

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

DOCKETED 07/26/06
SERVED 07/26/06

In the Matter of)
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EXELON GENERATION COMPANY, LLC)
)
(Early Site Permit for Clinton ESP Site))
)
_____)

Docket No. 52-007-ESP

In the Matter of)
)
)
SYSTEM ENERGY RESOURCES, INC.)
)
(Early Site Permit for Grand Gulf ESP Site))
)
_____)

Docket No. 52-009-ESP

CLI-06-20

MEMORANDUM AND ORDER

Today we consider two NRC Staff petitions seeking Commission review of Atomic Safety and Licensing Board orders relating to two separate mandatory licensing proceedings.¹ The petitions raise questions concerning the Board's authority to demand that the NRC Staff

¹ See *Exelon Generation Company, LLC* (Early Site Permit for the Clinton ESP site), NRC Staff Petition for Interlocutory Review of the Licensing Board's May 3, 2006 Order (May 23, 2006) ("Clinton Staff Petition"); *System Energy Resources, Inc.* (Early Site Permit for the Grand Gulf ESP Site), NRC Staff Petition for Interlocutory Review of the Licensing Board's May 31, 2006, Order (June 15, 2006) ("Grand Gulf Staff Petition").

turn over, and in some cases create, documents relating to its review of the application. In each case the Staff objects that the Board order improperly expands the scope of the Board's inquiry and imposes unreasonable burdens on the staff. We accept review of the orders and direct the Boards to tailor their orders to promote efficiency and avoid imposing unnecessarily burdensome or duplicative efforts on the NRC Staff.

I. BACKGROUND

The two orders both involve early site permit ("ESP") applications by current license holders to build new nuclear power reactors on the sites of existing reactors. In 2003, Exelon Generation Company, LLC filed an application for an ESP for a new nuclear power reactor at the site in Clinton, Illinois. Although a group of intervenors was admitted as a party to the proceeding at its onset, the group's contention was resolved through summary disposition in 2005.² After that action, the proceeding became uncontested but still subject to a mandatory hearing under the Atomic Energy Act.

System Energy Resources, Inc. filed its early site permit application for the Grand Gulf, Mississippi, site in 2003. In that proceeding, the Board found that none of the parties attempting to intervene had submitted an admissible contention.³ As in *Clinton*, the licensing action then became subject to an uncontested mandatory hearing.

In each of these cases, the Board ordered the Staff to produce documents for the record, and in each case the Board narrowed its demand upon a motion for reconsideration. In the *Clinton* proceeding, the Staff has asked our review of the Board's May 3, 2006 order on

² *Exelon Generation Company, LLC* (Early Site Permit for the Clinton ESP site), LBP-05-19, 62 NRC 134, 183 (2005), *rev. den'd*, CLI-05-29, 62 NRC 801 (2005).

³ See *System Energy Resources, Inc.* (Early Site Permit for the Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004), *aff'd* CLI-05-04, 61 NRC 10 (2005).

reconsideration (“Clinton order”).⁴ In the Grand Gulf proceeding, the Staff disputes a May 31, 2006 Board order (“Grand Gulf order”).⁵

The Board in *Clinton* (“Clinton Board”) directed the NRC Staff to create a narrative summary of its review of the application, describing, among other things, whether any guidance documents applied to the issue under consideration and whether the Staff followed or deviated from those guidance documents.⁶ The NRC Staff in *Clinton* (the “Clinton Staff”) objects to creating such a narrative because it would be time-consuming, duplicative of material already in the safety evaluation report (SER) and environmental impact statement (EIS), and, they argue, beyond the scope of the Board’s review in a mandatory hearing.

The Grand Gulf order demands similar documents.⁷ The NRC Staff reviewing the Grand Gulf site (“Grand Gulf Staff”) objects to portions of that order demanding that the Staff produce certain pre-decisional documents, specifically, any analyses that the Staff reviewer may have prepared regarding applicant responses to Staff requests for additional information (“RAIs”). The Grand Gulf Staff argue that the initial analyses, which may have been altered or refined considerably before they were included in the Staff SER, are not relevant to the Board’s task of assuring that each finding in the SER has “reasonable support in logic and fact.”⁸ They

⁴ *Exelon Generation Company* (Early Site Permit for the Clinton ESP Site), Order (May 3, 2006) (reconsideration of April 17, 2006 order).

