

RAS 11694

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/31/06

SERVED 05/31/06

Before Administrative Judges:

Lawrence G. McDade, Chairman
Nicholas G. Trikouros
Dr. Richard E. Wardwell

In the Matter of

SYSTEM ENERGY RESOURCES, INC.

(Early Site Permit for Grand Gulf ESP Site)

Docket No. 52-009-ESP

ASLBP No. 04-823-03-ESP

May 31, 2006

MEMORANDUM AND ORDER

(Ruling on Motions for Reconsideration and Clarification)

INTRODUCTION

System Energy Resources, Inc. (SERI) submitted an application for an early site permit (ESP) for the possible construction of additional nuclear power generating capacity at the existing Grand Gulf nuclear power station site in Claiborne County, Mississippi. Although various organizations filed petitions to intervene, the previously assigned Atomic Safety and Licensing Board determined that none of the Petitioners had submitted an admissible contention¹ and the Commission affirmed the Board's rulings.² Accordingly, remaining before this Board is the satisfaction of the mandatory hearing requirement with regard to SERI's ESP Application. 42 U.S.C. § 2235 (2000); 10 C.F.R. §§ 52.18, 52.21, 52.24.

Preliminarily, this Board issued an Order on April 19, 2006³ in which it directed the NRC Staff and SERI to submit documents, and briefing, which we had concluded would be of

¹ LBP-04-19, 60 NRC 277 (2004).

² CLI-05-04, 61 NRC 10 (2005).

³ See Licensing Board Order (Request for Documents and Briefings) (April 19, 2006) (unpublished) [hereinafter April 19 Order].

assistance to us in expeditiously conducting and concluding the mandatory hearing. In response the NRC Staff filed a Motion for Reconsideration and Clarification⁴ of the April 19 Order and SERI filed a Motion for Clarification⁵ of that same Order.⁶ Upon consideration, we grant the motions in part and deny them in part.

By way of preface, we believe that it would be helpful to outline this Board's understanding of its role, and the role of the NRC Staff and SERI, in this proceeding in order to ensure that the parties understand our ruling on their motions, better understand the rationale behind our April 19 Order, and provide maximum assistance to the Board as we move expeditiously toward the completion of this proceeding. Specifically, in this mandatory hearing on uncontested issues it is not our intent to repeat the NRC Staff's review of SERI's application. Rather, the Board contemplates that it will perform a "sufficiency" review of the NRC Staff's actions.⁷ This means that we do not intend to evaluate SERI's ESP Application de novo. Rather, we intend to determine "whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact." CLI-05-17, 62 NRC at 39. Also, given

⁴ See NRC Staff Motion for Reconsideration and Clarification of Board Order (Request for Documents and Briefing) Dated April 19, 2006 (May 1, 2006) [hereinafter NRC Staff Motion].

⁵ See System Energy Resources Inc.'s Motion for Clarification (May 1, 2006) [hereinafter SERI's Motion].

⁶ On May 8, 2006, SERI filed an Answer to the NRC Staff Motion and on May 16, 2006, the NRC Staff filed an Answer to SERI's Motion and a Reply to SERI's Answer.

⁷ System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-17, 62 NRC 5, 39 (2005). The Commission's guidance came in response to a number of certified questions issued by the Chief Administrative Judge of the ASLBP seeking clarification of the breadth and depth of the Board's mandatory hearing role. LBP-05-07, 61 NRC 188 (2005). The Commission suggested that "applying a less stringent 'sufficiency' standard when examining uncontested issues merely recognizes "the inherent limitations on a board's review . . .' [and] '[a]s a practical matter . . . it would simply not be possible for the two technical members of the panel to evaluate the totality of the material relevant to safety matters that the Staff and [the Advisory Committee on Reactor Safeguards] have generated through many months of work.'" CLI-05-17, 62 NRC at 40 (citation omitted).

that this proceeding involves an ESP Application, we will not be conducting an environmental cost benefit “weighing” under NEPA, as our responsibility under NEPA to consider reasonable alternatives is very limited. See id. at 47-48.⁸

