

January, 2005

NRC Commission Decision on Appeal of Environmental Justice Contention

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan
Jeffrey S. Merrifield

In the Matter of:

Docket No. 52-009-ESP

SYSTEM ENERGY RESOURCES, INC.
Early Site Permit for
Grand Gulf Site

CLI-05-04

MEMORANDUM AND ORDER

This order affirms the Board's decision in LBP-04-19,[1] which denied a hearing on contentions submitted by petitioners National Association for the Advancement of Colored People (Claiborne County, Mississippi Branch), Nuclear Information and Resource Service, Public Citizen, and Mississippi Chapter of the Sierra Club (collectively, "petitioners"). On appeal, petitioners challenge one Board ruling only - its rejection of an "environmental justice" claim. We affirm the Board's ruling.

I. Background

On October 16, 2003, System Energy Resources, Inc. (SERI) submitted an application for an early site permit (ESP) to build an additional nuclear reactor on the site of the existing Grand Gulf Nuclear Station in Claiborne County, Mississippi. As part of that application, SERI submitted a Site Safety Analysis Report, an Environmental Report, Emergency Planning Information, and a Site Redress Plan. If approved, the 20-year ESP would permit use of the site as a location for one or more new nuclear power reactors, but the construction and operation of a new plant would be subject to separate licensing proceedings under 10 C.F.R. Part 52. In February 2004 petitioners filed a hearing request and petition to intervene. Shortly thereafter, in response to SERI's motion, the Commission approved the use of our new Part 2 revised rules of practice in this proceeding,[2] and gave the Grand Gulf petitioners 60 days to file contentions.[3]

Petitioners filed several timely contentions - on, among other issues, site suitability, the environment (including environmental justice), and emergency planning. Neither the NRC staff nor SERI challenged petitioners' standing, but both challenged the admissibility of petitioners' contentions. The Board ruled that all petitioners had established standing, but none of their proffered contentions was admissible.[4] Petitioners pursue an appeal on one contention only -- their environmental justice claim that SERI's environmental report (ER) failed to properly consider disparate effects on the minority and low-income population surrounding Grand Gulf. Petitioners' appeal argues that: (1) the Board did not explain its environmental justice ruling adequately; (2) the ER did not adequately describe the local population and the disproportionate harm a reactor accident would cause; and (3) the ER did not discuss the poverty-induced deficiencies in implementing the emergency plan.

We agree with the Board's rejection of petitioners' claims and therefore affirm its ruling that petitioners' environmental justice contention is not litigable.

II. Discussion

A. General Background on Environmental Justice

In a recent policy statement, the Commission compiled and clarified its position on "environmental justice" matters and their impact on Commission proceedings.[5] Environmental justice is the offspring of the National Environmental Policy Act (NEPA). An environmental justice review under NEPA ensures that the agency considers and publicly discloses factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population.[6] Executive Order 12898, which directed agencies to take into account environmental justice issues in exercising their statutory duties, created no new substantive right.[7] As we have explained previously, the Commission views E.O. 12898 as relevant only to the Commission's actions under NEPA and not under any other statutory duty.[8] Because of this, the Commission only takes into account "disproportionate adverse effects" of a project that peculiarly affect an environmental justice community and have some nexus to factors properly within the scope of NEPA.

NEPA's twin goals are to inform the agency and the public about the environmental effects of a project.[9] At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to "flyspeak" environmental documents or to add details or nuances.[10] If the ER (or EIS) on its face "comes to grips with all important considerations" nothing more need be done.[11]

B. Factual Allegations

According to petitioners, Claiborne County - the site of Grand Gulf - has a poverty rate of 32.4%, more than twice the poverty rate in the United States as a whole, and an 84.1% African American population. Petitioners also point to the Mississippi tax code, which

provides that any nuclear power plant in the state (Grand Gulf being the only one now in existence) is taxed by the state directly instead of the county, so that the county only gets a fraction of the economic benefit that it would if it could tax the property directly. This would likely be true for a new facility built on the site.[12] Other Mississippi counties that host non-nuclear electric plants are allowed to tax the plants directly, petitioners say. Petitioners believe that the Mississippi tax code is discriminatory and the disparity was motivated by race, although this is not the foundation of their complaint.[13]

