

June 26, 2006 (12:57pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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
)	
)	June 26, 2006

**SYSTEM ENERGY RESOURCES, INC. ANSWER IN SUPPORT OF
NRC STAFF PETITION FOR INTERLOCUTORY REVIEW**

I. INTRODUCTION

On June 15, 2006, the Nuclear Regulatory Commission Staff ("NRC" or "Staff") filed a Petition for Interlocutory Review ("Petition") of the Order issued by the presiding Atomic Safety and Licensing Board ("Board") on May 31, 2006 ("May 31st Order"). Therein, the Board ordered the Staff to produce certain documents in support of the uncontested mandatory hearing in this proceeding. System Energy Resources, Inc. ("SERI") hereby files its Answer in support of the Petition.

II. PROCEDURAL BACKGROUND

On October 21, 2003, SERI submitted an application for an Early Site Permit ("ESP") for the possible construction of additional nuclear generating capacity at the existing Grand Gulf nuclear power station site in Claiborne County, Mississippi. Various organizations filed petitions to intervene in the proceeding, but the Board determined that none of the Petitioners had submitted an admissible contention,¹ and the Commission affirmed the Board's rulings.² Accordingly, the mandatory hearing for this proceeding is uncontested.

¹ *System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site) LBP-04-19, 60 NRC 277 (2004).*

On April 19, 2006, the Board issued an Order requesting certain documents and briefings (“April 19th Order”) which the Board concluded would assist it conduct the mandatory hearing in an expeditious fashion. The April 19th Order included four key milestones. First, the Board directed the Staff to submit by June 5, 2006, hard and electronic copies of certain NRC Staff and SERI documents described in Items 1 through 7 of the Order, as well as a narrative summary identifying regulatory guidance documents that were used, or are being used, in the Staff’s review of SERI’s ESP application. Second, within 30 days of the Staff’s initial submission (approximately July 5, 2006), the Order permits SERI to file any exceptions, additions, or objections to the Staff’s submission. Third, within 60 days of submission of the Staff’s narrative summary (August 4, 2006), the Staff is to file preliminary proposed findings of fact and conclusions of law. Fourth, within 30 days of the Staff’s filing of its preliminary proposed findings of fact and conclusions of law (September 3, 2006), the Order permits SERI to file any exceptions, additions, or objections to the Staff’s preliminary proposed findings and conclusions.

On May 1, 2006, the NRC Staff filed a Motion for Reconsideration and Clarification of the April 19th Order³ and SERI filed a Motion for Clarification of that same Order⁴. The Staff, in its Motion, suggested that Board review of all the information requested in the April 19th Order would amount to a *de novo* review of the application, contrary to applicable legal standards.⁵ SERI, in its Motion, requested clarification of the Order and timing of the submissions for the mandatory hearing, as well as when the Board plans to conduct the

² *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site) CLI-05-04, 61 NRC 10 (2005).

³ See NRC Staff Motion for Reconsideration and Clarification of Board Order (Request for Documents and Briefing), dated April 19, 2006 (May 1, 2006) (“Staff Motion for Clarification”).

⁴ See System Energy Resources, Inc.’s Motion for Clarification (May 1, 2006) (“SERI Motion for Clarification”).

⁵ Staff Motion for Clarification at 2.

mandatory hearing. In its filing, SERI emphasized the importance of such clarification to ensure a timely decision.⁶

On May 31, 2006, the Board issued an Order granting in part and denying in part the Staff and SERI Motions for Clarification. In the May 31st Order, the Board reaffirmed its request for any written Staff analyses of SERI's responses to NRC Requests for Additional Information ("RAIs") and certain ACRS documents, but temporarily deferred its request for the narrative summary. May 31st Order at 2, 8. The Board also rejected the Staff's and SERI's requests to file preliminary proposed findings of fact and conclusions of law after the submission of pre-filed testimony. *Id.* at 9. In doing so, the Board stated that it does not know what form the mandatory hearing in this proceeding will take, adding that further oral or written testimony or exhibits may not be necessary. *Id.* The May 31st Order also revised the date for the initial submission of documents to June 12, 2006, and submission of the preliminary proposed findings of fact and conclusions of law to August 11, 2006 (or 60 days after June 12). *Id.* at 11.

III. DISCUSSION

A. Interlocutory Review is Appropriate Because the Board's Order Affects the Basic Structure of this Proceeding in a Pervasive and Unusual Manner

As noted in the Staff's Petition, interlocutory review is appropriate if a particular ruling affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.341(f)(2)(ii). SERI agrees with the Staff that the instant case now warrants interlocutory review. Given the disagreement between the NRC Staff and the Board regarding the appropriate scope of the Board's review, uncertainty regarding the process for conducting the mandatory hearing, and the lengthy delay in issuance of the ESP that may result from both considerations,

⁶ SERI Motion for Clarification at 2.

