

February 27, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

March 1, 2004 (10:17AM)

In the Matter of )  
 )  
SYSTEM ENERGY RESOURNCES, INC. )  
 )  
(Grand Gulf Nuclear Station )  
Early Site Permit )

Docket No. 52-009

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

NRC STAFF'S ANSWER TO HEARING REQUEST AND PETITION TO INTERVENE BY THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CLAIBORNE COUNTY, MISSISSIPPI BRANCH, NUCLEAR INFORMATION AND RESOURCE SERVICE, PUBLIC CITIZEN, AND MISSISSIPPI CHAPTER OF THE SIERRA CLUB

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the "Hearing Request and Petition to Intervene" (Petition) jointly filed on February 12, 2004, by the National Association for the Advancement of Colored People Claiborne County, Mississippi Branch (NAACP), Nuclear Information and Resource Service (NIRS), Mississippi Chapter of the Sierra Club (Sierra Club), and Public Citizen (collectively, Petitioners) in this Early Site Permit (ESP) proceeding. For the reasons set forth below, the Staff does not object to NAACP's, NIRS', Sierra Club's, or Public Citizen's standing to intervene in this matter. However, Petitioners must still proffer at least one admissible contention pursuant to 10 C.F.R. § 2.714(b).

BACKGROUND

On October 16, 2003, System Energy Resources, Inc. (SERI) submitted an application pursuant to 10 C.F.R. §52.15 in which it requested an ESP for property co-located with the existing Grand Gulf Nuclear Station near Port Gibson, Mississippi (Grand Gulf ESP site). A Notice of Hearing initiating the proceeding on the application and offering an opportunity to petition for leave

to intervene was published in the *Federal Register* on January 16, 2004. 69 Fed. Reg. 2,636 (2004). In response to the Notice, NAACP, NIRS, Sierra Club, and Public Citizen filed a petition in which they jointly seek to intervene in the ESP proceeding. As set forth below, the NRC Staff has no objection to NAACP's, NIRS', Sierra Club's, and Public Citizen's standing.<sup>1</sup>

## DISCUSSION

### A. Legal Requirements for Intervention

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that they have standing to do so. See Section 189a.(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239(a) (AEA or Act). In order to establish standing, the "petitioner shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in [§2.714(d)(1)]." 10 C.F.R. §2.714(a)(2). In addition, the petitioner must advance a "specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene." *Id.*

The petitioner, whether an individual or an organization, must establish the requisite interest for standing. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). In order to establish the requisite interest for standing, the petitioner must allege that the proposed action will cause "injury-in-fact" to the petitioner's interest, and that the injury is arguably within the "zone of interest" protected by the statutes governing the proceeding. See *e.g., Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993). In Commission proceedings, the injury must fall within the "zone of

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<sup>1</sup>In order to be admitted as parties to the proceeding, petitioners must still proffer at least one admissible contention pursuant to 10 C.F.R. § 2.714.

interests” sought to be protected by the AEA or the National Environmental Policy Act of 1969 (NEPA). *Quivira Mining Co. (Ambrosia Lake Facility)*, CLI-98-11, 48 NRC 1, 6 (1998).

To establish injury-in-fact, the petitioner must establish (a) that petitioner personally has suffered or will suffer a “distinct and palpable” harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 195 (1998), citing *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC* 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle*, 38 NRC at 32. It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels Corp. & Gen. Atomic (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 71-72 (1994).

The injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. A petitioner must have a “real stake” in the outcome of the proceeding to establish injury-in-fact for standing; while this stake need not be a “substantial” one, it must be “actual,” “direct” or “genuine.” *Houston Lighting and Power Co. (South Texas Project, Units 1 and 2)*, LBP-79-10, 9 NRC 439, 447-48 (1979), *aff’d* ALAB-549, 9 NRC 644 (1979). An abstract, hypothetical injury is insufficient to establish standing to intervene. *International Uranium Corp. (White Mesa Uranium Mill)*, CLI-98-6, 47 NRC 116, 117-18 (1998).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury in fact test either (1) by showing an effect upon its organizational interests, or (2) by showing that at least one of its members would suffer as a result

of the challenged action, sufficient to confer upon it “derivative” or “representational” standing. *South Texas Project*, 9 NRC at 447-448.

Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31 (1998). *Georgia Tech*, CLI-95-12, 42 NRC at 115. The alleged injury in fact to the member must fall within the purposes of the organization. *Private Fuel Storage*, 48 NRC at 33-34.

Historically, standing has been granted based on a presumption that a petitioner’s close proximity to the facility at issue is sufficient, without more, to establish the requisite injury-in-fact. *Virginia Electric Power Company* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979). As the “proximity presumption” evolved, it has been applied in a variety of proceedings in which petitioners have lived in ranging distances from the site. See e.g. *Northern States Power Co.* (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-107, 6 AEC 188, 190 (1973) (30-40 miles from the site); *Virginia Electric and Power Company*, 6 AEC at 634 (16 miles from the site); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421, n.4 (1977) (50 miles from the site, standing denied on other grounds). Other types of licensing actions have also adopted a variation of the “proximity presumption.” See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).<sup>2</sup> In *St Lucie*, the Commission noted:

It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto... However, those cases involved the construction or operation of the reactor itself,

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<sup>2</sup>While this case addressed an exemption from regulatory requirements, the Commission decision characterized the type of proceeding subject to the “proximity presumption.”

with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences.

*Id.* at 329 (citations omitted). Therefore, in other licensing actions, “absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact...’” *St. Lucie* 30 NRC 329-30. While there arguably are differences between an ESP and a construction permit or operating license, the NRC Staff does not object to Petitioners’ standing based on their members’ proximity to the Grand Gulf ESP site.

#### B. Petitioners’ Standing to Intervene

Petitioners maintain that they have established representational standing to intervene in this proceeding by demonstrating that several members of their respective organizations have standing to intervene and by identifying aspects within the scope of the proceeding. All four organizations have asserted that their members reside within 50 miles of the Grand Gulf ESP site. In addition, Petitioners claim an injury-in-fact to several of their members who assert that because nuclear reactors are “inherently dangerous,” the construction of one or two new nuclear reactors could jeopardize their health and safety. Affidavit at 1.<sup>3</sup> In order to obtain representational standing, an organization must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member’s interest. As set forth below, NAACP, NIRS, Sierra Club’, and Public Citizen satisfy the representational standing requirement.

##### 1. NAACP

In the Petition, NAACP has alleged representational standing based on the interests of four members: A.C. Garner, Jessie Davis, Ellis Neal, and J. Gilbert Buck. These individuals have provided affidavits in support of NAACP’s standing in which they assert that they reside in close

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<sup>3</sup> The assertions contained in all of the Petitioners’ affidavits are identical in substance. Therefore, unless reference to a specific affidavit is warranted, all will be noted in this pleading as “Aff.”

proximity—within 50 miles—of the Grand Gulf ESP site and that nuclear facilities in close proximity to their homes “could pose a grave risk to [their] health and safety.” Aff. at 1. Based on the above, and in light of the proximity standard set forth in *St. Lucie*, the NRC staff does not challenge the standing of each of NAACP’s five members to intervene in his or her own right. In addition, all members have authorized NAACP to represent their interests in the instant proceeding. *Id.* Thus, the NRC staff does not object to NAACP’s representational standing to intervene.

## 2. NIRS

NIRS asserts representational standing to intervene based on the affidavits of three of its members: Martha Ferris, Shelby F. Ferris, and Evan Doss, Jr. All of the affiants claim standing based on their proximity to the Grand Gulf ESP site and each has authorized NIRS to represent their interests in this matter. Aff. at 1. All affiants claim to reside within 50 miles of the Grand Gulf ESP site. As the Staff would not contest the affiants’ standing to intervene as individuals, the Staff does not object to NIRS’s representational standing.

