

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF PETITION FOR INTERLOCUTORY REVIEW
OF THE LICENSING BOARD'S MAY 31, 2006, ORDER

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June 15, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	1
DISCUSSION	4
I. The Commission Should Take Review of the Board's May 31 st Order	4
A. Interlocutory Review of the Board's Order is Appropriate Because the Request for Certain Predecisional Documents Affects the Basic Structure of the Proceeding in a Pervasive and Unusual Manner	4
B. Interlocutory Review of the Board's Order is Appropriate Because the Order Raises Novel Questions and Has Generic Implications for Other Proceedings ..	5
II. The Board's Request for Predecisional Staff RAI Response Analyses is Contrary to the Proper Role of the Board in an Uncontested Mandatory Proceeding	5
A. Legal Standards Governing the Board's Review	6
B. The Board's Request for Preliminary and Predecisional Staff RAI Response Analyses Misapprehends the Board's Role in the Mandatory Hearing Process ..	7
III. The Board's May 31 st Order Raises Other Concerns Regarding the Proper Conduct of Uncontested Mandatory Hearings	10
A. Provision of ACRS Documents	11
B. Format and Delivery of Documents to the Board	12
C. Board's (Deferred) Request for Narrative Summary	14
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<u>JUDICIAL DECISIONS</u>	
<i>Calvert Cliffs' Coordinating Committee v. AEC</i> , 449 F.2d 1109 (D.C. Cir. 1971)	6
<i>Union of Concerned Scientists v. AEC</i> , 499 F.2d 1069 (D.C. Cir. 1974)	6
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>Carolina Power and Light Co.</i> (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 541 (1980)	16
<i>Exelon Generation Co., LLC et al.</i> (Early Site Permit for the Clinton ESP Site), CLI-05-17, 62 NRC 5 (2005)	6-9, 12, 15
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000)	5, 10
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001)	4
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307 (1998)	4
<i>Safety Light Corp. et al.</i> (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992)	4
<i>System Energy Resources, Inc.</i> (Early Site Permit for Grand Gulf ESP Site), CLI-05-04, 61 NRC 10 (2005)	2
<i>Virginia Electric and Power Co.</i> (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974)	11

Atomic Safety and Licensing Appeal Board:

<i>Cleveland Electric Illuminating Co.</i> (Perry Nuclear Power Plan, Units 1 and 2), ALAB-675, 15 NRC 1105 (1982)	4
<i>Pac. Gas and Elec. Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42 (1979)	11
<i>Rockwell Int'l Corp.</i> (Rocketdyne Division), ALAB-925, 30 NRC 709 (1989)	4

Atomic Safety and Licensing Board:

<i>Arizona Public Service Co.</i> (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45 (1983)	16
<i>Carolina Power and Light Co.</i> (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85 (2000)	11
<i>New England Power Co.</i> (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978)	16
<i>System Energy Resources, Inc.</i> (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004)	2

STATUTES

Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972)	11
--	----

REGULATIONS

10 C.F.R. § 2.337(g)	9
10 C.F.R. § 1.13	11
10 C.F.R. § 2.1000 et seq.	13

	<u>Page</u>
10 C.F.R. § 2.104	4
10 C.F.R. § 2.104(b)(2)	9
10 C.F.R. § 2.1203	13
10 C.F.R. § 2.1207(b)(4)	15
10 C.F.R. § 2.325	9
10 C.F.R. § 2.336(a)(2)(iii)	13
10 C.F.R. § 2.341(f)	1, 4, 5, 10
10 C.F.R. § 2.709(a)(1)	15

FEDERAL REGISTER

Electronic Availability of NRC Public Records and Ending of NRC Local Public Document Room Program; Final Rule, 64 Fed. Reg. 48942 (Sept. 9, 1999)	12-13
Use of Electronic Submissions in Agency Hearings; Proposed Rule, 70 Fed. Reg. 74949 (Dec. 16, 2005)	13

MISCELLANEOUS

<i>Radiation Safety and Regulation: Hearings Before the Joint Comm. on Atomic Energy,</i> 87 th Cong. 313 (1961) (Statement of AEC Commissioner Loren K. Olson)	9
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998)	5, 10

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NRC STAFF PETITION FOR INTERLOCUTORY
REVIEW OF THE LICENSING BOARD'S MAY 31, 2006, ORDER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f), the staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Commission grant interlocutory review of the Order issued by the presiding Atomic Safety and Licensing Board ("Board") on May 31, 2006 ("May 31st Order"). The May 31st Order granted in part and denied in part the NRC Staff's Motion for Reconsideration and Clarification ("Motion"), dated May 1, 2006.¹ For the reasons discussed below, the Staff believes that the May 31st Order affects the basic structure of the proceeding in a pervasive or unusual manner and, therefore, warrants Commission review at this time. See 10 C.F.R. § 2.341(f)(2)(ii).

