

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffery S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 11/09/06
SERVED 11/09/06

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

CLI-06-28

ORDER

The Commission is responding to the Atomic Safety and Licensing Board's October 17, 2006 Notice (Change in Schedule). We have decided to consider for ourselves a recently filed late contention raising the issue of whether the Environmental Impact Statement must analyze the impacts of terrorism on the proposed facility.

In the October 17 Notice, the Board advised the Commission that it had revised its schedule for the mandatory hearing proceeding and that these changes will prevent the Board from meeting the Commission's expectation of a Board decision by November 30, 2006. The Board explained that it had granted the NRC Staff's unopposed motion for a seven-day extension of time to respond to the Board's inquiries concerning the Environmental Impact Statement. When granting the extension, the Board concluded that "minor modifications" to the schedule were necessary, and the Board adjusted the date for commencement of the

mandatory hearing from November 15 to November 29, 2006.¹ The Board also instructed the NRC Staff and Systems Energy Resources, Inc., the applicant, to file any objections to the revised order by October 16, 2006, and neither filed an objection.

In the October 17 Notice, the Board also advised the Commission that, on October 12, 2006, several environmental interest groups had petitioned for a hearing on a late-filed National Environmental Policy Act (NEPA) contention concerning the environmental impacts of a terrorist attack on the proposed facility. Citing its need to take briefs on the admissibility of the proposed contention, the Board advised the Commission that it was “unable to determine what, if any, impact” the late-filed contention would have on its schedule.

While it is incumbent on the Boards to establish and adjust schedules to meet the key milestones and the Commission’s expectations, under the present circumstances it would be inefficient for the Board to take its attention away from the mandatory hearing issues to decide whether to admit the NEPA-terrorism contention. Whichever way the Board ruled on the contention, its decision would inevitably come before the Commission. The Ninth Circuit’s recent decision in *San Louis Obispo Mothers for Peace v. NRC*,² which found fault in the Commission’s established view on NEPA/terrorism, has created an unusual situation calling into question interim decisions in several proceedings. As a result, the Commission has before it a number of requests for clarification on how this decision affects current and future NEPA reviews. Fundamentally, this is a question of law and policy, which calls for a Commission determination. The Commission will determine the agency’s response to the Ninth Circuit’s decision and will provide direction on this matter to our Boards for the resolution of these issues and to the NRC Staff for the conduct of environmental reviews.

¹ Licensing Board Order (Granting the NRC’s Motion for an Extension of Time and Revise Case Schedule (Oct. 11, 2006) (unpublished).

² 449 F.3d 1016 (9th Cir. 2006).

The Board has indicated that the “delay beyond November 30 in concluding this proceeding ... will be very limited (far less than 45 days)”³ Our decision to take up the NEPA/terrorism contention ourselves should ensure that the filing of the late-filed contention does not impede the Board in achieving this goal.

There is no reason to alter the briefing schedule from what it would be if this issue were proceeding before the Board. The answers that the NRC Staff and the applicant have already filed before the Board will be considered as if they had been filed with the Commission. The petitioners may reply with briefs submitted directly to the Commission no later than November 13.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 9th day of November, 2006

³ Order (Oct. 11, 2006), at 3 (unpublished).

Commissioner Gregory B. Jaczko respectfully concurs:

I agree with my fellow Commissioners that, fundamentally, the question presented here is a question of law and policy which calls for a Commission determination. I offer a separate, concurring opinion because I also believe that the issue deserves immediate Commission resolution. Until the Commission renders a decision on the NEPA/terrorism issue, parties will have no choice but to continue to file or renew these contentions in all NRC adjudicatory cases and the Boards, having no Commission direction on the issue, will continue to be faced with this challenge. Regardless of whether the Commission continues to take this issue from all future Boards, doing so will inevitably result in unnecessary delays to the adjudicatory proceedings and to some licensing actions. Therefore, I agree that the issue should be resolved by the Commission. I also believe, however, that the Commission should do so expeditiously.