## 3. Sierra Club

Sierra Club claims to have representational standing to intervene based on the affidavits of four of its members: Janet Akers, Dr. Eugene Ferris, Minor Ferris, and Mary Elizabeth Price. All of Sierra Club’s affiants reside within 50 miles of the Grand Gulf ESP site, and all have authorized Sierra Club to represent their interests in this matter. Aff. at 1. Inasmuch as the Staff would not challenge the affiants’ standing to intervene as individuals, the Staff does not object to Sierra Club’s representational standing.

## 4. Public Citizen

Public Citizen claims to have representational standing to intervene in this proceeding based on the affidavits of three of its members: Kos Kostmayer, Patricia Neveleff, and Hampton Shive. While Mr. Kostmayer resides in Vicksburg, Mississippi, Mr. Shive and Ms. Neveleff have

failed to specify the exact distances they live from the Grand Gulf ESP site. However, all affiants declared that they reside within 50 miles of the Grand Gulf ESP site and all have authorized Public Citizen to represent his or her interests in this matter. Inasmuch as the Staff would not contest the affiants' standing to intervene as individuals, the Staff does not object to Public Citizen's representational standing.

C. Petitioners' Aspects

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is required to state the "specific aspect or aspects of the subject matter of the proceeding" as to which it wishes to intervene. The purpose of this requirement is not to judge the admissibility of the issues, but to determine whether the Petitioners specified "proper aspects" for the proceeding. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277-78 (1978). To constitute an appropriate aspect, the subject matter of the aspects must be within the scope of the application or the proceeding. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991); *Florida Power & Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 151 (2001); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 280 (2001); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 206 (1993).

Petitioners proffer nine aspects of the subject matter of the ESP application that they wish to challenge. Petition at 5-7. Petitioners' Aspect 1 is within the scope of the ESP application:

1. Whether enough information is available regarding reactor designs for the proposed site to permit sound judgments about environmental impacts of the proposed construction and operation of new reactors on the site.

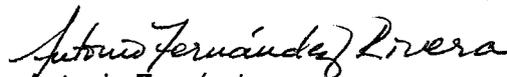
Petition at 5-6 (citations omitted). Since a petitioner is only required to plead at least one aspect that is within the scope of the proceeding, the NRC Staff agrees that the Petitioners' filing meets

regulatory requirements regarding petitions to intervene.<sup>4</sup> Therefore, contingent on the filing of at least one admissible contention, the Petitioners have adequately demonstrated their standing to intervene in the instant hearing.

#### CONCLUSION

For the reasons set forth above, the Staff concludes that NAACP, NIRS, Sierra Club, and Public Citizen have established standing to jointly intervene in this proceeding, and have identified an aspect of the subject matter of the proceeding in which they wish to intervene. Leave to intervene, however, should not be granted unless the Petitioners submit at least one valid contention, pursuant to 10 C.F.R. § 2.714(b).

Respectfully submitted,

  
Antonio Fernández  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 27th day of February, 2004

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<sup>4</sup>Although the Staff agrees that Aspect 1 is within the scope of the proceeding, at this time the Staff does not take a position on the adequacy of the remaining aspects set forth by the Petitioners.

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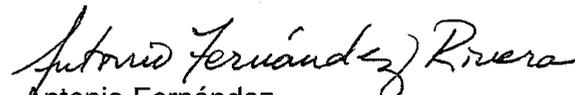
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 )  
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Early Site Permit) )

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter in accordance with 10 C.F.R. § 2.713(b).

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Respectfully submitted,

  
Antonio Fernández  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 27th day of February, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO HEARING REQUEST AND PETITION TO INTERVENE BY THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE CLAIBORNE COUNTY, MISSISSIPPI BRANCH, NUCLEAR INFORMATION AND RESOURCE SERVICE, PUBLIC CITIZEN, AND MISSISSIPPI CHAPTER OF THE SIERRA CLUB" and "NOTICE OF APPEARANCE" for Antonio Fernández in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (\*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (\*\*), this 27<sup>th</sup> day of February, 2004.

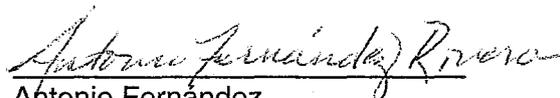
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