Claiborne County has emergency planning duties with respect to the existing Grand Gulf site and would be responsible for providing emergency services in the case of an accident at the proposed plant. Petitioners allege that due to the high level of poverty in the county, the "local agencies that are responsible for responding to an emergency at Grand Gulf [have] major shortages of funding and equipment that seriously impair the agency's ability to respond to a radiological emergency." [14] To support these claims, petitioners submitted declarations from persons currently or formerly responsible for responding to an emergency at Grand Gulf. For example, one of the declarations points out that the county has only one fire station, despite the fact that firefighters would be called on to help evacuate the county if necessary.[15] A declaration from a county deputy sheriff indicates that Claiborne county has only has 10 law enforcement officers, only one of whom patrols at night.[16] There is just one hospital in the county, also designated as a "first responder" in case of a radiological emergency. According to the declaration submitted by the hospital administrator, it is in debt and unprepared to respond to a radiological emergency.[17]

Based on these allegations, petitioners' contention argued that building a new nuclear power plant in Claiborne County presents an environmental justice issue because, by imposing the danger of a radiological emergency on a community that cannot afford to respond appropriately, the new plant will have a disproportionately high and adverse environmental effect on an impoverished and minority community. They complained that SERI's ER failed to consider these disproportionate impacts, as well as certain other impacts, such as reduced property values, not raised on appeal.

C. Sufficiency of the Board's Decision

Petitioners argue that the Board's opinion fails to explain why it refused to admit their environmental justice contention and "has made a guessing game out of this appeal." [18] The Board's decision on environmental justice consists of a page-long discussion which, rather than summarizing the positions of the litigants, incorporates by reference the relevant portions of their pleadings and the transcript from the prehearing conference.[19] The Board concluded that the "contention and its supporting bases fail to raise a material legal or factual dispute *and/or* fall outside the scope of the proceeding." [20]

We agree that the Board's incorporation of the parties' arguments by reference and its use of the disjunctive "and/or" forces the reader to work to discern its meaning. But a ruling at the initial contentions stage, as opposed to a decision after a full evidentiary hearing, is

customarily terse. In the early stages of litigation, Boards frequently must consider numerous contentions and are expected to act promptly,^[21] necessitating reasonable brevity. Here, the Board's remarks, plus its reference to the litigants' incorporated arguments, make the basis of its ruling reasonably apparent. The Board found no "genuine dispute of material" fact "and/or" that petitioners' allegations concerning emergency planning were outside the scope of the proceeding.^[22]

The Board used the disjunctive "and/or" presumably because not every aspect of petitioners' contention both failed to raise a material legal or factual dispute and was outside the scope of the hearing. Thus, if either infirmity applies to any portion of petitioners' contention, that portion was rightly found inadmissible, allowing us to affirm the Board's ruling.^[23] We suggest, however, that in future admissibility rulings, licensing boards avoid the potentially confusing and/or formulation.

D. Contention 3.1: Inadequate Consideration of Disproportionate Adverse Impacts on Minority and Low-Income Community

Petitioners' contention says:

SERI's Environmental Report ("ER"), prepared in support of its Early Site Permit application, does not comply with the National Environmental Policy Act ("NEPA") 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.^[24]

In support of this, petitioners offered a number of claims.^[25] But on appeal they rely on two specific infirmities in the ER, which we now consider in turn.

