UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/02/04

COMMISSIONERS:

SERVED 03/02/04

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
DOMINION NUCLEAR NORTH ANNA, LLC	)	Docket No. 52-008
(Early Site Permit for North Anna ESP Site)	)	
In the Matter of	)	
EXELON GENERATION COMPANY, LLC	)	Docket No. 52-007
(Early Site Permit for Clinton ESP Site)	)	
In the Matter of	)	
SYSTEM ENERGY RESOURCES, INC.	)	Docket No. 52-009
(Early Site Permit for Grand Gulf ESP Site)	)	

CLI-04-08

MEMORANDUM AND ORDER

Between December 1, 2003 and mid-January, 2004, the Commission issued three notices, each announcing the opportunity to petition to intervene in a hearing on one of three pending applications for an early site permit (ESP), captioned above. Separate, but overlapping, sets of petitioners timely sought to intervene in the hearings on the applications of Dominion Nuclear North Anna, LLC (Dominion), Exelon Generation Company, LLC (Exelon), and, most recently, System Energy Resources, Inc. (SERI)

for the North Anna ESP site, Clinton ESP site and Grand Gulf site, respectively.[1] In each of the proceedings, subsequent to the intervention petitions, we received the applicant's motion to apply the Commission's newly promulgated less formal hearing procedures ("New Part 2 rules" or simply "New Rules"), which became effective on February 13, 2004, in lieu of the procedures in effect when the hearings were noticed. See 69 Fed. Reg. 2182 (January 14, 2004)(amending 10 C.F.R. Part 2, the NRC Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders).

In this order we direct that all three early site permit proceedings be conducted under the New Rules.

Positions of the Parties in the North Anna proceeding

Dominion's "Motion to Apply New Adjudicatory Process," dated January 16, 2004, (Dominion's motion) requested that this proceeding be governed by the Commission's New Rules. Dominion argues that application of the New Part 2 rules is permitted by the effectiveness provision of the new rule under the express terms that apply the rules to "proceedings noticed on or after the effective date, unless otherwise directed by the Commission." 69 Fed. Reg. at 2,182 (emphasis added). Dominion further asserts that applying the New Rules to its hearing "would promote the efficiency and other benefits intended by the new rule, and [given the early stage at which it would be applied] would result in no prejudice to any party." Dominion's motion at 1. Dominion concludes that applying the New Rules prospectively would require some adjustment to the timing of filing contentions and recommends one.

North Anna Petitioners, whose joint petition to intervene is pending, oppose the motion. They note, in apparent agreement with Dominion's motion on this point, that the Commission "was not required to delay the effectiveness of the rule", but opined that given "the breadth and austerity of the new rules, it was fair for the Commission to provide a 30 day grace period before the rule went into

[1]Blue Ridge Environmental Defense League, Nuclear Information and Resource Service and Public Citizen all sought joint intervention in both North Anna and Clinton and were joined in the latter by Environmental Law and Policy Center and Nuclear Energy Information Service. In Grand Gulf, Nuclear Information and Resource Service and Public Citizen were joined by the National Association for the Advancement of Colored People Claiborne County, Mississippi Branch and Mississippi Chapter of the Sierra Club. We refer hereinafter to "North Anna petitioners", "Clinton petitioners" and "Grand Gulf petitioners". Grand Gulf petitioners included an incorrect citation for the Federal Register notice related to the Grand Gulf application. We deem that error corrected.

effect." North Anna Petitioners' Opposition at 1. In their brief response they do not explain why the Commission should not apply the New Rules, do not elaborate on what they mean by "breadth and austerity" or describe in what way, if any, it would be unfair for the Commission to apply the New Rules.

Similarly, they fail to flesh out how the "novelty of the proceeding and the complexity of the issues" would be better served by the old rules. They simply conclude with their opinion that "a formal hearing will be a more effective and efficient means of resolving the parties' disputes".

The NRC staff does not oppose Dominion's motion. The staff states that the application of the New Rules would be intended to achieve "long-standing agency goals without prejudice to the substantive opportunity of any person to participate in this proceeding," noting that North Anna Petitioners had failed to identify any specific procedure in the now-superseded Rules of Practice which would be unavailable to them if it is necessary to resolve any contested issue.
See New 10 C.F.R .§2.310, 69 Fed. Reg. at 2240.

