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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

ASLBP No. 04-823-03-ESP

BRIEF OF SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO  
APPEAL BY 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 FROM LBP-04-19

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.311(a) and 2.341(c)(2), System Energy Resources, Inc. ("SERI") herein responds in opposition to the appeal filed on August 27, 2004, by the National Association for the Advancement of Colored People - Claiborne County, Mississippi Branch, Nuclear Information and Resource Service, Public Citizen, and the Mississippi Chapter of the Sierra Club ("Appellants").<sup>1</sup> Appellants seek reversal only of that portion of the decision of the Atomic Safety and Licensing Board ("Licensing Board"), issued on

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<sup>1</sup> "Notice of Appeal of LBP-04-19 by the National Association for the Advancement of Colored People-Claiborne County, Mississippi Branch, Nuclear Information and Resource Service, Public Citizen, and Mississippi Chapter of the Sierra Club" and "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," August 27, 2004 ("Appellants Brief").

August 6, 2004, denying admission of Proposed Contention 3.1.<sup>2</sup> *See System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 59 NRC \_\_\_\_ (slip op. August 6, 2004). For the reasons discussed herein, the Licensing Board's decision in LBP-04-19 on Proposed Contention 3.1 should be affirmed.

## II. STATEMENT OF CASE HISTORY

On October 16, 2003, SERI submitted an application to the Nuclear Regulatory Commission ("NRC"), pursuant to 10 C.F.R. § 52.15, requesting an early site permit ("ESP") for certain property co-located with the existing Grand Gulf Nuclear Station ("GGNS") near Port Gibson, Mississippi. The site is located in Claiborne County, Mississippi, approximately 25 miles south of Vicksburg, Mississippi. If approved by the NRC, the 20-year ESP would permit use of the site as a location for one or more new nuclear power reactors, to be authorized for construction and operation in a future NRC licensing proceeding. *See* 10 C.F.R. §§ 52.11, 52.27(a).

A Notice of Hearing and Opportunity to Petition for Leave to Intervene was published in the *Federal Register* on January 16, 2004.<sup>3</sup> Appellants filed their Hearing Request and Petition to Intervene on February 12, 2004.<sup>4</sup> In an answer filed on February 24, 2004,<sup>5</sup> SERI did not contest the representational standing of Appellants. In a Memorandum and Order

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<sup>2</sup> Proposed Environmental Contention 3.1, is entitled, "Inadequate Consideration of Disproportionate Adverse Impacts on Minority and Low-Income Community." *See* LBP-04-19, at 15.

<sup>3</sup> "System Energy Resources, Inc; Notice of Hearing and Opportunity To Petition for Leave To Intervene Early Site Permit for the Grand Gulf ESP Site," 69 Fed. Reg. 2636 (Jan. 16, 2004).

<sup>4</sup> Appellants amended their Hearing Request and Petition to Intervene on February 17, 2004.

<sup>5</sup> "Answer by System Energy Resources, Inc. to Petition to Intervene," February 24, 2004.

(CLI-04-08) dated March 2, 2004, the Commission directed that the pending ESP proceedings be conducted under the revised Part 2 rules.<sup>6</sup> The Licensing Board issued its Initial Prehearing Order on March 8, 2004, establishing procedures for the conduct of the proceeding.<sup>7</sup>

On May 3, 2004, Appellants filed their proposed contentions, including Contention 3.1.<sup>8</sup> SERI filed its answer, opposing admission of all of the proposed contentions, on May 28, 2004.<sup>9</sup> After seeking an extension of time, Appellants filed their reply to both the NRC Staff and SERI responses to the proposed contentions on June 9, 2004.<sup>10</sup> On June 21 and 22, 2004, the Licensing Board heard oral argument on the issue of the admissibility of Appellants' proposed contentions.

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<sup>6</sup> See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

<sup>7</sup> Licensing Board Memorandum and Order (Initial Prehearing Order) (Mar. 8, 2004) (unpublished).

<sup>8</sup> "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," ("Contentions"), May 3, 2004, at 12.

<sup>9</sup> "Answer By System Energy Resources, Inc. To Proposed Contentions," May 28, 2004, at 14. Similarly, the NRC Staff opposed admission of Contention 3.1. "NRC Staff's Response to Petitioners' Contentions Regarding The Early Site Permit Application for the Grand Gulf Site," May 28, 2004, at 26.

