RAS 8396

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USNRC

September 1, 2004 (11:17AM)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

Docket No. 52-009

System Energy Resources, Inc. (SERI)

(Early Site Permit for Grand Gulf ESP Site)

BRIEF OF 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 ON APPEAL OF LBP-04-19

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August 27, 2004

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), Appellants, the National Association for the Advancement of Colored People Claiborne County, Mississippi Branch ("NAACP"); Nuclear Information and Resource Service ("NIRS"); Public Citizen; and Mississippi Chapter of the Sierra Club (Sierra Club) hereby submit their brief on appeal of LBP-04-19, Memorandum and Order (Ruling on Standing and Contentions) (August 6, 2004) (hereinafter "LBP-04-19"), which denies Appellants' request for a hearing on the adequacy of System Energy Resources, Inc.'s ("SERI's") application for an early site permit ("ESP") for construction of a new nuclear reactor (or reactors) on the site of the Grand Gulf nuclear power plant in Claiborne County, Mississippi.

Appellants seek reversal of that portion of LBP-04-19, which denies them a hearing on the adequacy of SERI's Environmental Report to discuss the disproportionately high and adverse environmental impacts of a new nuclear plant on the minority and low-income community which resides within the ten-mile Emergency

Planning Zone ("EPZ") surrounding the plant.[1] The decision should be reversed because it disregards Appellants' factual evidence and legal arguments which satisfy the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") standard for an admissible environmental justice contention under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 et seq., as set forth in Commission precedents and the Commission's recently-issued Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (August 24, 2004) (hereinafter "Environmental Justice Policy Statement").

LBP-04-19 must also be rejected because contrary to basic principles of administrative law, it fails to explain why the ASLB found the considerable factual evidence submitted by the Appellants regarding the significant and disparate impacts of the proposed facility on the adjacent minority and low-income community to be insufficient to support an admissible environmental justice contention. In rejecting the contention, the ASLB did no more than recite the elements of the environmental justice legal standard and make a summary finding that the Appellants did not satisfy them. As such, the ASLB has made a guessing game out of this appeal. By rejecting, without explanation, a thoroughly documented and carefully pled environmental justice contention in this proceeding, the ASLB also casts confusion on what is required of the public to raise environmental justice issues in NEPA cases, thus undermining the NRC's stated goal of maintaining "openness and clarity" and "seeking and welcoming public

[1] *See* Contention 3.1, Inadequate Consideration of Disproportionate Adverse Impacts on Minority and Low-Income Community, which is found at page 12 of Contentions of 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 Regarding Early Site Permit Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) (hereinafter "Contentions").

participation" in the process of considering environmental justice issues. Environmental Justice Policy Statement, 69 Fed. Reg. at 52,043.

II. FACTUAL BACKGROUND

A. Claiborne County Demographics and Resources

1. Poverty level and minority representation

SERI proposes to build a new nuclear plant in one of the poorest communities in the State of Mississippi. Claiborne County has a poverty rate of 32.4%, which places it among the top 12 poorest counties in Mississippi. Contentions at 16-17. The poverty level in Claiborne County is more than twice the poverty level of the entire United States.[2] *Id.* The county is also 84.1% African American. Contentions at 16.

When construction of the existing Grand Gulf nuclear power plant began in 1974, Claiborne County residents hoped that the presence of the plant would help to lift the community out of poverty. During the twenty years since construction began, however, the poverty level has remained essentially unchanged. Moreover, the county has declined in population from a peak of 12,279 to 11,830 today. Contentions at 16. The "white flight" syndrome also left the county with higher minority representation, which went from 74.5% African American in 1980 to 84.1% today. *Id.*

2. Lack of emergency response capability

As is the case in most communities that host nuclear power plants, Claiborne County is part of the offsite emergency response organization that is responsible for assisting SERI and protecting the general public in the event of a radiological emergency

[2] Claiborne County income levels are also low in comparison with the state and the rest of the U.S. The 1999 median household income in Claiborne County was $22,615, compared with a 1999 median household income of $31,330 in the State of Mississippi, and a 1999 median U.S. income of $41,994. Contentions at 17.

