

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-04-19

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

SYSTEM ENERGY RESOURCES, INC.

(Early Site Permit for Grand Gulf ESP Site)

Docket No. 52-009-ESP

ASLBP No. 04-823-03-ESP

August 6, 2004

MEMORANDUM AND ORDER
(Ruling on Standing and Contentions)

Before the Licensing Board is the request of the National Association for the Advancement of Colored People (Claiborne County, Mississippi Branch) (NAACP), Nuclear Information and Resource Service (NIRS), Public Citizen (PC), and the Mississippi Chapter of the Sierra Club (Sierra Club) (collectively Grand Gulf Petitioners) seeking to intervene in this proceeding to challenge the application of System Energy Resources, Inc., (SERI) for a 10 C.F.R. Part 52 early site permit (ESP). The ESP application seeks approval of the site of the existing Grand Gulf nuclear power station in Claiborne County, Mississippi, for the possible construction of one or more new nuclear reactors. For the reasons set forth below, we find that while the Grand Gulf Petitioners have established the requisite standing to intervene in this proceeding, they have failed to submit at least one admissible contention concerning the SERI application. Accordingly, we deny the Grand Gulf Petitioners' request to be admitted as a party to this proceeding. Further, although this ruling terminates the contested portion of this proceeding, because of the mandatory hearing aspect of this proceeding, we request additional procedural information from SERI and the NRC staff regarding the conduct of the uncontested portion of this proceeding.

I. BACKGROUND

A. SERI Early Site Permit Application

Under the Part 52 licensing process, an entity may apply for an ESP, which would allow it to resolve key site-related environmental, safety, and emergency planning issues before deciding to build, or choosing the design of, a nuclear power facility on that site. Thus, if granted, an ESP essentially would allow an entity to bank a possible site for the future construction of new nuclear power generation facilities. SERI, a subsidiary of Entergy Corporation, filed an ESP application on October 16, 2003, that consists of a section on Administrative Information about SERI, a Site Safety Analysis Report (SSAR), an Environmental Report (ER), an Emergency Plan (EP), and a Site Redress Plan (SRP). The particular site for which SERI seeks to obtain an ESP is the Grand Gulf Nuclear Station property (Grand Gulf), where SERI owns a ninety percent aggregate interest in an existing nuclear power plant that has been producing electricity since 1985. See [SERI] Grand Gulf Site [ESP] Application (Oct. 2003) at 1.1-2 [hereinafter Grand Gulf ESP Application].

Two other companies, Dominion Nuclear North Anna, LLC, (DNNA) and Exelon Generation Company, LLC, (EGC) recently submitted ESP applications for the sites at the existing North Anna and Clinton nuclear facilities. See [DNNA] North Anna [ESP] Application (Sept. 25, 2003); [EGC ESP] Application (Sept. 25, 2003). Because of the temporal and substantive similarity of the three applications, and because these Part 52 licensing proceedings are the first of their kind, as is noted below, preliminary matters in the Part 52 licensing process concerning these applications have been afforded joint consideration by the Commission and the Licensing Board for purposes of efficiency and ensuring uniformity among the three proceedings.

B. Grand Gulf Petitioners Hearing Request and Petition to Intervene

In response to a January 7, 2004 notice of hearing and opportunity to petition for leave to intervene regarding the SERI ESP application, 69 Fed. Reg. 2636 (Jan. 16, 2004), on February 12, 2004, the Grand Gulf Petitioners filed a request for hearing and petition to intervene, which they supplemented on February 17, 2004. See Hearing Request and Petition to Intervene by [Grand

Gulf Petitioners] (Feb. 12, 2004) [hereinafter Hearing Request]; Amended Hearing Request and Petition to Intervene by [Grand Gulf Petitioners] (Feb. 17, 2004) [hereinafter Amended Hearing Request]. SERI and the staff responded to the Grand Gulf Petitioners' request on February 24 and February 27, 2004, respectively. See Answer by [SERI] to Petition to Intervene (Feb. 24, 2004) [hereinafter SERI Hearing Request Response]; NRC Staff's Answer to Hearing Request and Petition to Intervene by the [Grand Gulf Petitioners] (Feb. 27, 2004) [hereinafter Staff Hearing Request Response]. Neither SERI nor the staff challenged the Grand Gulf Petitioners' representational standing, but explaining that the Grand Gulf Petitioners must present at least one litigable contention in order to be admitted as parties to this proceeding, both challenged the admissibility of one or more of the Grand Gulf Petitioners issue statements.

