed “timely” under 10 C.F.R. § 2.309(f)(2). Any contention filed later than that will be deemed “nontimely” under 10 C.F.R. § 2.309(c), and any motion to admit such a “nontimely” contention will be expected to address the eight factors found in that regulation.

6. Procedures Governing New and Amended Contentions

We adopt the proposal of the parties, as follows:

[A] party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2) or a motion for leave to file a nontimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Exelon and the NRC Staff may file an answer within twenty-five (25) days after service of the motion and proposed contention.

The parties disagree on the length of time that NRDC shall be provided to reply the Exelon’s and NRC Staff’s answers. Exelon proposes a seven-day deadline, in accordance with 10 C.F.R. § 2.309(h)(2). NRDC proposed a 14-day deadline, because intervenors are often faced with the task of replying to lengthy answers filed by both applicants and the NRC Staff, and that the standard seven-day deadline does not account for weekends or holidays. In short, NRDC contends that a seven-day deadline is “unreasonably short.” In the interest of ensuring adequate time to respond to potentially two separate answers, we agree. NRDC shall have 14 days to file a reply to any answers to a motion to admit new or amended contentions.⁶

Given the recent Part 2 amendments, it is no longer necessary to discuss consolidated briefing for new or amended contentions and provide which deadlines apply to responses to those

⁶ ISO at 7-8 (footnotes omitted).

contentions. Therefore, the Staff proposes that the first paragraph of section 6 of the ISO be eliminated.

In addition, the new § 2.309(i) specifies that a new or amended contention's sponsor will have seven days to file a reply to an answer to the new or amended contention. As stated above, the ISO provides a 14 day period for such replies. Because this language in the ISO reflects a case-specific ruling by the Board, the Staff proposes retaining the second paragraph of section 6, with modifications to address new citations.

Under the new rules, all contentions filed after the initial deadline will need to meet the timeliness criteria currently in § 2.309(f)(2). Thus, the ISO's discussion of nontimely contentions under current § 2.309(c) in section 5 of the ISO is superfluous. Consequently, the Staff proposes the following revision to sections 5 and 6 of the ISO (deletions are crossed out, additions are underlined).

5. Timeliness of New and Amended Contentions

NRC regulations state that new or amended contentions may be filed after new information becomes available provided that, among other requirements, the contentions are "submitted in a timely fashion based on the availability of the subsequent information." The regulations do not define the phrase "timely fashion."

For purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed "timely" under 10 C.F.R. § 2.309(~~fc~~)(21)(iii). Any contention filed later than that will be deemed "nontimely," ~~under 10 C.F.R. § 2.309(c), and any motion to admit such a "nontimely" contention will be expected to address the eight factors found in that regulation.~~

6. Procedures Governing New and Amended Contentions

~~We adopt the proposal of the parties, as follows:~~

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~~2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Exelon and the NRC Staff may file an answer within twenty-five (25) days after service of the motion and proposed contention.~~

The parties disagree on the length of time that NRDC shall be provided to reply ~~the to~~ Exelon's and NRC Staff's answers to contentions filed after the initial deadline. Exelon proposes a seven-day deadline, in accordance with 10 C.F.R. § 2.309(h)(2). NRDC proposed a 14-day deadline, because intervenors are often faced with the task of replying to lengthy answers filed by both applicants and the NRC Staff, and that the standard seven-day deadline does not account for weekends or holidays. In short, NRDC contends that a seven-day deadline is "unreasonably short." In the interest of ensuring adequate time to respond to potentially two separate answers, we agree. NRDC shall have 14 days to file a reply to any answers to a motion to admit new or amended contentions.

The above revisions would bring sections 5 and 6 of the ISO into conformity with the Part 2 amendments.

B. Mandatory Disclosures and Production of Hearing File

Additionally, the Part 2 amendments limit the scope of the Staff's hearing file disclosure obligations under 10 C.F.R. § 2.336(b) to documents that "are relevant to the admitted contentions."⁷ The ISO does not specifically discuss the scope of the Staff's disclosure obligations, so no revisions are necessary to conform the ISO to the amendments to § 2.336(b). Nonetheless, the Staff takes this opportunity to inform the parties and the Board that in light of this amendment, future hearing file updates will only reflect those documents that "are relevant to admitted contentions" or otherwise subject to disclosure under 10 C.F.R. § 2.1203.⁸

⁷ 77 Fed. Reg. 46,563-65, 46,574-75, 46, 583, 46,593.

⁸ The ISO provides, "Documents disclosed [shall] be those generated through the 1st day of the previous month, allowing parties 30 days to gather, review and disclose documents." ISO at 3 (alterations in original, footnote omitted). The Part 2 amendments provide that the mandatory disclosure updates need not include "documents that are developed, obtained, or discovered during the two weeks before the due date" for the disclosure. 77 Fed. Reg. at 46,575, 46,593. Thus, the ISO provides for an earlier cut-off date for including documents in an update than the new regulations provide. Nonetheless, because the ISO reflects the parties' agreement, sanctioned by the Board, the parties understand the ISO (continued. . .)

C. Dispositive Motions

The Part 2 Amendments also clarify the standards for summary disposition in a subpart L proceeding under 10 C.F.R. § 2.1210.⁹ The Board's Notice stated that the Part 2 Amendments suggest that the normal 10-day filing deadline for motions should apply to dispositive motions but that the ISO provided for a 30-day deadline.¹⁰ The Notice clarified that the 30-day deadline in the ISO will continue to apply to this case, so the Staff finds no reason to modify the ISO's section on dispositive motions.

D. Other Changes

In addition, the Part 2 Amendments moved several existing regulations in Part 2 and changed the citations for other regulations. As a result, the Staff recommends revising the following citations in the ISO that have been outdated by the amendments.

| <u>Page/Line</u> | <u>Delete</u> | <u>Insert</u> |
|------------------|----------------------|-------------------------|
| 9 /7 | 10 C.F.R. § 2.323(c) | 10 C.F.R. § 2.323(a)(2) |
| 9 n. 43/ 2 | 10 C.F.R. § 2.323(c) | 10 C.F.R. § 2.323(a)(2) |
| 10/ 7 | 10 C.F.R. § 2.323(a) | 10 C.F.R. § 2.323(a)(2) |
| 11/ 16 | 10 C.F.R. § 2.323(a) | 10 C.F.R. § 2.323(a)(2) |

Moreover, the amendments to Part 2 change many citations in sections 5 and 6 of the ISO, but if the Board accepts the proposed modification to those sections, those citations will be deleted or fixed.

(. . .continued)

to still control on this issue.

⁹ 77 Fed. Reg. at 46,569, 46,579-80, 46,585, 46,598.

¹⁰ Notice at 2.

CONSULTATION CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), counsel for the Staff consulted on this filing with the counsel for the other parties to this case, the Exelon Generation Company, LLC and the Natural Resources Defense Council. Neither party opposes the Staff's position.

CONCLUSION

For the reasons set forth above, the Staff respectfully believes that the Part 2 amendments warrant the aforementioned changes to the ISO.

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S UNOPPOSED RESPONSE TO THE BOARD'S NOTICE" dated August 29, 2012, have been served upon the following by the Electronic Information Exchange, this 29th day of August, 2012:

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