at the Grand Gulf nuclear power plant. Due to the high level of poverty in the county, however, equipment and staffing for emergency preparedness are grossly inadequate to meet the demands of a radiological emergency. For instance, Claiborne County has only one fire station in operation, although five such stations were originally envisioned for the county. Contentions at 2-23, citing attached Declaration of A.C. Garner, NAACP Claiborne County, Mississippi Branch, par. 7 (April 28, 2004). The only other operable fire station for Claiborne County is located at the Grand Gulf nuclear power plant. *Id.*

The Claiborne County Sheriff's Department, which plays a critical role in security and emergency response for the Grand Gulf Nuclear Station, and is designated as the first responder for any accident or other emergency that occurs at the plant, is similarly under-equipped and under-staffed. Contentions at 23, citing attached Declaration of Joseph C. Davis, President of the NAACP, Claiborne County, Mississippi Branch, par. 5 (April 28, 2004) (hereinafter "Joseph C. Davis Declaration"). The County has only nine law enforcement officers, and only two are on patrol for the entire county at night. *Id.* Moreover, there are only ten patrol cars at the Sheriff's Department, which is inadequate to respond to an emergency at the Grand Gulf nuclear power plant. *Id.* at 10, citing attached Declaration of Frank Davis in Support of Petitioners' Contentions Regarding the Grand Gulf Early Site Permit Application, par. 3 (April 29, 2004) (hereinafter "Frank Davis Declaration").

These deficiencies in the local law enforcement capabilities are particularly significant in light of the current post-9/11 threat environment. As recognized by the Nuclear Energy Institute (NEI), the recent increase in the security threat to nuclear power plants has led to a corresponding and rapid rise in initial response requirements from

local law enforcement agencies, namely the Claiborne County Sheriff's Department. Contentions at 23, citing attached viewgraph presentation by Lance Terry, NEI, "Nuclear Power Plant Security," NRC Regulatory Information Conference (March 2003).

Claiborne County Hospital, the only hospital in the county, is also designated as the first responder in a radiological emergency. Contentions at 24, citing attached Declaration of Wanda C. Fleming, Claiborne County Hospital Administrator, par. 3 (April 27, 2004). The hospital is housed in a 53-year old building with antiquated and deteriorating facilities. Fleming Declaration, par. 4. Constraints on space and finances make it impossible to expand the facility or the base of services offered; or to upgrade vital medical, information and communications equipment, and needed surveillance/security systems. *Id.* In order to provide the most basic services, such as emergency room care, the hospital has had to borrow in excess of half a million dollars. *Id.*, par. 6. The hospital does not have adequate financial resources to effectively prepare for and medically manage a radiological emergency at the existing nuclear power plant, let alone two new reactors. *Id.*

3. Effects of Mississippi tax code

To some extent, the lack of adequate resources for the Claiborne County emergency response agencies can be attributed to the general economic condition of the County; but there is a more insidious and unique factor at work in Claiborne County. While every other county in Mississippi that hosts an electricity generating station is allowed to tax that generating station for its own citizens, the Mississippi Tax Code provides that Grand Gulf is to be taxed by the State instead of the county, and that the taxes on the plant are to be shared with 44 other counties in the State of Mississippi and

within the electricity distribution of the nuclear power station. Contentions at 24-25. *See also Burrell v. Mississippi State Tax Commission,* Supreme Court of Mississippi, 536 So.2d 848 (Miss. Sup. Ct. 1988). As a result of this arrangement, Claiborne County receives only 30% of the tax revenue generated by the Grand Gulf nuclear power plant. *Id.*

B. ESP Proceeding

On January 16, 2004, the NRC published a notice of opportunity to request a hearing on SERI's application for an ESP for the Grand Gulf site. 69 Fed. Reg. 2,636. Appellants responded by filing a hearing request and a set of contentions on May 3, 2004. *See* note 1, supra. Appellant's Contention 3.1 challenged the adequacy of SERI's Environmental Report to address the significant and adverse environmental impacts of a new reactor on the minority and low-income community which resides within the ten-mile radius of the Grand Gulf site. The text of the contention reads as follows:

> **Contention:** SERI's Environmental Report ("ER"), prepared in support of its Early Site Permit application, does not comply with the National Environmental Policy Act ("NEPA") because it does not adequately consider the adverse and disparate environmental impacts of the proposed nuclear facilities on the predominately African American and low-income community of Claiborne County.
>
> At the outset, while the ER acknowledges the existence of minority and low-income populations within a 50-mile radius around the Grand Gulf site, *see* ER § 2.5.4, the ER understates the levels of minority representation and poverty in Claiborne County, which hosts the Grand Gulf site and which takes up much of the area in the portion of Grand Gulf's 10-mile-radius emergency planning zone that lies on the east side of the Mississippi River. As a result, the ER falsely minimizes the disparity of the adverse impacts on the minority and low-income community of Claiborne County.
>
> The ER also fails to address the environmental impacts of the proposed reactor(s) in light of the "factors peculiar to" the minority and low-income community [of] Claiborne County. *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998) (hereinafter "CLI-98-3"). For instance, the ER fails to address the fact that, by virtue of the simple factor of its close proximity to the proposed reactor(s), the minority and low-income

> community bears the highest risk of injury and illness as a result of severe accidents at the proposed facility. Moreover, the ER fails to address the fact that the Claiborne County government is particularly unprepared to respond to a radiological emergency or a security threat at the proposed reactor(s), as a result of the high level of poverty in the county and the effects of a discriminatory tax policy that sends most of the tax revenue from Grand Gulf out of Claiborne County.
>
> The ER also fails to consider the effect of adding two reactors to the Grand Gulf site on property values and the overall economic health of Claiborne County. By concentrating three nuclear power plants on one site, SERI proposes to create a nuclear sacrifice zone in Claiborne County. The ER should consider the predictable decline in property values and the economic health of the area.
>
> The ER is also deficient because it makes no attempt to evaluate the disparity in distribution of the economic benefits yielded by the proposed reactors. For instance, under current tax law, most of the tax revenue generated by the new reactors will go to the State of Mississippi and county governments other than Claiborne County. Most of the jobs generated by the new reactor(s) will go to people who live outside Claiborne County.
>
> Finally, the ER fails to weigh the costs of the proposed reactor(s) to the minority and low-income community against the benefits to the community, or to examine alternatives that would lessen the impact of the facility and/or distribute the costs and benefits more equitably. These alternatives could include consideration of other sites whose surrounding populations are in a better financial position to absorb the costs of mounting an effective response to a radiological emergency at the nuclear plant, or arrangements to more equitably distribute the wealth that is generated by the facility.

The contention was supported by a detailed 13-page basis which discussed the inadequacies of the Environmental Report at length. It was also supported by the expert declaration of Dr. Robert Bullard, who has previously been found to be a qualified expert on environmental justice issues. *See Louisiana Energy Services* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 379 (1997) (hereinafter "LBP-97-8"), *affirmed in part and reversed in part,* CLI-98-3, 47 NRC 77 (1998) (hereinafter "CLI-98-3").

Both SERI and the NRC Staff opposed the admission of Appellants' environmental justice contention. Answer by System Energy Resources, Inc. to Proposed Contentions (May 28, 2004); NRC Staff's Response to Petitioners' Contentions Regarding the Early Site Permit Application for the Grand Gulf Site (May 28, 2004). On

June 22, a panel of the Atomic Safety and Licensing Board ("ASLB") entertained oral argument at NRC headquarters regarding the admissibility of the contention.

On August 6, 2004, in LBP-04-19, the ASLB rejected the contention, holding that it is inadmissible. LBP-04-19, slip op. at 17-18. In rejecting the contention, the ASLB cited the following guidance in a draft environmental justice policy statement that had been published by the Commission in 2003:

> In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad ranging review of racial or economic discrimination.

Id., slip op. at 18, citing 68 Fed. Reg. 62,642, 62,643-33 (November 5, 2003). While conceding that the contention "does adequately indicate the presence of a low-income and minority family concentration near the proposed site," the ASLB found that the contention:

> fails to identify any significant and disproportionate environmental impact on the minority or low-income population relative to the general population arising from the proposed siting of additional reactors on the site at issue so as to raise a genuine dispute on a material issue of fact or law.

Id. Moreover, the ASLB held that Appellants' claim that the minority and low-income population near the site is "disadvantaged with respect to their ability to deal with emergency planning and responses to a potential accident at the facility" is "beyond the scope of the proceeding."[3] *Id.*

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[3] The ASLB also observed, but did not rely on, the alleged "fact" that Appellants' claim is "belied" by "the correspondence with the local emergency planning authorities contained in the SER application." *Id.*

III. ARGUMENT

A. The ASLB Violated Fundamental Principles of Fairness in Administrative Decision-making by Failing to Explain the Basis for Its Decision.

