

RAS 8440

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/09/04

BEFORE THE COMMISSION

In the Matter of

SYSTEM ENERGY RESOURCES, INC.

(Early Site Permit for Grand Gulf ESP Site)

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Docket No. 52-009-ESP

ASLBP No. 04-823-03-ESP

NRC STAFF'S BRIEF IN OPPOSITION TO PETITIONERS' APPEAL OF LBP-04-19

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September 8, 2004

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the staff of the Nuclear Regulatory Commission (NRC Staff or Staff) hereby files its brief in opposition to the Appeal filed by 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), collectively Petitioners. See Brief of the [Petitioners] on Appeal of LBP-04-19 (Aug. 27, 2004).¹ The Appeal concerns the Atomic Safety and Licensing Board's (Licensing Board or Board) denial of the petitions for leave to intervene filed by the Petitioners in this proceeding. LBP-04-19. In its decision, the Board found that, although Petitioners demonstrated standing, they failed to proffer at least one admissible contention. As discussed below, the Licensing Board correctly denied the Petitioners' request for intervention in the instant proceeding and the order denying their request should be affirmed.

¹The Petitioners' Appeal was not timely filed. Therefore, pursuant to 10 C.F.R. § 2.306, the Staff is filing this brief eleven days from receipt of the appeal.

STATEMENT OF THE CASE

This case arises from the October 16, 2003 application by System Energy Resources, Inc. (SERI) to obtain an early site permit (ESP) for property located at the Grand Gulf Nuclear Station site (Grand Gulf). See [SERI] Grand Gulf Site [ESP] application (Oct. 2003). On January 16, 2004, the NRC published a "Notice of Hearing and Opportunity to Petition for Leave to Intervene" related to the foregoing application. 69 Fed. Reg. 2636 (Jan. 16, 2004). On February 12, 2004, the Petitioners jointly filed a petition to intervene in the instant hearing. See Hearing Request and Petition to Intervene by [Petitioners] (Feb. 12, 2004). Subsequently, on March 2, 2004, the Commission issued an order referring the petition to the Board and holding, upon motion from SERI, that the recent revisions to the Commission's Rules of Practice in 10 C.F.R. Part 2 regulations would apply to the instant proceeding. See CLI-04-08, 59 NRC 113, 118-19 (2004). On May 3, 2004, Petitioners jointly filed their contentions. See Contentions of [Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) [hereinafter Contentions]; Waste Confidence Contentions of [Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004). Following responses by SERI and the Staff,² and oral argument before the Board on June 21 and 22, 2004, regarding the admissibility of contentions raised by Petitioners, on June 6, 2004, the Licensing Board issued an order rejecting the Petitioners' request to intervene in the instant hearing.

² On May 28, 2004, SERI and the Staff filed their answers to the Petitioners' proposed contentions. See Answer by [SERI] to Proposed Contentions (May 28, 2004) [hereinafter SERI Contentions Response]; NRC Staff's Response to Petitioners' Contentions Regarding the [ESP] Application for the Grand Gulf Site (May 28, 2004) [hereinafter Staff Contentions Response]. The Grand Gulf Petitioners filed their reply to the SERI and Staff answers on June 9, 2004. Reply by [Petitioners] to [SERI's] and NRC Staff's Responses to Petitioners' [Contentions] (June 9, 2004) [hereinafter Petitioners' Reply].

STATEMENT OF THE ISSUES

The Licensing Board below correctly denied the Petitioners' request for intervention in the instant mandatory hearing. Since the Petitioners failed to assert any admissible contentions, they failed to meet the requirements of 10 C.F.R. Part 2 to be granted intervention. On appeal, the Petitioners argue that the Board committed two errors and ask that the Commission reverse the Board's ruling or, alternatively, remand the case for further consideration by the Board. Both points of error asserted by the Petitioners concern the Board's ruling that the proposed contention addressing environmental justice is inadmissible. First, the Petitioners argue that the Board's order is contrary to general principles of administrative law in that, allegedly, it does not provide a basis for its legal conclusion that proposed contention 3.1 is inadmissible. Second, the Petitioners assert that proposed contention 3.1, as pled, is admissible and the Board erred in rejecting it.

LEGAL STANDARDS

A. Legal Standard for Review of Licensing Board Decisions

Pursuant to 10 C.F.R. § 2.311(a), "[a]n order denying a petition to intervene and/or request for hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted."

