

May 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SYSTEM ENERGY RESOURCES, INC.)	Docket No. 52-009-ESP
)	
(Early Site Permit for Grand Gulf ESP Site))	ASLBP No. 04-823-03-ESP

NRC STAFF MOTION FOR RECONSIDERATION AND CLARIFICATION OF BOARD
ORDER (REQUEST FOR DOCUMENTS AND BRIEFING) DATED APRIL 19, 2006

INTRODUCTION

On April 19, 2006, the Atomic Safety and Licensing Board ("Board") in this proceeding issued an Order requesting documents and briefings ("Order").¹ Pursuant to 10 CFR § 2.323 and the Board's Order (Order at 5), and for the reasons set forth below, the NRC Staff ("Staff") respectfully requests that the Board reconsider its Order. The Staff also requests clarification of certain aspects of the Order.²

BACKGROUND

In its Order, the Board directed the Staff to submit to the Board copies of certain documents pertaining to the System Energy Resources, Inc., ("SERI" or "Applicant") early site permit ("ESP") application. Order at 2. The Board also directed the Staff to prepare and submit to the Board a narrative summary identifying all regulatory guidance documents that were used, or are being used, in the Staff's review of SERI's application. *Id.* The Board specified the information to be included in the summary, as further discussed below, and indicated that the purpose of its request is to facilitate the Board's preparation for the Mandatory Hearing. *Id.* The Board specified that these documents be filed by June 5, 2006, together with an electronic

¹ See Order (Request for Documents and Briefings), unpublished, dated April 19, 2006.

² Pursuant to 10 C.F.R. § 2.323, Staff counsel has discussed this Motion with counsel for the Applicant.

copy of them on CD or DVD. *Id.* at 3. The Order also provided for the Applicant to file exceptions, additions, or objections to the NRC Staff's submission. *Id.* at 3-4. Further, the Board instructed the Staff to file, within 60 days after submission of the summary, preliminary proposed findings of fact and conclusions of law as the Staff deems relevant to the findings which the Board must make in the Mandatory Hearing. *Id.* at 4. The Board also ordered SERI to submit any exceptions, additions, or objections to the NRC Staff's proposed findings within 30 days of the Staff's filing of its preliminary findings. *Id.* at 4.

DISCUSSION

The Staff respectfully requests that the Board reconsider its Order in light of the scope of its review in a Mandatory Hearing. As further discussed below, the Staff believes that Board review of all the information requested in the Board's Order would amount to the Board's unnecessarily repeating the Staff's review of the application, contrary to applicable legal standards. These legal standards are set forth below.

I. Legal Standards:

The Board's role in an uncontested proceeding has been defined as analogous to "the function of an appellate court, applying the 'substantial evidence' test[.]" *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC 5, 34 (2005) ("Exelon") *citing Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (1974) ("UCS"). In this role, the Board "looks not only to the information in the record, but also to the thoroughness of the review that the Staff . . . has given it." *Id.* A Board is to determine "whether the findings required by the [Atomic Energy Act of 1954, as amended ("Act")] and the Commission's regulations should be made." *UCS*, 499 F.2d at 1076. The Board is not to make the findings itself. *Id.* Rather, the Board "should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact." *Exelon*, 62 NRC at 39.

Boards should carefully probe the Staff findings by asking appropriate questions and by requiring supplemental information when necessary, and thereby undertake the kind of truly independent review that Congress anticipated when it established the mandatory hearing requirement. *Id.* at 40. The Board need not demand that all possible views and facts relating in any way to the matters in question must be placed in the evidentiary record. *Id.* at 41-42. Rather, “the [licensing] boards should decide simply whether the safety and environmental record is ‘sufficient’ to support license issuance.” *Id.* at 39.

With regard to uncontested matters, Commission policy leaves to the Staff the “prime responsibility for technical fact-finding on uncontested matters.” *Id.* Second, “it promotes efficient case management and prompt decision-making by concentrating [the Commission’s] boards’ attention on resolving disputes *rather than redoing NRC staff work.*” *Id.* (emphasis added). While the Board should probe the logic and evidence supporting NRC Staff findings, the Board should give appropriate deference to NRC Staff technical expertise, and should not replicate NRC Staff work. *Id.* at 34.