Contrary to basic principles of administrative law, LBP-04-19 fails entirely to explain why the ASLB found the substantial body of factual evidence submitted by the Appellants regarding the significant and disparate impacts of the proposed facility on the adjacent minority and low-income community insufficient to support an admissible environmental justice contention. Given the crucial role that the ASLB's ruling on admissibility of contentions plays in determining whether an interested member of the public will obtain a hearing on its concerns about a proposed nuclear operation, and given the rigor of the pleading standard for contentions, the ASLB should be required to provide an explanation of its ruling which applies the law to the factual evidence submitted in support of Appellants' contention. Therefore, as discussed below, the contention should be remanded for a more complete explanation of the ASLB's ruling.

(1) Standard for admissibility of contentions

Section 189a of the Atomic Energy Act gives interested members of the public the right to an adjudicatory hearing regarding proposed licensing decisions by the NRC. 42 U.S.C. § 2234(a). Under the Commission's regulations, in order to obtain such a hearing, a petitioner must satisfy a rigorous pleading standard. A hearing request must include "contentions" which raise, with "particularity," the concerns the petitioner seeks to litigate. 10 C.F.R. § 2.309(f). For each contention, the hearing requester must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the finding the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinion which support the requester's/petitioner's position on the issue and on which the petitioner intends to rely at a hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. . .

Id.

While the Commission has asserted that its admissibility standard does not rise to the level of a summary judgment standard, its requirement for the presentation of factual support for a contention is more rigorous than the previous admissibility standard, which "[did] not require a petitioner to describe facts which would be offered in support of a proposed contention." Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (August 11, 1989). Thus, the NRC's admissibility standard sets an exacting threshold pleading requirement by requiring a petitioner to state a legal claim and support it with factual evidence that is sufficient to demonstrate a genuine and material dispute with the applicant on a specific licensing question.

(2) The ASLB failed to explain the basis for its decision.

In this case, Appellants submitted detailed and documented factual evidence, supported by an expert declaration, which was facially sufficient to demonstrate a genuine and material dispute of fact with SERI regarding the adequacy of the

Environmental Report to discuss the significant and disparate environmental impacts of a new reactor on the minority and low-income community that resides within a ten-mile radius of the Grand Gulf site. In rejecting the contention, the ASLB announced the legal standard under which it found the contention inadequate and summarily concluded that the legal standard was not met, but it completely failed to explain how and why the factual evidence presented by the Appellants was insufficient to state an admissible claim with respect to an environmental justice violation of NEPA. The following constitutes the entirety of the ASLB's ruling on the extensive body of evidence and legal argument presented in Appellants' contention:

> While this contention does adequately indicate the presence of a low-income and minority family concentration near the proposed site, it fails to identify any significant and disproportionate environmental impact on the minority or low-income population relative to the general population arising from the proposed siting of additional reactors on the site at issue so as to raise a genuine dispute on a material issue of fact or law. Further, putting aside the fact that the Grand Gulf Petitioners [sic] arguments that these particular communities are disadvantaged with respect to their ability to deal with emergency planning and responses to a potential accident at the facility – whether by State taxation laws or otherwise -- are belied by the correspondence with the local emergency planning authorities contained in the SER application, it is apparent such matters are beyond the scope of this proceeding.

LBP-04-19, slip op. at 18.

In fact, as discussed below in Section III.B.2, the contention did provide documented factual evidence to support every element of a valid environmental justice claim. If the ASLB considered this evidence to be insufficient to support an environmental justice claim, it has given Appellants no meaningful notice of the reasons for its determination. Moreover, the ASLB gives no explanation of why it considers Claiborne County's substandard emergency response capability to be "beyond the scope of this proceeding." It is not clear, for instance, whether the ASLB rejected the claim

because it believed the claim relates only to emergency planning and not environmental impacts; whether the ASLB believed that the environmental impacts of the State of Mississippi's discriminatory tax policy are excluded by the Commission's Environmental Justice Policy Statement; or whether it relied on some other rationale. One is left to guess at the rationale employed by the ASLB.