B. Legal Standards for the Admission of Contentions

The Staff now turns to the standards governing the admissibility of contentions, which remain unchanged from those that existed before the effective date of revised Part 2. See 69 Fed. Reg. at 2,220-21. To gain admission to a proceeding as a party, a petitioner must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). This section states that a petitioner must provide:

- (i) a specific statement of the issue of law or fact to be raised or controverted;
- (ii) a brief explanation of the basis for the contention;

- (iii) a demonstration that the issue raised in the contention is within the scope of the proceeding;
- (iv) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue; and
- (vi) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). These provisions "incorporate the longstanding contention support requirements of former 10 C.F.R. § 2.714—no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met." 69 Fed. Reg. at 2,221. The Commission has emphasized that its rules on admission of contentions establish an evidentiary threshold more demanding than a mere pleading requirement and are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Under the rule, a petitioner "must do more than submit 'bald or conclusory' allegation[s] of a dispute with the applicant." *Id.* Rather, the petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view." *Id.* Moreover, a petitioner must provide a "clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The contentions are limited by the scope of the proceeding, which is delineated by the Commission in the notice of hearing for the proposed licensing action. *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985). In determining the scope of the proceeding, the Licensing Board should be guided by the regulations governing the substantive matters under consideration in the proceeding. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000). Although the focal point of an NRC adjudication is on contentions rather than the underlying bases, the Commission has recently reiterated, "[w]hen an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002) (citations omitted).

C. Legal Standards Governing the Environmental Review of Esps

In addition to a safety review, the Commission conducts an environmental review of each ESP application pursuant to the National Environmental Policy Act (NEPA). The Commission's regulations implementing NEPA are set forth in 10 C.F.R. Part 51. Environmental review requirements specific to ESPs are set forth in 10 C.F.R. Part 52. Specifically, 10 C.F.R. § 52.18 states, in pertinent part:

[T]he Commission shall prepare an environmental impact statement during review of the application, in accordance with the applicable provisions of 10 CFR part 51, provided, however, that the draft and final environmental impact statements prepared by the Commission focus on the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters, and provided further that the statements need not include an assessment of the benefits (for example, need for power) of the proposed action, but must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed.

See generally 10 C.F.R. §§ 51.70, 51.71, 51.73, 51.75, 51.90, 51.91, and 51.94 (setting forth general requirements for the Commission's preparation and consideration of environmental impact statements). In connection with the instant environmental review, 10 C.F.R. § 52.17(a)(2) requires that the applicant include with the ESP application:

A complete environmental report as required by 10 CFR 51.45 and 51.50 . . . provided, however, that such environmental report must focus on the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters, and provided further that the report need not include an assessment of the benefits (for example, need for power) of the proposed action, but must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed.

DISCUSSION

A. The Licensing Board Decision Fully Satisfies
the Basic Principles of Administrative Law.

In the instant case, the Board properly held that the Petitioners' proposed contention 3.1 was inadmissible. The Petitioners, however, assert that the Board violated "basic principles" of administrative law in issuing its decision. See Petitioners' Appeal Brief at 10-14. In fact, a careful review of the Board's order proves the contrary. The orderly functioning of the administrative process requires that "the grounds upon which . . . [the Board] acted [be] clearly disclosed and adequately sustained," such that a reviewing authority can discharge their review responsibilities. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This general concept of administrative law, however, does not mandate that each and every legal and factual issue raised in a petition for intervention be addressed in minute detail. Indeed, under 10 C.F.R. Part 2, the Board is only obligated to make the threshold determination of whether the Petitioners have standing and ruling on the admissibility of their contentions. Once the Board has reached a legal conclusion on the admissibility of the proposed contentions and provides a basis for that conclusion, no further justification for the Board's decision is required.

The Board's decision below provides support for its finding that the proposed contention fails to meet the Commission's standard for admissibility of a contention asserting a deficiency concerning the issue of environmental justice.³ And, contrary to Petitioners' assertions, the Board has adequately supported its ruling that the proposed contention is inadmissible. First, the Board noted that the Petitioners have indicated the presence of low-income or minority populations near the site. LBP-04-19, slip op. at 18. The Board, however, decided that the Petitioners' proposed contention failed to meet the contention admissibility standard. *Id.* The Board reasoned that the contention "fails to identify any significant and disproportional [sic] environmental impact on the minority or low-income population relative to the general population arising from the siting of additional reactors on the site at issue" *Id.* In the absence of such an impact, the proposed contention fails to provide a necessary component for an admissible contention alleging deficiencies related to environmental justice. Thus, contrary to the Petitioners' assertions, the Board's decision concisely provides a basis for its finding that the proposed contention was deficient and therefore inadmissible.