BACKGROUND

The instant case arises out of the System Energy Resources, Inc. ("SERI" or "Applicant") early site permit ("ESP") application under 10 C.F.R. Part 52. As no contentions

¹ NRC Staff Motion for Reconsideration and Clarification of Board Order (Request for Documents and Briefing) Dated April 19, 2006 (May 1, 2006). The May 31st Order also granted in part and denied in part a Motion for Clarification filed by the applicant, System Energy Resources, Inc., on May 1, 2006.

were admitted on the application,² the proceeding is uncontested; nevertheless, the mandatory hearing remains before the Board.

On April 19, 2006, the Board issued an Order requesting documents and briefings (“April 19th Order”).³ In the April 19th Order, the Board directed the Staff to submit to the Board copies of certain documents pertaining to the application. April 19th Order at 2. The documents requested included NRC Staff Requests for Additional Information (“RAIs”), the applicant’s replies, and “any written analyses of those replies that have been prepared by the NRC Staff.” *Id.* The Board also requested minutes and/or transcripts of Advisory Committee on Reactor Safeguards (“ACRS”) meetings relevant to the application, as well as “any reports, letters, or memoranda prepared by or on behalf of the ACRS” which relate to the application. *Id.*

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 and indicated that the purpose of its request was to facilitate the Board’s preparation for the Mandatory Hearing. *Id.* The Board specified that four paper copies of all the aforementioned documents should be provided (indexed and in binders) to the Board by June 5, 2006, together with an electronic copy of the documents on CD or DVD. *Id.* at 3.

On May 1, 2006, the Staff filed a Motion for Reconsideration and Clarification. In its motion, the Staff did not take issue with the entirety of the Board’s Order. The Staff agreed to provide the Board with the Final Environmental Impact Statement (“FEIS”) and Safety

² Several petitioners filed requests for hearing and petitions to intervene, but the Board denied intervention after finding that the petitioners had failed to submit at least one admissible contention. See *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004). This ruling was affirmed by the Commission on appeal. See *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-04, 61 NRC 10 (2005).

³ See Order (Request for Documents and Briefings), unpublished Order, dated April 19, 2006.

Evaluation Report (“SER”) (Items 3 and 4 of the Board’s numbered document requests), and noted that the Applicant had agreed to provide the Board with copies of the requested Applicant-authored documents, including the RAIs it had received from the Staff along with its response (Items 1-3, part of Item 6). Motion at 4. However, the Staff contended that the other documents requested in the Order were either beyond the scope of the Board’s review in an uncontested proceeding, outside the Staff’s control, or duplicative of other documents to be submitted. *Id.*

On May 31, 2006, the Board issued an Order granting in part and denying in part the Staff’s Motion.⁴ In particular, the Board denied the Staff’s Motion with respect to production of the Staff’s RAI response analyses. May 31st Order at 5-6. The Board also repeated its request for certain documents prepared by or on behalf of the ACRS, although it modified the Staff’s obligations in terms of whether the Staff “is aware of” documents and/or whether it can “readily secure” them. *Id.* at 6-7. In addition, while the Board agreed to defer its request for a narrative summary of the Staff’s review process, it did not withdraw that request; indeed, it cautioned that such a supplemental request “may well be forthcoming[.]” *Id.* at 8.

The May 31st Order also revised the date for production of the requested documents to June 12, 2006. *Id.* at 11. The Staff filed a motion to stay the effectiveness of the May 31st Order. See “NRC Staff Motion for Housekeeping Stay,” dated June 7, 2006. On June 12th, the Staff submitted to the Board an index and copies of Staff documents provided to the ACRS and ACRS documents received by the Staff, as well as copies of the ACRS meeting summaries and transcripts relevant to the application. See Letter from Ann P. Hodgdon to Administrative Judges, dated June 12, 2006. Pursuant to the May 31st Order, the Staff also provided a Staff RAI response analysis identified during the Staff’s search for potentially responsive documents.

