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Title: South Texas Project Units 3 & 4

Docket Numbers: 52-012-COL
52-013-COL
05-838-01-ML

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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TELECONFERENCE

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IN THE MATTER OF: :
SOUTH TEXAS PROJECT : Docket No. 52-012-COL,
UNITS 3 & 4 : 52-013-COL
: ASLBP No. 05-838-01-ML

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Friday, March 26, 2010

Nuclear Regulatory Commission
Hearing Room T-3 B45
11545 Rockville Pike
Rockville, Maryland

BEFORE:

MICHAEL GIBSON, Chair
GARY ARNOLD, Administrative Judge
RANDALL CHARBENEAU, Administrative Judge

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P-R-O-C-E-E-D-I-N-G-S

10:17 a.m.

1
2
3 JUDGE GIBSON: Judge Arnold, Judge
4 Charbeneau and I don't have a whole lot that we wanted
5 to communicate today. But there were a few things
6 that we thought we ought to make sure we're all on the
7 same page of the same hymnal about.

8 First, counsel for the NRC staff, I think
9 the operative date in the scheduling order for
10 purposes of filing dispositive motions is 20 days
11 after an event or occurrence. And I assume in this
12 case the event or occurrence would be the date that
13 the draft EIS was made available to the applicant.
14 When was that?

15 MS. KIRKWOOD: I'm just checking with our
16 Product Manager to be certain of the date. Give me
17 one second.

18 JUDGE GIBSON: Oh, that's fine. Perhaps
19 Maureen Lewis knows. I was just --

20 MR. BURDICK: I don't have that date
21 offhand.

22 JUDGE GIBSON: Okay. Well in any event,
23 I just wanted -- if there is a little bit of a
24 disparity here in this order and it may not be
25 apparent without us talking about it and that's why I

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1 wanted to be sure.

2 MS. KIRKWOOD: This is Sarah Kirkwood from
3 the NRC staff.

4 We made it available on ADAMS last
5 Thursday, March 18th. We didn't give it to the
6 applicant any before we give it to the general public.

7 JUDGE GIBSON: Okay. Okay. So March 18.
8 So if I understand, if the order, I think, would read
9 20 days from March 18 would be when any dispositive
10 motions based on the draft EIS would be due.

11 Now with respect to new contentions --

12 MR. FRANCE: Judge Gibson, this is Steve
13 France. May I ask for a clarification?

14 We had submitted a motion a while ago to
15 the Board for clarification in that particular
16 provision. And as I understand it, we as the
17 applicant, if we wish to file a motion for summary
18 disposition based upon the information in our
19 environmental report, we would not be tied to this 20
20 day period after the DEIS, we would instead be subject
21 to the requirement in your order related to the FEIS,
22 is that correct?

23 JUDGE GIBSON: I have to tell you I
24 haven't looked at that particular issue. And I've not
25 had a chance to consult with Judge Arnold and Judge

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1 Charbeneau, so I couldn't just tell you off the top of
2 my head what the answer is.

3 MR. FRANCE: Yes. And that brings me back
4 to our original motion. We had asked, in that
5 particular motion, if the Board's view was different
6 from ours. In other words, that we were required to
7 file based upon issuance of DEIS. We had asked for an
8 extension that was tied to the Board's ruling on the
9 new contentions and our motion to dismiss. Because
10 frankly it makes no sense for us to file a motion for
11 summary disposition until the Board rules on these new
12 contentions and rules on the motion to dismiss,
13 because we're just going to be duplicating effort
14 needlessly.

15 JUDGE GIBSON: Well your point is well
16 taken and we will address that issue. But I guess it
17 is important, at a minimum, that we at least make
18 clear that based on the language of the scheduling
19 order, dispositive motions based on new information in
20 the draft EIS would be due 20 days after March 18.

21 MR. FRANCE: Okay. And --

22 JUDGE GIBSON: Now we can certainly
23 discuss any modification that you want to make to it.
24 And as I said, Judge Arnold, Judge Charbeneau, and I
25 will be glad to look at that issue. But I just wanted

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1 to make clear at least that that is I think what the
2 scheduling order as drafted would require.