Having provided a basis for its threshold conclusions, the Board has discharged its duties to enable the parties to "apprehend the essential ingredients of that determination." *Va. Elec. & Power Co. (North Anna Nuclear Power Station, Units 1 & 2)*, ALAB-584, 11 NRC 451, 453-54 n.4 (1980). Once the Board concluded that one critical criterion was not met, the Board was under no further obligation—administrative or otherwise—to resolve each and every point raised by the

³According to the Commission, to be admissible, an environmental justice contention "must allege, with the requisite documentary basis and support as required by 10 C.F.R. Part 2, that the proposed action will have significant adverse impact on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated." Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047 (Aug. 24, 2004). Hereinafter the Staff, like the Petitioners, makes reference to the final published version of the Commission's Policy Statement. Though the final version of the Policy Statement was not available at the time the contentions were filed, the Draft Version was available and no substantive changes to the Policy Statement were made.

Petitioners. Thus, the Petitioners' complaints that the decision inadequately explains the Board's reasoning are unwarranted.

B. The Petitioners' Appeal Does Not Satisfy the Standards for Commission Review.

The Petitioners' appeal does not warrant Commission review because it fails to establish that the Board's decision was erroneous. 10 C.F.R. § 2.311(a). To the contrary, the Board's factual and legal conclusions as to the sufficiency of Petitioners' proposed contentions are supported by the Applicant's Environmental Report and a series of Commission decisions addressing environmental justice. Further, the Petitioners' appeal does not raise new or substantial questions of law or policy that would warrant Commission review. The very issues raised by the Petitioners in their initial contentions and again on appeal have been addressed in previous Commission decisions and most recently, in the Commission's Policy Statement on Environmental Justice. 69 Fed. Reg. 52,040. As the discussion below will demonstrate, the Board's decision in LBP-04-19 is clearly supported by Commission precedent, Commission policy and the Applicant's Environmental Report. Accordingly, the Petitioners' appeal of LBP-04-19 should be denied.

1. The Board's Dismissal of the Petition to Intervene was not in Error

As discussed above, in LBP-04-19, the Board denied the Petitioners' request to intervene in the instant proceeding, finding that the Petitioners had failed to file any admissible contentions. Specifically, the Board found that the Petitioners failed to satisfy the Commission's requirements for admission of an environmental justice contention. LBP-04-19, slip op. at 18. The proposed contention 3.1 asserts that the ER does not comply with NEPA "because it does not adequately consider the adverse and disparate environmental impacts on the predominately African American and low-income community of Claiborne County." Contentions at 12. Significantly, however, the Board determined that Contention 3.1 was inadmissible because it fails to demonstrate a genuine dispute with the Applicant regarding the consideration of the environmental impacts of the project

on minority and low-income communities, raises issues outside the scope of the proceeding, and lacks the requisite legal or factual basis. LBP-04-19, slip op. at 18; *see generally* 10 C.F.R. § 2.309(f)(1). As the following discussion will demonstrate, the Board's decision on the proposed environmental justice contention is clearly supported by Commission precedent and policy on environmental justice and is not in conflict with the Petitioners' factual assertions.

a. The NRC and Environmental Justice: Commission Precedent and Policy

The Commission has made it clear that environmental justice ("EJ") issues are only considered when and to the extent required by NEPA. In *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-03, 47 NRC 77 (1998) (*LES*), regarding an application to construct and operate a privately owned uranium enrichment facility located between two minority communities, the Commission held that the disparate impact analysis within NEPA is the principal tool for addressing EJ issues, and that the "NRC's goal is to identify and adequately weigh or mitigate, effects on low-income or minority communities" by assessing impacts "peculiar" to those communities. *Id.* at 100. The Commission emphasized that the Executive Order did not establish any new rights or remedies; instead the Commission based its decision on NEPA, stating that "[t]he only 'existing law' conceivably pertinent here is NEPA, a statute that centers on environmental impacts." *Id.* at 102.

The Commission also addressed the possibility that racial considerations affected the facility siting. *Id.* at 100. The Commission concluded that an "agency inquiry into a license applicant's supposed discriminatory motives or acts would be far removed from NEPA's core interest: the physical environment—the world around us, so to speak." *Id.* at 102 (citation omitted). The Commission noted that the Council on Environmental Quality's draft guidance for implementing the Executive Order "focuses exclusively on identifying and adequately assessing the impacts of the proposed actions on minority populations, low-income populations, and Indian Tribes" and that the guidance "makes no mention of a NEPA-based inquiry in racial discrimination." *Id.* at 102.