⁴ Memorandum and Order (Ruling on Motions for Reconsideration and Clarification), unpublished Order, dated May 31, 2006 (“May 31st Order”).

See *id.* On June 13, 2006, the Board granted the Staff's stay motion. See Order (Granting Motion to Stay), dated June 13, 2006.

DISCUSSION

I. The Commission Should Take Review of the Board's May 31st Order

A. Interlocutory Review of the Board's Order is Appropriate Because the Request for Certain Predecisional Documents Affects the Basic Structure of the Proceeding in a Pervasive and Unusual Manner

In accordance with 10 C.F.R. 2.341(f)(2)(ii), interlocutory review is appropriate if a particular ruling "affects the basic structure of the proceeding in a pervasive or unusual manner." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3-4 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). Review is warranted under this provision if a decision will "fundamentally alter[] the very shape" of the proceeding, *Rockwell Int'l Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 712 n.1 (1989) (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982)), or where a substantial and important jurisdictional question has been raised, see *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 86 (1992).

The instant case warrants interlocutory review of the Board's May 31st Order because, as established below in Part II, the Order's demand for certain predecisional Staff documents affects the basic structure of the mandatory proceeding in two ways. First, it reflects a misunderstanding about the proper scope of the Board's review in a mandatory hearing by inquiring into preliminary Staff deliberations rather than the Staff's findings. See 10 C.F.R. § 2.104; see also *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-05-17, 62 NRC 5, 34 (2005) (citing *Union of Concerned Scientists v. AEC*, 499 F.2d 1069,

1076 (D.C. Cir. 1974) (“UCS”)). Second, it misconstrues the proper process for developing the record for the Board’s review, by seeking supplemental information concerning the Staff’s review process before the Board has identified any inadequacies in the Staff’s primary review documents.

B. Interlocutory Review of the Board’s Order is Appropriate Because the Order Raises Novel Questions and Has Generic Implications for Other Proceedings

Independent of the 10 C.F.R. 2.341(f) review standards, the Commission may choose to review adjudicatory rulings as part of its inherent supervisory authority. Occasions for such review include where there is a “novel question[] which could benefit from early resolution” or where there are “generic implications for other proceedings.” *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000); *see also* Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). Because this hearing is among the first of many anticipated hearings associated with the processes in 10 C.F.R. Part 52, the Staff notes that the conduct of this proceeding could have generic implications and thereby affect the basic structure of all future mandatory hearings. Therefore, in addition to the issue of Staff predecisional documents discussed in Part II, Part III of this petition describes other aspects of the Board’s May 31st Order that the Staff believes require Commission guidance to promote clarity, consistency, and efficiency.

II. The Board’s Request for Predecisional Staff RAI Response Analyses Is Contrary to the Proper Role of the Board in an Uncontested Mandatory Proceeding

The Board’s demand in its May 31st Order for disclosure of Staff RAI response analyses would improperly expand the scope of the Board’s review and would circumvent the appropriate process for developing the record in the proceeding. As set forth below, both outcomes are contrary to applicable legal standards.

A. Legal Standards Governing the Board's Review

The Commission has defined the board's role in an uncontested proceeding as analogous to "the function of an appellate court, applying the 'substantial evidence' test[.]" *Exelon*, CLI-05-17, 62 NRC at 39 (citing *UCS*, 499 F.2d at 1076). 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." *Exelon*, CLI-05-17, 62 NRC at 39 (citing *UCS*, 499 F.2d at 1076). A board is to determine "whether the findings required by the [Atomic Energy Act of 1954, as amended] and the Commission's regulations should be made." *UCS*, 499 F.2d at 1076. However, 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*, CLI-05-17, 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 (emphasis added) (citing *Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971)). The board need not demand that all possible views and facts relating in any way to the matters in question be placed in the evidentiary record. See *Exelon*, CLI-05-17, 62 NRC 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.* at 35. That policy also "promotes efficient case management and prompt decisionmaking by concentrating [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. See *id.* at 34. Similarly, with respect to environmental matters, boards must reach independent determinations on the NEPA “baseline” questions, but should not second-guess underlying technical or factual findings by the NRC Staff. *Id.* 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.*

B. The Board’s Request for Preliminary and Predecisional Staff RAI Response Analyses Misapprehends the Board’s Role in the Mandatory Hearing Process

As described above, the Board’s May 31st Order directs the Staff to produce “any written analyses of [the applicant’s RAI responses] that have been prepared by the NRC Staff.”