C. Commission Application of Revised 10 C.F.R. Part 2 Rules of Practice and Referral of Hearing Petition

On February 19, 2004, SERI submitted a motion to apply the recently revised version of 10 C.F.R. Part 2, which permits the use of an informal hearing process for ESP applications. See Motion of [SERI] to Apply Revised Rules of Practice (Feb. 19, 2004); see also 69 Fed. Reg. 2182, 2188 (Jan. 14, 2004). The Grand Gulf Petitioners opposed SERI's motion, citing a lack of fairness, effectiveness, and efficiency applying the new Part 2 to this proceeding. See [Grand Gulf Petitioners] Response to [SERI] Motion to Apply Revised Rules of Practice (Mar. 1, 2004). Ultimately, in a March 2, 2004 issuance, the Commission granted the SERI motion and found that applying the new Part 2 would not result in any interruption, unwarranted delay, added burden, or unfairness in this or the other two ESP proceedings. See CLI-04-08, 59 NRC 113, 118-19 (2004). As part of that decision, the Commission also gave the Grand Gulf Petitioners sixty days within which to file their contentions in the proceeding and referred their hearing petition to the Atomic Safety and Licensing Board Panel for further consideration. See id. at 119.

D. Post-Referral Developments

Responding to the Commission's referral, in a March 8, 2004 initial prehearing order, among other things, the Licensing Board Panel Chief Administrative Judge reaffirmed the May 3, 2004 deadline for submitting contentions and requested that each contention be placed in one or more of the following subject matter categories: (1) Administrative, (2) Site Safety Analysis, (3) Environmental, (4) Emergency Planning, or (5) Miscellaneous.¹ See Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 3-4 (Mar. 8, 2004) (unpublished). The initial prehearing order also set a May 28, 2004 deadline for SERI and staff responses to the Grand Gulf Petitioners petition supplement and a June 4, 2004 deadline for the Grand Gulf Petitioners to reply to the SERI and staff responses. See id. at 4. Thereafter, on March 22, 2004, this Atomic Safety and Licensing Board was established to adjudicate this ESP proceeding.² See 69 Fed. Reg. 15,911 (Mar. 26, 2004). In a memorandum and order issued on the same day, the Board established a June 21, 2004 date for an initial prehearing conference for this proceeding (as well as the North Anna and Clinton ESP proceedings) at the NRC's Rockville, Maryland headquarters facility.³ See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Mar. 22, 2004) (unpublished).

¹ Because section 2.714(a)(3) of the superceded Part 2 rules permitting petitioners to supplement their hearing requests to provide standing-related information did not have an analog in the new Part 2, the Grand Gulf Petitioners were allowed to supplement their petition with standing-related information when they filed their contentions. Further, they were permitted to make any request under section 2.309(g) regarding the selection of hearing procedures other than the Subpart L procedures that otherwise apply under the new Part 2. See Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 2 (Mar. 8, 2004) (unpublished).

² That same day, Board establishment notices were issued for the North Anna and Clinton ESP proceedings setting up two Boards with the same membership as this Board. See 69 Fed. Reg. 15,910 (Mar. 26, 2004) (North Anna proceeding); 69 Fed. Reg. 15,910 (Mar. 26, 2004) (Clinton proceeding). Although the Board designation notices for these proceedings established three separate licensing boards, for simplicity we will refer to these Boards in the singular when referencing rulings that affected all three proceedings identically.

³ The petitioners in all three ESP proceedings filed a motion on April 1, 2004, to hold separate prehearing conferences in the vicinity of each proposed ESP site, as opposed to one single prehearing conference for all three proceedings at the NRC's Rockville, Maryland headquarters. See Petitioners' Motion for Reconsideration of Memorandum and Order Scheduling

Initial Prehearing Conference (Apr. 1, 2004). The Licensing Board denied this motion on the grounds that, given the similarity of the three proceedings and the location of principal counsel for all parties in the Washington, D.C. area, the most efficient and effective means for conducting the prehearing conference was to do so jointly in Rockville. See Licensing Board Memorandum and Order (Denying Motion Requesting Reconsideration of Initial Prehearing Conference Location) at 3-4 (Apr. 5, 2004) (unpublished).