Accordingly, *LES* limits the scope of an environmental justice contention to issues considered in a NEPA analysis.

Conspicuously absent from Petitioners' brief is the Commission's more recent decision in *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002) (*PFS*), a proceeding involving the licensing of a proposed fuel storage facility on land owned by the Skull Valley Band of Goshute Indians in which the Commission reiterated its views on environmental justice. *Id.* at 149. The intervenor, Ohngo Gaudadeh Devia ("OGD"), argued that individual members of OGD, including band members who opposed the project, might suffer the environmental impacts of the project without enjoying its benefits as a result of an alleged misappropriation of funds paid on the PFS lease. *Id.* First, the Commission repeated its view that NEPA is the only pertinent statute and stated that environmental justice, as applied at the NRC, "means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community." *Id.* at 156. The Commission then reasoned that "the essence of an environmental justice claim, in NRC practice, is disparate environmental *harm*." *Id.* at 153 (emphasis added). Accordingly, in the Commission's view, NEPA does not call for an investigation into disparate economic benefits as a matter of environmental justice because "nothing" in the executive order or NEPA suggests "that a failure to receive an economic benefit should be considered tantamount to a disproportionate impact." *Id.* at 154. The Commission went on to note that "the executive order asks agencies to consider environmental justice implications only when disparate environmental effects are 'high and adverse.'" *Id.* Thus, NEPA does not call for a detailed examination of the distribution of the financial benefits of a proposed project. *Id.*

Most recently, the Commission published a policy statement setting out its views and policy on the significance of the Executive Order and NRC guidelines on when and how EJ will be

considered in NRC licensing and regulatory actions. 69 Fed. Reg. 52,040. The Commission confirmed that the “the basis for admitting EJ contentions in NRC licensing proceedings stems from the agency’s NEPA obligations.” *Id.* at 52,046. Procedurally, an EJ review is a tool, within the normal NEPA process, “to identify communities that might otherwise be overlooked and identify impacts due to their uniqueness as part of the NRC’s NEPA review process.” *Id.* at 52,047. Thus, admissible contentions in this area are “those which allege, with the requisite documentary basis and support as required by 10 C.F.R. Part 2, that the proposed action will have *significant adverse impact* on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated.” *Id.* (emphasis added). The Commission reiterated that “racial motivation and fairness or equity issues are not cognizable under NEPA.” *Id.* Thus, the focus of an EJ review should be on “identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population.” *Id.*

The Policy Statement also includes procedural guidelines for implementing an EJ review through identification of minority and low-income communities and assessing the environmental impacts they may experience. *Id.* The Commission considered the components of an EJ review to include defining the geographic area for assessment, identifying low-income and minority communities, and emphasizing scoping. *Id.* at 52,047-48. The Commission also chose to endorse the Staff’s use of numerical guidance as a useful tool for performing an EJ review to be augmented through the NEPA scoping process. *Id.* at 52,048. For example, the Commission noted that under current Staff guidance, an area is defined as low-income or minority if the impacted area’s percentage of minority or low-income population significantly (defined as greater than 20 percent) exceeds that of the State or County. *Id.* Thus, the “goal of the 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." *Id.*

b. Proposed Environmental Contention 3.1 is Inadmissible

As the Board has determined, the Petitioners have failed to raise a genuine dispute on a material issue of law or fact with regard to the proposed Contention 3.1. LBP-04-19, slip op. at 18. Further, many of the issues raised by the Petitioners in their initial contentions and on appeal are clearly outside the scope of the proceeding. *Id.* Most significantly, Petitioners have failed to identify an *impact peculiar to* minority or low-income populations relative to the general population and have failed to demonstrate a significant impact that falls *disproportionately* on minority and low-income communities. The Petitioners' proposed environmental contention and each of the associated bases are briefly described below:

Contention 3.1: Inadequate Consideration of Disproportionate Adverse Impacts on Minority and Low-Income Community.

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 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.

Contentions at 12-14.

The Petitioners base their proposed contention on: the requirements of NEPA; the history and demographics of Claiborne County; the ER's representation of minority and low-income populations, purported disproportionate accident risk; purported disproportionate risk due to lack of adequate emergency planning and security resources; purported disproportionate adverse economic impacts; purported disproportionately low benefits of proposed reactors; and a failure to adequately weigh alternatives. Contentions at 14-28.