Positions of the Parties in the Clinton Proceeding

On January 28, 2004, Exelon filed a motion seeking application of the New Rules to the Clinton ESP hearing. In addition to making arguments similar to those made by Dominion, Exelon emphasizes the early stage of the proceeding, specifically that no contentions had yet been filed and that a Licensing Board had not yet been appointed. For those reasons, it maintains application of the New Rules would not "disrupt this proceeding", and for "similar reasons", Exelon asserts that the New Rules would not "prejudice any of the parties". Exelon motion at 2.

Exelon urges that the application of the New Rules would be "especially appropriate" in that no ESP hearing had ever been conducted under the old part 2 rules and that all future applications would be conducted under the new ones. Thus there would be "particular merit" to proceeding in Clinton under the New Rules in order to establish appropriate precedents that will ensure consistent treatment and add predictability for future ESP proceedings. Exelon motion at 3.

Noting that all of the North Anna Petitioners were also petitioners in Clinton, Exelon

addresses the argument made by petitioners in North Anna that due to the "novelty of the proceeding" and " complexity of the issues" a "formal hearing" would be more effective and efficient in resolving parties' disputes. Exelon responds that arguments for a formal hearing are inapposite because the issue is not whether to hold a formal hearing, but rather which rules to apply. Nonetheless, Exelon provides a three-pronged answer, that the matters involved in Clinton did not seem to raise complex issues, that the Commission had already concluded in its Part 2 rulemaking that complexity was not a sufficient basis to require a formal hearing and that the most formal procedures (apparently referring to cross examination) are appropriate only for issues such as those that go to credibility of an eyewitness or intent or motive of a person providing testimony. Exelon motion at 3-4.

On February 6, 2004, Clinton petitioners responded in opposition. They argue that the new rule "radically alters the scope and nature of hearings," that a 30-day grace period (before the New Rules become effective) was appropriate and that the Commission should honor it.[2] They maintain further that the pendency of an appeal of the New Rules before the United States Court of Appeals for the First Circuit and their own evaluation of the likely success of that appeal make it senseless for the Commission to go forward under the New Rules with a proceeding that would be at risk of requiring repetition. In evaluating the likelihood that the Commission would not be allowed to maintain its New Rules, the petitioners cite various cases and a 1989 memorandum by the then NRC General Counsel—all allegedly to the effect that the Commission cannot depart from its current rules for formal hearings.

The NRC staff's answer in Clinton, dated February 12, 2004, mirrored its response in North Anna, concluding that the staff did not oppose the Applicant's motion for application of the New Rules for substantially the same reasons that it had previously provided.

[2]Clinton petitioners' point that the New Rules do not become effective until mid-February has, at the least, been overtaken by time.

Positions of the Parties in the Grand Gulf Proceeding

System Energy Resources, Inc. (SERI) filed its motion requesting application of the New Part 2 Rules of February 19, 2004. SERI argues that the new Part 2 constitutes an improvement over the earlier version and that use of more formal adjudicatory procedures is not warranted. Applicant claims that "a less formal hearing process will avoid needless delay and unproductive litigation, focus the hearing on well-defined contentions and at the same time ease the burdens in hearing preparation and participation *for all participants* " (emphasis in original). Furthermore, use of the New Part 2 would result in "no interruption, delay, or prejudice to any participant in this proceeding." SERI further argues that the pendency of a judicial challenge to the New Part 2 should not delay its implementation. SERI claims that this would lead to the result that the Commission must effectively stay implementation of the New Part 2 for months, while the matter is being litigated.

Grand Gulf petitioners in a March 1, 2004 pleading oppose the use of the New Part 2 rules. Petitioners believe that use of the old Part 2 is needed to "maintain fairness and regularity in the decisionmaking process" and that use of the New Part 2 would not improve the hearing process. Petitioners argue that given the novelty of the proceeding and the potential complexity of the issues, a formal hearing will be a more effective and efficient means of resolving the parties' disputes. Petitioners, like the petitioners in the Clinton proceeding, assert that the pendency of a legal challenge to the new rule in the Federal courts of appeals further weighs against retroactive application of Part 2 in this case. Petitioners state that if the NRC does not prevail in that litigation, it risks the possibility of being ordered to repeat the hearing using the old Part 2 rules.