The Grand Gulf Petitioners timely filed their contentions supplements on May 3, 2004.⁴ See Contentions of [Grand Gulf Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) [hereinafter Contentions]; Waste Confidence Contentions of [Grand Gulf Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) [hereinafter Waste Confidence Contentions]. On May 28, 2004, SERI and the staff filed their answers to the Clinton Petitioners-proposed contentions. See Answer by [SERI] to Proposed Contentions (May 28, 2004) [hereinafter SERI Contentions Response]; NRC Staff-s Response to Petitioners-Contentions Regarding the [ESP] Application for the Grand Gulf Site (May 28, 2004) [hereinafter Staff Contentions Response]. Following a June 1, 2004 motion for extension of time to reply to the SERI and staff responses to their contentions, which the Licensing Board granted on June 3, the Grand Gulf Petitioners filed their reply to the SERI and staff answers on June 9, 2004. See Petitioners-Motion for Extension of Time to Reply to Responses to Contentions (June 1, 2004); [EGC] Answer in Opposition to Petitioners-Motion for Extension of Time to Reply to Response to Contentions (June 2, 2004); Licensing Board Order (Granting Extension Request) (June 3, 2004); Reply by [Grand Gulf Petitioners] to [SERI-s] and NRC Staff-s Responses to Petitioners-[Contentions] (June 9, 2004) [hereinafter Grand Gulf Petitioners Reply].

On June 21-22, 2004, the Board conducted a two-day prehearing conference during which it heard oral presentations regarding the standing of each of the ESP petitioners and the admissibility of their contentions, which were grouped by topic into separate categories.⁵ See Tr. at 1-410.

⁴ In their supplements, the Grand Gulf Petitioners did not provide any additional information regarding standing matters or address the use of other hearing procedures in this proceeding.

⁵ As a result of the Board-s concurrent consideration of the three ESP cases, today we also are issuing standing/contentions admission rulings in those cases as well. See Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC __ (Aug. 6, 2004); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC __ (Aug. 6, 2004).

II. ANALYSIS

A. Grand Gulf Petitioners Standing

1. Standards Governing Standing

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

We apply these rules and guidelines in evaluating each of the Grand Gulf Petitioners standing presentations.

2. NAACP

DISCUSSION: Hearing Request at 2-5, attachments 1-4; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: NAACP is a not-for-profit organization whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf Petitioners hearing request are the affidavits of four NAACP members, each of whom states that NAACP is authorized to represent his or her interests. All four members reside within fifty miles of the Grand Gulf site, one as close as six miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NAACP to represent their interests are sufficient to establish NAACP's standing to intervene in this proceeding.

3. NIRS

DISCUSSION: Hearing Request at 2-5, attachments 5-7; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: NIRS is a not-for-profit corporation whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf Petitioners hearing request are the affidavits of three NIRS members, each of whom states that NIRS is authorized to represent his or her interests. All three members reside within fifty miles of the Grand Gulf site, one as close as five miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NIRS to represent their interests are sufficient to establish NIRS's standing to intervene in this proceeding.

4. PC

DISCUSSION: Hearing Request at 2-5, attachments 8-10; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: PC is a not-for-profit organization whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf hearing request are the affidavits of three PC members, each of whom states that PC is authorized to represent his or her interests. All three members reside within fifty miles of the Grand Gulf site, one as close as thirty-five miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit PC to represent their interests are sufficient to establish PC's standing to intervene in this proceeding.

5. Mississippi Chapter of the Sierra Club

DISCUSSION: Hearing Request at 2-5, attachments 11-14; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: The Mississippi Chapter of the Sierra Club is an affiliate of the Sierra Club, a not-for-profit organization whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf Petitioners hearing request are the affidavits of four Sierra Club members, each of whom states that the Sierra Club is authorized to represent his or her interests. All four members reside within fifty miles of the Grand Gulf site, one as close as twenty miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit the Sierra Club to represent their interests are sufficient to establish the Sierra Club's standing to intervene in this proceeding.