In light of the foregoing, the Board correctly determined that the proposed contention, on

the whole, is inadmissible on the grounds that it does not set forth sufficient information to show that a genuine dispute exists regarding the Applicant's discussion of the environmental impacts on minority and low-income communities. LBP-04-19, slip op. at 18. While NEPA requires agencies to assess the impacts of a proposed action and determine whether those impacts are significant, the Executive Order seeks consideration of "environmental justice implications only when the disparate environmental impacts are 'high and adverse.'" *PFS*, 56 NRC at 154 (citing E.O. 12898, § 1-101). The process endorsed by the Commission for identification of environmental justice concerns consists of: a) identification of minority and low income populations, and b) determining whether there are disproportionately high and adverse impacts on those populations. *See, e.g.*, 69 Fed. Reg. at 52,048. Here, the environmental report found that "while there are substantial minority populations and a few localized low-income populations in the region of the GGNS site, there are *no significant adverse effects* from facility operation that would disproportionately affect these populations." ER, § 5.8.3.3 (emphasis added).

After noting that the ER adequately indicates the presence of low-income and minority communities near the site, the Board determined that Petitioners failed to identify an environmental impact from the proposed reactor(s) that will have a significant and disproportionate impact on the minority or low-income population relative to the general population. LBP-04-19, slip op. at 18. Absent a finding to the contrary, environmental justice considerations under NEPA are not pertinent. *Cf. PFS*, 56 NRC at 154; 69 Fed. Reg. at 52,047 ("If there will be no significant impact as a result of the proposed action, it follows that an EJ review would not be necessary."). Since the proposed contention fails to identify high and adverse impacts on a minority or low-income population different from the impacts to the population-at-large, it does not demonstrate a genuine dispute with the Applicant's ER concerning environmental justice considerations and NEPA. Thus, the Board did not err in rejecting the proposed contention.

2. The Petitioners' Proposed Contention and its Associated Bases Failed to Meet the Commission's Contention Pleading Standard.

The threshold determination in the Board's decision, discussed in the prior section, is sufficient to reject the Petitioners' proposed environmental justice contention in its entirety. Consequently, the Board did not need to address in detail each separate basis in the Petitioners' proposed contention. Nevertheless, each of the Petitioners' bases—none of which satisfy the criteria for an admissible contention—are discussed individually below.

a. Distortion of Minority and Low-Income Populations

i. *Minority Population*

First, Petitioners charge that the ER understates the levels of minority representation and poverty in Claiborne County and thus falsely minimizes the impacts on the minority and low-income community. Appeal at 16-17; Contentions at 18. This portion of the proposed contention is inadmissible because the Petitioners have neither identified a genuine dispute on a material issue of fact or law nor shown that the contention, if proven, would entitle Petitioner to any relief. 10 C.F.R. § 2.309(f)(1)(vi); 10 C.F.R. § 2.309(f)(1)(iv). The Petitioners claim that SERI distorts the minority populations surrounding the Grand Gulf site by failing to note the exact level of minority population inside the 10-mile radius emergency planning zone and instead evaluating minority population within the 50-mile radius. However, as noted by the Petitioners, the ER *does* acknowledge the areas where minority representation is greater than 50 percent.⁴ See ER, Figs. 2.5-6, 2.5-7. Once that threshold for conducting a in-depth EJ review is exceeded (as SERI acknowledges in its application), the precise demographics of a given area are not critical; instead,

⁴ Notably, the Office of Nuclear Reactor Regulation's own internal guidance considers a minority or low-income population to be present if: (1) the minority or low-income population in the census block groups or environmental impact site exceeds 50 percent, or (2) the minority or low-income population is significantly greater (typically at least 20 percentage points) than the minority or low-income population percentage in the geographic area chosen. NRR Office Instruction, LIC-203, "Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues" at D-8, D-9.

the focus of the environmental justice review shifts to assessing the impacts on the minority populations.⁵ Because the ER correctly identifies “minority populations” and conducts an in-depth environmental justice review, there is no effective relief that could be granted. Additionally, the Petitioners have not provided any information asserting that the application failed to identify a specific minority community. Thus, the Petitioners have not demonstrated that the Applicant’s identification of minority populations is inadequate and has not identified a genuine dispute regarding the identification of minority populations in the ER. Therefore, the proposed contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

ii. Low-Income Population

The Petitioners further assert that the ER distorts the levels of low-income population in the affected area by failing to follow the guidance of LIC-203.⁶ Appeal at 16-17; Contentions at 18. This portion of the proposed contention is inadmissible because the Petitioners have neither identified a genuine dispute on a material issue of fact or law nor shown that the contention, if proven, would entitle Petitioner to any relief. 10 C.F.R. § 2.309(f)(1)(vi); 10 C.F.R. § 2.309(f)(1)(iv). Since the purpose of identifying the low-income and minority populations is to aid in assessing potentially significant impacts to those communities, whether a specific area is defined as low-income or minority is effectively inconsequential as long as the review ultimately considers impacts unique to those communities. Because the ER identifies “low-income populations” and conducts

⁵ For example, using LIC-203, minority populations of 50 percent, 60 percent and 84 percent would all trigger an environmental justice review.