May 31st Order at 5. The Board stated that access to these analyses, in addition to the initial RAIs and 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.’” *Id.* at 5 (citing *Exelon*, CLI-05-17, 62 NRC at 39). The Board noted that “written analyses of the RAI responses *beyond the level of detail provided in the SER and EIS*...would greatly facilitate the Board’s inquiry into ‘whether the NRC Staff performed an adequate review.’” May 31st Order at 5-6 (emphasis added) (citing *Exelon*, CLI-05-17, 62 NRC at 39). As demonstrated by its document production on June 12, 2006, the Staff has determined that at least one such preliminary RAI response analysis exists and that others may need to be produced pursuant to the Board’s request.

However, the Board’s logic would impermissibly broaden the parameters of a mandatory hearing established by the Commission. RAI response analyses include assessments by individual staff reviewers of applicant responses to requests for additional information that arise during the course of the staff’s review; for the Grand Gulf ESP application, 13 sets of RAIs

(including nearly 300 subparts) have been issued. These initial Staff evaluations may or may not reflect the Staff's ultimate findings with respect to a given issue. To the extent an initial assessment *is* consistent with the Staff's formal conclusions, the Staff's reasoning should be apparent in the FSER and FEIS. Consequently, review of the requested RAI response analyses would involve the Board in Staff deliberations that were preliminary and thus not necessarily reflective of the Staff's ultimate determinations in the FSER and FEIS. As *Exelon* made clear, the Board is not to conduct a *de novo* review. See *Exelon*, CLI-05-17, 62 NRC at 39. The Board is tasked with evaluating whether the Staff's *findings* are well-supported and adequately explain the Staff's reasoning, *see id.*, not whether the Staff's predecisional *process* took a particular path.

Therefore, the Commission's instruction that the Board examine the adequacy of the Staff's review and the support for the Staff's findings should not be understood to authorize pre-emptive scrutiny of all Staff analysis and deliberations. Precisely because such analyses of RAI responses are preliminary, they do not (and were not intended to) reflect or represent the Staff's ultimate conclusions on the sufficiency of the application, and are not the basis for the Staff's technical and factual findings. Because it is implicit in the Board's Order that the Staff may be required to explain or defend such analyses before the Board – even if the analyses are peripheral to the findings and reasoning ultimately relied on by the Staff – production of these documents would divert the Board from the limited nature of its inquiry as delineated in *Exelon*. The Staff maintains that in order to determine the adequacy of the Staff's review and “whether the Staff's findings were made ‘with reasonable support in logic and fact,’” *see id.*, the Board need look in the first instance no further than the Staff's review documents, namely the FSER and FEIS.

Furthermore, even if the requested documents were properly subject to the Board's review, the Board's Order would have a pervasive effect because it would circumvent the process for developing the record in the proceeding. The burden of developing the record is on the parties to the proceeding – the applicant, which, overall, has the burden of demonstrating the sufficiency of its application, and the Staff, which has to explain the sufficiency of its review. **See 10 C.F.R. §§ 2.325, 2.337(g); see also *Exelon*, CLI-05-17, 62 NRC at 39; 10 C.F.R. § 2.104(b)(2).** The Staff submits, therefore, 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 makes its decision based on the record, and not on evidence not in the record, *see Exelon*, CLI-05-17, 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)), and 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 and NEPA compliance. *See Exelon*, CLI-05-17, 62 NRC at 42, 45.