<sup>10</sup> "Reply By Petitioners, 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, To System Energy Resources, Inc.'s and NRC Staff's Responses to Petitioners' Contentions Regarding Early Site Permit Application for Site of Grand Gulf Nuclear Power Plant," June 9, 2004. Proposed Contention 3.1 is discussed therein, beginning at page 9.



The Licensing Board subsequently issued LBP-04-19 on August 6, 2004, finding that while Appellants established the requisite standing to intervene in the ESP proceeding, they had failed to submit at least one admissible contention concerning the SERI application. LBP-04-19, at 1. The Licensing Board specifically ruled that Contention 3.1 was inadmissible because both the contention and its supporting bases had failed to demonstrate a material legal or factual dispute. *Id.* at 16. After seeking – and being granted – an extension of time, Appellants filed the subject appeal on August 27, 2004.

### III. ARGUMENT

A Licensing Board ruling will be affirmed where the “brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board’s decision.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000), citing *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998). As discussed below, there has been no error of law or abuse of discretion by the Licensing Board – the request for hearing was properly denied and the Licensing Board’s decision should be affirmed. As found by the Licensing Board, the Appellants in Contention 3.1 did not demonstrate an admissible contention regarding environmental justice (“EJ”). Furthermore, LBP-04-19 is legally sufficient and not “contrary to basic principles of administrative law,” as claimed by Appellants.<sup>11</sup> Appellants Brief at 2.

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<sup>11</sup> Specifically, Appellants aver that the Licensing Board “has made a guessing game out of this appeal,” purportedly due to an inadequate explanation of the grounds for its decision. Appellants Brief at 2.

A. *The Licensing Board Properly Rejected Proposed Environmental Justice Contention 3.1*

In Proposed Contention 3.1, Appellants asserted that SERI's Environmental Report ("ER") "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 predominantly African American and low-income community of Claiborne County." Contentions at 12. In support of this challenge to SERI's EJ analysis, Appellants proffered eight bases in the proceeding below. All of the issues embedded in these bases were fully addressed in SERI's filings in this proceeding. Rather than repeat the arguments set forth therein, in their entirety, SERI respectfully refers the Commission to the relevant filing.<sup>12</sup> Below we address the particular arguments raised by the Appellants in their Brief.

1. *Legal Standard Governing Admissibility of Contentions*

To be admissible in NRC licensing proceedings, proposed contentions must satisfy 10 C.F.R. § 2.309(f)(1), which 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;

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<sup>12</sup> See "Answer By System Energy Resources, Inc. To Proposed Contentions," May 28, 2004, at 14-37. To the extent arguments are not made on appeal, SERI also presumes that those issues are waived. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 (1991).

- (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) (emphasis added).

The Commission has warned that its rules on admission of contentions are more demanding than a mere pleading requirement and are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). If the contention and supporting material fail to demonstrate a genuine dispute as required by Section 2.309(f)(vi), then the presiding officer must refuse to admit the contention. *See Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (citing Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)). With respect to EJ, the Licensing Board correctly ruled that Proposed Contention 3.1 and its supporting bases – including the declaration of Dr. Robert Bullard – fail to establish a genuine dispute on a material issue of law or fact. The scope of material EJ issues under NEPA has been defined by the Commission, as discussed below.

## 2. *NRC Standard Regarding the Scope of Environmental Justice Issues*

In early 1994, Executive Order (“E.O.”) 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” directed all federal agencies to develop strategies for considering EJ in their programs, policies, and activities.<sup>13</sup> The E.O. characterizes an agency’s EJ analysis as “identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects” of its programs, policies, and activities on minority and low-income populations. 59 Fed. Reg. at 7629. Thereafter, the NRC Staff developed EJ guidance<sup>14</sup> and the Commission addressed the scope of an NRC EJ review in the adjudicatory context<sup>15</sup>.

Acknowledging the need for a more comprehensive assessment of, and guidance on, its approach to the consideration of EJ matters, the Commission also published a Draft Policy Statement in late 2003.<sup>16</sup> Since issuance of LBP-04-19, the Commission published its Final

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<sup>13</sup> Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 Fed. Reg. 7629 (Feb. 16, 1994), *codified* at 3 C.F.R. Part 859 (1995).