⁶ Although the ER used state-wide poverty levels instead of poverty levels for an overall geographic area that encompasses all of the alternative site geographic areas as urged by Petitioners, the ER nevertheless identifies low-income populations in the area surrounding the proposed site. ER at § 2.5.4. In addition, there is no regulatory requirement prescribing the use of a particular geographic scope for comparison. *See, e.g.*, 69 Fed. Reg. 52,048 (“[N]umerical guidance is helpful” in identification of EJ communities, but the procedural guidelines for EJ review should allow for “flexibility.”). Moreover, SERI did consider environmental justice in its evaluation of alternative sites. *See* ER at § 9.3.5.

an in-depth environmental justice review covering both low-income and minority communities, there is no effective relief that could be granted. Thus, even if the Petitioners are correct that the low-income population is distorted, they would not be entitled to any relief because the ER already considers impacts to the minority and low-income communities throughout the affected area. In its application, once SERI acknowledged the need to do an EJ analysis, the review shifted focus to an assessment of the impacts to a low-income population rather than concentrating on formulating ever more precise census statistics. Additionally, the Petitioners have not provided any information asserting that the application failed to identify a specific low-income community.

Accordingly, the portion of the proposed contention that asserts that the ER understates the levels of minority representation and poverty in Claiborne County is inadmissible because it fails to demonstrate an issue that would entitle Petitioner to any relief. 10 C.F.R. § 2.309(f)(1)(iv).

b. Failure to Address Environmental Impacts Peculiar to the Minority and Low-Income Population

Petitioners assert that the ER fails to address the environmental impacts of the proposed reactor(s) in light of the “factors peculiar to” the minority and low-income community in Claiborne County. Appeal at 17-18; Contentions at 12-13. According to the Petitioners, “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.” *Id.* at 13. However, this portion of the proposed contention does not raise a genuine issue of material fact or law because the Petitioners have provided no information to support their assertion that minority or low-income populations surrounding the proposed reactor face any special, unique or particularized impacts apart from those faced by the general population. Under NEPA, the purpose of the EJ review is “to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid *special impacts* attributable to the

special character of the community.” PFS, 56 NRC at 156 (emphasis added). Thus, the focus of the EJ review should be on “identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that *may be different from the impacts on the general population.*” 69 Fed. Reg. at 52,047 (emphasis added).

As the Petitioners recognize, the ER does evaluate the potential environmental, human health and socioeconomic impacts on the minority and low-income populations. See ER, § 5.8.3.2. Petitioners, however, claim that the ER fails to consider the impacts of severe accidents and offsite costs on the minority and low-income populations within the 10-mile radius emergency planning zone. Yet, the Petitioners do not provide any information to suggest that the impacts of severe accidents on the adjacent minority and low-income populations are unique, special, or particularized relative to the general population surrounding the proposed site.⁷ The mere existence of a minority or low-income population does not create an adverse or disproportionate impact. See also Tr. at 324. The Petitioners simply do not describe a nexus between the effect on minority and low-income populations and factors affecting risk in a severe accident, e.g., meteorology and demography (the factors mentioned by Petitioners). See Appeal at 18; Contentions at 21-22. There is no need for a separate EJ review when the same environmental impacts have already been evaluated for the general population in the ER. Absent any indication that there are impacts peculiar to the minority or low-income populations relative to the overall population surrounding the site, the portion of the proposed contention that relates to “factors peculiar to” minority and low-income populations is inadmissible because the Petitioners have not demonstrated that a material dispute exists. Therefore, the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

⁷ For example, LIC-203 notes a special character of a community might include “interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action.” LIC-203, App. D at D-2.

c. County Government's Ability to Respond as a Result of Poverty and an Alleged Discriminatory Tax Policy

Third, the Petitioners contend that the "ER fails to address the fact that the Claiborne County government is particularly unprepared to respond to a radiological emergency or 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." Contentions at 13. This portion of the proposed contention is inadmissible since it fails to show that a genuine dispute exists regarding the adequacy of emergency preparedness, constitutes a generalization of Petitioners' views on what regulatory standards it believes should apply, and is otherwise outside the scope of this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(vi); 10 C.F.R. § 2.335(a); 10 C.F.R. § 2.309(f)(1)(iii).

