

October 8, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

October 8, 2004 (1:04PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
DOMINION NUCLEAR NORTH ANNA, LLC)
)
(Early Site Permit for North Anna ESP Site))

Docket No. 52-008

ASLBP No. 04-822-02-ESP

JOINT MEMORANDUM ON THE MANDATORY HEARING PROCESS

As requested by the Atomic Safety and Licensing Board (the "Board") in a prehearing conference call on September 15, 2004 (Tr. 440-42), Dominion Nuclear North Anna, LLC ("Dominion") and the NRC Staff¹ submit this memorandum addressing the Board's questions concerning the procedure for conducting the uncontested portion of the mandatory hearing in this early site permit ("ESP") proceeding. The Board requested that the parties provide their views on the mandatory determinations that the Board must make and their interrelationship with the regulatory requirements for an ESP (Tr. 441), including the following issues:

- If a hearing is contested, does the Board conduct a de novo review of the application to support its mandatory determinations? Tr. 433-34.
- How does 10 C.F.R. § 51.105 apply and how is it reconciled with the rules eliminating consideration of benefits in the environmental review of an ESP application? Tr. 435-36.
- To what extent should the Intervenor be allowed to participate in any hearings on the mandatory findings? Tr. 439.

These questions are addressed below, followed by a short description of the procedure that is proposed for this proceeding.

¹ Intervenor were invited to join in this submittal, but they declined.

I. NATURE AND SCOPE OF AN ESP PROCEEDING

An ESP is considered a partial construction permit proceeding and therefore is subject to all procedural requirements in 10 C.F.R. Part 2 which are applicable to construction permits. 10 C.F.R. § 52.21. However, the scope of an ESP proceeding is limited to (1) whether issuance of the ESP will be inimical to the common defense and security and health and safety of the public; (2) whether taking into consideration the site criteria contained in 10 C.F.R. Part 100, a reactor or reactor having characteristics that fall within the parameters for the site can be constructed without undue risk to the health and safety of the public; and (3) whether in accordance with the requirements in Subpart A of 10 C.F.R. Part 51, the ESP should be issued as proposed. Notice of Hearing, 68 Fed. Reg. 67,489 (Dec. 2, 2003).²

II. FUNCTION OF THE BOARD

Since the ESP proceeding is a partial construction permit proceeding, the review function of the Board should be the same as in a contested construction permit proceeding, although the issues that the Board considers are narrower, as discussed above. This review function was explained in the Commission's 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 1954, as Amended ("Policy Statement").³

In contested proceedings, the board will determine the controverted matters as well as decide whether the findings required by the Act and the Commission's regulations should be made and whether, in accordance with subpart A of part 51,

² These issues are derived from 10 C.F.R. § 52.21, which specifies which of the issues addressed in a Notice of Hearing on a construction permit application should be included in a Notice of Hearing on an ESP application.

³ This Policy Statement was previously codified at 10 C.F.R. Part 2 App. A. The appendix was removed from 10 C.F.R. Part 2 when those rules were revised this year (see 69 Fed. Reg. 2,182, 2,274 (Jan. 14, 2004)), but the explanation of a Board's role in a contested proceeding is still germane.

the construction permit should be issued as proposed. Thus, in such proceedings, the board will determine the matters in controversy and may be called upon to make technical judgments of its own on those matters. As to matters pertaining to radiological health and safety which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the staff and ACRS, and they are authorized to rely upon the testimony of the staff, the applicant, and the conclusions of the ACRS, which are not controverted by any party.

Policy Statement, § III(f)(1).⁴

Thus, in a contested construction permit proceeding, the Board's function is "to evaluate independently and resolve the appropriate contentions of the various parties, to assure itself that the regulatory Staff's review has been adequate, and to inquire further into areas where it may perceive problems or find a need for elaboration." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 A.E.C. 331, 335 (1973). The Board should not duplicate the review of the staff or perform independent basic research. See id.; Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 N.R.C. 760, 774 (1977). See also Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-3, 59 N.R.C. 10, 13 (2004) (in a mandatory hearing on an enrichment facility, the Board shall make its determinations on matters not covered by admitted contentions without conducting a *de novo* evaluation of the application).