⁵ *System Energy Resources, Inc.* (Early Site Permit for the Grand Gulf ESP Site), Memorandum and Order (Ruling on Reconsideration and Clarification) (May 31, 2006) (reconsideration of April 19, 2006, order).

⁶ See *Clinton* order, at 4-6.

⁷ In its initial (April 19, 2006) order, the Grand Gulf Board included a demand for a narrative similar to the one in the *Clinton* order, but “deferred” this requirement after the Staff stated that all requested information was already in the SER and EIS, and that in no case were applicable guidance documents not followed. *Grand Gulf* order, at 7-8.

⁸ See *Exelon Generation Company* (Early Site Permit for the Clinton ESP Site), CLI-05-17, 62 NRC 5 (2005).

also object to the Board's asking for four paper copies of each document in addition to electronic copies. Finally, the Grand Gulf Staff objects to the Board's instructions to produce documents authored by the Advisory Committee on Reactor Safeguards ("ACRS").

Both Boards have stayed the effect of their orders pending our consideration.⁹

II. DISCUSSION

The Atomic Energy Act requires the Commission to hold hearings on applications for the construction of certain production and utilization facilities, including nuclear power plants, even if the proceeding is uncontested.¹⁰ Because the NRC has not seen a license application for a facility of this type in some time, it had not held a so-called "mandatory hearing" in over twenty years. The *Grand Gulf* and *Clinton* proceedings are, therefore, among the first of the modern generation of mandatory hearings.

In July 2005 we responded to six questions certified to us by the Chief Administrative Judge of the Atomic Safety and Licensing Board concerning the conduct of "mandatory hearings" ("mandatory hearings order").¹¹ Our order sought to clarify the scope and depth of the licensing boards' "mandatory" review. We emphasized that boards were not to undertake a *de novo* review of the application, but were rather to perform merely a "sufficiency" review of the NRC Staff's findings. We explained that a board's task was to ensure that the Staff's review was "adequate" and that the Staff "made findings with reasonable support in logic and fact."¹² We said that a board should not reconsider the NRC Staff's factual findings unless it first determines

⁹ *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), Order (Granting Motion for Stay) (May 9, 2006); *System Energy Resources, Inc.* (Early Site Permit for the Grand Gulf ESP Site), Order (Granting Motion for Housekeeping Stay) (June 13, 2006).

¹⁰ See AEA, §189a, 42 U.S.C. §2239(a).

¹¹ See *Exelon Generation Company* (Early Site Permit for the Clinton ESP Site), CLI-05-17, 62 NRC 5 (2005).

¹² *Id.* at 39. See also 10 C.F.R. § 2.104(b)(2).

that the Staff's "review [was] inadequate or its findings insufficient."¹³ But we also said that a board should "carefully probe" the Staff's findings and ask appropriate questions.¹⁴

Recently, in *Louisiana Energy Services, L.P.* (National Enrichment Facility), one of our licensing boards handed down the first final partial initial decision in a mandatory hearing in over twenty years.¹⁵ While we recognize that each board must have the freedom to manage the proceedings before it, the approach the Board used in *National Enrichment Facility* is informative. In that case, the Board commenced the "mandatory" portion of its proceeding in August, 2005, by requesting the Staff produce certain documents, including the executive summaries of the final Staff review documents (the final Safety Evaluation Report (SER) and Environmental Impact Statement (EIS), the license application documents, Staff requests for additional information and the responses thereto, and documents relating to the ACRS review of the application).¹⁶ Following the production of these documents, the Board had a series of prehearing conferences with the Staff and applicant. From the documents and prehearing conferences, the Board produced an order setting forth the issues for an oral hearing.¹⁷ Among the items the Board asked the parties to address at the hearing was to identify any regulatory guides that were either directly or indirectly applicable to the facility and an explanation of how

¹³ *Id.* at 39-40.

¹⁴ *Id.* at 40.