Accordingly, although the Board is tasked with determining “whether the application and the record of the proceeding contain sufficient information” to support approval of SERI’s ESP Application, 10 C.F.R. § 2.104(b)(2)(I), in this proceeding, we will not be adjudicating challenges to SERI’s ESP Application nor directly evaluating its adequacy, rather the Board will be determining the Application’s adequacy by scrutinizing the NRC Staff’s review of that Application. As we understand the Commission’s guidance in its answer to the ASLBP’s certified questions (CLI-05-17), once SERI has established to the satisfaction of the NRC Staff and the Advisory Committee on Reactor Safeguards (ACRS) that its application should be favorably acted upon, the NRC Staff must then explain and justify, to the satisfaction of this Board, the adequacy of its review and the logic supporting its findings.⁹

In determining the adequacy of the NRC Staff’s review it will be necessary for the Board to analyze the logic and facts supporting the Staff’s conclusions – matters which are not, in

⁸ In accordance with 10 C.F.R. §§ 52.17(a)(2) and 52.18, we will weigh and compare alternative sites, but not other alternatives such as alternative energy sources. See CLI-05-17, 62 NRC at 48 & n.112.

⁹ In making this determination the Board has been directed by the Commission to accord deference to the NRC Staff’s technical expertise. See CLI-05-17, 62 NRC at 34. However, while Commission directives permit this Board to accept only those Staff findings which we find to be well rooted in fact and logic, the Commission has left with the Board the ultimate responsibility for determining (1) whether the application and the record of the proceeding contain sufficient information to support the issuance of the requested permit and (2) whether the review of the application by the NRC Staff has been adequate. 10 C.F.R. § 2.104(b)(2)(I). Nothing in the Commission’s regulations or case law advises that the review underlying our determinations places any burden of proof, as that term of art is customarily used, on either the NRC Staff or the Applicant in the proceeding before this Board. Accordingly, the task of review and determination in this mandatory hearing falls singularly upon the Board, and the roles of the NRC Staff and the Applicant in this proceeding will be to respond to our inquiries and thereby aid the Board in completing its task.

many instances, readily apparent from the content of the Safety Evaluation Report (SER) and the Environmental Impact Statement (EIS).¹⁰ The purpose of our April 19 Order was to facilitate an efficient evaluation of the Staff's review. Accordingly, in crafting that Order, we took guidance from the Commission's statement that "we do not dictate any particular procedure in the current cases, but we would expect the boards to select the most appropriate and expeditious approach given the circumstances of a case." CLI-05-17, 62 NRC at 43. However, the Commission advised that it does not "think the task need consume anything close to 1000 (or 2000) person hours." Id. at 41. Accordingly, for the Board to carry out its review function in anything approaching the limited time period anticipated by the Commission, it will be necessary for the NRC Staff to provide material assistance. It was for this reason, along with the obvious fact that it was a task the Staff was best equipped to perform, that we initially asked the Staff to prepare and deliver the requested narrative summaries.

The April 19 Order embodied this Board's preliminary determination that the most efficient approach to prepare for our review was to allocate support efforts to the party that could most efficiently carry them out. We concluded that the approach we outlined – i.e. initially requiring summary documentation of the NRC Staff's logic and underlying facts to be followed up with preliminary, proposed findings of fact and conclusions of law – would be more efficient than performing our review of the record without such a roadmap.

Nothing submitted in the two motions before us has altered our general thinking in this area. Nevertheless, as will be explained below, at the request of the NRC Staff and SERI, we have modified our previous Order and will try another course for the time being.

¹⁰ The Board has been directed by the Commission that its task is to analyze the logic and facts supporting the NRC Staff's conclusions; the Commission has further made clear that it does not expect us, nor will it permit us, to take a more cursory, hands-off approach. Specifically, the Commission stated that "we anticipate that our boards will carefully probe those findings by asking appropriate questions and by requiring supplemental information when necessary." CLI-05-17, 62 NRC at 40.