SERI now believes that further Commission guidance on the appropriate scope of the Board's review and the process for conducting this uncontested mandatory hearing is warranted.⁷

SERI concurs with the Staff that certain of the Board's requests for information appear to go beyond those called for by NRC regulations and contemplated by the Commission in a previous ruling.⁸ For example, the May 31st Order directs the Staff to produce any written analyses of SERI's responses to RAIs prepared by the Staff. May 31st Order at 5, 6. As noted by the Staff in its Petition, this request reflects a misunderstanding about the proper scope of the Board's review in a mandatory hearing by inquiring into *predecisional* Staff deliberations, rather than Staff findings. Petition at 4. Such preliminary analyses of SERI's RAI responses may not reflect the Staff's final determinations – final determinations are documented in the Final Environmental Impact Statement (“FEIS”) and Safety Evaluation Report (“SER”).⁹ Also, it would be fundamentally unfair to SERI for the Board to consider these predecisional documents, which may or may not accurately reflect the basis for the Staff's technical and factual findings,

⁷ Note that in SERI's May 8, 2006 Answer to the Staff Motion's for Clarification, SERI disagreed with the Staff's suggestion that the Board refer its rulings or certify a question to the Commission with regard to the request for documents and briefings. As discussed more fully below, however, SERI now believes that Commission action in this proceeding is warranted given the status of the current dispute between the Board and the Staff in this and the Clinton ESP proceeding. *See* NRC Staff Petition for Interlocutory Review of the Licensing Board's May 3, 2006 Order (Early Site Permit for the Clinton ESP Site), Docket No. 52-007-ESP.

⁸ *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, 39 (2005).

⁹ *See* Safety Evaluation Report for an Early Site Permit (ESP) at the Grand Gulf Site (NUREG-1840), at iii (noting that the SER documents the Staff's technical review of the site safety analysis report and emergency planning information included with the ESP application); Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf Site (NUREG-1817), at iii (noting that the EIS documents the Staff's analysis that considers and weighs the environmental impacts of constructing and operating up to two new nuclear units at the Grand Gulf ESP site or at alternative sites, and mitigation measures available for reducing or avoiding adverse impact).

during the mandatory hearing when SERI has never seen or had the opportunity to comment on these documents.¹⁰

Further, in response to the Board's May 31st Order, SERI and the Staff already have submitted voluminous documentation to the Board, including a complete and current copy of the Site Safety Analysis Report, Emergency Planning Information, Environmental Report, all environmental and safety RAIs issued by the Staff,¹¹ SERI's RAI responses with supporting analyses and references, ACRS documents and transcripts, and the FEIS and SER. It is difficult to understand why the Board needs additional predecisional or preliminary documents, which may not reflect the Staff's final determinations, to decide whether the safety and environmental record is sufficient to support issuance of the requested ESP.¹²

Finally, SERI acknowledges that the Board has the authority to request supplemental information, as necessary, to ensure sufficient evidence is available to support the Staff's technical and factual findings.¹³ Production and review of predecisional documents, however, will only divert the Board from the limited nature of its review, as defined by the Commission in *Exelon*, and may result in the Board redoing NRC Staff work.¹⁴ This also could result in an unnecessarily lengthy and inefficient hearing process – especially in the context of an uncontested proceeding such as this – which is directly contrary to Commission's strong emphasis on efficient case management and prompt decision making.¹⁵

¹⁰ See NRC's June 12, 2006 Letter to the Board forwarding certain documents as requested in the May 31st Order, but noting that the Staff's RAI response analysis provided to the Board is not included in ADAMS and should not be made public.

¹¹ As noted by the Staff in its Petition, there are 15 sets of RAIs, including nearly 300 subparts.

¹² See *Exelon* CLI-05-17, 62 NRC at 39.

¹³ *Id.* at 40.

¹⁴ *Id.* (stating that the Board should not second guess underlying technical or factual findings by the Staff).

¹⁵ *Id.* at 35.

B. Interlocutory Review Also is Appropriate Because the Board's May 31st Order Raises Novel Questions and Has Generic Implications for Future Mandatory Hearings

As the Commission is aware, there currently are two other pending ESP proceedings and numerous combined license and/or ESP proceedings are expected over the next several years. Therefore, the conduct of this proceeding is likely to serve as important precedent for future mandatory hearings and impact the basic structure of future mandatory hearings. Accordingly, the Commission should accept the Staff's Petition for review and provide clear and consistent guidance on the appropriate scope of the Board's review and the process for conducting mandatory hearings.

