

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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DOCKETED 04/17/07
SERVED 04/17/07

In the Matter of)
)
SOUTHERN NUCLEAR OPERATING CO.)
)
(Early Site Permit for Vogtle ESP Site))
_____)

Docket No. 52-011-ESP

CLI-07-17

MEMORANDUM AND ORDER

In its March 12, 2007, Ruling on Standing and Contentions,¹ the Licensing Board admitted two environmental contentions, rejected all other proposed contentions, and also certified the following question to the Commission:

May the Vogtle [Early Site Permit] Licensing Board go forward with merits litigation on admitted environmental contentions in the proceeding such that any evidentiary hearing could be conducted following issuance of the [S]taff's [draft environmental impact statement], as opposed to the [final environmental impact statement]?²

The Board first posed this question during a Pre-Hearing Conference. At that time, the Board asked the parties whether there would “be any objection to going forward based on the draft . . . rather than the final environmental impact statement” and asked for a joint report from the

¹LBP-07-03, slip op. (March 12, 2007).

²LBP-07-03, slip op. at 44.

parties on this question.³ The NRC Staff filed the parties' joint report.⁴ Both the Joint Petitioners⁵ and the NRC Staff opposed the Board's proposal – the Staff on purely legal grounds and the Joint Petitioners on the same legal grounds plus a concern that expediting the proceeding might undermine its integrity – while the early site permit applicant, Southern Nuclear Operating Company, favored proceeding on the merits based upon the draft environmental impact statement. On the record before us, we decline to authorize or require a merits hearing prior to the issuance of the final environmental impact statement.

The relevant portion of our Part 2 regulations on hearings, 10 C.F.R. § 2.332(d), distinguishes between safety issues and environmental issues with respect to the timing of the hearing (though not with respect to the timing of discovery). Our regulations give the presiding officer (here, the Licensing Board) discretion to accelerate the merits hearing on safety issues, but not on environmental issues:

In establishing a schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. *Hearings on safety issues may be commenced* before publication of the NRC staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. Where an environmental impact statement (EIS) is involved, *hearings on environmental impacts addressed in the EIS may not commence* before the issuance of the final EIS. In

³Transcript of Pre-Hearing Conference held in Waynesboro, GA, at 186 (February 13, 2007), available as ADAMS Accession No. ML070530133. (ADAMS is the acronym for the NRC's Agencywide Documents Access and Management System, which is publicly accessible through the NRC's web page at <http://www.nrc.gov>.)

⁴Joint Report Regarding Scheduling (February 23, 2007) (Joint Report). This Joint Report presents the parties' positions and legal arguments and serves as briefing for our purposes here.

⁵Joint Petitioners are the 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.

addition, discovery against the NRC staff on safety or environmental issues, respectively, should be suspended until the staff has issued the [safety evaluation report] or EIS, unless the presiding officer finds that the commencement of discovery against the NRC staff (as otherwise permitted by the provisions of this part) before the publication of the pertinent document will not adversely affect completion of the document and will expedite hearing.⁶

Thus, while the Board may decide to proceed to an early hearing on the merits of safety issues – that is, before the NRC Staff finishes its safety evaluation – the Board “may not commence” a hearing on environmental issues before the final environmental impact statement has been issued.

This reading of Part 2 is reinforced by one of our Part 51 regulations on environmental procedure, 10 C.F.R. § 51.104(a)(1). That regulation says that (in cases where a hearing is held, a final environmental impact statement is prepared, and environmental matters are at issue) the NRC Staff “*may not* offer the final environmental impact statement into evidence or present the position of the NRC staff on matters within the scope of NEPA [the National Environmental Policy Act] and [Part 51] *until* the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.”⁷

Prior to our 2004 revision of Part 2, we had approved early hearings on safety issues only, not on environmental issues: “[A]ny evidentiary hearing should not commence before completion of the staff’s Safety Evaluation Report . . . or Final Environmental Statement . . . regarding an application, unless the presiding officer finds that beginning earlier, e.g., by starting the hearing *with respect to safety issues* prior to issuance of the [Safety Evaluation

⁶10 C.F.R. § 2.332(d). (Emphasis added.)

⁷10 C.F.R. § 51.104(a)(1). (Emphasis added.)

Report], will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner."⁸ The same view is apparent in our case law: "The evidentiary hearing should not commence until after completion of the final [Safety Evaluation Report] and [Final Environmental Statement], unless the Licensing Board in its discretion finds that starting the hearing *with respect to safety issues* prior to the issuance of the final [Safety Evaluation Report] will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner."⁹

The Board lacks discretion to proceed to hearing on an accelerated basis on environmental issues because – unlike the Staff's work on safety issues – its work on environmental issues requires compliance with the public participation and public comment processes of NEPA and associated regulations. In addition, whereas NRC hearings on safety issues concern the adequacy of the license application, not the NRC Staff's work, NRC hearings on NEPA issues focus entirely on the adequacy of the NRC Staff's work.¹⁰ A premature hearing on a *draft* Staff document has the potential to distract the Staff from tasks it otherwise would be performing, or to force the Staff to take legal positions on environmental issues before public comments have been filed and before the Staff has had a full opportunity to consider its draft environmental impact statement – to the possible detriment of the quality of Staff's analysis. As we noted in our statements of consideration when revising Part 2 in 2004:

In proceedings where the NRC staff is a party, the staff may not be in a

⁸Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). (Emphasis added.)

⁹*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 214 (2001). (Emphasis added.)