With respect to environmental matters, Boards must reach independent determinations on the three “baseline” questions under the National Environmental Policy Act of 1969, as amended (“NEPA”), *i.e.*, (1) whether the NEPA process “has been complied with,” (2) what is the appropriate “final balance among conflicting factors,” and (3) whether the “construction permit should be issued, denied, or appropriately conditioned.” *Id.* at 45; 10 C.F.R. §§ 2.104(b)(3), 51.105(a)(1)-(3). In reaching those judgments, the Board should not second-guess underlying technical or factual findings by the NRC Staff. *Exelon*, 62 NRC at 45. The only exceptions to this would be if the Board found the Staff review to be incomplete or the Staff findings to be insufficiently explained in the record. *Id.*

II. Information requested by the Board:

As a preliminary matter, the Staff will provide to the Board the requested paper and electronic copies of the final Environmental Impact Statement ("FEIS") (Order at 2, Item 4) and Safety Evaluation Report ("SER") (*id.*, Item 5). The Staff is preparing an electronic copy of the SER, and will provide the requested copies of the SER and FEIS to the Board promptly upon completion of the electronic copy of the SER, but not later than June 5, 2006, as required by the Order. *Id.* at 3. The Staff notes that the report of the Advisory Committee on Reactor Safeguards ("ACRS") on the SER (*id.*, Item 7), which is dated December 23, 2005, is bound into the SER in Appendix E. When the Staff submits the SER and FEIS to the Board, the Staff will include a second ACRS letter dated April 14, 2006 (*id.*, Item 7), which also relates to the SER. In addition, counsel for the Applicant has indicated to Staff counsel that the Applicant will provide to the Board four paper copies and one electronic copy of the Application, which includes the Site Safety Analysis Report ("SSAR") (*id.*, Item 1), the emergency planning information (*id.*, Item 2), and the Environmental Report ("ER") (*id.*, Item 3), by June 5, 2006. The Applicant has indicated that it will also provide the requisite copies of its responses to the Staff Requests for Additional Information ("RAIs") (*id.*, Item 6) to the Board by the same date.

The Staff respectfully requests reconsideration of the requirements in the Order for the Staff to submit other documents to the Board for the following three reasons: (1) the documents are beyond the scope of the Board's review in an uncontested proceeding as contemplated by the regulations and the Commission (see *Exelon*, 62 NRC at 37; 10 C.F.R. § 2.104(b)(2)(i)); (2) the documents are not under the Staff's control or are better provided by another person; or (3) the documents are duplicative in nature, as the information requested by the Board is already contained in another document requested by the Board that will be submitted either by the Staff or the Applicant.

In general, the Staff submits that the Board's review can best be supported by the Staff's submission of the FEIS and SER, which the Staff ultimately intends to place in evidence in the proceeding,³ and the submission of the Application, the Staff's RAIs, and the Applicant's responses thereto. The Staff believes it can be most effective in assisting the Board in its consideration of the FEIS and SER if the Board reviews these documents, the Application, the RAIs and responses, and then poses questions for the Staff to address in its prefiled testimony. Appropriate additional documentation could then be provided together with the Staff testimony. The Staff also believes this to be the most efficient manner in which to make a record. In keeping with these principles, the Staff's specific requests for reconsideration and clarification are set forth below.

A. Reconsideration of requirement for Staff submission of SSAR, emergency planning information, and ER

As stated above, the Applicant has indicated that it will provide to the Board the requested copies of the SSAR, emergency planning information, ER, and the Applicant's answers to the Staff's RAIs by June 5, 2006. The Applicant's responses to the Staff's RAIs are in question and answer form and include the RAIs (Order at 2, Item 6) themselves. Inasmuch as the Applicant has agreed to provide these documents to the Board, the Staff respectfully submits that Staff submission of these items would be duplicative and unnecessary.

B. Reconsideration of requirement to submit written Staff analyses of Applicant replies to Staff RAIs (Order at 2, Item 6)

To the extent the Staff has prepared written analyses of Applicant RAI responses that are material to the Staff's conclusions, these analyses are reflected in the SER or FEIS.

³ The Board makes its decision based on the record, and not on evidence not in the record. See *Exelon*, 62 NRC at 41, citing *Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy*, 87th Cong. 313 (1961) (Statement of AEC Commissioner Loren K. Olson). The Staff submits that it is up to the Staff (and Applicant) in the first instance to request admission into the record of evidence, including the report of the ACRS on the application, the SER, and the FEIS. See 10 C.F.R. § 2.337(g). The Board need only ensure that the evidentiary record contains evidence sufficient to allow it to make a decision on the ultimate question of safety. *Exelon*, 62 NRC at 42.

Therefore, the Staff respectfully submits that re-submission of the analyses already set forth in the Staff's review documents would be duplicative, and that Board consideration of the remainder of the requested material would amount to unnecessary repetition of the Staff's review.