As the Commission contemplated, the Board can probe the Staff's findings by asking appropriate questions and by requiring supplemental information, *when necessary*. *Id.* at 40 (emphasis added). Consequently, the Board should not seek supplemental information concerning the Staff's review before the Board has identified any inadequacies in the findings and reasoning articulated in the Staff's primary review documents. In short, the Staff proffers the FSER and FEIS with the intention that they will be sufficient to demonstrate the thoroughness and adequacy of the Staff's review. Because the Staff has not yet entered evidence on the record, and the Board has not identified aspects of the FSER or FEIS that raise questions, the Board request at issue is premature. Should the Board need clarification or

additional information regarding specific areas of the Staff review after reviewing the evidence in the proceeding, the Staff will make every effort to provide that information.⁵

III. The Board's May 31st Order Raises Other Concerns Regarding the Proper Conduct of Uncontested Mandatory Hearings

For the reasons discussed in Part II with respect to the Board's request for Staff RAI response analyses, the Staff submits that Commission review is warranted pursuant to 10 C.F.R. § 2.341(f). However, given the generic implications of this proceeding for new Part 52 and for future mandatory hearings, the Staff would like to refer three additional aspects of the Board's May 31st Order to the Commission's attention as matters appropriate for review under the Commission's inherent supervisory authority. See *PFS*, CLI-00-13, 52 NRC at 28-29; see also Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 23. In light of concerns the Staff raised in its recent review petition in the Clinton ESP proceeding,⁶ the Staff believes that similar issues are likely to arise in other Part 52 proceedings and that timely Commission guidance would, therefore, promote clarity, consistency, and efficiency.

⁵ Indeed, the Board's May 31st Order appeared to acknowledge this process, as it deferred its request for a narrative summary of the Staff's review pending Board examination of the FSER and FEIS. May 31st Order at 8. The Staff believes that providing clarifying information, as necessary, is more efficient than providing the information requested by the Board before the Board has had an opportunity to review the FSER and FEIS. This should allay the Board's concern regarding lengthening of the review schedule. See *id.* The review documents may reveal the information the Board is seeking, thus rendering the provision of the requested information unnecessary. In the event that the Board has questions after it has reviewed those primary documents, the Board's questions and the Staff's responses will be more focused on the specific information the Board requires to make its finding, resulting in a more efficient use of Staff and Board resources.

⁶ See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), NRC Staff Petition for Interlocutory Review of the Licensing Board's May 3, 2006 Order, dated May 23, 2006 ("Clinton ESP Review Petition").

A. Provision of ACRS Documents

The Board's May 31st Order rephrased, but retained, its request for certain ACRS documents, including "reports, letters, or memoranda prepared by or on behalf of the ACRS" which relate to the application. May 31st Order at 6-7. Despite the Staff's argument that it does not control ACRS records, see Motion at 6, the Board instructed the Staff to produce requested documents that are in its possession or that it can "readily secure," and to identify responsive documents the Staff may be aware of but cannot readily secure. May 31st Order at 6-7.

The ACRS is an independent federal advisory committee that advises the Commission. See Federal Advisory Committee Act, Pub. L. 92-463, 86 Stat. 770 (1972); 10 C.F.R. § 1.13. It is an entity distinct from the Staff, which reports to the Executive Director for Operations, and the Staff does not ordinarily have any knowledge of, or access to, documents reflecting the ACRS's internal communications or deliberations. Similarly, in contested proceedings, an attempt to obtain discovery materials (or testimony) from the ACRS requires a showing of exceptional circumstances. See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-519, 9 NRC 42, 45 (1979); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 100 n.4 (2000). The discovery of ACRS documents in such proceedings has been obtained from the ACRS, not the Staff. See, e.g., *Diablo Canyon*, ALAB-519, 9 NRC at 45. Therefore, while it is appropriate for the Staff to provide the Board with documents that it received from ACRS or vice versa,⁷ the ACRS's independent status indicates that the Staff should not be required to produce other ACRS-related records requested by the Board.

⁷ As noted earlier, the Staff has provided the Board with an index and copies of Staff documents provided to the ACRS, of ACRS documents received by the Staff, and of the ACRS meeting summaries and transcripts relevant to the application. See Letter from Ann P. Hodgdon to Administrative Judges, dated June 12, 2006.

B. Format and Delivery of Documents to the Board

In its April 19th Order, the Board specified that four paper copies of all of the aforementioned documents be provided (indexed and in binders) to the Board, together with an electronic copy on CD or DVD. April 19th Order at 3. This requirement was not changed by the May 31st Order.

