1133 Connecticut Ave. NW Suite 200 Washington D.C. 20036
(Voice) 202.659.4344 (Fax) 202.659.0791

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Michael Lesar, Chief
Rules Review and Directives Branch
Division of Administrative Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555

HEP: #02-005

SUBJECT: Louisiana Energy Services Gas Centrifuge Enrichment Facility
NRC Docket No. 70-3103

On October 2, 2002, the U.S. Nuclear Regulatory Commission ("NRC") offered an opportunity for members of the public to comment on a series of white papers presented to the NRC by Louisiana Energy Services ("LES") related to the licensing of a uranium enrichment facility (67 Fed. Reg. 61,932). Comments were initially due by November 1, 2002. On October 25, 2002, the NRC announced that it was extending the comment period to November 13, 2002 (67 Fed. Reg. 65,613).

LES would like to take this opportunity to comment further on the white papers that we submitted in April of this year, for the purpose of ensuring that the Commission has a clear understanding of our purpose in seeking additional guidance in the six areas that are addressed in our white papers, as well as to clarify on the public record certain issues that have been raised by interested stakeholders.

As we indicated when we submitted our white papers to the NRC (*see* Letter from Peter L. Lenny to USNRC, April 24, 2002), and in the subsequent public meeting with the NRC of April 30th, our purpose in submitting these white papers is to "obtain definitive guidance from NRC on standards to be applied in reviewing a license application for an enrichment facility."

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(LES Presentation to NRC Staff, April 30, 2002).

During the past several years significant time and effort has been devoted by the Commission and by Congress to establishing the standards that should be applied to the licensing of a commercial enrichment facility. The LES-1 proceeding -- where the vast bulk of the seven-year licensing effort focused on determining the appropriate standards to be applied -- culminated in the establishment of standards on several key issues, including financial qualifications, the NEPA issues of "need" and the "no action alternative," and environmental justice. Subsequent to the LES-1 proceeding, the Commission published NUREG-1520 and NUREG-1748, addressing a number of additional key issues. And finally, in statutory changes adopted by Congress during, or subsequent to, the LES-1 proceeding, Congress provided further guidance on the treatment of depleted tails, foreign ownership, and antitrust.

To ensure an efficient and disciplined licensing process, and to avoid the uncertainty that arose in the previous review, we believe it is absolutely essential that the Commission clearly articulate the applicability of these various standards to the review of our License Application, and adopt these standards at the outset of the licensing proceeding in the form of a legally binding order. This will serve to identify in one location the standards to be applied by the Commission's Staff, as well as by the Licensing Board, in the Agency's review of our application. We believe that, as an applicant, we are entitled to know at the outset of the proceeding the standards that we must satisfy in order to obtain a license.

In making this request, we must emphasize that we are not seeking to deny interested members of the public an opportunity to participate in a meaningful way in the pre-licensing and licensing process for the proposed enrichment facility, nor to "prejudge" the outcome of the mandatory hearing that must be held under the statute to ascertain whether LES, as an applicant, can satisfy the applicable licensing standards established by the Commission. Suggestions that "citizens will not get a hearing on the LES plant,"[1] that we are "asking the NRC to approve [a] license and not allow citizens to have hearing(s) on this vital issue,"[2] or that we are attempting "to resolve in [our] favor serious issues that should only be considered in Atomic Safety and Licensing Board (ASLB) adjudicatory hearings"[3] are nothing more than factually

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1 NIRS statement on LES white papers (October 10, 2002), p. 1.

2 Citizens for Safe Choices statement (undated), at <http://www/stoples.org/ lesintro.htm>.

3 Letter from M. Mariotte, Executive Director, NIRS to M. Virgilio, Director, NRC/NMSS, p. 1 (September 11, 2002).

incorrect and incendiary comments that have as their sole purpose obscuring the facts for the sake of opposing this facility at any cost.