(3) LBP-04-19 violates basic principles of fairness in administrative decisionmaking and undermines NRC's environmental justice policies.

As the Appeal Board has cautioned, "every determination of a board on a matter crucial to the ultimate disposition of the proceeding before it should be sufficiently developed to enable the parties (and reviewing tribunals) to apprehend the essential ingredients of that determination." *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453-4 n.4 (1980) *See also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 40-42 (1977), *affirmed,* CLI-78-1, 7 NRC 1 (1978), quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("it is a well-accepted principle of administrative law that 'the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'")

There can be no doubt that the threshold stage of an NRC licensing proceeding is "crucial to the ultimate disposition of the proceeding," because an adverse ruling on the admissibility of a contention will preclude the hearing requester from being heard on the subject of his or her contention. ALAB-584, 11 NRC at 453-54 n.4. Moreover, it is reasonable to expect that the level of detail and rigor that is demanded of a hearing requester's contention will be met by some degree of rigor in any ruling that denies

admission of that contention. Yet, aside from a brief recitation of the legal standard and a conclusory summary of its ruling, the ASLB gives no indication of the reasoning behind its decision.

The ASLB's failure to explain its decision violates basic principles of fairness in administrative proceedings, in three important ways. First, the lack of an explanation for the ASLB's decision undermines this appeal process by forcing both the Appellants and the Commission to "guess as to the agency's findings or reasons." *Greater Boston Television Corporation v. FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970). Second, it also frustrates the Commission's overall ability to hold the ASLB accountable for rationality and consistency in its administration of the law.

Finally, the ASLB's failure to explain its decision undermines the future administration of the Commission's policies for consideration of environmental justice claims under NEPA. A future petitioner who wishes to avoid rejection of an environmental justice contention will have no idea what were the deficiencies of the Appellants' contention that should be avoided in the future. In this way, the ASLB undermines the NRC's stated goal of maintaining "openness and clarity" and "seeking and welcoming public participation" in the process of considering environmental justice issues. NRC Office Environmental Justice Policy Statement, 69 Fed. Reg. at 52,043. *See also* NRC Office Instruction LIC-203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues at D-2 (2001) (citing NRC Staff's

policy of encouraging "effective public participation" and "meaningful community representation" in the process of considering environmental justice issues.)[4]

B. By Rejecting Appellants' Contention, the ASLB Violated the NRC's Standard for Admissibility of a NEPA Environmental Justice Contention.

1. Requirements of the National Environmental Policy Act and NRC Environmental Justice Policy

As the Commission has previously held, NEPA requires the NRC to fully assess the impacts of the proposed action, including the disparate impacts on a low-income and minority community. CLI-98-3, 47 NRC at 106. The question of whether a proposed NRC action adversely affects minority and low-income communities in a disparate way "lies close to the heart of NEPA." *Id.* Adverse impacts that "fall heavily on minority and impoverished citizens call for particularly close scrutiny." *Id.*

In CLI-98-3, the Commission declared that a "disparate impact analysis" is its principal tool for advancing environmental justice under NEPA." *Id.*, 47 NRC at 100. As the Commission explained, in a disparate impact analysis, the NRC "identifies and adequately weighs, or mitigates, impacts on low-income and minority communities apparent only by considering factors peculiar to those communities." *Id.* Thus, in CLI-98-3, the Commission upheld a decision by the ASLB that the Environmental Impact Statement ("EIS") for a proposed uranium enrichment facility was inadequate because it had failed to address the disparate environmental impacts on the adjacent poor and minority communities of the two impacts that would be caused by the plant's

[4] While the Commission did not explicitly incorporate the goals of LIC-203 into the Environmental Justice Policy Statement, it reaffirmed the validity of the Staff's guidance. 69 Fed. Reg. at 52,042.

construction and operation: the need to relocate a road between the communities, and the impacts of diminished property values. *Id.*, 47 NRC at 106-110.

Recently, the Commission reaffirmed its view that:

> an analysis of disproportionately high and adverse impacts needs to be done as part of the agency's NEPA obligations to accurately identify and disclose all significant environmental impacts associated with a proposed action.