1. Incomplete Information Concerning Minorities and Low-income Populations and Risk of Injury to Them

a. Incomplete Population Information

Petitioners' contention alleged that the ER's descriptions under-represent the minority and impoverished populations potentially affected by the proposed facility:

At the outset, while the ER acknowledges the existence of minority and low-income population 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.^[26]

In addition, petitioners maintain, the ER erroneously compares the poverty rate in Claiborne County (32.4%) to the poverty rate in Mississippi at large (19.9%) in order to conclude that most of Claiborne County is not "low-income."[27]

NEPA requires that information in the environmental impact statement be sufficiently accurate to inform both the acting agency and the public. On its face, SERI's ER discloses that Claiborne County is one of the poorest counties in the second-poorest state in the country.[28] The ER also discloses that the Mississippi tax code exempts "any nuclear generating plant owned by a public utility" from local taxes.[29] The ER describes how the state taxes the facility directly (not less than \$20 million annually), allocates more than \$3 million to Claiborne County as the host county, then divides most of the remaining funds among the counties (including Claiborne) in proportion to the energy used by retail customers therein.[30]

The ER includes a table showing the population distribution by race in the low population zone (area within a two mile radius of the existing reactor containment), the emergency planning zone (the area within a modified ten mile radius around the Grand Gulf site), and the region (the area within a 50 mile radius around the site).[31] According to this table, African Americans constitute 77.5% of the low population zone, 63.3% of the emergency planning zone, and 45.1% of the region. The ER also includes maps showing the population distribution by race and by below-poverty level households.[32]

Petitioners argue that because of the way SERI chose to report the information, the ER does not accurately reflect how high the minority and low-income population in the areas immediately surrounding the site is. The ER, for example, does not disclose that Claiborne County itself is over 84% African American. In addition, even though 32.4% of the population of Claiborne County lives below the poverty level, the ER includes a graph showing only a small area of Claiborne County to be a "low-income population."[33] The map identifies as "low income" only one tiny area, about 25 miles south of the plant, where the poverty level is "20 percentage points" higher than the comparison area, the State of Mississippi. SERI based its "low-income" designation on an NRC Office Instruction, LIC-203,[34] which defines a "low-income population" as one where "the poverty level ... is significantly greater (typically 20 percentage points) than the low-income populations percentage in the geographic area chosen for comparative analysis."[35] Because 32.4% of Claiborne County is below poverty level, and the rest of Mississippi has a poverty rate of 19.9%, Claiborne County did not show up on the map as a "low income population."

Petitioners argue that according to the office instruction SERI used for its analysis, the area for comparison should not be the State of Mississippi, but the entire geographic area that includes all alternative sites considered in the ER. The guidance document states that "[w]hen a regulatory action is being considered that involves alternative site considerations, such as an [ESP], then, in addition to determining the individual geographic area for each site [staff should] determine an overall geographic area that encompasses all of the alternative site geographic areas."[36] The ER considered six other nuclear plants, including some in the Northeast where the poverty rate is much

lower than it is in the South.[37] By comparison to this larger geographic area, petitioners say, all of Claiborne County would be considered a low-income population area.

The Environmental Justice Policy Statement, which became final after the Board's decision, suggests that SERI's method of comparing the local population to the state, rather than the entire region comprising alternative sites considered, is the correct one.[38] However, even if petitioners' method were shown to be the better method, it would not be sufficient to create a litigable, material issue here. The ER states in the narrative, and includes a table showing, that 32.4% of Claiborne County lives below the poverty level.[39] The ER cites statistics showing that Claiborne's unemployment rate is 12.4%, higher than the surrounding areas and more than twice that of Mississippi at large.[40] It does not appear that SERI attempted in any way to hide or skew the fact that Claiborne County's population is impoverished. While petitioners might prefer different language or emphasis, "editing" NEPA documents is not a function of our hearing process.[41] "Our busy boards do not sit to parse and fine-tune EISs." [42]

We find the information contained in the ER sufficiently detailed in its descriptions of the minority and low-income populations surrounding the plant. The choice to analyze populations within 2-, 10- and 50-mile radius of the proposed reactors is a reasonable one, grounded in our regulations and reflecting emergency planning considerations.[43] On its face, the ER is sufficiently accurate to inform the public as to the socio-economic makeup of the affected community. Petitioners' demand for more precision does not justify an NRC adjudicatory hearing.

b. Risk of Injury Due to Proximity to the Reactor

Petitioners' environmental contention maintained that SERI's ER ignored the special risk of injury to the local community:

The ER also fails to address the environmental impacts of the proposed reactor(s) in light of the "factors peculiar to" the minority and low-income community of Claiborne County. ... 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. [44]

We disagree that the ER omitted necessary information concerning the potential impacts to minorities and low-income populations due to their proximity to the reactor. The ER, in fact, reveals that the population closest to the reactor is overwhelmingly African American and largely poor. Thus, there is no missing information and no material litigable issue on that point.