B. Grand Gulf Petitioners Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. ' 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both *within the scope of the proceeding* and *material to the findings the NRC must make to support the action that is involved in the proceeding.* Id. ' 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); see also Arizona Public Service Company (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 143, 155-56 (1991).

NRC case law has further developed these requirements, as is summarized below:

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. ' 2.335; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See Portland General Electric Company (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. See Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. See Palo Verde, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support to its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 305.

Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. See Fansteel, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. See Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-2, 43

NRC 61, 90 (1996); rev-d in part on other grounds, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that, the subject matter of the contention must impact the grant or denial of a pending license application. See 10 C.F.R. ' 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. See Yankee Nuclear, LBP-96-2, 43 NRC at 75; see also Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41(2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

e. Insufficient Challenges to Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. ' 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate Acontentions@rather than Abases,@it has been recognized that A[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.@ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff-d sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 502 U.S. 899 (1991); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. ' ' 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more of the petitioners appear related or when redrafting would clarify the scope of a contention.

3. Contentions Regarding Site Safety Analysis (SSA) Report

SSA 2.1 - FAILURE TO PROVIDE ADEQUATE SAFETY ASSESSMENT OF REACTOR INTERACTION

CONTENTION: The ESP application for Grand Gulf Unit 1 fails to comply with 10 C.F.R. ' 52.17 because its safety assessment does not contain an adequate analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under the radiological consequences evaluation factors identified in 10 C.F.R. ' 50.34(a)(1). In particular, the safety assessment does not adequately take into account the potential effects on radiological accident consequences of co-locating new reactors with advanced designs next to an older reactor. The safety assessment should contain a comprehensive

evaluation and analysis of the ways in which interaction of the old and new plants under accident conditions may exacerbate the consequences of a radiological accident.

DISCUSSION: Contentions at 2-7; SERI Contentions Response at 9-12; SERI Contentions Response at 9-18; Grand Gulf Petitioners Reply at 2-6; Tr. at 16-62.

RULING: Inadmissible, in that this contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly challenges Commission regulatory requirements. See section II.B.1. a, b.

This contention of omission alleges that the SSAR does not contain information relating to the design of the control room and equipment of the not-as-yet selected new plant; however, that information is not required to be specified at the ESP stage, which focuses upon acceptability of the site assuming the new plant falls within the applicant's submitted plant parameters envelope (PPE). It is neither possible nor necessary for the applicant to provide the requested level of detailed information about control room and equipment design at the ESP stage of the licensing process. A challenge to the applicant's choice of control room and equipment design, which this contention posits, belongs in a proceeding under either Subparts B or C of the 10 C.F.R. Part 52 licensing process.

SSA 2.2 - FAILURE TO EVALUATE SITE SUITABILITY FOR BELOW-GRADE PLACEMENT OF REACTOR

CONTAINMENT

CONTENTION: The Site Safety Analysis Report for the Grand Gulf ESP application is inadequate because it does not evaluate the suitability of the site to locate the reactor containment below grade-level. Below-grade construction is advisable and appropriate, if not necessary, in order to maintain an adequate level of security in the post-9/11 threat environment.

DISCUSSION: Contentions at 7-12; SERI Contentions Response at 13-14; SERI Contentions Response at 18-21; Grand Gulf Petitioners Reply at 6-9; Tr. at 64-115, 227-33.

RULING: Inadmissible, in that this contention and its supporting bases improperly challenge the Commission's regulatory requirements and/or raise an issue outside the scope of the proceeding. See section II.B.1.a, b above.

Petitioners would have this Board rely upon the provisions of 10 C.F.R. ' 100.21(f), which require that site characteristics be such that adequate security plans and measures can be developed, to impose a new regulatory requirement to include analysis of below-grade placement in ESP applications. Because the regulations that govern an ESP application do not impose any requirement upon an applicant to select any particular plant design or surface/subsurface location, this contention improperly challenges Commission regulations.