In UCS v. AEC, 499 F.2d 1069 (D.C. Cir. 1974), the Court noted that in determining whether findings required by the Atomic Energy Act and NRC regulations should be made – a

⁴ The Notice of Hearing in this proceeding states that if a hearing is not contested, the presiding officer will determine whether the application and the record contain sufficient information, and the review of the application has been sufficient, to support certain findings, and whether the review conducted pursuant to NEPA has been adequate. 10 C.F.R. § 2.104(b)(2), on which this statement in the Notice of Hearing is based, adds that this determination is made without *de novo* review. These statements do not suggest that a *de novo* review is required in a contested proceeding. Rather, they indicate the appropriate role of the Board with respect to all uncontested issues.

responsibility borne by a licensing board whether or not the proceeding is contested⁵ – a licensing board does not make the findings itself but rather determines whether the application and the record contain sufficient information, and the review of the application by the Staff has been adequate, to support the Staff's proposed findings. 499 F.2d at 1076. The Court drew an analogy between a licensing board's role and the function of an appellate court applying the substantial evidence test, but noted that the analogy is imperfect because a licensing board looks not only to the information in the record but also to the thoroughness of the staff's review. Id.

With respect to the Board's responsibilities under NEPA, the Notice of Hearing in this proceeding states:

Regardless of whether the proceeding is contested or uncontested, the presiding officer will: (1) Determine whether the requirements of Section 102(2)(A), (C) and (E) of NEPA and 10 subpart A of CFR part 51 have been complied with in this proceeding; (2) independently consider the final balance among conflicting factors contained in the record of this 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.

68 Fed. Reg. at 67,489.⁶ This formulation of the Board's responsibilities stems from Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), in which the Court remanded a rule that had precluded a licensing board from conducting an independent review of an EIS if no party raised an environmental issue. The Court explained:

The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own "determine whether the application and record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative

⁵ The UCS case involved an operating license proceeding, but the proceeding predated amendments to the Commission's rules limiting hearings at the operating license stage to matters in controversy. See 499 F.2d at 1074 n.12.

⁶ This statement in the Notice of Hearing is consistent with 10 C.F.R. § 2.104(b)(3) and the Policy Statement, § V(f)(3).

findings on” various environmental factors. NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not go over the same ground covered in the “detailed statement.” But it must at least examine the statement carefully to determine whether “the review . . . by the Commission’s regulatory staff has been adequate.” And it must independently consider the balance among conflicting factors that is struck in the staff’s recommendation.

449 F.2d. at 1118, citing 10 C.F.R. § 2.104(b)(2) (1971).

As explained in Consumers Power, the Calvert Cliffs decision made it clear that NEPA requires the Commission “to consider environmental issues, just as they consider other matters within their mandates.” ALAB-123, 6 A.E.C. at 335. Thus, the Board should consider environmental issues in the uncontested portion of an ESP proceeding in essentially the same manner as it considers safety issues, by relying on the testimony of the Staff and the applicant and the conclusions of the ACRS, rather than duplicating the NRC Staff’s review. As the Appeal Board held, “Calvert Cliffs . . . require[s] no independent research by the Board” and does “not require the Board to duplicate the analysis performed by the staff.” Id. What Calvert Cliffs requires is an “independent review of staff proposals by the Board, and conclusions independently arrived at on the basis of the evidence in the record, including the Staff’s Final Environmental Statement.” Id. at 335-36 (footnote omitted).

III. CONSIDERATION OF 10 C.F.R. § 51.105

10 C.F.R. § 52.21 states that the issues specified for the notice of hearing shall not be construed to require that the environmental report or draft or final EIS include an assessment of the benefits of the proposed action. Similarly, 10 C.F.R. §§ 52.17(a)(2) and 52.18 state that the ER and EIS, respectively, should focus on the environmental effects of construction and operation of a reactor and need not include an assessment of benefits (for example, need for power) of the proposed action. In light of these provisions, the Board requested views on how

the NRC would weigh benefits against costs, as specified in 10 C.F.R. § 51.105, if these is no assessment of benefits in connection with an ESP application.