<sup>14</sup> See NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, Final Report” (Aug. 22, 2003); NRR Office Instruction LIC-203, “Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues” (June 21, 2001).

<sup>15</sup> See generally *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, *remanded issues vacated as moot*, CLI-98-5, 47 NRC 113 (1998); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002), *motion to reopen the record denied*, CLI-04-09, 59 NRC 120 (2004).

<sup>16</sup> See Issuance of Draft Policy Statement and Notice of Opportunity for Public Comment, “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,” 68 Fed. Reg. 62,642 (Nov. 5, 2003) (“Draft Policy Statement”).

Policy Statement – which became effective on August 24, 2004.<sup>17</sup> In their most pertinent parts, both the Draft and Final Policy Statements recognize that the 1994 E.O. does not create new legal rights or obligations, and that EJ is not *per se* litigable in NRC proceedings. *See* 69 Fed. Reg. at 52,046-47. Rather, the NRC will consider EJ as part of its NEPA review in assessing the environmental impact of a proposed action.

The scope of a NEPA review is limited to impacts on the environment. An EJ review under NEPA, therefore, excludes issues of racial discrimination in the siting of nuclear reactors. “NEPA is an environmental statute and a broad-ranging inquiry into allegations of racial discrimination goes beyond the scope of NEPA’s mandate to adequately identify and weigh significant adverse environmental impacts.” 69 Fed. Reg. at 52,045. The Commission has further explained that “NEPA is not the appropriate context in which to assess racial motivation and *fairness or equity issues*.” *Id.* (emphasis added). Thus, “[t]he focus of any ‘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.* at 52,047 (emphasis added).

3. *Proposed Contention 3.1 Does Not Meet the Standards for Admissibility and Must Be Rejected*

As a matter of law, Appellants have not raised a material legal or factual dispute because they have not identified a disproportionately significant and adverse environmental impact that is unique to the residents of Claiborne County and different from the impacts on the general population around GGNS as analyzed in the ER. There are three reasons which support

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<sup>17</sup> “Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions,” 69 Fed. Reg. 52,040 (August 24, 2004) (“Final Policy Statement”).

this conclusion and explain why the Licensing Board's decision to reject Proposed Contention 3.1 should be affirmed. First, as demonstrated in the ER, there is no significant environmental impact resulting from issuance of the requested ESP. The proposed contention provided no basis to challenge this conclusion. It merely *presumed* a significant environmental impact. Second, even assuming such an environmental impact, Appellants have failed to identify any factors cognizable in an EJ review that are unique or peculiar to the identified minority and low-income population group that result in disproportionately significant and adverse environmental impacts – that is, distinct from those common to the general population as analyzed. In particular, there is no showing of a significant and adverse risk due to accidents (design basis or severe) that is different from that for the population analyzed. Third, the primary factor identified – purported discrepancies in resources available for emergency planning and response – does not relate to environmental impacts. Instead, it is a thinly-veiled challenge to the Major Features Emergency Plan provided by SERI in Part 4 of its ESP application, and falls outside the scope of EJ and NEPA. In any event, given that regulatory compliance may be presumed, the contention fails to demonstrate any disproportionate environmental impact due to this factor.

a. *There Are No Significant Environmental Impacts Attendant to Issuance of the Requested ESP*

As a threshold matter, and contrary to the Appellants' bald assertions, there has been no basis provided for a contention that the SERI ER "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." Appellants Brief at 16. In fact, SERI's ER openly acknowledges that "the community surrounding the GGNS site is located in a rural economically isolated region of Mississippi." ER at 2.5-3. Furthermore, as reflected in NRC Staff guidance

LIC-203, the NRC normally uses a 50-mile radius to define the potential environmental impact area for which it seeks to obtain demographic data,<sup>18</sup> as did SERI.

By focusing on a subset of this geographic, 50-mile area (*i.e.*, “a ten-mile radius”), Appellants tried to narrow the scope of EJ analysis but still failed to identify, with the requisite specificity and basis, a significant environmental impact purportedly resulting from issuance of the requested ESP. Appellants Brief at 17. The existence of minority and low-income population groups, alone, does not establish the requisite basis for an admissible EJ contention. As noted above, the Commission has explained that racial motivation, as well as fairness and equity issues, are not litigable EJ matters. Moreover, Proposed Contention 3.1 simply does not provide any basis to conclude that there is a significant environmental impact on *any population* that might live in either the 10- or 50-mile zone surrounding the ESP site.