In fact, this contention does not raise any question of site suitability, which is the focus of the ESP proceeding, but instead essentially raises a Apolicy@matter, i.e., whether or not a site approval hearing Atoday@should attempt to project future requirements or needs in the site review process. A contention that attempts to litigate the merits of below-grade reactor placement and requires speculation about the Commission's possible future modification of the review process is not within the scope of this proceeding.

3. Environmental Contentions (EC)

EC 3.1 - INADEQUATE CONSIDERATION OF DISPROPORTIONATE ADVERSE IMPACTS ON MINORITY AND LOW-INCOME COMMUNITY

CONTENTION: SERI's Environmental Report, prepared in support of its Early Site Permit application, does not comply with the National Environmental Policy Act because it does not adequately consider the adverse and disparate environmental impacts of the proposed nuclear facilities on the predominately African American and low-income community of Claiborne County.

At the outset, while the ER acknowledges the existence of minority and low-income populations within a 50-mile radius around the Grand Gulf site, see ER ' 2.5.4, the ER understates the levels of minority representation and poverty in Claiborne County, which hosts the Grand Gulf site and which takes up much of the area in the portion of Grand Gulf's 10-mile-radius emergency planning zone that lies on the east side of the Mississippi River. As a result, the ER falsely minimizes the disparity of the adverse impacts on the minority and low-income community of Claiborne County.

The ER also fails to address the environmental impacts of the proposed reactor(s) in light of the Afactors peculiar to@the minority and low-income community Claiborne County. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998). For instance, the ER fails to address the fact that, by virtue of the simple factor of its close proximity to the

proposed reactor(s), the minority and low-income community bears the highest risk of injury and illness as a result of severe accidents at the proposed facility. Moreover, the ER fails to address the fact that the Claiborne County government is particularly unprepared to respond to a radiological emergency or a security threat at the proposed reactor(s), as a result of the high level of poverty in the county and the effects of a discriminatory tax policy that sends most of the tax revenue from Grand Gulf out of Claiborne County.

The ER also fails to consider the effect of adding two reactors to the Grand Gulf site on property values and the overall economic health of Claiborne County. By concentrating three nuclear power plants on one site, SERI proposes to create a nuclear sacrifice zone in Claiborne County. The ER should consider the predictable decline in property values and the economic health of the area.

The ER is also deficient because it makes no attempt to evaluate the disparity in distribution of the economic benefits yielded by the proposed reactors. For instance, under current tax law, most of the tax revenue generated by the new reactors will go to the State of Mississippi and county governments other than Claiborne County. Most of the jobs generated by the new reactor(s) will go to people who live outside Claiborne County.

Finally, the ER fails to weigh the costs of the proposed reactor(s) to the minority and low-income community against the benefits to the community, or to examine alternatives that would lessen the impact of the facility and/or distribute the costs and benefits more equitably. These alternatives could include consideration of other sites whose surrounding populations are in a better financial position to absorb the costs of mounting an effective response to a radiological emergency at the nuclear plant, or arrangements to more equitably distribute the wealth that is generated by the facility.

DISCUSSION: Contentions at 12-27; SERI Contentions Response at 14-37; SERI Contentions Response at 21-35; Grand Gulf Petitioners Reply at 9-13; Tr. at 311-57.

RULING: Inadmissible, in that this contention and its supporting bases fail to raise a material legal or factual dispute and/or fall outside the scope of this proceeding. See section II.B.1.b, d above.

In its November 5, 2003 draft policy statement on the treatment of environmental justice (EJ) matters in agency regulatory and licensing Actions, the Commission declared AEJ per se is not a litigable issue in our proceedings,[@] and AEJ issues are only considered [in our proceedings] when and to the extent required by NEPA.[@] 68 Fed. Reg. 62,642, 62,643-44 (Nov. 5, 2003). In particular, the policy statement provides the following guidance:

In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify

and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad ranging review of racial or economic discrimination.

Id. at 62,645. While this contention does adequately indicate the presence of a low-income and minority family concentration near the proposed site, it fails to identify any significant and disproportional environmental impact on the minority or low-income population relative to the general population arising from the proposed siting of additional reactors on the site at issue so as to raise a genuine dispute on a material issue of fact or law. Further, putting aside the fact that the Grand Gulf Petitioners arguments that these particular communities are disadvantaged with respect to their ability to deal with emergency planning and responses to a potential accident at the facility -- whether by State taxation laws or otherwise -- are belied by the correspondence with the local emergency planning authorities contained in the SERI application, it is apparent such matters are beyond the scope of this proceeding.