The Staff recognizes the challenges facing the Board in conducting adjudications on applications and doing so in the expeditious and timely manner expected by the Commission. Applications and the associated Staff review documents are lengthy and complex, and, as the Commission recognized, the resources expended by Boards during their review cannot and should not replicate those expended by the Applicant and Staff. *Exelon*, CLI-05-17, 62 NRC at 41. Also, as the Board noted, the Commission expects boards to determine in each case what approach is most “appropriate and expeditious.” May 31st Order at 4 (citing *Exelon*, CLI-05-17, 62 NRC at 43). Consequently, the Staff agrees with the Board’s stated approach of “allocat[ing] support efforts to the party that [can] most efficiently carry them out.” May 31st Order at 4. The Staff agrees that it is appropriate and consistent with that objective for the Staff to identify certain documents and make them available to the Board; the Staff is in the best position to recognize and disclose which materials were used during the Staff’s review.

However, the Board’s demand for hard copies of a wide array of lengthy documents appears to be at odds with the Commission’s increasing emphasis on facilitating the electronic conduct of agency business, including hearings. For example, ADAMS has become a vital mechanism for managing and accessing the agency’s records, and it also permits easy and timely public access to certain official materials from the Public Document Room. See, e.g., <http://www.nrc.gov/reading-rm/adams.html> (public ADAMS site); see also Electronic Availability of NRC Public Records and Ending of NRC Local Public Document Room Program; Final Rule,

64 Fed. Reg. 48942 (Sept. 9, 1999). In the agency's rules governing adjudicatory proceedings, discovery-related disclosures such as the Staff's hearing file may be made electronically.

See 10 C.F.R. §§ 2.336(a)(2)(iii), 2.1203. Accordingly, adjudicatory filings, including the Staff's hearing files, are made publicly available online through an Electronic Hearing Docket. See <http://www.nrc.gov/reading-rm/ehd.html>. Furthermore, the Commission has determined that discovery in any Subpart J proceedings will be conducted via the Licensing Support Network, an internet-based system to make documents electronically available to participants.

See 10 C.F.R. § 2.1000 et seq. In fact, the agency has recently proposed to amend its regulations to require the use of electronic submissions in all other agency hearings as well. See Use of Electronic Submissions in Agency Hearings; Proposed Rule, 70 Fed. Reg. 74949 (Dec. 16, 2005).

Given the numerous and lengthy documents that will likely be generated in the instant proceeding and in future Part 52 adjudications, if boards routinely require comparable hard copy production, the cumulative burden (on Staff as well as on other parties) will be significant.⁸ The Staff submits that this outcome would be inconsistent with the Commission's heightened interest in the efficient conduct of complex adjudications. Therefore, the Staff submits that where electronic versions of documents exist in ADAMS, it should be sufficient for the Staff to make an index of the document titles and ADAMS accession numbers available to the Board.

⁸ As noted above, the hard copies requested by the Board encompass not only the applicant's Site Safety Analysis Report, Environmental Report, and Emergency Planning Information, and the primary Staff review documents (FSER and FEIS), but also all RAIs, replies, and associated response analyses; ACRS transcripts and meeting summaries; an "in depth" narrative summary describing "subsection-by-subsection" how the Staff applied guidance documents in its review of the application; and copies of all the referenced guidance documents (including the applicable Standard Review Plans ("SRPs") and regulatory guides), as well as of all other documents referenced or discussed in the narrative summary. See April 19th Order at 2-3, May 31st Order at 5-8.

C. Board's (Deferred) Request for Narrative Summary

The Staff believes that the narrative summary requested in the April 19th Order, but deferred⁹ by the Board's May 31st Order, portends the Board's expectation of its role in an uncontested proceeding beyond that envisioned by the Commission in *Exelon*. For reasons similar to those the Staff raised in the Clinton ESP Review Petition, the Board's Order reflects misapprehensions about the respective functions of the Board, the Staff, and the Commission.