The Board's responsibilities in the uncontested portion of the proceeding are compatible with the limited focus of the NEPA documents at the ESP stage. As stated in the Notice of Hearing, and as reflected in 10 C.F.R. § 51.105(a)(2) and 10 C.F.R. § 2.104(b)(3)(ii), the Board's responsibility is to "independently consider the balance among conflicting factors contained in the record." 68 Fed. Reg. at 67,489 (emphasis added). Since the benefit of new plants is not required to be considered, the record of this proceeding will not contain any NEPA balance of the ultimate costs and benefits of constructing and operating new units (i.e., the EIS will not contain a recommendation on whether new units should be built). The record may, however, balance competing factors in deciding other issues, such as whether some environmental impact is acceptable or warrants mitigation. If the record contains such judgments, they would be subject to the Board's independent review.

As stated in the Notice of Hearing, the Board must also determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values. 68 Fed. Reg. at 67,489. This charge is narrower than 10 C.F.R. § 51.105(a)(3), which requires the weighing of a number of benefits in a full construction permit proceeding. The scope of the Board's determination as formulated by the Commission for this ESP proceeding does not requiring a weighing of benefits.⁷ Although an ESP is a partial

⁷ The Board could weigh the benefits of issuing an ESP against the environmental impact of those activities that are authorized by the ESP (i.e. site preparation activities allowed by 10 C.F.R. § 52.25) to determine that issuance of the ESP, as opposed to construction of new units, is appropriate under NEPA. The benefits of an ESP include early resolution of siting issues before large sums are invested in new plant design and construction, early resolution of issues on the environmental impact of construction and operation of reactors that fall with the site parameters, and the ability to bank sites on which nuclear plants may be located. See 68 Fed. Reg. at 40,029. It should be noted that site preparation activities are permissible only if the NRC's final environmental impact statement concludes that the activities will not result in any significant environmental impacts which cannot be redressed. 10 C.F.R. § 52.25(a).

construction permit, the specific rules limited the scope of the ESP proceeding, and the specific formulation of the issues to be considered in an ESP proceeding, should govern over any more general rules applicable to broad construction permit proceedings.⁸

IV. INTERVENORS' ROLE IN THE HEARING ON UNCONTESTED ISSUES

Dominion and the NRC Staff submit that the Intervenor's participation in the mandatory hearing should be limited to Contentions EC 3.3.2, "Impacts on Striped Bass in Lake Anna," and EC 3.3.4, "Failure to Provide Adequate Consideration of the No-Action Alternative" (the latter in the event EC 3.3.4 is not settled). It is well established that a licensing board, in a construction permit proceeding, has the authority to "regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested." United States Dept. of Energy (Clinch River Breeder Reactor Plant), ALAB-761, 19 N.R.C. 487, 492 (1984). Indeed, the Atomic Safety and Licensing Appeal Board has stated that to allow an intervenor the right to participate "on issues beyond those which have been put in contest" in a construction permit proceeding would "almost certainly run counter to" the objectives of the Commission's contention requirements. Northern States Power Co. (Prairie Island Nuclear Generating Station, Units 1 & 2), ALAB-244, 8 A.E.C. 857, 870 (1974), aff'd, CLI-75-1, 1 N.R.C. 1 (1975).⁹

⁸ A basic rule of interpretation is that the specific governs the general. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992).