EC 3.2 - INADEQUATE DISCUSSION OF SEVERE ACCIDENT IMPACTS

CONTENTION: The ER's discussion of severe accident is inadequate, because it relies on the findings and conclusions of NUREG-1437, Vol. 1, the Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants (1996), without providing specific design information that would justify the applicability of the NUREG.

DISCUSSION: Contentions at 27-30; SERI Contentions Response at 37-42; SERI Contentions Response at 35-39; Grand Gulf Petitioners Reply at 14-15; Tr. at 116-40.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge an agency regulatory requirement, fall outside the scope of this proceeding; and/or lack adequate factual or expert opinion support. See section II.B.1. a, b, c above.

Misconstruing 10 C.F.R. ' 52.17(a)(2), which, in relevant part, requires that the ER Amust focus upon the environmental effects of a reactor, or reactors, which have characteristics which fall within the postulated site parameters,@the Grand Gulf Petitioners would have the Board require that an ESP applicant consider the potential severe accident consequences associated with a

specific reactor design. As it is permitted to do, SERI has elected to develop and employ a Plant Parameters Envelope (PPE) to establish the bounding severe accident consequences that would be associated with the reactor or reactors it eventually elects to construct on the site under consideration in this ESP case. See 10 C.F.R. ' 52.17(a)(2). From an environmental perspective, if the site is acceptable when subjected to those consequences, then the requirements of section 52.17 are satisfied. If at some future date the applicant elects a specific reactor design whose severe accident consequences do not fall within the PPE employed in this proceeding, the environmental matters may then be litigated under the provisions of section 52.39. However, for the purposes of an ESP, there is no requirement that the applicant develop and examine a specific reactor design and study its theoretical severe accident consequences.

Nor do we find persuasive as basis for admission the Grand Gulf Petitioners argument, based on staff guidance letters, that the applicant is required to justify its use of findings and conclusions based on NUREG-1437, Vol. 1, the Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants (1996) [hereinafter NUREG-1437]. See Letter from Dr. Ronald L. Simard, NEI, to James E. Lyons, re: Resolution of Generic Topic ESP-10 (Use of License Renewal Generic Environmental Impact Statement (NUREG-1437) for Early Site Permits) (Feb, 6, 2003). Putting aside the fact that the guidance provided in such staff letters merely describes one method of complying with NRC requirements, and is not binding on an applicant, see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001), nothing submitted by the Grand Gulf Petitioners indicates that reliance on the severe accident consequence information contained in NUREG-1437 with respect to earlier reactor designs are not suitable for use in development of the PPE parameters.

EC 3.2.1 - FAILURE TO EVALUATE WHETHER AND IN WHAT TIME FRAME SPENT FUEL GENERATED BY PROPOSED REACTORS CAN BE SAFELY DISPOSED OF

CONTENTION: The ER for the Grand Gulf ESP is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated fuel that will be generated by the proposed reactors if they are built and operated. Nor has the NRC made an assessment on which SERI can rely regarding the degree of assurance now available that

radioactive waste generated by the proposed reactors can be safely disposed of [and] when such disposal or off-site storage will be available.® Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors.

DISCUSSION: Waste Confidence Contentions at 2-6; SERI Contentions Response at 43-47; SERI Contentions Response at 39-44; Grand Gulf Petitioners Reply at 15-21; Tr. at 140-80.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge the Commission's regulatory requirements. See section II.B.1.a above. The matters the petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

[T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. ' 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.⁶

EC 3.2.2 - EVEN IF THE WASTE CONFIDENCE DECISION APPLIES TO THIS PROCEEDING, IT SHOULD BE RECONSIDERED

CONTENTION: Even if the Waste Confidence Decision applies to this proceeding, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.

DISCUSSION: Waste Confidence Contentions at 6-9; SERI Contentions Response at 47-50; SERI Contentions Response at 39-44; Grand Gulf Petitioners Reply at 21; Tr. at 180-85.

⁶See 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) (The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors' [operating licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs.®; see also id. at 38,501-04.