As the Board reiterated in its May 31st Order, the requested narrative summary would entail a highly detailed description of the Staff's review process. It would "identify all regulatory guidance documents that were used, or are being used, by the NRC Staff in its review" of the application; "explain in depth – referring subsection-by-subsection to the [Standard Review Plans] and regulatory guides – how these [guidance] documents were used" by the Staff; and "highlight those areas where relevant portions of the published guidance documents were not used." May 31st Order at 7. Further, the Board intended that the Staff explain "what was done to review [the 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." *Id.* The Board also sought identification of the particular individuals in charge of each portion of the review, and copies of all documents referenced and discussed in the narrative summary. *Id.*

In its Motion for Reconsideration, the Staff contended that the Board's review of information of the level of detail requested would be tantamount to redoing the Staff's work. See Motion at 6. The Board disagreed, explaining that the summary will allow it to "facilitate [its] understanding of the process followed by the NRC Staff in its review, and help [it] to better

⁹ Although the Board chose to "defer" its request, it noted that such a request "may well be forthcoming[.]" May 31st Order at 8.

understand the thinking that led to the Staff's conclusion in each section of the SER and EIS." May 31st Order at 8.

First, as with the Staff RAI response analyses discussed in Part II, the Board's logic would impermissibly broaden the parameters of a mandatory hearing established by the Commission. The Board is not to conduct a *de novo* review. See *Exelon*, CLI-05-17, 62 NRC at 39. The Board is tasked with evaluating whether the Staff's *findings* are well-supported and adequately explain the Staff's reasoning, see *id.*, not whether the *development* of the Staff's conclusions took a particular course. By ordering the Staff to produce a detailed report of how Staff guidance was applied to the ESP application – indeed, a subsection-by-subsection defense of its review process and decisionmaking – the Board is, in effect, altering the depth and focus of the Board's review contemplated by the Commission.¹⁰

Second, as also discussed in Part II, the Board's request for such detailed explanation at this stage in the proceeding would circumvent the process for developing the record. The Board's inquiry should begin with whether the findings in the Staff's FSER and FEIS demonstrate "reasonable support in logic and fact"; if the Board needs to further probe the Staff's conclusions, it can then ask appropriate questions and require supplemental information.

¹⁰ The Staff notes that the Board's May 31st Order similarly deferred, but did not withdraw, its request that the Staff "identify the particular individual who was in charge of each portion of the review." May 31st Order at 8 n.13. As the Board acknowledged, see *id.*, the Staff (through designation by the Executive Director for Operations) determines who will answer questions concerning its findings, absent exceptional circumstances, such as where a named Staff member has "direct personal knowledge of a material fact not known to the witness" made available by the EDO. See 10 C.F.R. §§ 2.709(a)(1), 2.1207(b)(4).

The Board urged the Staff to prepare such a list notwithstanding its deferral, commenting that "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." May 31st Order at 8 n.13. To the extent this indicates the Board's belief that it must call Staff witnesses to address not only the basis for the Staff's review *findings* but also the Staff's *preliminary deliberations and administrative process*, the Staff reiterates its concern that the Board misapprehends the scope of its review. Staff witnesses are responsible for understanding the basis and reasoning for the Staff's ultimate conclusions, not the preliminary development of the Staff positions.

See Exelon, CLI-05-17, 62 NRC at 39-40. By directing the Staff to create in advance a comprehensive, highly detailed, yet otherwise unnecessary (or duplicative) document like the narrative summary at issue, the Board would divert significant resources from the Staff's existing review responsibilities.

Finally, the Board's request would intrude on the Commission's inherent supervisory authority over the Staff. *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 541, 516 (1980). The Board does not have the authority to direct the Staff in its independent, administrative function, including its application review process. *See id.*; *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 2 and 3), LBP-83-36, 18 NRC 45, 49 (1983) (citing *New England Power Co.* (NEP Units 1 and 2), LBP-78-9, 7 NRC 271 (1978)). The Board's request would require that additional extensive documentation of the Staff's process be prepared in conjunction with the Staff's review of the application. Moreover, producing the detailed information envisioned in the narrative summary would, in effect, alter and expand the manner in which the Staff must present and defend its findings before the Board. The Staff submits, therefore, that the Board's request would encroach on the Staff's discretion in conducting its review, and would constitute an exercise of oversight authority that is reserved to the Commission.

CONCLUSION

For the foregoing reasons, the Staff submits that the Commission should take review of the Board's Order of May 31, 2006, grant relief from the Board's request for the Staff's preliminary RAI response analyses, and provide guidance to the Board as appropriate concerning the matters identified in Part III of this petition.

Respectfully submitted,

/RA/

Patrick A. Moulding
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of June, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF PETITION FOR INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S MAY 31, 2006, ORDER" 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 15th day of June, 2006:

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