2. Inadequate Emergency Response

Finally, Petitioners offer the complaint that the ER does not address alleged poverty-driven deficiencies in emergency planning:

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.[45]

This allegation does not support a litigable contention because, as the Board properly found, petitioners fail to raise a material legal or factual dispute. As is evident from the ER, and as discussed previously, there is no dispute regarding the presence of a low-income community surrounding the proposed site. First, petitioners have failed to point to any environmental impact, as analyzed by the applicant in the ER, which they believe to be in error. Moreover, petitioners' purported impact, that of poverty-driven inadequacies in emergency response, has not been shown to disproportionately affect the 34% of Claiborne County which are below the poverty level. Without evidence to the contrary, the "environmental impact" petitioners describe in their claim would fall equally on all members of the community - the 66% of the population living above the poverty line in Claiborne County as well as the 34% living below.[46]

III. CONCLUSION

We therefore affirm the Board's ruling rejecting the environmental justice contention proffered by petitioners.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of January 2005.

[1] *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004).

[2] *See* Final Rule 69 Fed. Reg. 2182 (Jan. 14, 2004). *See generally* *Citizens' Awareness Network v. NRC*, ___ F.3d ___, 2004 WL 2827297 (1st Cir., Dec. 10, 2004). Our new rules

establish a less "formal" hearing process for reactor licensing cases than our former 10 C.F.R. Part 2, Subpart G.

[3] *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-04-08, 59 NRC 113, 118-19 (2004). (The new Part 2 rules take effect for proceedings filed after February 13, 2004).

[4] LBP-04-19, 60 NRC at 286-88, 294.

[5] Nuclear Regulatory Commission, Final Policy Statement: Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004). The Policy Statement essentially restates doctrines emerging from a series of adjudicatory decisions. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002); *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-110 (1998).

[6] 69 Fed. Reg. at 52,044.

[7] See *id.* at 52,046. Accord, *Sua Contra La Contaminacion v. EPA*, 202 F.3d 443, 449 (1st Cir. 2002).

[8] See 69 Fed. Reg. 52,046, n. 2. See also *Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 102.

[9] See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 339 (1989); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 (2002).

[10] See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 71 (2001).

[11] *Id.*

[12] A nuclear facility owned by a "public utility rendering electrical service within the state and ... which is not owned or operated by an instrumentality of the federal government" is exempt from local taxation. MISS. CODE ANN. §27-35-309(3).

[13] Grand Gulf, Unit 1 commenced operations in 1985. In 1986, voters approved an amendment to the Mississippi constitution that allowed the state legislature to deny or limit the local taxing authority's right to impose taxes on, specifically, nuclear powered generating plants. The amendment also allowed the legislature to impose a "special mode of valuation, assessment and levy upon nuclear-powered electrical generating plants," and to distribute the tax as the legislature saw fit. See *Burrell v. Mississippi State Tax Commission*, 536 So. 2d 848 (Miss. 1989).

[14] See Contentions of the National Association for the Advancement of Colored People-Claiborne County, Mississippi Branch, Nuclear Information and Resource Service, Public Citizen and Mississippi Chapter of the Sierra Club Regarding Early Site Permit Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) ("Contentions"), at 22.

[15] See Contentions, Exhibit 3.1-4 (Declaration of A.C. Garner, former Civil Defense Director, Claiborne County)("a number of inadequacies in the Grand Gulf radiological emergency plan were identified" during his tenure as Civil Defense Director, the emergency operations center is in "deplorable condition," and the Sheriff's department cannot function as first responder to a security threat).

