

February 23, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SOUTHERN NUCLEAR OPERATING CO.	)	Docket No. 52-011-ESP
	)	
(Early Site Permit for Vogtle ESP Site)	)	

JOINT REPORT REGARDING SCHEDULING

Pursuant to the Atomic Safety and Licensing Board's ("Licensing Board") February 16, 2007 Memorandum and Order (Submission of Joint Report Regarding Scheduling) ("Order"), the NRC Staff herein provides the Licensing Board with a joint report, setting forth the views of each participant in this matter regarding the scheduling issue raised by the Licensing Board at the February 13, 2007 prehearing conference on admissibility of contentions.¹ Specifically, the Licensing Board requested that this report set forth the participants' position(s) on the following issue:

whether, if one or more of the proposed environmental contentions currently at issue in this early site permit proceeding were to be admitted, there would be any objection to going forward on that contention or contentions such that any evidentiary hearing could be conducted following the issuance of the [S]taff's draft environmental impact statement (EIS), as opposed to the final EIS, see 10 C.F.R. § 2.332(d).

Order at 1. The position of each participant follows.

NRC Staff

The Staff is of the view that NRC regulations do not provide for going to hearing on environmental issues in advance of the issuance of the final EIS ("FEIS"). In

¹ See Tr. at 185-87.

particular, as noted by the Licensing Board, 10 C.F.R. § 2.332(d) states, in pertinent part, “Where an [EIS] is involved, hearings on environmental issues addressed in the EIS may not commence before issuance of the final EIS.” Similarly, 10 C.F.R. § 51.104(a)(1) states:

In any proceeding in which (i) a hearing is held on the proposed action, (ii) a [FEIS] has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA [the National Environmental Policy Act] and this subpart are in issue, the NRC staff may not offer the [FEIS] in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the [FEIS] is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.

As noted by the Licensing Board,² in the recent *Louisiana Energy Services* (“LES”) proceeding, evidentiary presentations were made and resolved by the licensing board on the basis of the draft EIS. However, it is the Staff’s view that this proceeding is not in the same posture as the *LES* matter. In the notice of hearing issued in the *LES* matter, the Commission gave specific direction on the disposition of environmental contentions in its discussion of the hearing schedule:

The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents (SER [Safety Evaluation Report] or EIS) unless the Licensing Board in its discretion finds that starting the hearing with respect to one or more safety issues prior to issuance of the final SER (*or one or more environmental contentions directed to the Applicant’s Environmental Report*) will expedite the proceeding without adversely impacting the Staff’s ability to complete its evaluations in a timely manner.

² See Tr. at 186.

Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10, 17 (2004)(emphasis added)(footnote omitted). No similar Commission direction has been issued in the Vogtle proceeding.³

Because the notice of hearing does not contain such direction here, the Staff is of the view that the regulations in 10 C.F.R. §§ 2.332(d) and 51.104(a)(1) are controlling, and that any contested hearing on environmental issues may be commenced only after issuance of the FEIS.

Joint Petitioners

Counsel for Joint Petitioners (Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women's Action for New Directions, and Blue Ridge Environmental Defense League) has authorized the Staff to state that the Joint Petitioners concur in the Staff's analysis of 10 C.F.R §§ 2.332(d) and 51.104(a)(1).

Further, Joint Petitioners would object to going forward with an evidentiary hearing on any admitted contentions prior to the issuance of the final EIS. Although SNC may prefer a more expeditious licensing process, this is not a valid reason to diverge from the process set forth in the regulations. The Commission's decision in *LES* is expressly limited to the particular circumstances of that case:

The Commission believes that a reasonably achievable schedule would result in a final NRC decision on the pending application within about two and a half years of the date the application was received, and the Commission thus will impose a 30-month milestone schedule for this proceeding. The Commission recognizes, however, that legislation currently being considered would require the NRC to issue decisions on new enrichment facility

³ See *generally* Southern Nuclear Operating Company; Notice of Hearing and Opportunity to Petition for Leave to Intervene on An Early Site Permit for the Vogtle ESP Site, 71 Fed. Reg. 60,195 (Oct. 12, 2006).

applications within two years of receipt of the application; consequently, the Commission will endeavor to identify efficiencies, and provide the pertinent resources, to further reduce the time the agency needs to complete reviews and reach decisions in licensing uranium enrichment facilities.

LES, CLI-04-3, 59 NRC at 16. No similar circumstances exist here.

Moreover, *LES* was contingent upon the Licensing Board's finding that moving forward on the basis of the draft environmental impact statement ("DEIS") "will expedite the proceeding *without adversely impacting the Staff's ability to complete its evaluations in a timely manner*." *Id.* at 17 (emphasis added). Joint Petitioners believe that expediting this ESP proceeding could potentially undermine its integrity. *See id.* ("We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted on this application.")