Specifically, ER Chapters 4 and 5 address the environmental effects of facility construction and operation, respectively. These chapters of the ER consider, *inter alia*, land-use impacts, water-related impacts, ecological impacts, socioeconomic impacts, radiological impacts to construction workers, cooling system impacts, radiological impacts of normal operations, waste management impacts, and transmission system impacts. They also address measures and controls to limit adverse impacts during construction and operation. The potential impacts of facility construction and facility operation (as well as potential mitigation measures or controls that would minimize or eliminate such impacts) are summarized in ER Tables 4.6-1 and 5.10-1, respectively. In addition, ER Tables 10.1-1 and 10.1-2 address the “unavoidable adverse

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<sup>18</sup> Draft Policy Statement, 68 Fed. Reg. at 62,644; NRC Office Instruction LIC-203, “Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues,” (June 2001), App. D at D-3, D-8; ER at 2.5-9. *See also* Final Policy Statement, 69 Fed. Reg. at 52,047-48.

impacts” of facility construction and operation. All potential and “unavoidable” impacts were determined to be minimal – *i.e.*, not significant. Nothing in Appellants’ Contention 3.1 – including the declaration of Dr. Bullard – identified a significant (much less disproportionate) environmental impact on *any* population group.<sup>19</sup>

*b. The Requested ESP Results in No Disparate Adverse Impacts on the Residents of Claiborne County*

Even assuming there was a showing of a significant environmental impact, this alone would not be sufficient to establish a litigable EJ issue. An EJ contention must identify a disparate impact on the minority or low-income population group that differs from an impact on the general population. This disparate impact must be the result of unique or peculiar characteristics of the minority or low-income population. Appellants in Contention 3.1 did not identify any such unique characteristics, nor the attendant disparate impact on the minority and low-income population groups at issue. Again, an admissible EJ contention must do more than merely point to the existence of a minority or low-income population group. Quite simply, Contention 3.1 did not demonstrate how members of the population groups at issue, living in the 10- or 50-mile geographic areas, would be disproportionately impacted (that is, impacted in a way different from the impacts analyzed in the ER) by issuance of the requested ESP.

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<sup>19</sup> While Dr. Bullard may have been found to be a qualified EJ expert in a 1997 proceeding, his declaration in this proceeding is inadequate to support admission of Proposed Contention 3.1 due to a dearth of factual and legal foundation in support of his professional opinion. See Appellants Brief at 7, citing *Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 379 (1997), *affirmed in part and reversed in part*, CLI-98-3, 47 NRC 77 (1998). “[A]n expert opinion that merely states a conclusion . . . without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).



Appellants adamantly, yet erroneously, proclaim that they have “showed that the community would suffer disparate adverse impacts as a result of the peculiar characteristics of that community.” Appellants Brief at 17. They point to two purportedly “peculiar characteristics”: (1) “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 (2) “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.” *Id.* However, neither “characteristic” alone establishes a disparate, adverse environmental impact that would constitute an admissible issue.

The second “characteristic” (emergency preparedness) is addressed below, in Section III.A.3.c. The first purported characteristic (*i.e.*, “relatively high risk of injury and illness”), by its very terms, is vague, speculative, undocumented, unsupported, and lacking specificity. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996) (“For a contention to be admissible, a petitioner must refer to the specific portion of the license application being challenged, state the issue of fact or law associated with that portion, and provide a ‘basis’ of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or expert opinions.”) What specific sources establish and support the existence of said “relatively high risk”? Indeed, the only fact supporting this aspect of the contention is the geographic vicinity and existence of the population group, both of which are insufficient for purposes of EJ analysis. There is no showing as to how

this group is unique and thereby affected in a disparate way relative to the impacts assessed in the ER.<sup>20</sup>

Appellants erroneously claim an adequate contention on the grounds 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.” Appellants Brief at 18. In fact, ER Section 7.2 contains a detailed evaluation of the environmental impacts and offsite costs of severe accidents. It concluded that the societal and economic impacts of severe accidents for a future nuclear power plant will be small. ER at 7.2-8.<sup>21</sup> Appellants continue to overlook this information in the ER. No specific challenge was raised in the contention. More importantly, apart from the emergency preparedness angle discussed below, the contention did not establish how the low-income and minority population would be affected (due, for example, to unique cultural characteristics) in any way different from the analysis.