The facts are as follows: Over the course of the past eight months, LES has had seven "pre-application review" meetings with the NRC staff. In each and every case, the meeting was publicly noticed in advance, open to participation by members of the public, and summarized in minutes prepared by the NRC staff, all of which were made available to the public. Indeed, these meetings were widely attended and participated in by interested members of the public. With the identification of the Hartsville site as our preferred site, further public meetings were held in the vicinity of the site by the NRC and local officials. Indeed, in view of the level of interest that was expressed in the public meeting in Hartsville on October 14th, LES requested an extension of the public comment period on the proposed white papers. Beyond this, we note that, as part of NRC's review of our License Application, NRC will conduct extensive public "scoping" meetings in the vicinity of the site, for the purpose of soliciting input from interested members of the public on the environmental impacts of the proposed facility. Additionally, the public will have an opportunity to comment on the NRC's draft environmental impact statement. Finally, upon the submission of our License Application, there is a statutorily-mandated, trial-type hearing that must be held before a license can be issued by the NRC, at which any interested member of the public will have an opportunity to participate.

For all of the foregoing reasons, we categorically reject the suggestion that we are seeking to circumvent the right of the public to participate in this important undertaking. Indeed, nothing could be further from the truth. We are actively reaching out to engage interested members of the public early in the process in a way that is unparalleled for such a facility.

We also think it is important to clarify our purpose in seeking Agency positions on the six policy issues that are addressed in our white papers. As noted above, in each and every one of these white papers, we are seeking confirmation from the Commission on the standards that will be applied by the agency in its review of our License Application including the Environmental Report. We discuss each of these issues below.

ISSUE 1: ANALYSIS OF NEED AND NO ACTION ALTERNATIVE UNDER NEPA

In LES's white paper entitled "Analysis of Need and No Action Alternative Under NEPA," we proposed that the Commission adopt a presumption that a need exists for new enrichment capacity in the United States and that, based upon this presumption, no further consideration of the "no action alternative" should be required in any proceeding for the licensing of a uranium enrichment facility. The basis for our recommendation is found in the Commission's decision in the LES-1 proceeding, where the Commission observed:

> [I]t might fairly be said that not only the FEIS, but also national policy, establish a need for a 'reliable and economical domestic source of enrichment services. (*See* CLI-98-3, 47 NRC 77, 95 (1998))

As we emphasized in our white paper, the Commission in the LES-1 decision squarely addressed the important national security benefits of additional domestic enrichment capacity, given the United States' reliance on only one domestic supplier:

> The fact that USEC already exists to serve national security interests does not entirely obviate a role for LES in helping to ensure a reliable and efficient domestic uranium enrichment industry, particularly when USEC currently is the only domestic supplier. *See* H.R. Rep. No. 102-474, 102d Cong., 2d Sess., pt. 1, at 143 (1992) (acknowledging that reliable sources of enrichment services 'are already available from longtime allies of the United States and could become increasingly available from former Soviet republics,' yet affirming that 'facilities located in the U.S., such as the Louisiana Energy Services (LES) project, could offer additional, secure possibilities'); *see also* Final Rule, Certification of Gaseous Diffusion Plants, 59 Fed. Reg. 48,944, 48,951 (Sept. 23, 1994) (citing USEC's concern that a denial of a certificate of compliance for the gaseous diffusion plants 'may have potential implications for national and public policy' because the gaseous diffusion plants 'are currently the sole domestic source of enrichment services'). (*See* CLI-98-3, p. 96, n.15.)

Indeed, if anything, the need for additional reliable, economic domestic enrichment capacity is even greater today than it was at the time of the Commission's decision in LES-1, in light of the closure of one of the two remaining operating facilities in the United States, a point that the Department of Energy recently emphasized in its annual report to Congress on this subject:

> With the tightening of world supply and the closure of the Portsmouth Gaseous Diffusion Plant by USEC Inc. in May 2001, the reliability of U.S. supply capability has become an important energy security issue. (*See* "Effect of U.S./Russia Highly Enriched Uranium Agreement 2001," December 31, 2001, p. 13.)