¹⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-17, 63 NRC __ (June 23, 2006).

¹⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), Memorandum and Order (Memorializing Results of Prehearing Conference) (Aug. 12, 2005).

¹⁷ See *Louisiana Energy Services, L.P.* (National Enrichment Facility), Memorandum and Order (Memorializing Board Questions/Areas of Concern for Mandatory Hearing) (Jan. 30, 2006).

they were applied or adapted for the proposed enrichment facility.¹⁸ It also asked the Staff to explain how it addressed issues where no regulatory guide applied.¹⁹ In February 2006, the NRC Staff and the applicant submitted prefiled written testimony, and the Board heard live testimony from the Staff's and applicant's witnesses in March 2006. In April, the Staff and applicant filed proposed findings of fact and the Board closed the record. Thus, the *National Enrichment Facility* Board was able to frame the issues without requiring the Staff to generate additional, specially prepared documents at the outset, and was able to complete the mandatory hearing process, including oral testimony, expeditiously.

A. Interlocutory Appellate Review

Here, in both petitions, the NRC Staff argues that the Board's order could potentially require a lot of unnecessary work for the Staff and argues that the order "portends an expectation of [the Board's] role in an uncontested proceeding beyond that envisioned by the Commission in [the mandatory hearings order]."²⁰ The Staff argues that interlocutory review is warranted as the contested orders will have a "pervasive and unusual effect" on the litigation.²¹

We do not necessarily agree that the Boards' orders reflect an intent to expand their review beyond that described in our regulations and in the mandatory hearing order. The Clinton Board explained that its purpose in requesting the information was to narrow its focus to those areas which the Staff itself found problematic or where it was "plowing new ground," and to "assist the Board in the identification of areas of the Application that the Staff found difficult to

¹⁸ See *id.* at 2-3.

¹⁹ *Id.*

²⁰ See Clinton Staff Petition at 6, see also Grand Gulf Staff Petition at 14.

²¹ See 10 C.F.R. § 2.341(f)(2)(i) (grounds for interlocutory Commission review).

resolve.”²² Similarly, the Grand Gulf Board reiterated that it had no intention of conducting a *de novo* review of the application,²³ and justified its order on the ground that in many instances the “logic and facts supporting Staff’s conclusions” were not “readily apparent” from the SER and EIS prepared by the Staff.²⁴

As we interpret the Boards’ intention here, they plan to give a harder look at those issues that the Staff itself found problematic. That the Boards are looking for clues as to which areas these might be does not, standing alone, suggest to us that they intend to expand their role in a manner that would have a “pervasive and unusual effect on the litigation,” necessitating interlocutory review.

That being said, however, the Commission does have inherent supervisory power over its adjudications and may direct our licensing boards’ conduct of proceedings.²⁵ Because our licensing boards are conducting the first “mandatory” hearings this agency has held in more than two decades, we believe additional Commission guidance is necessary to ensure that the proper balance is struck between the boards’ need to obtain information for their review and the burden that production of such information could impose on the NRC staff. We therefore accept review under our inherent supervisory power over adjudications.

B. Documents and Information to be Made Available

1. *The Balance Between the Boards’ and the NRC Staff’s Needs*

We appreciate the concerns of both the Boards and the NRC Staff in this dispute. On the Staff’s side, teams of technical reviewers have spent many months producing documents

²² See Clinton order, at 6-7.

²³ Grand Gulf order, at 2.

²⁴ *Id.* at 3-4.

²⁵ See, e.g., *Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-21, 60 NRC 21, 27 (2004).

reflecting their analyses and conclusions. The NRC Staff has devoted extensive resources to reviewing the applications for both the Clinton and Grand Gulf sites. From the Staff's perspective, the work is finished. To go back at this point to generate additional material documenting what was done would be onerous, and, to their thinking, unnecessary.

The Boards, on the other hand, are presented with enormous technical documents and are trying to determine where to focus their attention. They have limited time to investigate, judge, and report the findings of their review. The Boards should be able to look to the Staff for assistance in understanding the basis for each major finding in the SER and EIS and in identifying appropriate areas of inquiry. In addition, the Boards are responsible for managing the proceedings before them,²⁶ and should be granted appropriate discretion to determine the best way to approach their job, particularly where, as here, they are engaged in an essentially new process where the agency lacks recent experience.