In support of its assertion, Petitioners point to alleged shortages of funding and equipment at various agencies that are responsible for responding to an emergency at the existing Grand Gulf site, including local fire, police, and hospital services. Appeal at 3-5; Contentions at 23-25. However, at the ESP stage, SERI is only required to "include a description of contacts and arrangements with local, state and federal governmental agencies with emergency planning responsibilities." 10 C.F.R. § 52.17(b)(3).⁸ To satisfy this requirement, SERI provided letters from various Claiborne County officials who indicated a willingness to work with SERI to extend the current emergency planning arrangement to a new facility. *See* Emergency Planning Information, Appendix A, "Agency Letters of Agreement." In these letters prepared as part of the ESP application, some of the same officials who provided declarations in support of Petitioners' assertion that Claiborne County is particularly unprepared to respond to a radiological emergency indicate that they are "aware of no significant impediments to the development and implementation of emergency plans for the site." *See* Letters of Agreement for Sheriff Frank Davis, ER

⁸ SERI did not select the option set forth in 10 C.F.R. § 52.17(b)(2)(ii).

Appendix A at 9, and Claiborne County Hospital Administrator Wanda C. Fleming, ER Appendix A at 18. In addition, as noted in the ER, “[I]f the new facility at the GGNS ESP Site increased the demands on local police and fire departments, the additional burden could be mitigated through the addition of police or fire staff, additional vehicles, and building new facilities or improvements and additions to existing facilities Costs incurred by local fire and police departments would likely be offset by the additional tax revenues generated by plant personnel living in the affected community, and through tax revenues generated by the operation of a new facility.” ER, § 5.8.2.3.3. Thus, any discussion of the adequacy of emergency plans for an additional unit(s) is premature.

Finally, as discussed previously, Petitioners allege that “Claiborne County Sheriff’s Department, fire department, and hospital, have grossly insufficient resources and personnel to respond to a radiological emergency at Grand Gulf.” Contentions at 32. To the extent this basis for the proposed contention challenges the adequacy of the existing emergency planning for Grand Gulf Unit 1, which has not been demonstrated, it is outside the scope of this proceeding. In addition, to the extent the contention alleges that offsite emergency planning will be insufficient after adding a new facility, the Petition fails to demonstrate that the Applicant’s showing is deficient under 10 C.F.R. § 52.17(b)(3) and further fails to demonstrate a genuine dispute regarding the ability of offsite agencies to address emergency preparedness because they have provided no factual information or expert testimony to challenge the Applicant’s conclusion that adequate emergency plans can be developed. *See* 10 C.F.R. § 2.309(f)(1)(v). For the reasons described above, this portion of the contention is inadmissible.

With respect to the assertions regarding the effects of a discriminatory tax policy, that portion of the contention is inadmissible as outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). The Commission has declared that NEPA “[does] not call for an investigation into the disparate economic benefits as a matter of environmental justice.”

PFS, 56 NRC at 154. Even though money (or social services) might make it easier to tolerate environmental impacts, “nothing” in NEPA suggests “that a failure to receive an economic benefit should be considered tantamount to a disproportionate environmental impact.” *Id.* Moreover, since an “agency inquiry into a license applicant’s supposed discriminatory motives or acts would be far removed from NEPA’s core interest: the physical environment—the world around us, so to speak,” an inquiry into a state’s tax policy motives is even more removed. *LES*, 47 NRC at 102 (citation omitted). “NEPA is simply not the vehicle, and the NRC not the forum, for resolving the question of whether a state’s tax policies are discriminatory.” *PFS*, 56 NRC at 159. Accordingly, the portion of the proposed contention that relates to effect of the state’s tax policy on Claiborne County’s ability to respond to radiological emergency or security threat is inadmissible because it is outside the scope of the proceeding. Therefore, the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