The May 31st Order generally maintains the original process and schedule issued by the Board in its April 19th Order, as outlined in Section II above. Unfortunately, the process outlined by the Board provides little guidance as to how the proceeding will be conducted or when the Board plans to issue its decision on SERI's application. As SERI noted in its Motion for Clarification, it is not unreasonable to expect that the mandatory hearing process should begin with the production of certain documents relevant to the proceeding (*e.g.*, the license application, RAIs, Safety Evaluation Report, Environmental Impact Statement).

After or concurrent with the Board's preliminary review of such documentation, however, it is anticipated that the Board may hold a prehearing conference, conduct a site visit, or perhaps thereafter issue an Order identifying areas for further inquiry and review.¹⁶ In the latter event, SERI could then anticipate that it (and the Staff) would prepare prefiled testimony on any such issues identified by the Board and, only if deemed necessary, perhaps prepare and

¹⁶ SERI acknowledges that the Board has stated that, at this point in the proceeding, it does not know what form the mandatory hearing will take or whether additional oral or written testimony or exhibits will be necessary.

present oral testimony on these and related issues. The Board's May 31st Order does not include any provisions or schedules for such reasonable contingencies.

Further, while the Board has requested that the Staff (as opposed to SERI) first submit preliminary proposed findings of fact and conclusions of law, it appears such findings are due prior to the receipt of any questions or comments from the Board on previously-submitted documents. SERI believes that preliminary proposed findings of fact and conclusions of law are more appropriately submitted after the record is complete; *i.e.*, after the submission of all Staff and SERI testimony and exhibits. SERI also believes that pursuant to 10 CFR §§ 2.324, 2.325, it should submit the initial preliminary proposed findings of fact and conclusions of law.

Finally, as noted above, the Board has only deferred its request for a narrative summary. If the Board subsequently requests the narrative summary, then the Staff may be required to amend the preliminary proposed findings of fact and conclusions of law based on Board questions or comments on the narrative, likely resulting in additional delays. Based on all of these considerations, SERI respectfully requests clarification from the Commission on the scheduling and conduct of the mandatory hearing, including the nature, order, and timing of submissions.

IV. NEED FOR A SCHEDULE

If the Commission accepts review, then SERI respectfully submits that the Commission has sufficient information – now – to rule on the merits of the Petition, without further briefing by the parties. In particular, the Staff, in its Motion for Reconsideration of the Board's April 19th Order and its Petition to the Commission, clearly describes the areas of and bases for disagreement with the Board. Similarly, the Board's May 31st Order clearly describes its bases

for the various document requests. Thus, the Commission should promptly issue an Order on the merits of the issues raised by the Staff and SERI.

Furthermore, SERI urges the Commission to establish a schedule for the remainder of this proceeding. As noted previously, SERI submitted the ESP application in October 2003 and, even prior to this dispute between the Board and Staff, the NRC did not expect to issue a final decision on the ESP until January 2007 (or nearly 40 months after submission of the application).¹⁷ By setting a schedule, the Commission can preclude further unnecessary delays. Given the relatively uncomplicated nature of this proceeding (*i.e.*, an uncontested ESP application for a site housing an existing, operating reactor), such a lengthy NRC review process is inappropriate, inefficient, and contrary to Commission expectations and directives.¹⁸ Therefore, SERI strongly urges the Commission to expeditiously resolve the dispute between the Staff and the Board, more clearly define the mandatory hearing process, and set a prompt schedule for the conduct and conclusion of this proceeding.

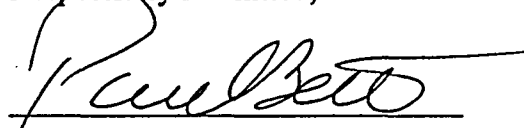
¹⁷ SERI understands that the published Grand Gulf ESP review schedule is not binding on the Commission or Board. It nevertheless has played an important role in instilling discipline and confidence in the licensing process.

¹⁸ See NRC Policy Statement on the Conduct of Adjudicatory Proceedings, 63 Fed. Reg. 41,872 (Aug. 5, 1998).

V. CONCLUSION

For the reasons stated above, the Commission should grant interlocutory review of the Board's May 31st Order and promptly issue a decision on the merits, without further briefing by the parties.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Bessette", written over a horizontal line.

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COUNSEL FOR SYSTEM
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Dated at Washington, District of Columbia,
this 26th day of June, 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "System Energy Resources, Inc. Answer in Support of NRC Staff Petition for Interlocutory Review" in the captioned proceeding have been served as shown below by deposit in the United States Mail, first class, this 26th day of June 2006. Additional service has also been made this same day by electronic mail as shown below.

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