We find that a balance must be struck between Board leeway to perform its "truly independent" review,²⁷ and burdens on the NRC Staff. A "mandatory hearing" Board must narrow its inquiry to those topics or sections in Staff documents that it deems most important and should concentrate on portions of the documents that do not on their face adequately explain the logic, underlying facts and applicable regulations and guidance. It serves no purpose for the Staff to produce volumes of documents and information supporting facts and conclusions that are of small importance and are beyond dispute. It likewise serves no purpose for the Staff to produce copies of every document used in its review when the Board cannot possibly read through every one, let alone scrutinize them.

2. Rulings on Specific Classes of Documents

²⁶ 10 C.F.R. § 2.319.

²⁷ See mandatory hearings order, 62 NRC at 40.

The portions of the Boards' orders that are in dispute are as follows:

a. Narrative Report

The Clinton Board asked for “a detailed report setting out, subsection-by-subsection, how the relevant regulatory guidance applied by the Staff in reviewing the Application and a description of each instance where the Staff’s review deviated from the guidance.”²⁸ The report was also to include the name and job title of each Staff reviewer, and a list of all areas where the project manager or supervisor disagreed with proposed findings of the Staff reviewer.²⁹ In addition, it instructed the Staff to provide “a list of all areas of the application review wherein the project manager (or supervising Staff member) disagreed with the proposed finding of the Staff member charged with a portion of the review.”

The Clinton Board said the purpose of its order is to require the Staff to document its logic and underlying facts.³⁰ The Clinton Board rejected the Staff’s argument that this order “directs” the Staff in its review, but said the order simply requires the Staff to tell the Board what it did.³¹

In its initial order requesting documents, the Grand Gulf Board included a demand for a narrative similar to the one in the Clinton order,³² but on reconsideration deferred this requirement in view of the Staff’s assertion (in its motion for reconsideration) that all requested information was already in the SER and EIS, and that in no case were applicable guidance

²⁸ Clinton order at 4.

²⁹ Clinton Board’s April 17, 2006 order, at 3.

³⁰ Clinton order at 4-5.

³¹ *Id.* at 5 n.11.

³² See *System Energy Resources, Inc.* (Early Site Permit for the Grand Gulf ESP Site), Order (Request for Documents and Briefings) (Apr. 19, 2006), at 2-3.

documents not followed.³³ The Grand Gulf Staff has nevertheless asked our review because the Board's order "portends the Board's expectation of its role in an uncontested proceeding beyond that envisioned by the Commission in [the mandatory hearing order]."³⁴

As the NRC Staff maintains, the SER and EIS should already explain their conclusions, logic and underlying facts, as well as provide references to all applicable guidance documents. A comprehensive, freshly prepared, narrative report covering the entire SER and FEIS would require an unnecessary duplication of effort. Instead, it is appropriate for the Board to review the Staff documents (together with additional materials requested), and then *tailor* its request for additional information to those areas for which it needs additional information in order to understand the Staff's review documents. We therefore vacate the Boards' demand for a complete narrative report, although we agree that the Boards' request for specific information as described below should be provided. We expect that the Boards will limit their requests for information to focus on specific issues. The Boards, if they choose, may require the Staff to provide indexes, as suggested in Exelon's pleading in *Clinton*,³⁵ as a device to simplify the review of Staff's documents.

b. Application and Departures from Regulatory Guides

Among the information the two Boards specifically requested that the narrative include was a list of all regulatory guides applicable to the Staff's analysis, together with a list of all instances where the applicable regulatory guides were not followed. In *Grand Gulf*, the Board withdrew its request after the Staff informed it that all regulatory guides used were already cited

³³ Grand Gulf order at 7-8.

³⁴ Grand Gulf Staff Petition at 14.