[16] See Contentions, Exhibit 3.1-5, Declaration of Joseph C. Davis, Deputy Sheriff, Claiborne County. See also, GGNS Early Site Permit Application, Part 4, Emergency Planning Information, at 3-5.

[17] See Contentions, Exhibit 3.1-8, Declaration of Wanda C. Fleming, Claiborne County Hospital Administrator ("Realistically, we are ill prepared, at present, to respond to any large-scale medical emergency or act of terror").

[18] Appeal Brief at 2.

[19] LBP-04-19, 60 NRC at 293-94. The relevant pleadings are Contentions at 12-17, SERI Contentions Response (date) at 21-35, Grand Gulf Petitioners Reply at 9-13, and Tr. at 311-57.

[20] LBP-04-19, 60 NRC at 294 (emphasis added).

[21] See 10 C.F.R. §2.309(i) (decision due within 45 days after filing answers and replies).

[22] See LBP-04-19, 60 NRC at 294.

[23] See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 131 (2004); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit 2), CLI-91-12, 34 NRC 149, 155 (1991).

[24] Contentions of the National Association for the Advancement of Colored People-Claiborne County, Mississippi Branch, Nuclear Information and Resource Service, Public Citizen, and Mississippi Chapter of the Sierra Club Regarding Early Site Permit Application for Site of Grand Gulf Nuclear Power Plant ("Contentions"), May 3, 2004, at 12.

[25] These included alleged disparities in property values and economic benefits, among other grievances. We view all claims not argued in the petitioners' appellate brief as waived and do not consider them further. See *Internat'l Uranium (USA) Corp.* (White

Mesa Uranium Mill), CLI-02-2, 57 NRC 161, 165 (2002); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 198 n.1 (1998).

[26] Contentions at 12 (citation omitted).

[27] Contentions at 18-19. *See* Petitioners' Brief on Appeal at 16-17.

[28] *See* Grand Gulf Nuclear Station Early Site Permit Application, Part 3-Environmental Report ("ER"), at 2.5-3.

[29] *See* ER at 2.5-4.

[30] *Id.* *See also* Miss. Code Ann. §27-35-309.

[31] *See* ER, Table 2.5-3.

[32] *See* ER, Figures 2.5-6 and 2.5-7 (showing areas in Mississippi and Louisiana where the minority population in a 50-mile radius of the site exceeds 50%), Figures 2.5-8 and 2.5-9 (showing locations of low-income populations in Mississippi and Louisiana within a 50-mile radius of the site).

[33] *See* ER, Figure 2.5-8.

[34] Office of Nuclear Reactor Regulation, LIC-203, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues (2001).

[35] LIC-203, at D-9.

[36] LIC-203, at D-4.

[37] Comparison sites included James Fitzpatrick and Indian Point in upstate New York, and Pilgrim in Massachusetts.

[38] *See* Environmental Justice Policy Statement, 69 Fed. Reg. at 52,048. The Policy Statement "retains the current procedure as articulated by NMSS and NRR in their respective office guidance" for identifying the impacted areas, but then states that the minority and low income population in the affected area should be compared to the minority and low income population in the "County (or Parish) and the State," without mention of the larger area comprising all the alternative sites considered in the EIS. *Id.*

[39] *See* ER at 2.5-3; ER, Table 2.5-7.

[40] ER at 2.5-4.

[41] *See* *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2002).

[42] *Id.*

[43] The ER (and ultimate EIS) need only make reasonable comparisons, not every conceivable one. *See Communities Against Runway Expansion v. FAA*, 355 F.3d 678, 688-89 (D.C. Cir. 2004).

[44] Contentions at 13 (citation omitted). *See also* Pet. Brief on Appeal at 17-18.

[45] Contentions at 13. *See also* Pet. Brief on Appeal at 18-20.

[46] Petitioners offered a stand-alone emergency planning contention, but the Board rejected it. *See* LBP-04-19. 60 NEC at 297-98. The Board said that "with the 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." *Id.* Petitioners did not appeal the Board ruling on the emergency planning contention.