ER Sections 4.4 and 5.8, discuss the socioeconomic impacts of facility construction and operation, including the direct physical effects and social and economic impacts of these activities on the community and surrounding region. In these ER sections, SERI concludes, “based on the information gathered for its Environmental Justice review,” that, “while there are substantial minority populations and a few localized low-income populations in the

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<sup>20</sup> Appellants also seem to argue that, in addition to proximity, the “relatively high poverty level” also creates a disparate impact vis-à-vis the general population which has a higher income level. Appellants Brief at 17. The logical, much less factual, nexus between population group income levels and risk of injury is not addressed by Appellants. The requisite basis, support, and specificity are again lacking.

<sup>21</sup> “Based on the NRC and industry implementation of the 1985 policy statement, the generic NUREG-1437 risk evaluations, and the GGNS ESP site-specific demography and meteorology, the probability-weighted consequences of atmospheric and (surface and ground) water pathways, and the societal and economic impacts for severe accidents for a future nuclear power plant on the GGNS ESP site will also be ‘Small.’” ER at 7.2-8.

region of the GGNS site, there are no significant adverse impacts as a result of facility construction and operations that would disproportionately affect these populations.” See ER at 4.4-9, 5.8-10. Appellants in their proposed contention failed to provide a basis to controvert SERI’s conclusions regarding the insignificance of the environmental impacts of facility construction and operation on the general population and on minority and low-income populations. The proposed contention did not identify any potential significant “special impacts” that are “attributable to the special character of the community.” *Private Fuel Storage*, CLI-02-20, 56 NRC at 156; *Claiborne*, CLI-98-3, 47 NRC at 106. Cf. *Hydro Resources*, CLI-01-4, 53 NRC at 70 (stating that intervenors pointed to no “specific facet” of the subject population’s health that conceivably would have altered the Staff’s EJ-related conclusions, given the negligible incremental impacts from the proposed uranium mining project).

At bottom, the Licensing Board properly ruled that proposed Contention 3.1 did not establish any genuine dispute regarding the existence of minority and low-income populations within 50 miles of the ESP site. More importantly, Appellants had provided no support for their belief that approval of the ESP would result in disproportionately significant and adverse environmental impacts. Appellants’ theory of EJ seems to be that the mere existence of a minority or low-income population is sufficient to establish both a unique characteristic, as well as significant and disproportionate environmental impacts; thereby automatically yielding an admissible contention. This is not the case. The purpose of an EJ review under NEPA is to focus on any disproportionate impacts as compared to the impacts

analyzed for the general population.<sup>22</sup> Proposed Contention 3.1 did not provide a basis for a genuine dispute on that point. As such, the Licensing Board properly rejected the contention.

*c. Appellants' Emergency Preparedness Concerns Are Outside the Scope of This Proceeding*

As indicated above, Appellants cite a second, purportedly unique population characteristic – its “added vulnerability” to the impacts of a severe accident “given the lack of resources to mount an effective response to a radiological emergency.” Appellants Brief at 17. This too is legally insufficient to support admission of Proposed Contention 3.1. It does not relate to a cognizable environmental impact. The Licensing Board correctly ruled that this aspect of the proposed contention is beyond the scope of the proceeding. LBP-04-19, at 17.

Now disavowing a “paramount concern” about the racial motivations underlying the Mississippi Tax Code, Appellants explain that the focus of this aspect of Proposed Contention 3.1 is on “the practical effects of the tax code . . . .” Appellants Brief at 20. Specifically, they claim that due to 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.” *Id.* As a result, they believe that the minority and low-income population groups are “vulnerable to the impacts of a severe accidents [sic] 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.” *Id.* Fundamentally, this is a “fairness or equity” issue and a political view best taken to the Mississippi state legislature.

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<sup>22</sup> “At bottom, for the NRC, EJ is a tool, within the normal NEPA context, to identify communities that might otherwise be overlooked and identify impacts *due to their uniqueness* as part of the NRC’s NEPA review process.” Final Policy Statement, 69 Fed. Reg. at 52.047.