³⁵ *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), Exelon Generation Company's Answer in Support of NRC Staff's Petition for Interlocutory Review (May 30, 2006), at 4.

in the SER and EIS and that there were no departures from relevant regulatory guides.³⁶

As noted above, we would expect that the SER will already contain references to applicable regulatory guides. However, if it is the case that a regulatory guide was used and not referred to in the SER and EIS, that fact may not be otherwise apparent to the Board. Likewise, if a potentially applicable guide was not used, that may not necessarily be apparent on the face of the Staff reports. We find it is reasonable for the Board to request information of this nature in order to help focus its review.³⁷ We also note that the Clinton order clarified that this information could be provided in the form of a table.³⁸ Finding the Clinton Board's demand reasonable, we decline to direct it to modify this requirement.

c. Internal Disputes and Pre-Decisional Records

The Clinton Board requested a “list of all areas of the application review ‘wherein the project manager (or supervising Staff member) disagreed with the proposed findings of the Staff member charged with a portion of the review, setting out the topic at issue, the ultimate resolution, and the rationale for such resolution.’”³⁹ The Clinton Staff argues that the Board “doesn’t need this level of detailed information” to perform its review.⁴⁰

Similarly, the Grand Gulf Board asked for materials that the Staff claims are “pre-decisional” documents, including any initial analyses that a Staff member produced concerning

³⁶ Grand Gulf order at 8; Grand Gulf Staff Motion for Reconsideration at 6-7.

³⁷ We note, however, that provisions in regulatory guides or even a standard review plan are not a substitute for the regulations and compliance is not a requirement. See, e.g., 10 C.F.R. § 50.34(h)(3).

³⁸ Clinton order at 6.

³⁹ Clinton order at 6.

⁴⁰ Clinton Staff Petition at 8-9.

the applicant's response requests for additional information.⁴¹ The Grand Gulf Staff argues that these initial analyses do not necessarily reflect the Staff's ultimate findings, which are found in the SER and EIS. Because the Board's task is to evaluate whether the Staff's ultimate findings have reasonable support in logic and fact, the Staff reviewer's initial impressions are beside the point, the Staff argues. The Grand Gulf applicant, System Energy Resources, Inc. ("SERI"), filed a pleading supporting the Staff's view of predecisional documents.⁴² In addition to the objection that such documents would expand the scope of inquiry, SERI argues that it is unfair to SERI to introduce analyses that it "has never seen or had the opportunity to comment on."⁴³

A primary drawback to requiring the Staff to produce pre-decisional documents is that it burdens the Staff while providing the Board with information of potential limited utility. There are other considerations, too, that warrant modifying the Board requirement: first, the Board's use of nonpublic information in evaluating Staff documents may create confusion over the bases for the Board's decisions; second, Board reliance on early staff deliberations has the appearance of elevating them in weight to that of thoroughly vetted Staff products, such as the FEIS and SER; third, a policy of encouraging Boards to explore non-final deliberative staff material in making decisions may stifle the free flow of debate at the Staff level; and fourth, Board focus on early Staff views or differences diverts a Board from its task of determining whether the staff's ultimate determinations are reasonably supported in logic and fact.⁴⁴

⁴¹ The Grand Gulf Staff produced one such analysis of an RAI response on June 12, 2006. Because the analysis is pre-decisional, the analysis is not publically available.

⁴² See System Energy Resources, Inc., Answer in Support of NRC Staff Petition for Interlocutory Review (June 26, 2006), at 4-5.

⁴³ *Id.* at 5.

⁴⁴ See 10 C.F.R. § 2.104(b)(2) (the Board must determine whether "the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support an affirmative finding [by the Staff])."

We hesitate to permit the Board to request Staff documents that overburden the staff and pose other problems without being shown to be of significant help to the Board. As the Commission explained in its prior direction, the Board's role in an uncontested proceeding is somewhat analogous to "the function of an appellate court, applying the 'substantial evidence' test [.]"⁴⁵ The Board need not demand all possible views and facts be put into the record or presume preliminary views to raise matters of controversy about the bases for the final staff determinations. Rather, the "boards should decide simply whether the safety and environmental record is sufficient."⁴⁶ Consistent with the Commission's regulations⁴⁷ the boards may probe the staff for additional testimony or record material when necessary to ascertain whether the staff had reasonable bases for the staff's final determinations.⁴⁸ An uncontested, mandatory hearing need not, and should not, commence with a requirement to identify, explain, and resolve preliminary differences of opinion. Exceptional circumstances should not be presumed. For these reasons, we decline to uphold the Board's requirement.