Environmental Justice Policy Statement, 69 Fed. Reg. at 52,040. While the Commission ruled that "EJ per se is not a litigable issue in NRC proceeding," it confirmed the admissibility of contentions which:

> allege, with the requisite documentary basis and support as required by 10 CFR Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated."

Id., 69 Fed. Reg. at 52,047.

2. The ASLB Erred in Denying Admission of Appellants' Contention.

The ASLB rejected Appellants' contention on two grounds: (a) that it failed to raise a "material or factual dispute" with the applicant, and (b) that it falls "outside the scope of this proceeding." LBP-04-19, slip op. at 17. These conclusions are presented in the tersest possible form, without any attempt to apply the law to the considerable factual evidence submitted by Appellants in support of their contention. As discussed above in Section III.A.3, the ASLB's failure to explain the basis for its decision violates fundamental principles of fairness in administrative decision-making.

In any event, the record shows that neither of the grounds proffered by the ASLB for its decision has merit. Appellants have provided ample factual evidence and legal analysis to establish a genuine and material dispute regarding the adequacy of SERI's

Environmental Report to discuss the significant and disparate impacts of a new reactor on the minority and low-income community that resides adjacent to the Grand Gulf site.[5]

(a) Appellants raised a material legal and factual dispute with SERI regarding the adequacy of the Environmental Report.

As discussed above in Section III.B.1, the Commission has three principal requirements for raising a material dispute regarding an environmental justice claim under NEPA. The petitioner must show: (1) significant and disparate adverse environmental impacts on an adjacent minority and low-income community that (2) are apparent only by considering the peculiar characteristics of that community, and that (3) have not been adequately considered in the Environmental Report for the proposed facility.

Contrary to the ASLB's conclusion, Appellants satisfied this standard. First, as conceded by the ASLB, the Appellants "adequately indicate[d] the presence of a low-income and minority family concentration near the proposed site." LBP-04-19, slip op. at 18. Moreover, Appellants showed that the Environmental Report distorted the level of minority representation and poverty in the area adjacent to the plant, in disregard of NRC Staff guidance for environmental justice analyses. Contentions at 17-19, citing LIC-203.

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[5] Without further explanation, the ASLB quotes the Commission to the effect that "EJ per se is not a litigable issue in our proceedings," and "EJ issues are only considered [in our proceedings] when and to the extent required by NEPA." LBP-04-19, slip op. at 17-18, quoting Draft Environmental Justice Policy Statement, 68 Fed. Reg. at 62,643-44. The ASLB's citation to this language suggests that the ASLB may have based its decision in part on the conclusion that Appellants' contention is defective because it raised an environmental justice contention without any reference to NEPA. Such a conclusion is contradicted by the contention itself, which explicitly alleges a violation of NEPA, under the standard for environmental justice-related NEPA claims articulated by the Commission in CLI-98-3 and the Environmental Justice Policy Statement. *See* Contentions at 12.

As discussed in the contention, the environmental justice analysis in the Environmental Report is inconsistent with LIC-203 and distorts the level of minority representation by evaluating a 50-mile radius (46% African American) around the plant rather than a ten-mile radius (over 84% African American). Contentions at 17-18. Contrary to the guidance in LIC-203, the Environmental Report also erroneously fails to show that Claiborne County is a low-income community, by comparing the poverty of Claiborne level (32.4%) to the poverty level in the State of Mississippi (20%), rather than comparing Claiborne County to the poverty level in the entire United States. Contentions at 18-19.

Second, Appellants showed that the community would suffer disparate adverse impacts as a result of the peculiar characteristics of that community. These peculiar characteristics consist of (a) the community's relatively high risk of injury and illness by virtue of its close proximity to the site, *i.e.,* within the ten-mile radius of the Grand Gulf site, and (b) the added vulnerability of the community to the impacts of a severe accident, given the lack of resources to mount an effective response to a radiological emergency. Contentions at 13, 20-21, 22-25. Appellants also showed by virtue of both the proximity of the community to the site and its relatively high poverty level, these impacts are greater relative to the general population, which resides farther from the site, and has a higher income level (20% poverty rate in the entire State of Mississippi) and lower level of minority representation (46% rate of minority representation within a 50-mile radius of the Grand Gulf site). Contentions at 17-18, 20-21, 22-25.