SPECIFIC RULINGS

A. Staff Submission of the Site Safety Analysis Report, Emergency Planning Information, Environmental Report, and Requests for Additional Information

In our April 19 Order this Board directed the NRC Staff to provide, inter alia, copies of the Site Safety Analysis Report (SSAR), Emergency Planning Information, Environmental Report (ER), the NRC Staff's Requests for Additional Information (RAI) and SERI's response to those RAIs. The NRC Staff and SERI suggest that these documents be provided by SERI rather than by the NRC Staff. We have no objection to that proposal.¹¹

B. Staff Analyses of Applicant Replies to RAIs

In our April 19 Order, the Board directed the NRC Staff to provide "any written analyses of those [RAIs] that have been prepared by the NRC Staff" (April 19 Order at 2, # 6). Our decision to direct the Staff to provide these analyses was based on the conclusion that a review of the RAIs, followed by the applicant's responses, followed by the NRC Staff's analysis of those responses would allow the Board, in the most efficient manner, to analyze whether the Staff's findings were made "with reasonable support in logic and fact." CLI-05-17, 62 NRC at 39. The Staff indicates that these analyses are "reflected" in the SER or EIS and that it would be "duplicative" to provide them to us. NRC Staff Motion at 5-6. We disagree.

In most instances, the SER merely notes what the RAI asked, and how the applicant responded, without providing an explanation of the NRC Staff's analysis of the adequacy of the response. If written analyses of the RAI responses beyond the level of detail provided in the

¹¹ The NRC Staff also suggested, with the concurrence of SERI, that the entire ESP Application, not just the sections specifically referenced in our April 19 Order, be submitted to the Board by SERI. See NRC Staff Motion at 4. We agree. We direct, however, that the paper copies of the Application be submitted in binders segregated by the applicable level of handling requirements, and that only a single paper copy of any classified information be provided to the Board. In addition, for those portions of the Application for which an electronic copy exists, a single electronic copy should also be provided to the Board.

SER and EIS are available, it would greatly facilitate the Board's inquiry into "whether the NRC Staff performed an adequate review." CLI-05-17, 62 NRC at 39. If such written analyses exist, we believe that our review of them would expedite this proceeding.

Accordingly, while we have no objection to the Applicant, rather than the NRC Staff, providing the RAIs and the responses, we direct the NRC Staff to provide any existing analyses of those responses which it has prepared. These analyses should be indexed in a manner that will facilitate the Board's ability to follow from one to another. For example:

Analysis of SERI Response, dated 8/10/04, to NRC RAI, Letter No. 2, dated 7/15/04.
Analysis of SERI Response, dated 9/30/04, to NRC Supplemental RAI, dated 8/26/04.
Analysis of SERI Response, dated 10/19/04, to NRC RAI, Letter No. 4, dated 9/21/04.

In our judgment, review of these documents will provide the Board with insights into the adequacy of the NRC Staff review not duplicated by the abbreviated discussion in the SER.

C. ACRS Minutes, Transcripts, Reports, Memoranda and Letters

The NRC Staff argues that it would be unnecessarily duplicative for the Board to require it to produce the ACRS Report, dated December 23, 2005, because that report is included in Appendix E to the SER.¹² NRC Staff Motion at 6. While we agree that reproducing the final report would be duplicative, we directed the NRC Staff to produce not only the final report but also all minutes and/or transcripts of any ACRS meetings relevant to SERI's ESP Application, and any reports, letters, or memoranda prepared by or on behalf of the ACRS which relate to SERI's ESP Application. See April 19 Order at 2, #7. In response the NRC Staff indicated that it "does not control ACRS records." NRC Staff Motion at 6. We are not, however, certain of the exact meaning of the Staff's response.

Accordingly, we direct the NRC Staff to submit to the Board an index describing all documents that it submitted to the ACRS and copies of all documents that the Staff received

¹² The ACRS Report requested is four pages long.

from the ACRS. In addition, if the Staff has a copy of any other requested documents in its possession, it shall produce them. If the Staff does not have a copy of any other requested documents in its possession but can readily secure them, it shall do so and produce them. If the Staff is aware of the existence of responsive documents but can not readily secure a copy, it shall identify the documents and advise the Board from whom it may be secured.