d. ACRS Documents

The Grand Gulf Staff object to the Board's order relating to documents authored by the Advisory Committee on Reactor Safeguards (ACRS).⁴⁹ The Grand Gulf Board directed the Staff

⁴⁵ Mandatory hearings order, CLI-05-17, 62 NRC at 39 (citing *UCS*, 499 F.2d at 1076).

⁴⁶ *Id.* at 39.

⁴⁷ The Commission's regulations provide procedures that should assist and guide the Board in its approach in seeking testimony, additional witnesses, and documents. See, e.g., 10 C.F.R. §§ 2.709(a)(1) , 2.1207.

⁴⁸ The Boards can be assisted in their work by indexes and tables relating to the staff's documents as authorized in this order. Clearly, to the extent that the staff provides road maps to its conclusions and analyses in its final documents or submissions to the Board, the Board's tasks and the interests in efficient and effective proceedings are well served.

⁴⁹ The Clinton Board initially requested the same documents in its April 19, 2006 order. The Staff agreed to provide the Board with copies of ACRS documents in its control and copies of any materials it provided to the ACRS. The Board order stated that it would contact the

to produce documents that it has in its possession and those that the Staff can “readily secure,” and also to identify relevant documents that the Staff is aware of but cannot readily secure.⁵⁰ The Grand Gulf Staff argues that it is appropriate to produce ACRS documents that it received from ACRS but that it should not be required to produce other ACRS documents.

We agree with the Grand Gulf Staff. The ACRS is an independent federal advisory committee that is not under the Staff’s control. It is not apparent how the Staff can readily obtain ACRS documents it does not already have, nor how the Staff even would know about such documents. But most importantly, it is not clear that ACRS documents *that the Staff has not reviewed* are germane to the Board’s review, given that the purpose of the Board’s review is to ensure that the Staff’s conclusions have “reasonable support in logic and fact.” The ACRS presumably would have forwarded to the Staff records or analyses that it determined were important to the Staff’s review. We find that while the Board may ask the Staff to produce relevant ACRS documents that it has reviewed, the Board should not ask the Staff to obtain additional documents of dubious significance.

e. Four Paper Copies

The Grand Gulf Board asked for four paper copies, in addition to electronic copies, of the materials described in its order.⁵¹ While this seems like a lot of paper, we note that the Grand Gulf Staff didn’t question this requirement in its motion for reconsideration of the Board’s initial order, and in fact stated that it was preparing the copies of other materials.⁵² The

ACRS directly for any additional documents it determines are necessary to its review. Clinton order at 3.

⁵⁰ Grand Gulf order at 6-7.

⁵¹ Grand Gulf April 19 order, at 3. The Board asked for only one paper copy of any classified materials.

⁵² See NRC Staff Motion for Reconsideration and Clarification of Board Order (Request for Documents and Briefing) Dated April 19, 2006 (May 1, 2006), at 4.

Commission is not in a better position than the Board to assess the Board's need for four paper copies. The Board, in fact, consists of three judges and employs supporting personnel.

Providing the extra paper copies does not on its face appear unreasonable. Perhaps in future proceedings, other licensing boards will determine that such a requirement is excessive. But this is a matter we believe best left for the Boards' discretion, and therefore we deny the Staff's request.

f. Need for a Schedule

In their pleadings in support of the NRC Staff's petitions for review, the applicants in both these proceedings asked the Commission to set a schedule for the Board's review. With respect to the Grand Gulf application, SERI submitted its ESP application in October 2003, and the staff issued its final Safety Evaluation Report (SER) and Final Environmental Impact Statement (FEIS) in April 2006. The Board acted promptly upon issuance of the SER and FEIS, but did not set a hearing schedule. The staff asked, however, that the Grand Gulf Board await the outcome of the staff petition for review on the document-disclosure order, and the Board granted the staff's request. In keeping with the Commission's expectation that the boards act promptly in concluding the hearing process, the Commission expects the boards in uncontested cases to issue their final initial decisions generally within four, and at the most six, months of the staff's SER and FEIS issuances. In most cases, we expect that the time would be significantly shorter. Considering both the time that the final SER and FEIS has been available and the stay associated with the staff's petition for the review, we expect the Grand Gulf Board to issue its decision on the mandatory hearing no later than November 30. The Grand Gulf Board should proceed to set a schedule that contains key deadlines to issue a decision by that date.