- C. Reconsideration of requirement to submit minutes and transcripts of ACRS meetings on SERI's ESP application, and reports, letters, and memoranda by or for the ACRS relating to the application (Order at 2, Item 7)

As noted above, the December 23, 2005 report of the ACRS on the Application is included in the SER in Appendix E, which will be offered into evidence as provided by 10 C.F.R. § 2.337. Therefore, submission of this report as a separate document would be duplicative. With the exception of the subsequent April 14, 2006 ACRS letter to the Staff, which the Staff will provide to the Board and will also offer into evidence pursuant to § 2.337, any other ACRS reports, letters, memoranda, meeting minutes or meeting transcripts, are under the ACRS's control. The ACRS is an independent federal advisory committee that advises the Commission; it is not part of the NRC Staff. See Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972). The Staff does not control ACRS records. Accordingly, the Staff should not be required to provide this material, other than the two ACRS letters identified above.

- D. Reconsideration of requirement to prepare and submit a narrative summary identifying all regulatory guidance documents that were used, or are being used, in the Staff's review of the Application

As indicated above, licensing boards in uncontested proceedings are charged with evaluating the sufficiency of the record, not with redoing the Staff's work. See *Exelon*, 62 NRC at 39. The Board's review of information at the level of detail requested would be tantamount to redoing the Staff's work. Nonetheless, the SER summarizes the guidance the Staff used in its review.⁴ Specifically, the SER contains subsections entitled "regulatory

⁴ The Staff's review of the application is now complete, and no such guidance is currently being used.

evaluation,” each of which identifies the relevant regulations and guidance documents used by the Staff to evaluate that portion of the application. Accordingly, the Staff expects that the SER will satisfy the Board’s request for an in-depth, subsection-by-subsection explanation of how the Standard Review Plan (“SRP”)⁵ or regulatory guides (“RGs”) were used by the Staff in its review of the Application, to the extent the information requested by the Board is relevant to the Board’s decision.

As part of the narrative summary, the Board requested that the Staff highlight areas where relevant portions of the published guidance documents were not used. Order at 3. The Staff does not know of any such instances. Nonetheless, for instances in which existing regulatory guidance was not directly applicable to the Application, or in which the guidance could not be applied in part, the SER, in its “regulatory evaluation” subsections, sets forth how the Staff applied the existing guidance, or what other methodology the Staff did use, and why such use was acceptable.

The Board has also requested a summary describing the key areas of the Staff review of the application, with reference to the EIS and SER. *Id.* A concise summary of the key areas of the safety and environmental review would amount to a recompilation of the information in the SER and FEIS. Therefore, the Staff submits that the requested summary is duplicative of information readily accessible in the SER and FEIS.⁶

⁵ The SRP does not apply to the Staff’s review of an ESP application; rather, RS-002, “Processing Applications for Early Site Permits,” applies to the Staff’s review.

⁶ The information sought by the Board with respect to safety, as the Staff understands the Board’s request, is available in the following portions of the SER: (1) the Executive Summary; (2) Chapter 1, “Introduction and General Description”; and (3) Appendix A, “Permit Conditions, COL Action Items, Site Characteristics, and Bounding Parameters.” Items (1) and (2) provide background information and identify the general areas of Staff review, while item (3) summarizes the results of the Staff’s review, the bases for which are set forth throughout the rest of the SER. Similar information with respect to the environmental review is available in the following portions of the FEIS: (1) the Executive Summary; (2) Chapter 1, “Introduction”; (3) Chapter 3, “Site Layout and Plant Parameter Envelope”; (4) Chapter 9, “Comparison of the Impacts and Alternative Sites”; and (5) Chapter 10, “Conclusions and Recommendations.” Items (1), (2), and (3) contain background and describe the general areas of
(continued...)

In connection with the narrative summary, the Board has requested that the Staff “identify the particular individual who was in charge of each portion of the review.” Order at 3. The Staff respectfully submits that this information is not needed for the Board to make its findings in an uncontested proceeding for two reasons. First, as discussed above, the Board is charged with determining whether the safety record is sufficient to support license issuance (see *Exelon*, 62 NRC at 39), and the identity of the reviewer is irrelevant to this determination. Second, the Staff’s testimony will be presented by appropriate persons designated by the Executive Director for Operations. See 10 C.F.R. § 2.1207(b)(4).

E. Clarification of requirement for submission of additional documents (Order at 3)

The Staff does not now know of documents in addition to the Application, the SER, the FEIS, and the RAI responses on which the Board should rely in making its findings. Nonetheless, the Staff would expect to identify such documents during the preparation of Staff testimony to respond to any Board questions arising from the Board’s review of the Application and the Staff’s review documents. The Staff believes that its testimony would make clear why such documents are relevant and necessary for inclusion in the record of the proceeding.