For the foregoing reasons, LES believes that the Commission has a sound basis for adopting a presumption that a need exists for new domestic enrichment capacity in the United States.

Having said this, should the Commission conclude that its NEPA regulations require a presentation of the need for additional enrichment capacity and an analysis of the no action alternative, LES is fully prepared to set forth in its Environmental Report the basis for its conclusion that additional reliable domestic enrichment capacity is vitally needed. Indeed, we firmly believe that the underlying policy imperatives that have been so clearly and consistently articulated by Congress and the Administration over the past several years constitute a sufficient basis upon which the Commission can conclude that the need issue has been adequately addressed by the applicant. In this regard, it is noteworthy that both the Administration and the Congress have spoken strongly about this issue. As the Department of Energy recently noted:

> The Department believes that the earlier than anticipated cessation of plant operations at Portsmouth has serious domestic energy security consequences, including the inability of the U.S. enrichment supplier to meet all of its enrichment customers contracted fuel requirements, in the event of a supply disruption from either the Paducah plant production or the HEU Agreement deliveries. The energy security concerns are due, in large part, to the lack of available replacement for the inefficient and non-competitive gaseous diffusion enrichment plants. These concerns highlight the importance of identifying and deploying an economically competitive replacement domestic enrichment capability in the near term. (*See* DOE Annual Report on HEU Agreement, p. 14.)

Moreover, it is clear from an examination of the original rationale for the privatization of the U.S. Government's enrichment program, that it was undertaken, as the Administration noted at the time, explicitly for the purpose of creating "a 'climate' that allows private uranium enrichment ventures to be formed in the United States and to compete freely" (S. Rep. No. 100-214, at 90 (1987) (statement of DOE Asst. Secretary Rossin)), thereby reflecting a recognition of the need to encourage the development of additional enrichment ventures in the United States.

In view of the overwhelming evidence that there is a need for additional reliable and economic enrichment capacity in the United States -- a need that both the Administration and Congress have consistently identified over the past several years -- we are prepared to

present the case in the context of our need analysis in our Environmental Report, as well as to discuss the consequences of the "no action alternative" in relation to this nation's domestic energy security and national security, should the Commission conclude that this is required.

Finally, we think it is important to address briefly the suggestion that NEPA should be the vehicle for an analysis of the impact that new domestic enrichment capacity might have on the 1993 U.S./Russia HEU Agreement, and the implication that foreign ownership of this new domestic enrichment capacity might, in some unspecified way, be detrimental to U.S. national security interests.

First, as noted above, we certainly agree that it is appropriate for the Commission to rely upon domestic energy security and national security reasons as a basis for concluding that a demonstrated need exists for new domestic enrichment capacity. In this regard, the Administration has made it abundantly clear that new domestic enrichment capacity will enhance our domestic energy security: "Maintaining a reliable and economical U.S. uranium enrichment industry is an important U.S. energy security objective." (DOE comments on LES white papers, p. 2 (July 25, 2002) (quoting unclassified excerpt from U.S. Department of State cable SECSTATE WASHDC 212326Z DEC 01 (NOTAL)). Moreover, the issue of foreign ownership of this new technology has also been explicitly addressed by the Administration: "The U.S. Government supports the deployment of Urenco gas centrifuge technology in new U.S. commercial uranium enrichment facilities as a means of maintaining a reliable and economical U.S. uranium enrichment industry." (*Id.*)

Second, it is important to note that Congress has explicitly addressed the analysis to be undertaken with regard to the relationship between new domestic enrichment capacity and the 1993 U.S./Russia HEU Agreement. Section 3112(b)(10) of the USEC Privatization Act directs the President to monitor the actions of the U.S. Executive Agent for the HEU Agreement and to report yearly to Congress on the effect that the LEU delivered under the HEU Agreement is having on, *inter alia*, the domestic enrichment industry. Further, this report is required to describe the actions necessary to "prevent or mitigate any material adverse impact." The important point to emphasize is that Congress has explicitly directed the President to assess the impact of the HEU Agreement on the domestic enrichment industry, not *vice versa*, as others have suggested. Indeed, in the 2001 report -- a report in which the LES initiative to develop new domestic enrichment capacity is specifically discussed -- the Administration explicitly concluded that the HEU Agreement has not negatively impacted the domestic enrichment industry.