Commission Decision

On issuance of the New Part 2 rules, the Commission provided for them to apply to proceedings noticed after February 13, 2004; however, we expressly reserved the option of making individualized decisions to do otherwise where we find that it is warranted. At that time, we did not endeavor to address potential arguments for or against application of the New Rules in any individual cases that were only commencing. As a general matter, we could not foresee all particular circumstances that

might be presented and thus retained the discretion to expand or restrict the application of the New Rules. Our reservation resulted in significant part from our awareness that there might be sound reasons to apply the New Rules to earlier noticed but still incipient proceedings in any number of situations that were not immediately predictable and thus not readily definable. Some we might designate sua sponte, see Notice of Hearing for Louisiana Energy Services, CLI-04-03, __NRC __, January 30, 2004; others, as here, on consideration of the motion of a party or potential party to a hearing. There has been no argument that we lack authority to exercise that discretion and thus we proceed to consider whether to do so here.

Three Applicants for a license for an early site permit seek the efficiency and other benefits intended from applying the New Part 2 rules in the first hearings on the first applications for Early Site Permits. On consideration, the Commission is convinced that it will be preferable to apply the New Rules in these circumstances where no previous hearing for an Early Site Permit has been held, where these hearings are still at an early stage and where the hearings are likely to continue for a substantial period beyond the effective date of the New Rules. No person or organization seeking intervention has yet been admitted as a party or submitted contentions. Our exercise of discretion to take this action will not only provide for the early site permit hearings the benefits sought by the Commission in promulgating the New Rules but, perhaps more importantly, will enable the establishment of meaningful precedent for a line of hearings to follow should subsequent early site permit applications be filed. It makes little sense to hold hearings on a new class of applications using the old Part 2, when future hearings on such applications will be conducted under the New Part 2. We are therefore ordering the use of the New Part 2 in all three proceedings.

As we made clear in reciting the position of the North Anna Petitioners, there is not sufficient development of their argument to warrant much further discussion. Essentially they oppose the application of the New Rules with an unexplained belief that the old rules will result in a better hearing and a similarly unexplained suggestion of unfairness. As to the former, a full explanation of the Commission's contrary estimate appears in the statement of considerations for the New Rules.

See 69 Fed. Reg. 2182, 2190 - 2215. As to the latter, none of the Petitioners has specified any unfairness that would result from granting the Applicants' requests to apply the New Rules, and we know of none. (We resolve below a minor technical difference in timing for filing contentions between the two sets of rules to avoid any disadvantage to Petitioners.) Moreover, we believe that there can be no unfairness because we are applying these procedures before any intervention petitions have been granted and before a Licensing Board has been appointed in any ESP proceeding. Even parties have no vested interest in any form of procedure; the Commission may change its rules of procedure so long as there is adequate notice and no prejudice. National Whistleblower Center v. NRC, 208 F. 3d. 256, 262 (D.C. Cir. 2000), cert. denied 531 U.S. 1070 (2001); City of W. Chicago v. NRC, 701 F.2d 632, 647 (7th Cir. 1983), citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Certainly, therefore, procedures may be altered without prejudice before the admission of parties. None of the petitioners has established that they will not be fully able to represent their views using the full range of adjudicatory procedures set forth in the New Part 2. Moreover, the Commission has changed its rules in an orderly process and in full compliance with the Atomic Energy Act and the Administrative Procedure Act, and notwithstanding the pendency of a legal challenge to the New Rules, we have no expectation of being required to withdraw them.

Because we conclude that applying the New Part 2 rules would result in no interruption, unwarranted delay, added burden or unfairness in these proceedings, we hereby decide that they shall govern with the exception of the New Rules' prescribed schedule for the petition for hearing and contentions. Petitioners in all three proceedings have 60 days from the date of this order to submit contentions.

The Commission refers each of the petitions for hearing referenced in the foregoing discussion to the Atomic Safety and Licensing Board Panel. Pursuant to 10 C.F.R. 2.334, the Licensing Boards established to preside over these proceedings shall establish schedules that will result in timely decisions on these applications. The Licensing Boards may also issue any orders they deem appropriate specifying the format for contentions.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of March 2004