F. Reconsideration of requirement to submit preliminary proposed findings of fact and conclusions of law (Order at 4)

While the Staff does not object to the concept of filing preliminary proposed findings of fact and conclusions of law, the Staff urges the Board to reconsider the timing of this filing. The Order currently provides for the Staff to file such findings sixty days after it completes the submission of other documents requested by the Order. Order at 4. The Staff anticipates, however, that both the Staff and Applicant will prepare pre-filed testimony, likely with exhibits, in response to Board questions formulated after the Board’s review of the Application and Staff review documents. Since the Order does not provide for this, it is not clear when this would

⁶(...continued)
review, while items (4) and (5) summarize the Staff’s results and conclusions.

occur, if at all. The Staff submits that preliminary findings would be vastly more useful to the Board if prepared after all testimony and exhibits were filed, but before the hearing is conducted. In addition, the Applicant, as the proponent of issuance of the ESP in this matter, ordinarily has the burden of proof and would be expected to make initial filings to which the Staff would respond (subject to reply by the Applicant). See 10 C.F.R. §§ 2.324 and 2.325. Accordingly, the Staff respectfully requests the Board to reconsider the Order's provisions for the order of procedure for filing preliminary proposed findings of fact and conclusions of law before commencement of the hearing.

G. Clarification of requirement for Applicant to file exceptions, additions, or objections to Staff submissions to Board (Order at 3-4)

The Staff does not object to the Board's affording the Applicant an opportunity to correct any errors, technical or otherwise, that the Applicant may identify in the Staff review documents. In this regard, the Applicant would normally make the initial filing, as discussed above, and could identify any such apparent errors at that time. The Staff would normally then be afforded an opportunity to explain or correct any seeming error in the Staff's review documents identified by the Applicant.⁷ The Staff, therefore, requests clarification of this provision of the Order.

In addition, it appears from the use of the term "objections" that the Board may be affording the Applicant opportunities to raise a controversy with the Staff. The Staff submits that if the Applicant seeks to raise a controversy with the Staff, and make the proceeding into a contested one (see 10 C.F.R. § 2.4), it should propose to the Board a contention as to why it believes the Staff has denied some portion of its application (*e.g.*, by proposing a permit

⁷ During the process of the Staff's review of the application, including considering Applicant responses to RAIs, meeting with Applicant to discuss the Application, and the like, the Staff would presumably have become aware of any differences of opinion the Applicant may have had with the Staff, and would have considered such differences in preparing the SER. Nonetheless, since the Applicant is the proponent of the issuance of the ESP, the Applicant should have the right to offer testimony and exhibits into evidence to address any perceived deficiencies in the Staff's review documents.

condition) and asserting error in such denial.⁸ An Applicant proposal to contest the Staff evaluation should be based on the Staff review documents, and not on other material requested by the Board.

Finally, it is not clear to the Staff whether the Board intends for Applicant to make some type of submission other than the matters discussed above under these provisions of the Order. Accordingly, the Staff requests additional explanation of these provisions of the Order.

CONCLUSION

For the reasons set forth herein, the Staff respectfully requests that the Board reconsider and clarify its Order.⁹

Respectfully submitted,

/RA/

Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of May, 2006.

⁸ The Staff is not aware of any such controversy between the Staff and the Applicant.

⁹ Boards have issued similar orders in this proceeding, the Exelon Generating Co., Inc., proceeding (Early Site Permit for Clinton ESP Site, Docket No. 52-007-ESP, ASLBP No. 04-821-01-ESP, "Order" (Request for Documents and Briefings), unpublished, dated April 17, 2006)), and the USEC, Inc., proceeding (American Centrifuge Plant, Docket No. 70-7004-ML, ASLBP No. 05-838-01-ML, "Order" (Request for Documents and Briefings), unpublished, dated April 19, 2006)). The Staff has filed motions for reconsideration or clarification in each proceeding, and in light of the common issues raised in these motions, the Board may wish to refer its ruling on this Motion to the Commission in accordance with 10 C.F.R. § 2.323(f), or certify questions to the Commission with respect to the matters discussed in its Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SYSTEM ENERGY RESOURCES, INC.)	Docket No. 52-009-ESP
)	
(Early Site Permit for Grand Gulf ESP Site))	ASLBP No. 04-823-03-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION FOR RECONSIDERATION AND CLARIFICATION OF BOARD ORDER (REQUEST FOR DOCUMENTS AND BRIEFING) DATED APRIL 19, 2006" 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 1st day of May, 2006:

Lawrence G. McDade, Chair*
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: LGM1@nrc.gov)

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Dr. Nicholas G. Trikouros*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: NGT@nrc.gov)

Kathryn Sutton, Esq.*
Patricia L. Campbell, Esq.*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
(E-mail: ksutton@morganlewis.com,
pcampbell@morganlewis.com)

Dr. Richard E. Wardwell*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: REW@nrc.gov)

Office of Commission Appellate
Adjudication
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: ELJ@nrc.gov)

/RA/

Robert M. Weisman
Counsel for NRC Staff