¹⁰*See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121 & n.67 (1995); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 792-94 (1978).

position to provide testimony or take a final position on some issues until [the safety evaluation report and final environmental impact statement] have been completed. This may be the case in particular with regard to the NRC staff's environmental evaluation, less so with regard to the Staff's safety evaluation. In many cases, it could be unproductive and cumbersome to have a two-pronged hearing with one part of the hearing being conducted before issuance of the documents.¹¹

It is true that in two recent uranium enrichment proceedings we authorized hearing the merits of environmental issues in advance of a final environmental impact statement.¹² In one, the point became moot because no contentions were admitted.¹³ In the second, *Louisiana Energy Services, L.P.*, the merits hearing on environmental issues did in fact commence based on the Staff's draft environmental documents.¹⁴ But in that case, unlike the present proceeding, all parties acquiesced in an early hearing on environmental issues: "in this instance all the parties involved in [environmental] issues, including the Staff, agreed to go forward on the admitted environmental contentions following issuance of the Staff's draft [environmental impact

¹¹69 Fed. Reg. 2182, 2187 (Jan. 14, 2004).

¹²*Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 17 (2004); *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 60 NRC 426, 432 (2004). Our "authorization" took the following form:

"Threshold environmental legal and policy issues need not await issuance of the final [environmental impact statement]. . . . The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents ([safety evaluation report or environmental impact statement]) *unless the Licensing Board in its discretion* finds that starting the hearing with respect to one or more safety issues prior to the issuance of the final [safety evaluation report] (*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."
LES, CLI-04-3, 59 NRC at 17. (Emphasis added.)

¹³*USEC, Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433 (2006) (affirming denial of one set of contentions); *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451 (2006) (affirming denial of second set of contentions).

¹⁴*Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 395-96 (2005).

statement].”¹⁵ Here, by contrast, the Staff argues that our regulations do not allow the hearing to start until after the final environmental impact statement is issued.¹⁶ The Staff distinguishes this proceeding from *LES* because an early hearing was authorized from the outset in the Commission’s notice of hearing in *LES*, but not here.¹⁷ The Joint Petitioners concur with the Staff’s view, but go further to argue that an early hearing would compromise the integrity of the Staff’s NEPA review.¹⁸ We do not agree that an early hearing necessarily would compromise the Staff’s NEPA review. However, as we stated earlier, there are some potential consequences from an early hearing, at least as a general matter.

The applicant, Southern Nuclear, argues that we have the authority “to enter case-specific procedural orders . . . to facilitate the efficient resolution of issues before the Board.”¹⁹ We certainly agree with this proposition in general.²⁰ The *LES* example shows that we are willing to be flexible in the timing of NEPA hearings where special circumstances are present. But we see no basis for deviating from our regulations here since the circumstances that made *LES* a special case do not apply to the early site permit cases in general. While early site permit proceedings should and will be handled expeditiously – and are in fact intended to help streamline the licensing process for new reactors²¹ – no one has shown or even argued that the

¹⁵*LES*, LBP-05-13, 61 NRC at 396 n.1.

¹⁶Joint Report at 1-2.

¹⁷*Id.* at 2-3.

¹⁸*Id.* at 3-4.

¹⁹*Id.* at 5.

²⁰See e.g., *National Whistleblower Center v. NRC*, 208 F.3d 256, 262-63 (2000); *City of West Chicago v. NRC*, 701 F.2d 632, 647 (1983).

²¹See Final Rule: Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15372, 15378-79 (April 18, 1989).

particular urgency²² that motivated accelerating the *LES* proceeding is present here. Further, we do not see a distinction between this early site permit proceeding and other NRC licensing decisions, including recently decided or pending early site permit cases, calling for a special procedure here. Also, since two of the three parties have opposed proceeding to hearing prior to release of the final environmental impact statement, acquiescence is not an available basis or mechanism for following the alternate procedure used in *LES*.

²²In establishing a hearing schedule for the *LES* proceeding, we “recognize[d] . . . that legislation currently being considered would require the NRC to issue decisions on new enrichment facility applications within 2 years of receipt of the application; consequently, the Commission will endeavor to identify efficiencies, and provide pertinent resources, to further reduce the time the agency needs to complete reviews and reach decisions in licensing uranium enrichment facilities.” *LES*, 59 NRC at 16.

For all of these reasons, we do not authorize or require a merits hearing prior to the issuance of the final environmental impact statement at this time. We do expect the NRC Staff, however, to finalize its draft environmental impact statement as expeditiously as possible, and we expect the Board to conduct any ensuing hearing equally expeditiously, bearing in mind the anticipated submission of Southern Nuclear's application for a combined operating license not later than the first half of 2008.²³

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of April, 2007

²³See Southern Nuclear Operating Company, *Information on Site Modifications Prior to Limited Work Authorization Issuance for New Units at Vogtle Electric Generating Plant* (July 11, 2006), at 1, available as ADAMS Accession No. ML062050213. If the early site permit process remains incomplete when Southern Nuclear is ready to file its combined operating license application, the company may choose to avail itself of the provision in our regulations that allows an applicant for a construction permit or combined license to "at its own risk, reference in its application a site for which an early site permit application has been docketed but not granted." 10 C.F.R. § 52.27(c).

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COMPANY)
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(Early Site Permit for the Vogtle ESP Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-17) have been served upon the following persons by Electronic Information Exchange and/or electronic mail.

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[Original signed by Adria T. Byrdsong]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of April 2007