We decline to set a specific schedule with respect to the Clinton ESP proceeding in light

of the fact that the Staff's FEIS has only recently been issued.⁵³ The Board should promptly establish a schedule that reflects the Commission's direction, above, regarding completion of uncontested mandatory hearings.

III. CONCLUSION

For the foregoing reasons, the petition for review is *granted* and the Board is hereby directed to modify its order as described above to reflect the Commission's clarification of its expectations regarding the conduct of mandatory hearings.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 26th day of July, 2006

⁵³ Environmental Impact Statement for an Early Site Permit at the Clinton ESP Site (NUREG 1815) Final Report (July 2006). We note that the Clinton Board has already proceeded to propound inquiries to the staff regarding the final Staff SER. See *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), Order (July 20, 2006).

Dissenting Opinion by Commissioner Gregory B. Jaczko:

I dissent on this Order because the order restricts the ability of the licensing boards to implement Commission guidance on mandatory hearings in an efficient manner that ensures the adequate protection of public health and safety. The Commission could ultimately conduct licensing proceedings itself under the authority set forth in the Atomic Energy Act of 1954, as *amended* (AEA).⁵⁴ The Commission has delegated its authority, however, to conduct licensing proceedings to the Boards as permitted by the AEA. Mandatory hearings are the Boards' substantive review of the staff's work and, therefore, the Boards' final opportunity to review the staff's work on the uncontested safety and environmental matters. As a result, I am not inclined to second guess the Boards' determination about how to best conduct these hearings.

In particular, I support the Boards' determination in this case that narrative reports are needed to assist it in thoroughly and efficiently performing a sufficiency review of the staff's findings consistent with previous Commission guidance referred to in the Order as the mandatory hearings order (*i.e. Exelon Generation Co. (Early Site Permit for the Clinton ESP Site), CLI-05-17; 62 NRC 5*). The Boards' orders reflect an intent to narrow the Boards' focus to those areas the staff found problematic and to identify those areas the staff found difficult to resolve.

While I appreciate the concern that the Boards' document requests may require additional staff work, I believe the Boards' request is reasonable and not unduly burdensome. The Boards are requesting the information in summary format in order to tailor the proceeding and focus on important or controversial issues, not to broaden the scope of review. The Boards should be able to make a determination about the information they deem necessary to conduct a thorough sufficiency review in an efficient and expeditious manner. The Boards, therefore,

⁵⁴AEA, 42 U.S.C. § 2241.

should be given some leeway in mandatory hearings, where no contested issues exist, to obtain any reasonable information it deems necessary to conduct a thorough and efficient sufficiency review consistent with its statutory authority, rules, regulations and previous Commission guidance.

I am also dissenting because I disagree with the majority regarding setting a schedule for the Boards' review. I believe it would be premature to set a firm date for the conclusion of the mandatory hearings since the Boards have not had a opportunity to completely identify those areas where they need further information. The Commission is concerned with the Boards' expeditious completion of the review, yet the Commission denied the Boards' request to the staff to produce information designed to expedite the review (*i.e.* narrative reports). As indicated in the Board's Order in the *Clinton* case dated July 20, 2006, the Board promptly began and completed its preliminary review of the Applicant's documents and the final Staff Safety Evaluation Report (FSER). Additionally, in the *Clinton* Order, the Board noted that the preliminary review, conducted in the absence of the narrative reports and other information it requested, required the Board to expend a significant amount of resources. The obvious implication is that the Board's review would have been faster if its request had been granted. Based on the current record, there is no reason to doubt the Boards' commitment to expeditious handling of these cases.