⁹ The Appeal Board also noted in dicta in Prairie Island that intervenors should have the opportunity to participate with respect to safety or environmental matters raised *sua sponte* by a licensing board. 8 A.E.C. at 869-70. However, a licensing board recently held that, in light of subsequent revisions to the rules of practice, the type of intervenor participation recognized in the Prairie Island line of cases is no longer appropriate. Louisiana Energy Services, LP (National Enrichment Facility), Docket No. 70-3103-ML, unpublished Memorandum and Order (Clarification Requests Ruling and Commission Referral) at 4-5 (Sept. 14, 2004). Dominion and the NRC Staff also believe that this dicta in Prairie Island applied, at the time, only to those serious safety or environmental issues that met the standards (currently codified in 10 C.F.R. § 2.340) for *sua sponte* Board contentions. See Prairie Island, ALAB-244, 8 A.E.C. at 869-70, citing Consolidated Edison Co. (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 A.E.C. 7, 8-9 (1974) (holding that *sua sponte* issues in an operating license proceeding should be resolved on the record after giving the parties an opportunity to comment or otherwise be heard).

This position is consistent with the Commission's procedural rules. The contention admissibility rules are intended, among other things, to ensure that "the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2189-90 (Jan. 14, 2004). Further, in its 1989 amendments to its rules of practice, the Commission limited an intervenor's filing of proposed findings and its appeals to issues which that party actually places in controversy, in order "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issue." Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,177-78 (Aug. 11, 1989). Moreover, the rules governing the conduct of Subpart L proceedings (such as this one) provide for participation by the intervenors on *admitted contentions*. See, e.g., 10 C.F.R. § 2.1207 (limiting written statements of position and written testimony to the admitted contentions); § 2.1209 (limiting post-hearing findings of fact and conclusions of law to contentions addressed in an oral hearing under § 2.1207). In summary, under the NRC's procedural rules, the Intervenors should not participate as parties to the uncontested portion of the hearing.¹⁰

V. PROPOSED PROCEDURE

As discussed during the September 15 teleconference, Dominion and the NRC Staff propose essentially the same process outlined in the Joint Filing of System Energy Resources,

¹⁰ Of course, Intervenors are free to make limited appearances in the proceeding, within the limits and on the conditions fixed by the Board. See 10 C.F.R. § 2.315(a).

Inc. and the Nuclear Regulatory Commission Staff Regarding Mandatory Hearing (Sept. 7, 2004), as follows:

- Upon their completion, the NRC Staff would provide the Board with copies of its final review documents, i.e., the final Safety Evaluation Report (“SER”) and Environmental Impact Statement (“EIS”). Unlike the proposal in the *LES* proceeding,¹¹ the NRC Staff would not provide an executive summary of the key areas of review and Staff findings, unless requested by the Board.
- Dominion, the NRC Staff, and the Board would hold a pre-hearing 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 Board’s mandatory determinations.
- At the hearing, Dominion would offer the application, and the NRC Staff would offer the SER, EIS, and ACRS letter into evidence. Dominion and the NRC Staff would also respond, at hearing, to pre-hearing questions issued to them by the Board, by way of written testimony, affidavits, exhibits, and/or live testimony, on key issues underpinning the Board’s required legal determinations. During the hearing, the Board could question Dominion and NRC Staff witnesses, as necessary, to obtain any additional clarification or information necessary to support its findings.
- Dominion 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 Dominion’s submittal, the NRC Staff would then submit any revised and/or supplemental findings it deems necessary.
- The Board would issue a partial initial decision on the mandatory hearing determination after review of the record and proposed findings.

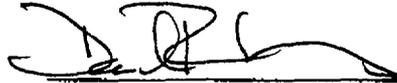
¹¹ Louisiana Energy Services, L.P. (National Enrichment Facility), Docket No. 70-3103-ML, Joint Status Report Regarding the Parties’ Proposed Discovery Plan and Other Adjudicatory Process Issues (July 29, 2004).

Respectfully submitted,



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Dated: October 8, 2004

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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DOMINION NUCLEAR NORTH ANNA, LLC)	Docket No. 52-008
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(Early Site Permit for North Anna ESP Site))	ASLBP No. 04-822-02-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Memorandum on the Mandatory Hearing Process," dated October 8, 2004, were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 8th day of October, 2004.

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