3 MR. FRANCE: Okay. And as long as we
4 don't base our motion then on the DEIS, then we don't
5 have this concern.

6 JUDGE GIBSON: Okay. Okay. Yes. And I
7 think that's fine, I just wanted to be make sure.

8 We're talking about really new matter or
9 really what's in the draft EIS.

10 MR. FRANCE: Right.

11 JUDGE GIBSON: And nothing more.

12 The second thing is the --

13 MS. KIRKWOOD: Judge Gibson, may I clarify
14 something on the date?

15 JUDGE GIBSON: Yes.

16 MS. KIRKWOOD: This is Sarah Kirkwood with
17 the United States --

18 JUDGE GIBSON: March 18.

19 MS. KIRKWOOD: I'm sorry. Since I'm
20 assuming this will govern both the dispositive motions
21 and also any late filed contentions on the DEIS. We
22 made it available, it was publicly available on March
23 18th. The press release that it was publicly
24 available went out on March 19th. And the *Federal*
25 *Register* notice telling the world that it was

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1 available was published yesterday.

2 From the NRC staff's perspective, any of
3 those later dates, either the 19th with the press
4 release or the *Federal Register* notice would be
5 appropriate days, especially to key off the new
6 contentions. Or I mean, if you want to make it March
7 18th, then the interveners don't object. We don't
8 mind. I just wanted to clarify that while it was
9 publicly available, nobody necessarily knew that.

10 JUDGE GIBSON: Okay. Well I appreciate
11 your clarification.

12 I guess that one of the reasons that I
13 wanted to make sure we were clear about this, is that
14 the language of the scheduling order is focused on
15 issuance of the draft EIS. And I'm wondering what the
16 staff views as the date of issuance of the draft EIS?

17 I mean obviously you talked about publicly
18 available and *Federal Register* notice, but I'm curious
19 what does the staff view as the date of issuance?

20 MS. KIRKWOOD: Sarah Kirkwood for the NRC
21 staff.

22 We view this date of issuance in terms of
23 whether or not we met our milestone as the date of the
24 EPA notice, which is today.

25 JUDGE GIBSON: The date, which would be

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1 today?

2 MS. KIRKWOOD: Yes. Of the EPA notice.

3 JUDGE GIBSON: Okay. And let me just ask
4 counsel for the applicant: Do you have any
5 disagreement with that as far as what is the date of
6 issuance of the draft EIS?

7 MR. FRANCE: No. We'll defer to the NRC
8 staff on that issue.

9 JUDGE GIBSON: Okay. And counsel for the
10 interveners, I assume you're not going to dispute
11 that?

12 MR. EYE: No, Your Honor.

13 JUDGE GIBSON: Okay. So it sounds to me
14 like 40 days from today will be the date that new
15 contentions will need to be filed.

16 Now I just wanted to be clear, though,
17 that we also have a oral argument on the 7th. And I
18 know that you all are assiduously preparing for that.
19 And I'm curious if the oral argument will in any way
20 impede your ability to meet the deadline, which would
21 be for the interveners 40 days from now to file those
22 contentions. And for the applicant it would be 20
23 days from the date that it was made available, which
24 I guess was March 18th.

25 MR. EYE: Your Honor, this is Bob Eye.

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1 The short answer to your question is yes.
2 I think that it as a practical matter, it will.

3 And the panel is likely aware that we have
4 oral arguments in a parallel case, Comanche Peak, the
5 week after the South Texas oral arguments are
6 scheduled. So we're kind of running somewhat
7 parallel. Which on the other hand --

8 JUDGE GIBSON: Which effects both of you,
9 I take it?

10 MR. EYE: Pardon me?

11 JUDGE GIBSON: Which effects both of you,
12 counsel for the applicant as well as --

13 MR. EYE: It does.

14 JUDGE GIBSON: Is that correct?

15 MR. EYE: That's correct, Your Honor, it
16 would.

17 So as a practical matter, the answer is
18 yes. I think that it is likely it would impinge on
19 the capacity to meet that 40 day deadline.

20 JUDGE GIBSON: Okay. So what would work
21 for you in terms of filing new contentions if you
22 can't meet the 40 day deadline?

