

September 14, 2004 (2:53PM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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
)	
)	

JOINT FILING OF SYSTEM ENERGY RESOURCES, INC. AND THE NUCLEAR
REGULATORY COMMISSION STAFF REGARDING MANDATORY HEARING

I. INTRODUCTION

In Section III of its Memorandum and Order (Ruling on Standing and Contentions) of August 6, 2004, the Licensing Board requested that System Energy Resources, Inc. ("SERI") and the Nuclear Regulatory Commission ("NRC") Staff provide their views on how it should proceed relative to the mandatory hearing findings required of the Board under the January 2004 hearing notice.¹ Specifically, the Licensing Board asked SERI and the Staff to prepare a joint filing outlining how they believe the Licensing Board should proceed in the uncontested portion of the proceeding, both with respect to the substance and timing of any further party submissions and any necessary evidentiary hearing.² With respect to the latter, the

¹ Although the Licensing Board cites the Hearing Notice for the Clinton Early Site Permit ("ESP") proceeding as 68 Fed. Reg. at 69,427 (December 12, 2003), the Hearing Notice relevant to this proceeding is dated January 16, 2004. 69 Fed. Reg. 2636.

² On August 31, 2004, the Licensing Board issued a Notice of Hearing (Application for Early Site Permit) in this proceeding. The Notice explains that the proceeding will be conducted in accordance with the procedures in 10 C.F.R. Part 2, Subparts C and L, and

Board asked that the joint filing address any difference between the mandatory hearing requirements in this proceeding and the uncontested portion of that involved with the proposed Louisiana Energy Services, L.P. ("LES") uranium enrichment facility.³

Counsel for SERI and the NRC Staff have discussed the issues set forth above. The NRC Staff has authorized counsel for SERI to submit this joint filing in response to the Licensing Board's request.

II. DISCUSSION

A. Scope and Nature of Licensing Board Findings in a Mandatory Hearing

The Commission's Notice of Hearing for this proceeding defines the scope of the proceeding. It states that the issues to be considered are:

- whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1);
- whether, taking into consideration the site criteria contained in 10 C.F.R. Part 100, a reactor, or reactors, having characteristics that fall within the parameters of the site, can be constructed and operated without undue risk to the health and safety of the public (Safety Issue 2); and
- whether, in accordance with the requirements of Subpart A of 10 C.F.R. Part 51, the ESP should be issued as proposed.

69 Fed. Reg. at 2636. These required findings on an ESP application also are reflected in NRC regulations. *See* 10 C.F.R. §§ 2.104(b)(1)(iv) and (v), (b)(2); § 52.21.

In setting forth the requisite legal determinations to be made by the Licensing Board, the Notice of Hearing distinguishes between "contested" and "uncontested" hearings.

that the Licensing Board may conduct evidentiary hearings in accordance with 10 C.F.R. §§ 2.327-.328, 2.1207.

³ Compare Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004).

Specifically, if the hearing is contested, as defined in 10 C.F.R. § 2.104,⁴ then the Licensing Board is to decide the issues in contentions as they relate to the required findings on Safety Issues 1 and 2, and NEPA. If the hearing is uncontested (*i.e.*, no contentions are admitted), then the Licensing Board is to determine, without conducting a *de novo* review of the license application:

whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support a negative finding on Safety Issue 1 above, and an affirmative finding on Safety Issue 2 above, as proposed to be made by the Director, Office of Nuclear Reactor Regulation; and whether the review conducted by the Commission pursuant to NEPA has been adequate.

69 Fed. Reg. at 2636.

Regardless of whether the proceeding is contested or uncontested, the Licensing Board also is required to make certain NEPA-related determinations. Specifically, the Board is required to:

(1) Determine whether the requirements of Section 102(2) (A), (C), and (E) of NEPA and Subpart A of 10 CFR Part 51 have been complied with in the proceeding; (2) independently consider the final balance among the conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (3) determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.

Id.; see also 10 C.F.R. § 2.104(b)(3).

At bottom, in a mandatory, uncontested proceeding, the Licensing Board must be satisfied that the application and the record support the Staff's safety and environmental

⁴ Section 2.4 defines a "contested" proceeding as one in which (1) there is a controversy between the NRC Staff and the applicant concerning the issuance of the license or any of the terms thereof, or (2) a petition for leave to intervene in opposition to the application has been granted or is pending before the Commission. 10 C.F.R. § 2.4.

findings.⁵ The Board is expected to rely on the testimony of the NRC Staff and applicant and not to duplicate the in-depth safety and environmental reviews performed by the Staff.

B. Conduct and Timing of the Mandatory Public Hearing

To fulfill its mandatory hearing responsibilities, the Licensing Board must conduct an evidentiary hearing that is open to the public. During the hearing, SERI and NRC Staff will present testimonial and documentary evidence to establish a record upon which the Board can base its determinations on the issues above.