RULING: Inadmissible, in that the contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly seek to challenge a Commission regulatory requirement. See section II.B.1.a, b above. Absent a showing of special circumstances under 10 C.F.R. ' 2.335(b), which the petitioners have not made, this matter must be addressed through Commission rulemaking.

4. Emergency Planning Contention (EPC)

EPC 4.1 - EMERGENCY PLANNING DEFICIENCIES

CONTENTION: SERI's ESP application is inadequate because it fails fully to identify physical characteristics unique to the proposed site, such as egress limitations from the area surrounding the site that could pose a significant impediment to the development of emergency plans. 10 C.F.R. ' 52.17(b)(1). In particular, Part 4 of the ESP application, entitled "Emergency Planning Information," fails to identify the significant impediment to the development of emergency plans posed by the gross inadequacies in offsite emergency response facilities, including the Claiborne County Sheriff's Department, the Claiborne County Fire Department, and the Claiborne County Hospital.

DISCUSSION: Contentions at 31-32; SERI Contentions Response at 50-52; SERI Contentions Response at 45-47; Grand Gulf Petitioners Reply at 22; Tr. at 359-79.

RULING: Inadmissible, in that this contention and its supporting bases raise matters falling outside the scope of this proceeding. See section II.B.1.b above. An ESP applicant must address unique physical characteristics of the site in its EP under 10 C.F.R. ' 52.17(b)(1), but the financial capabilities of organizations responsible for operation and maintenance of local infrastructure are not physical characteristics within the meaning of section 52.17(b)(1); see also 10 C.F.R. ' 100.20(c). Indeed, with this contention what the Grand Gulf Petitioners ultimately seek to challenge is the practicability of the emergency plan, which is a determination that would properly be made at the combined construction permit/operating license stage of the Part 52 licensing process.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, the Grand Gulf Petitioners have failed to proffer an admissible contention so as to establish their right to be admitted as parties to this proceeding. That,

however, does not end this Licensing Board's responsibilities relative to this ESP proceeding. While it does terminate the ~~contested~~ portion of this proceeding, there remains, consistent with the statutory and regulatory requirements that govern this proceeding, an ~~uncontested~~ portion of the case that must be addressed by this Board. To that end, we request that SERI and the staff provide their views on how the Board should proceed relative to the ~~mandatory hearing~~ findings required of the Board under the December 2003 hearing notice. See 68 Fed. Reg. at 69,427. In this regard, we ask that within thirty days of the date of this issuance, SERI and the staff provide the Board with a joint filing outlining how they would propose the Board proceed regarding the ~~uncontested~~ portion of this proceeding, both as to the substance and timing of any further party submissions and any evidentiary hearing that is required.⁷ Additionally, we note that it is the Board's currently intends at some appropriate future date to conduct limited appearance sessions in the vicinity of the Grand Gulf facility. See 10 C.F.R. ' 2.315(a).

IV. CONCLUSION

For the reasons set forth above, we find that the Grand Gulf Petitioners have established their standing to intervene, but their request for hearing must be denied for failing to put forth a litigable contention pursuant to 10 C.F.R. ' 2.309(f).

For the foregoing reasons, it is this sixth day of August, ORDERED, that:

1. The Grand Gulf Petitioners hearing request is denied.

⁷ In this regard, we ask that these parties also provide their views on the difference, if any, between what is required under this mandatory hearing proceeding and that involved with the proposed Louisiana Energy Services, L.P. uranium enrichment facility relative to matters that are not the subject of admitted contentions. Compare Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004).

2. The following petitioner contentions are rejected as inadmissible for litigation in this proceeding: SAR 2.1, SAR 2.2, EC 3.1, EC 3.2, EC 3.2.1, EC 3.2.2, EP 5.1.

3. SERI and the staff are to take the actions required by section III above in accordance with the schedule established herein.

4. In accordance with the provisions of 10 C.F.R. ' 2.311, as it rules upon intervention petitions, any appeal to the Commission from this memorandum and order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD⁸

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Paul B. Abramson
ADMINISTRATIVE JUDGE

Original Signed By
Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 6, 2004

⁸ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant SERI; (2) the Grand Gulf Petitioners; and (3) the staff.