In the context of an NRC proceeding, the Appellants' supposition on the tax code and the effect on emergency preparedness is made without any factual, documentary or expert basis and support, contrary to NRC adjudicatory precedent and the requirements of 10 C.F.R. § 2.309(f)(1)(ii), (v), (vi). *Private Fuel Storage*, LBP-98-7, 47 NRC at 180. More importantly, it raises present compliance and future licensing issues – *i.e.*, emergency plan implementation and preparedness issues – that are outside the scope of this ESP proceeding. The NRC *requires* emergency preparedness that is sufficient to meet its regulations. Part of the issue raised in Contention 3.1 seemingly pertains to the adequacy of the existing GGNS emergency plan and/or its implementation (*i.e.*, “equipment and staffing for emergency preparedness are grossly inadequate to meet the demands of a radiological emergency”).<sup>23</sup> Appellants Brief at 4. As such, it is beyond the scope of this proceeding and would more properly be addressed by a petition for enforcement action (*e.g.*, 10 C.F.R. § 2.206).

Additionally, Appellants seemingly challenge emergency planning and implementation for a future plant (*i.e.*, “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.”) *Id.* at 22. This aspect of the issue also is outside the scope of an ESP proceeding. NRC regulations require that an ESP application “identify physical characteristics unique to the proposed site, such as egress limitations from the area surrounding the site, that could pose a significant impediment to the development of emergency plans.”

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<sup>23</sup> In support of this current-day issue, Appellants point to the present number of fire stations, law enforcement officers, and patrol cars in Claiborne County. Appellants Brief at 4. While these figures may be sufficiently specific with respect to current county emergency response resources, there is no support or basis to apply these figures to any future plant construction and operation that would be the subject of a separate NRC licensing proceeding.

10 C.F.R. § 52.17(b)(1). In this regard, the GGNS site already has an emergency plan, confirming that there are no clearly limiting physical characteristics of the site. The following excerpt from Part 4 of the Application discusses this fact:

Approved plans governing emergency preparedness and response activities are *currently in place* for the GGNS Unit 1 facility. It is expected that these plans and implementing procedures would be expanded and modified as needed to support the proposed new facility. *Those implementation details would be developed in cooperation with participating agencies and organizations at the COL stage.* This Plan, presenting the major features of an emergency plan for the proposed new facility, describes or summarizes applicable portions of those plans currently in place *and how they apply, or will apply,* to the proposed new facility.

GGNS Application, Part 4, "Emergency Planning Information," at 1-1 (emphasis added). Any remaining issues associated with implementation of the Emergency Plan may be appropriately litigated in a future combined operating and construction license ("COL") proceeding for GGNS. See 10 C.F.R. § 52.79(d) (requires inclusion of Emergency Plan in COL application).

Appellants' Brief and previous filings enumerate purported resource constraints currently affecting certain Claiborne County public or social service institutions. Regardless of such constraints, compliance should be presumed at this stage of NRC licensing. Emergency preparedness sufficient to meet NRC requirements would assure that accident impacts would be mitigated at least to the extent expected by the NRC; that is, to a level where the NRC has decided that there is no undue risk in plant operation. Accordingly, the Appellants' argument does not identify any disproportionately significant and adverse environmental or socioeconomic impacts (*i.e.*, that are unique to the population of interest) cognizable under NEPA.<sup>24</sup> Moreover,

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<sup>24</sup> In fact, Appendix A to Part 4 of the Application documents letters from responsible organizations. The Claiborne County Sheriff Department, for example, confirmed its willingness to work with SERI and its lack of knowledge of any "significant impediments to the development and implementation of emergency plans for the site that could include

Appellants do not provide a sufficient basis to challenge the analysis and conclusions set forth in ER Section 5.8.2 (Social and Economic Impacts of Station Operation), which considers, *inter alia*, the impacts of future station operation on local public services, public safety, and social services. “[A] contention that fails directly to controvert the license application at issue or that mistakenly asserts the application does not address a relevant issue is subject to dismissal.” *Private Fuel Storage*, LBP-98-7, 47 NRC at 181 (citations omitted).

At its core, Appellants’ complaint is with the Mississippi Tax Code. This issue clearly falls outside the scope of this NRC licensing proceeding. It is well-established that “[a]ny issues of law or fact raised in a contention must be material to the grant or denial of the license application in question, *i.e.*, they must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief.” *Id.* at 179. The particular prescriptions of the Mississippi Tax Code, however fair or unfair, clearly are not within the purview of the Commission or the Licensing Board and, therefore, cannot be the subject of relief in this proceeding.