23 MR. EYE: Your Honor, I think if we had,
24 you know, another couple of weeks that should
25 essentially accommodate the oral arguments and

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1 traveling and so forth that goes along with it. And,
2 you know, sort of give us some additional time in
3 there to hopefully go through the DEIS in a
4 comprehensive hand and --

5 JUDGE GIBSON: Okay.

6 MR. EYE: -- figure out what contentions
7 are pertinent.

8 JUDGE GIBSON: Okay. Counsel for the
9 applicant, I realize that you're probably going to be
10 stretched. Although I know you probably have a few
11 more resources than Mr. Eye, you're probably going to
12 be stretched as well. If you add an additional two
13 weeks would that make your life a little easier?

14 MR. FRANCE: I guess that brings me back
15 to the original point we were discussing. Right now
16 we don't believe that there's a need for us to file
17 dispositive motions based upon the DEIS.

18 JUDGE GIBSON: Okay.

19 MR. FRANCE: We've already filed our
20 dispositive motions. We're waiting for a Board order
21 on those. And if the Board were to either deny those
22 motions or to admit new contentions that have already
23 been filed, then we would file motions for summary
24 disposition. But we don't believe, based upon the
25 Board's order and what you've said today, that we have

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1 any current deadline to do so, other than the line
2 tied to the final Environmental Impact Statement.

3 Now if my understanding is incorrect, then
4 I guess we would renew our motion that we submitted
5 several weeks ago for an extension to tie any motions
6 for summary disposition to rulings by the Board on our
7 motions to dismiss and the rulings on the new
8 contentions.

9 JUDGE GIBSON: Okay. Well recognizing
10 that the Board has not made that ruling yet, it sounds
11 to me like if we don't rule in your favor, you will
12 need to be filing something.

13 MR. FRANCE: Yes.

14 JUDGE GIBSON: And so let's assume for the
15 sake of argument that we are not going to be granting
16 the relief that you seek. If you had an additional
17 two weeks, would that be sufficient?

18 MR. FRANCE: Well assuming that the Board
19 does not rule on those motions and the new contentions
20 until several weeks after the upcoming oral argument
21 on April 7th, I think we will have sufficient time
22 without an extension.

23 JUDGE GIBSON: Okay.

24 JUDGE ARNOLD: One question.

25 This is Judge Arnold.

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1 During oral arguments, will that not also
2 include any perceived impacts of the draft
3 Environmental Impact Statement on the existing
4 contentions?

5 MR. FRANCE: My own reaction is probably
6 not. The contentions are based upon the contents of
7 the environmental report and the application. To the
8 extent that the interveners have new issues they want
9 to raise based upon the DEIS, then they have the
10 authority under 2.309(f)(2) to file new contentions.
11 But otherwise I think the oral argument on April 7th
12 should be focusing on the contents of the
13 environmental report.

14 MR. EYE: This is Bob Eye.

15 And this is one of those moments where we
16 should all probably take note of because I definitely
17 agree with Mr. France on that.

18 JUDGE GIBSON: Okay. While I appreciate
19 the fact that you guys are in agreement, I think I
20 would not want to ask you to do any formal briefing or,
21 anything, any elaborate argument.

22 I think Judge Arnold has raised an
23 excellent point and that is, at a minimum, I think it
24 would be helpful to us if you could at least include
25 a notation in your oral argument that based on the

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1 draft EIS, you anticipate filing some new paper
2 regarding whether it's in the nature of a motion to
3 dismiss or if it's based for mootness or to augment
4 what you've already done. Or if it is to file new
5 contentions that relate to those specific issues that
6 we're discussing.

7 And if you all could do that, I think it
8 would help Judge Charbeneau and Judge Arnold and I
9 immensely to at least know that we're probably going
10 to be getting some more paper that bears on the
11 specific issue that we're talking about. So I would
12 ask you to do that for our benefit, again nothing
13 elaborate. But at least if you could at least mention
14 it in your argument I think it would be helpful to us.

15 Will that be acceptable to you?

16 MR. EYE: This is Bob Eye.

17 Yes sir, it will be.

18 JUDGE GIBSON: Okay. And counsel, for
19 asking I realize that you're hoping you don't need to
20 file anything else but at least if you do, if it turns
21 out that you will, if you would at least let us know.
22 We'd appreciate that.

23 MR. FRANCE: Yes. What we'll do, and I
24 can tell the Board right now, if the Board were to
25 either deny our motions to dismiss or to admit new

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1 contentions, we will definitely file motions for
2 summary disposition.