d. Disparity of Distribution of Economic Benefits

The Petitioners assert that the ER makes no attempt to evaluate the disparity in distribution of economic benefits yielded from a potential reactor because most of the tax revenue from a new reactor would go to the State of Mississippi and other county governments and because most of the jobs will go to people who live outside Claiborne County. Appeal at 5-6; Contentions at 13. This portion of the proposed contention is inadmissible because it is outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). As discussed above, “the executive order, and NEPA generally, do not call for an investigation into disparate economic benefits as a matter of environmental justice,” and should look instead to disparate environmental harm—NEPA’s “core interest.” *PFS*, 56 NRC at 153-54. Here, the Petitioners mistakenly focus on the distribution of the economic benefits (i.e., tax revenue and jobs) of the proposed reactor rather than the environmental effects. Since a “failure to receive an economic benefit should not be considered tantamount to a disproportionate environmental impact,” the Petitioners have not raised an issue

that is cognizable under NEPA. *Id.* at 154. Therefore, the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1).

e. Effect of Adding Reactors on Property Values and Overall Economic Health

Petitioners also assert that the ER 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. Contentions at 13. To the contrary, the ER discusses the effect of adding new reactors on the economic health of the minority and low-income community and concludes that the effect will be positive due to increased employment opportunities and tax revenues. ER, § 5.8.3.2.3. In addition, Petitioners have provided no information to support their assertion that an additional reactor(s) will lead to a "predictable decline in property values and the economic health of the area." Contentions at 13. A bald assertion that a matter ought to be considered is not a sufficient basis to admit a contention. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998). Neither the proposed contention nor Dr. Bollard's declaration offer any analysis or explanation as to why an ESP (or the addition of a new reactor) would lead to a decline in property value; the proposed contention lacks even minimal factual support or rationale. Thus, this portion of the proposed contention is inadmissible because it fails to provide a statement of the alleged facts or expert opinion to support its assertion that the property values and economic health of the county will decline. 10 C.F.R. § 2.309(f)(1)(v). In the absence of factual information or expert opinion demonstrating a genuine dispute on a material issue, the contention lacks the necessary basis required by 10 C.F.R. § 2.309(f)(1)(ii).

f. Failure to Weigh the Costs on Minority and Low-Income Populations Against the Benefits of the Action

Lastly, the Petitioners assert that 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.” Contentions at 13-14. For support, the Petitioners note that the evaluation of alternative sites and energy sources did not take EJ issues into account. As an initial matter, contrary to the Petitioners’ assertions, the ER does address the environmental impacts to minority and low-income groups in the evaluation of the alternative sites and energy sources. See ER at § 9.2.2.5.5 (coal-fired generation); § 9.2.2.6.4 (gas-fired generation); § 9.3.5 (preferred site selection); and § 9.3.6.1.5 (greenfield alternative site). Thus, an alleged failure to consider EJ in weighing alternatives cannot form the basis of the proposed contention. Also, to the extent this portion of the proposed contention seeks to discuss the distribution of benefits more equitably, it is outside the scope of the proceeding for the reasons discussed *supra*.

As to the portion of the proposed contention that asserts failure to weigh the costs and benefits to the minority and low-income communities surrounding the Grand Gulf site, the Petitioners do not demonstrate that a genuine dispute exists on a material issue because Petitioners have not provided sufficient information to show that the impact on the minority or low-income populations are disproportionately high and adverse. The ER is required, as part of the NEPA analysis, to consider “environmental justice implications only when the disparate environmental impacts are ‘high and adverse’” relative to the general population. *PFS*, 56 NRC at 154 (citing E.O. 12898, § 1-101); 68 Fed Reg. at 52,047. Since the Petitioners do not claim that SERI failed to take into account high and adverse impacts to the minority and low-income communities relative to the remaining population, the contention does not demonstrate a genuine dispute of a material issue. Therefore, the contention does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

CONCLUSION

For the foregoing reasons, the Staff submits that the Board's decision in LBP-04-19 properly rejected the Petitioners' proposed environmental justice contention. Therefore, Petitioners' appeal of LBP-04-19 should be denied.

Respectfully submitted,


Antonio Fernández
Tyson Smith
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of September, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
SYSTEM ENERGY RESOURCES, INC.)	Docket No. 52-009-ESP
)	
(Early Site Permit for Grand Gulf ESP Site))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO PETITIONERS' APPEAL OF LBP-04-19" in the above-captioned proceeding have been served on the following by electronic mail and with copies by deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), through electronic mail with copies by deposit in the U.S. Mail on this 8th day of September, 2004:

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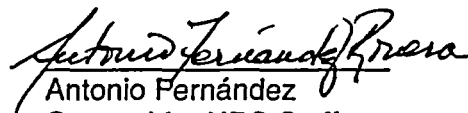
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