B. *The Licensing Board’s Decision Is Legally Adequate*

Appellants also claim that LBP-04-19 should be rejected because the decision is “contrary to basic principles of administrative law,” as it fails to adequately explain the bases for not admitting Proposed Contention 3.1 into the Grand Gulf ESP proceeding. Appellants Brief at 2. This argument is superficial and can be easily dismissed.

First, Appellants try to contrast the Licensing Board’s decision with their own, purportedly “detailed and documented factual evidence, supported by an expert declaration,

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a future nuclear facility (or facilities).” Letter from Joseph L. Blount (SERI), to Frank Davis (Claiborne County Sheriff Department) (Apr. 11, 2003) (with concurrence signature of Mr. Davis).

which was facially sufficient to demonstrate a genuine and material dispute of fact with SERI.” Appellants Brief at 10. However, the responses of both the NRC Staff and SERI are replete with explanations of why Appellants’ proposed contention lacked adequate specificity and basis to support admission into this proceeding. These pleadings, as well as the two-day oral argument in June 2004, are part of the record below and fully address the Appellants’ self-proclaimed “detailed and documented factual evidence.”

Furthermore, Appellants are incorrect that the “ASLB gives no indication of the reasoning behind its decision.” *Id.* at 13. While the Licensing Board decision in LBP-04-19 is succinct, it clearly explains that Appellants did not “identify any significant and disproportional 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.” LBP-04-19 at 17. This is the essential and correct legal basis for the decision. The Licensing Board also points to information in the SERI application which belies aspects of Appellants’ purported bases for Proposed Contention 3.1.<sup>25</sup>

For the reasons discussed above, the Licensing Board’s rationale adequately supports the conclusion that the proposed contention failed to provide a basis sufficient to demonstrate a genuine dispute on a material issue of law or fact and that the contention should not be admitted into the proceeding. That ruling contains no error of law or abuse of discretion,

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<sup>25</sup> Appellants’ claim that the “significance” of correspondence from Claiborne County officials and cited by SERI in its Application is a “disputed question of fact” completely misses the point. Said correspondence is “significant” because it fulfills the regulatory requirements in 10 C.F.R. §§ 52.17(b)(1) and (b)(2)(i). This correspondence from the responsible county officials demonstrates – in documentary form – that no physical characteristics unique to the proposed site have been identified by any state, local, or federal government agency to the best of their knowledge.



and the record does not compel a different result. Appellants have in no way explained how the Licensing Board abused its discretion in reaching these conclusions or why the Commission should re-visit the Licensing Board's findings.<sup>26</sup> As for Appellants' concern about the decision's potential to "undermine[] the future administration of the Commission's policies for consideration of environmental justice claims under NEPA," the Commission itself – via its decision in this appeal proceeding – can provide any necessary further guidance and elucidation of the adjudicatory standards already detailed in its Final Policy Statement.

#### IV. CONCLUSION

For the reasons articulated by the Licensing Board and for the reasons stated above, the Licensing Board correctly rejected Proposed Contention 3.1. Its decision in LBP-04-19 should be affirmed.

Respectfully submitted,



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Dated in Washington, DC this  
7th day of September 2004

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<sup>26</sup> See *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45 (2001) (Commission affirmed Licensing Board rulings on NEPA and EJ emphasizing it would decline to revisit factual findings with which it agreed "or [had] no strong basis to second-guess.").

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

|   |   |                         |
|---|---|-------------------------|
| In the Matter of:                           | ) |                         |
|   | ) |                         |
| System Energy Resources, Inc.               | ) | Docket No. 52-009       |
|   | ) |                         |
| (Early Site Permit for Grand Gulf ESP Site) | ) | ASLBP No. 04-823-03-ESP |
|   | ) |                         |
|   | ) |                         |

CERTIFICATE OF SERVICE

I hereby certify that copies of "BRIEF OF SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO APPEAL BY 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 FROM LBP-04-19" in the captioned proceeding have been served as shown below by deposit in the United States mail, first class, this 7<sup>th</sup> day of September 2004. Additional service has also been made this same day by electronic mail as shown below.

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A handwritten signature in black ink, appearing to read 'Kathryn M. Sutton', is written over a horizontal line.

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