Third, Appellants showed that the Environmental Report failed to address the significant and disparate environmental impacts of a severe radiological accident on the adjacent minority and low-income community:

> . . . [N]owhere in the ER does SERI provide an analysis of the environmental impacts of severe accidents on the minority and low-income community that lies within the ten-mile emergency planning zone around Grand Gulf. Nowhere does the ER address the relationship between the "site population," the "wind directions," and the environmental impacts of a severe accident on the minority and low-income community of Claiborne County. Nowhere does the ER address the "offsite costs" of a severe accident to Claiborne County. And nowhere does the ER address the disparity between the impacts of severe accidents on the adjacent minority and low-income community and the impacts on other communities in the area of impact of the proposed Grand Gulf reactor(s). Thus, the ER is grossly inadequate to satisfy the requirements of NEPA and the Commission's requirements in CLI-98-3.
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> The ER also fails to consider the disproportionate safety and security risk to Claiborne County, due to its lack of economic and material resources to respond to radiological emergencies.

Contentions at 21-22. Thus, there is no factual or legal basis for the ASLB's conclusion that Appellants have failed to demonstrate a genuine dispute with SERI regarding the significant and disparate environmental impacts of a new Grand Gulf nuclear plant on the adjacent minority and low-income community.

(b) Appellants' Contention Is Within the Scope of This Proceeding.

LBP-04-19 holds, without explanation, that Appellants' arguments that the adjacent minority and low-income community is "disadvantaged with respect to their ability to deal with emergency planning and responses to a potential accident at the facility" is "beyond the scope of the proceeding." *Id.* As discussed above in Section

III.A, it is not at all clear what the ASLB means by this conclusion. In any event, none of the possible bases for the ASLB's conclusion are reasonable.

If the ASLB means that this aspect of the contention is inadmissible because it raises emergency planning and/or safety issues as opposed to environmental issues, there is no reasonable basis for such a conclusion. Clearly, the consequences to public health and safety of a reasonably foreseeable severe nuclear reactor accident constitute cognizable environmental impacts under NEPA. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333 (1990). Effective emergency planning constitutes an important measure for avoiding or mitigating those impacts. The fact that emergency planning is required by NRC safety regulations does not mean that it has no legal significance with respect to the avoidance or mitigation of environmental impacts. As the U.S. Court of Appeals recognized in *Citizens for Safe Power v. NRC,* 524 F.2d 1291, 1299 (D.C. Cir. 1975), nuclear safety and environmental issues are closely related, such that safety regulation under the Atomic Energy Act cannot "be viewed separate and apart from NEPA considerations."

The ASLB may also mean by its conclusion that the impacts of the Mississippi tax law on the community's ability to protect itself from the effects of a severe accident are outside the scope of this proceeding because Appellants have charged that the tax law is discriminatory, and because the Commission has declared racial discrimination to be outside the scope of an NRC NEPA environmental justice analysis. *See* Environmental Justice Policy Statement, 69 Fed. Reg. at 52,045. This reasoning would also be faulty, in two respects. First, the Environmental Justice Policy Statement is concerned with precluding litigation of whether a licensing decision is racially motivated. Setting aside

the legal validity of that aspect of the Environmental Justice policy, which Appellants dispute, the policy is not with whether racial discrimination by some entity other than the NRC or the applicant affects the peculiar condition of a minority or low-income community. *Id.* Second, while Appellants do consider that the Mississippi tax code is racially motivated, the paramount concern of the contention is the practical effects of the tax code rather than the motivation behind it. As a result of the imposition of the tax code, for the past fifteen to twenty years Claiborne County has not received a substantial amount of tax revenue from Entergy that it would have used to develop and maintain its emergency response organization and infrastructure. Consequently, the minority and low-income community around the Grand Gulf site is vulnerable to the impacts of a severe accidents to an extent not experienced by communities around other reactors in the U.S., or by communities in Mississippi that lie beyond the ten-mile radius of the Grand Gulf plant. Therefore, the ASLB's conclusion that Appellants' concerns are outside the scope of this proceeding are without a legal or factual basis.

(c) The significance of correspondence by Claiborne County officials with SERI regarding the alleged lack of significant impediments to effective emergency planning is a disputed question of fact that should be resolved in the merits phase of the case.