D. Narrative Summary

The NRC Staff next asks that the Board reconsider the requirement contained in our April 19 Order for a narrative summary that discusses the process they used in reviewing SERI's ESP Application. See April 19 Order at 2-3; NRC Staff Motion at 6-8. The narrative summary envisioned by the Board would identify all regulatory guidance documents that were used, or are being used, by the NRC Staff in its review of SERI's ESP Application. This submission would also include copies of the applicable Standard Review Plans (SRPs) and regulatory guides, and would explain in depth – referring subsection-by-subsection to the SRPs or regulatory guides – how these documents were used by the NRC Staff in its review of SERI's ESP Application. It would also highlight those areas where relevant portions of the published guidance documents were not used. The NRC Staff was asked to explain what was done to review the ESP Application in those areas where the Staff was not able to, or otherwise did not, follow relevant portions of the published guidance, and explain in full why the chosen course of review was followed. Additionally, the Board envisioned that this narrative would describe the key areas of the NRC Staff's review of SERI's ESP Application (safety and environmental issues) with references to the SER and the EIS, and would identify the particular individual(s) who was/were in charge of each portion of the review. Further, to the extent not already included in response to the foregoing provisions of our April 19 Order, we asked the NRC Staff to attach copies of all documents referenced and discussed within the narrative summary.

In its request for reconsideration, the NRC Staff states that the Board's review of information at this level of detail would be equivalent to redoing the Staff's work. See NRC Staff Motion at 6. We disagree. The role of the Board in an uncontested proceeding, such as is presented here, is to "inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact." CLI-05-17, 62 NRC at 39. This Board concluded that the narrative summary we requested would facilitate our understanding of the process followed by the NRC Staff in its review, and help us to better understand the thinking that led to the Staff's conclusion in each section of the SER and EIS.

Having said this, it is the NRC Staff's position that the SER and EIS already contain the summary information requested by the Board (the SER summarizes the guidance used in its review, and the SER and EIS contain concise statements of the key review areas). Likewise, the NRC Staff represents that there are no instances where the relevant portions of the published guidance documents were not used in their review. See NRC Motion at 6-7. Based on these representations, the Board will defer our requirement for the narrative summary, and all attachments thereto, pending further review of these documents. We caution the NRC Staff that a future request for summary information to supplement the SER, the EIS, or both may well be forthcoming, and would lengthen our review schedule.¹³

¹³ In our April 19 Order we requested, as part of the narrative summary, that the NRC Staff "identify the particular individual who was in charge of each portion of the review." April 19 Order at 3. Although we are deferring our direction that the NRC Staff submit a narrative summary at this time (including the list of individuals involved), we nevertheless urge the NRC Staff to prepare such a list at this time. While we recognize that the Executive Director for Operations has the authority to determine who will speak for the NRC Staff, 10 C.F.R. § 2.1207(b)(4), we must decide whether the Staff has met its burden of establishing the adequacy of its review of SERI's ESP Application. Accordingly, if it is necessary to direct specific questions to the NRC Staff, it will be necessary for the person responding to not only be able to answer our questions but to also be able to explain the basis on which their testimony is grounded. Accordingly, if it has not already done so, we urge the NRC Staff to document the identity of the specific individuals who were responsible for each aspect of the NRC Staff's review in order to ensure that the hearing will proceed expeditiously.

E. Additional Documents

In our April 19 Order we told the NRC Staff that if there were any additional documents that it believed should be utilized by the Board in preparing for and conducting the mandatory hearing that it should provide the Board with a list of such documents. In response the NRC Staff represented that it is unaware of any documents which it can produce in response to this request. That answer fully responds to our request in the April 19 Order.

F. Preliminary Proposed Findings of Fact and Conclusions of Law

The NRC Staff next asks the Board to reconsider the timing for the filing of preliminary, proposed findings of fact and conclusions of law until after the submission of pre-filed testimony. See NRC Staff Motion at 8; see also SERI Motion at 3-4 (seeking clarification on the order and timing of the submission of the preliminary, proposed findings of fact and conclusions of law). We do not grant this request.