In previous NRC mandatory hearings, the development of the decisional record was accomplished through the conduct of a formal, trial-type hearing; *i.e.*, pursuant to the procedures resembling those set forth in Subpart G of 10 C.F.R. Part 2.⁶ Our review of past hearings indicates that:

- With respect to uncontested issues falling within the scope of the Licensing Board's mandatory findings, the Board submitted written inquiries to the applicant and the NRC Staff either before and/or during the hearing. Indeed, with respect to such issues, the hearing record was developed principally through applicant and Staff responses to Licensing Board inquiries.
- Applicant and Staff witnesses typically responded to Board questions via direct testimony or affidavits. These written responses were incorporated into the record of the proceeding.
- Written direct testimony was offered and accepted, whereas affidavits and other written evidentiary materials (applicant and Staff review documents, correspondence, reports, etc.) were offered and received into the record as exhibits.

⁵ Although the Notice of Hearing does not specifically identify the standard of review that is to govern the Licensing Board's mandatory determinations, Section 2.104(b)(2)(i) provides that the Licensing Board is to make those determinations "without conducting a *de novo* review of the application." Moreover, this is consistent with the approach used in previous NRC mandatory hearings.

⁶ See former "Appendix A to 10 C.F.R. Part 2 — Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is Required Under Section 189a of the Atomic Energy Act of 1964, as Amended."

- Following the conclusion of the hearing, at which the Licensing Board could question witnesses orally, the parties submitted proposed findings of fact and conclusions of law to the Board.

While the precise format of this phase of the hearing would be subject to Licensing Board discretion, we propose a process to include the following steps:

- Upon their completion, the NRC Staff would provide the Licensing Board with copies of its final review documents (*i.e.*, the final Safety Evaluation Report ("SER") and Environmental Impact Statement ("EIS")). Unlike the *LES* proceeding, in which there are admitted contentions and a Commission order, the NRC Staff would not provide an executive summary of the key areas of review and Staff findings. In the present case, the final Staff review documents should suffice.
- SERI, the NRC Staff, and the Licensing Board would hold a prehearing conference to discuss: (1) specific questions following the Board's review of the final SER and EIS; (2) key issues to be considered by the Board at hearing; and (3) the scope of any further evidentiary presentations necessary to support the Licensing Board's mandatory determinations.
- SERI and the NRC Staff would respond, at hearing, to pre-hearing questions issued by the Licensing Board to the parties, by way of written testimony, affidavits, exhibits, and/or live testimony, on key issues underpinning the Licensing Board's required legal determinations. During the hearing, the Licensing Board could question SERI and NRC Staff witnesses, as necessary, to obtain any additional clarification or information necessary to support its findings.
- SERI would submit proposed findings of fact and conclusions of law on the mandatory hearing issues, in the form of a proposed initial decision. After reviewing SERI's submittal, the NRC Staff would then submit any revised and/or supplemental findings it deems necessary.
- The Licensing Board would issue a partial initial decision on the mandatory hearing determination after review of the record and proposed findings.

This proposal essentially is identical to that proposed jointly by the applicant and NRC Staff in the *LES* proceeding. The only substantive difference involves the proposal in *LES* for the NRC Staff to provide an executive summary, at the outset, of key areas of Staff review and Staff findings. In the present case, the Staff views the final review documents as sufficient -- given that the case currently is not contested and there is no need to avoid overlap with admitted

contentions. Moreover, there is no Hearing Order in the present case and the scope of review of the present application is narrower.

As the foregoing suggests, the NRC Staff's final review documents (SER and EIS) must be available for incorporation into the record. Thus, we believe the mandatory hearing should commence when those documents are included into the record. The parties stand ready to provide the Licensing Board with any further information deemed necessary to fully address the procedural and administrative matters set forth in the Licensing Board's August 6 Memorandum and Order.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is underlined with a long horizontal line extending to the right.

David A. Repka
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Dated at Washington, District of Columbia
this 7th day of September 2004

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "JOINT FILING OF SYSTEM ENERGY RESOURCES, INC. AND THE NUCLEAR REGULATORY COMMISSION STAFF REGARDING MANDATORY HEARING" in the captioned proceeding have been served as shown below by deposit in the United States mail, first class, this 7th day of September 2004. Additional service has also been made this same day by electronic mail as shown below.

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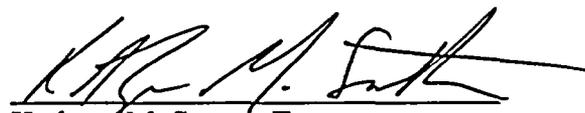
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