The ASLB also observed, but did not rely on, the alleged "fact" that Appellants' claim that the ability of the minority and low-income community to respond to a radiological emergency at a new Grand Gulf plant is "disadvantaged" by a lack of adequate resources is "belied" by "the correspondence with the local emergency planning authorities contained in the SERI application." LBP-04-19, slip op. at 18. Because the

ASLB did not rely on this observation for its holding, it constitutes mere dicta that can be disregarded by the Commission.

In any event, if the Commission decides to review the reasonableness of the ASLB's observation, it must be rejected as an inappropriate disposition of an issue that should be left for litigation on the merits. *Sierra Club v. NRC,* 862 F.2d 222, 228 (9th Cir. 1988), citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931 (1987); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 541 (1986); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 694 (1985), *aff'd on this ground and rev'd on other grounds, Limerick Ecology Action v. NRC,* 869 F.2d. 719 (3rd Cir. 1989).

Moreover, the ASLB's assertion that it is a "fact" that Appellants' claims are belied by the correspondence between SERI and offsite emergency planning officials is unsupported. The correspondence at issue consists of form letters from SERI to various state, county and local government officials that were written in the spring of 2003. They are found in Appendix A of Part 4 of SERI's ESP Application of October 2003. Each of the letters asked the respective state or local emergency response official for his or her "concurrence" that his or her agency would be:

> willing to enter into discussions with SERI to extend the current emergency preparedness arrangements, implemented for the existing GGNS facility, to a new facility (or facilities) that may be considered at the GGNS site.

Each of the letters also stated that:

> Your signature below . . . indicates that, at this time, you are aware of no significant impediments to the development and implementation of emergency plans for the site that could include a future nuclear facility (or facilities).

Directly above the signature line for the state or local official, the letters contained virtually identical language which stipulated that the respective state or local agency "currently provides emergency preparedness support to the Grand Gulf Nuclear Station," that the "specific nature of these arrangements is clearly established in a properly executed and binding agreement that is included in Appendix D of the GGNS Emergency Plan," and that the agency "would be willing to enter into discussions that may result in extending these arrangements to address the emergency preparedness needs of any additional nuclear generating units that may be constructed on the GGNS site."

Thus, the primary purpose of the letters was to obtain an agreement from state and local officials to cooperate in the future with any emergency response planning that would be needed for a new nuclear plant. The signers' additional concurrence that they could see no "significant impediments to the development of emergency plans" for a new site does not establish their belief that the County's existing emergency response capability is adequate, nor does it establish their view on whether the current lack of resources to mount an effective emergency response constitutes a "significant" impediment to the development of emergency plans in the future.

It should also be noted that only two of the individuals who submitted declarations in this proceeding regarding the inadequacy of the County's emergency response capability support of Appellants' contention – Frank Davis and Wanda C. Fleming – counter-signed a letter from SERI. The other two individuals who submitted declarations -- A.C. Garner and Joseph C. Davis – have personal knowledge of the adequacy of the County's emergency response capability, but did not counter-sign a letter from SERI. Therefore, the letters have no bearing on their declarations.

Accordingly, in addition to the fact that the ASLB's assertion regarding the significance of letters signed by Claiborne County officials constitutes mere *dicta,* they do not provide any factual support for the dismissal of Appellants' contention. At most, they demonstrate that there is a genuine and material dispute regarding the adequacy of local emergency response capability to protect the community in the event of a radiological accident at a new Grand Gulf reactor.

IV. CONCLUSION

For the foregoing reasons, the ASLB erred when it failed to explain the basis for its decision in rejecting Appellants' environmental justice contention. The ASLB's decision also ignored the factual evidence presented by Appellants demonstrating a genuine and material dispute regarding the adequacy of SERI's Environmental Report to address the significant and disparate environmental impacts of a new nuclear reactor on the minority and low-income community living within a ten-mile radius of the Grand Gulf site. Therefore, LBP-04-19 should be reversed, and the contention should be admitted. Alternatively, LBP-04-19 should be remanded to the ASLB for a more complete explanation of its decision.

Respectfully submitted,

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August 27, 2004

CERTIFICATE OF SERVICE

I certify that on August 27, 2004, copies of the foregoing BRIEF OF 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 ONAPPEAL OF LBP-04-19 were served by electronic mail and or first-class mail on the following, as indicated below:

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