At this point, the Board does not know what form the mandatory hearing in this proceeding will take. As the Commission pointed out “[t]he word ‘hearing’ can refer to any of a number of events, including trial-type evidentiary hearings, ‘paper hearings,’ paper hearings accompanied by oral arguments, [or] hearings employing a mixture of procedural rules.” CLI-05-17, 62 NRC at 42-43 (footnotes omitted). Accordingly, the Commission did “not dictate any particular procedure in the current case[.]” Id. at 43. Until our preliminary review of the record is complete, we will not know whether additional oral or written testimony or exhibits will be necessary in order for the Board to evaluate the NRC Staff’s review of SERI’s ESP Application.¹⁴

¹⁴ In SERI’s Motion, we are asked to clarify “when and how” we intend to conduct the mandatory hearing. SERI Motion at 3-4. At this point we can not answer that question. First, the NRC Staff’s published schedule is not binding on the Board. The Board’s decision will be issued as soon as possible, which may or may not be by September 2006. Second, with regard
(continued...)

We directed the filing of preliminary, proposed findings of fact and conclusions of law at this point in order to focus the attention of the NRC Staff and SERI on exactly what they think the Board would need to find in order to satisfy the mandatory hearing requirement in this case, and thereby help focus the Board as we review the record before us. Recognizing that the preliminary, proposed findings of fact and conclusions of law will, in all probability, be revised before we conclude this proceeding, we believe that this exercise, at this time, will help expedite the Board's review of the record. Accordingly, the NRC Staff's request in this regard is denied, and we direct that preliminary, proposed findings of fact and conclusions of law be submitted as specified in our April 19 Order.

SERI suggested that it should submit its proposed findings before the NRC Staff. See SERI Motion at 3-4. However, since the main focus of the proceeding before this Board will be for the NRC Staff to explain and justify the adequacy of its review and the logic supporting its findings, we have placed the burden on the Staff to file first, subject to comment by SERI. We do not alter that obligation.

G. The Opportunity for SERI to Supplement the Staff's Submissions

The NRC Staff requested that the Board clarify that portion of our April 19 Order in which we allow SERI thirty days in which to submit any exceptions, additions, or objections to the Staff's findings of fact and conclusions of law. See April 19 Order at 4; NRC Staff Motion at 9-10. We deny that request.

¹⁴(...continued)

to the form of the hearing, we have not yet made a determination on that issue. We anticipate that after we have received and reviewed the materials specified in our April 19 Order that we will be able to choose the most efficient format within which to conduct the mandatory hearing in this case. The Board will issue an Order setting a schedule for this proceeding once we have reviewed the documents identified in our Order of April 19 and chosen the appropriate format for the hearing.

The Order is clear as written in this regard and does not require the NRC Staff to do anything. Accordingly, the Staff's representation that it does not understand this clear provision is not of consequence. Nevertheless, we note that the Board does not view this provision of our April 19 Order as an invitation for SERI to "raise a controversy with the Staff" as suggested in the NRC Staff's Motion. See NRC Staff Motion at 9. Rather, as explained above, we do not, and sincerely hope that the NRC Staff and SERI do not, view this mandatory hearing as an adversary proceeding. Accordingly, we look forward to a cooperative, rather than a contentious proceeding.

We reject the NRC Staff's suggestion that, because various Boards have taken different approaches and requested somewhat different assistance in the various cases, this Board should certify the questions raised by the NRC Staff Motions to the Commission. See NRC Staff Motion at 10 n.9. As noted above, the Commission has made clear that a "one size fits all approach" is not required. CLI-05-17, 62 NRC at 43. Accordingly various Boards will properly try different approaches in order to expeditiously conduct the hearings to which they have been assigned.

CONCLUSION

In our April 19 Order we directed that the initial submission of documents pursuant to that Order should occur on or before June 5, 2006. Because of any uncertainty that may have existed while the parties waited for a ruling on their Motions, we change the date for the initial submission of documents to June 12, 2006. Accordingly, the preliminary, proposed findings of fact and conclusions of law will be due on August 11, 2006, sixty (60) days after June 12, 2006.

Objections to any portion of this Order shall be filed no later than June 9, 2006.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA by G.P. Bollwerk, III for:/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 31, 2006

¹⁵ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to: (1) Counsel for SERI and (2) Counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 52-009-ESP
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of May 2006