3 JUDGE GIBSON: Okay.

4 Okay. Just a couple of housekeeping
5 matters.

6 Obviously, Mr. Eye, you're going to need
7 to consult with the counsel here. I'm not going to
8 put them on the spot. But you will need to consult
9 with them about having an additional two weeks for
10 this to file any new contentions based on the draft
11 EIS.

12 And regardless, there's quite a bit of
13 time between now and then. And I do want to encourage
14 you to closely read pages 8 to 9 of the scheduling
15 order and make sure that you dot all your I's and
16 cross all your T's. And that will be most appreciated
17 if you do that.

18 Fair enough?

19 MR. EYE: Yes, sir.

20 JUDGE GIBSON: Okay. Okay. Is there
21 anything further that we need to do before we all get
22 back together on April 7th? Other than, I appreciate
23 counsel for the applicant, that we do need to turn our
24 attention to the relief that you've requested.

25 MR. EYE: Your Honor, this is Bob Eye.

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1 I have just one observation about how the
2 sequence of events is currently anticipated to roll
3 out, subsequent to the issuance of the DEIS. I can
4 see that there would be the possibility of any
5 dispositive motions that come out of the DEIS
6 conflicting with information that ultimately appears
7 in the final EIS. And in that regard, normally it
8 seems that the NEPA practice and so forth under EISS
9 really presents an opportunity for the parties to
10 brief whatever motions are appropriate once the FEIS
11 is out and everybody's had a chance to, you know, do
12 public comments and so forth on it. And thereby
13 crystallizing whatever issues might in fact need to be
14 dealt with.

15 And I'm not certain that we might not be,
16 kind of, going over ground again if we deal with
17 issues in the DEIS that still persist in the final EIS
18 and subsequent to public comments and so forth.

19 Would it be possible to consider adopting
20 a plan something like what Mr. France outlined whereby
21 essentially dispositive motions on the EIS are built
22 in and anticipated once the FEIS is completed? Just
23 so that we avoid the possibility at least of going
24 over that ground more than once or more than we need
25 to?

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1 JUDGE GIBSON: Well, you know, I hear what
2 you're saying. I can only tell you that the issue of
3 the NRC's treatment of draft EIS maybe a little
4 different than it is with other agencies. But the
5 basic notion is this: If there is new matter that
6 shows up in the draft EIS, it needs to be addressed at
7 that time. And if there's information in the final
8 EIS that is different from that which is in the draft
9 EIS, well then again, contentions can be asserted at
10 that time with respect to that new matter. But the
11 focus is less on the EIS, per se, and on new matter.

12 And I'm sure I'm not telling you all
13 anything you all don't already know. But in any
14 event, I can only tell you that I think there is a
15 structure in place that is normally followed. I will
16 not certainly tell you that it could not be modified.
17 But I certainly won't tell you that it could be
18 modified. Because I do think that is the basic
19 structure that's in place.

20 MR. EYE: Thank you, Your Honor.

21 JUDGE GIBSON: Because I think the focus
22 is on new matter, when is the new matter raised as
23 opposed to the EIS process.

24 Other agencies, you know, in my prior life
25 in private practice we were focused in other agencies

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1 on the EIS itself. And parties were encouraged to
2 solicit comments on the draft EIS and the agency would
3 then take those into consideration. And then a final
4 EIS might be issued and that would in turn form the
5 basis for some kind of challenge.

6 But again, the way the system is set up
7 here, it is not focused on the EIS, per se, but on new
8 matter. At least that is certainly my understanding.

9 Is there anything else?

10 Hearing nothing, I think we will stand
11 adjourned and we will see you all in Bay City on April
12 7th.

13 MR. EYE: Thank you, Your Honor.

14 MR. FRANCE: Thank you.

15 MS. KIRKWOOD: Thank you.

16 (Whereupon, the teleconference was
17 concluded at 10:39 a.m.)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: South Texas Projects

Units 3 & 4

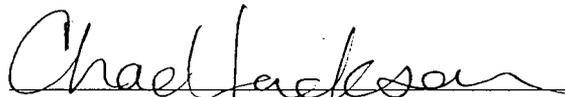
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Docket Number: 52-012-COL, 52-013-COL

ASLBP Number: 05-838-01-ML

Location: Rockville, Maryland

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