Applicant

Applicant, Southern Nuclear Operating Company ("SNC"), does not object to proceeding to hearing on the basis of the DEIS. SNC acknowledges the NRC Staff's and Joint Petitioners' position that the procedural posture of this proceeding is different than that presented in *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 396, n.1 (2005) ("*LES*"), to the extent that the Commission's Notice of Hearing in *LES* expressly contemplated proceeding to hearing prior to issuance of the Staff's FEIS. (Indeed, the Licensing Board held hearings on certain environmental contentions based on the ER and DEIS.). SNC believes, however, that a procedural mechanism does exist by which the Licensing Board may fashion a hearing schedule specifically for this proceeding by which the hearing on contested

environmental issues⁴ could commence based on the ER and DEIS. Moreover, SNC notes that the substantive reasons for proceeding to hearing on the DEIS in this proceeding (i.e., the need for expeditious decision-making) are as valid as those in *LES*.

Although the Staff notes correctly that both 10 C.F.R. § 51.104 and 10 C.F.R. § 2.332(d) contemplate proceeding to hearing on the basis of the FEIS, neither of those provisions overrides the authority of the Commission to enter case-specific procedural orders in order to facilitate the efficient resolution of issues before the Board. For example, 10 C.F.R. § 51.104(a)(2) provides that a party may offer evidence relative to “the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding *or in accordance with the terms of the notice of hearing.*” (Emphasis added.) Similarly, in the statements of consideration for 10 C.F.R. § 2.332(d), the Commission stated that an FEIS is “ordinarily” required prior to the commencement of hearings on the “matters related to the environment and/or the adequacy of the EIS...” 69 Fed. Reg. 2182, 2208 (Jan. 14, 2004). The Commission expressly left open the possibility of “pre-FEIS” hearings on environmental issues. Thus, as the *LES* proceeding demonstrates, the Commission can, in appropriate circumstances, fashion a case-specific scheduling order providing for the commencement of hearings not only on admitted contentions but mandatory hearings required under the Atomic Energy Act upon the issuance of the DEIS.

⁴ The Licensing Board directed its question regarding the acceleration of the hearing to Petitioners’ contentions, the admissibility of which has not yet been determined. SNC’s response is not intended to suggest that it agrees that such contentions should be admitted. Moreover, SNC believes that the commencement of the mandatory hearing on environmental issues on the basis of the DEIS would be feasible, and support the Commission’s goal of expeditious decision-making, regardless of whether any of the contentions are admitted.

In accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f), the Licensing Board has within its discretion the authority to refer, on the motion of one of the parties or *sua sponte*, this matter to the Commission for supplementation of the Notice of Hearing in order to allow for early commencement of the hearings on any contention(s) which may be admitted. SNC would not oppose such a referral and would support the supplementation of the Notice of Hearing to allow for the commencement of the hearings on any such contention(s) as described herein. Such an approach would be fully consistent with the Commission's "commitment to efficient and expeditious processing of adjudications" and the Commission's "inherent supervisory authority" over the conduct of NRC adjudications. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-70 (1988) (providing example of Commission "intervention to establish expedited procedures for the conduct of the proceeding"); see also *USEC, Inc.* (American Centrifuge Plant), CLI-07-05, 65 NRC __ (slip op. Feb. 1, 2007).

Respectfully submitted,

/signed (electronically) by/

Brooke D. Poole
Counsel for the NRC Staff

Dated at Rockville, MD
this 23rd day of February, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SOUTHERN NUCLEAR OPERATING CO.	)	Docket No. 52-011-ESP
	)	
(Early Site Permit for Vogtle ESP Site)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "JOINT REPORT REGARDING SCHEDULING" have been served upon the following persons by Electronic Information Exchange and electronic mail this 23rd day of February, 2007:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: gpb@nrc.gov)

Administrative Judge
James Jackson
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: jackson538@comcast.net)

Margaret Parish
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: map4@nrc.gov)

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

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ocaamail@nrc.gov)
Copy provided by e-mail only

Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, NW
Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

M. Stanford Blanton, Esq.
Peter D. LeJeune, Esq.
C. Grady Moore, III, Esq.
Kenneth C. Hairston, Esq.
Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2014
(E-mail: sblanton@balch.com;
plejeune@balch.com;
kchairston@balch.com; gmoore@balch.com)

Steven P. Frantz, Esq.
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Mary Freeze
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(E-mail: sfrantz@morganlewis.com;
ksutton@morganlewis.com;
pbessette@morganlewis.com;
mfreeze@morganlewis.com)

Mary Maclean D. Asbill, Esq.
Lawrence D. Sanders, Esq.
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
(E-mail: masbill@law.emory.edu;
lsanders@law.emory.edu)

Bentina C. Terry, Esq.
Southern Nuclear Operating Co., Inc.
40 Inverness Center Parkway
P.O. Box 1295, Bin B-022
Birmingham, AL 35201-1295
(E-mail: bdchisol@southernco.com)

Jeffrey Stair, Esq.
Georgia Public Service Commission
244 Washington Street
Atlanta, GA 30334
(E-mail: jeffreys@psc.state.ga.us)
Copy provided by e-mail only

/signed (electronically) by/
Brooke D. Poole
Counsel for the NRC Staff