Third and finally, the appropriate framework in which to address the issue of foreign ownership is in the context of the decision that the Commission is required to make under section 57(c) of the Atomic Energy Act, *to wit*, whether the issuance of a license would be

inimical to the common defense and security. This issue is addressed in more detail under Issue 5, below.

ISSUE 2: ENVIRONMENTAL JUSTICE

In LES's white paper on environmental justice, we are seeking clarity from the Commission on the standards that will be applied by the Agency in its review of issues related to environmental justice. The core of our recommendation is that the Commission establish in its order initiating its review of the LES application the relevant criteria for determining whether, as a threshold matter, an environmental justice issue exists which, in turn, would require further evaluation with regard to the potential "disparate impact" of a proposed enrichment facility on low-income or minority populations. We think this is particularly important in view of the substantial time and effort that the Commission has devoted in previous contested proceedings, as well as in guidance that the staff has recently published, to defining the applicable standards for consideration of issues associated with environmental justice. As we noted in our white paper on this subject:

> An evaluation of the disparate impact shall only be required if: (a) the percentage of minorities or low-income households within the total population residing in the area of assessment is greater than 20 percentage points above the corresponding percentage totals for the state or (in the case of minority population) county; or (b) the percentage of minorities or low-income households in the area of assessment is greater than 50 percent of that area's total population or households.

We further requested that the geographic area of assessment for disparate impact purposes for a Part 70 facility should be equal to or less than a 4-mile radius from the center of the site.

Importantly, both of the foregoing criteria are drawn directly from the Commission's draft guidance document on this subject, NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" (*see* Appendix B, which sets forth Environmental Justice Procedures). This guidance document, which has been out for public comment since October 18, 2001, is, by its terms, explicitly intended "For Interim Use and Comment." Thus we believe that the standard set forth in this document for the staff's review of an application should, in turn, be confirmed as the relevant standard for the applicant to meet.

ISSUE 3: FINANCIAL QUALIFICATIONS

With regard to the issue of financial qualifications, LES is asking that the Commission confirm that its financial qualifications standard can be met by a demonstration of the following:

1. Construction of the facility shall not commence before funding is fully committed. Of this full funding (equity and debt), LES must have in place before constructing the associated capacity: (a) a minimum of equity contributions of 30 percent of project costs from the parents and affiliates of the LES partners (*e.g.*, in escrow, on deposit, etc.); and (b) firm commitments ensuring funds for the remaining project costs.

2. LES shall not proceed with the project unless it has in place long term enrichment contracts (*i.e.*, 5 years) with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

In recommending the foregoing approach, we do not suggest that this is the only way to satisfy the Commission's financial qualifications standard. Indeed, there may well be other ways to demonstrate an applicant's financial qualifications. But in view of the endorsement by the Commission of the foregoing standard in the LES-1 proceeding, we are seeking clarification from the Commission that if, as an applicant, LES satisfies the foregoing criteria, that showing shall be sufficient for purposes of demonstrating financial qualifications under 10 CFR 70.22(a)(8) and 70.23(a)(5). This standard, which the Commission articulated at the conclusion of the LES-1 proceeding following over two years of deliberations by the Licensing Board and the Commission (*see* CLI-97-15, 46 NRC 294, 309 (1997)), is a reasonable, well-considered approach to assessing the financial qualifications of an applicant for an enrichment facility. Importantly, such an approach would require LES to demonstrate its financial qualifications in accordance with this standard. It would not, as has been suggested, take the financial qualifications issue off of the table. Nor would LES be dictating the parameters for this review. Instead, it would focus the Commission's review where it properly should be -- on the factual issue of whether LES can demonstrate that it satisfies the applicable regulatory standard, in accordance with the standard that the Commission, itself, established in 1997.

ISSUE 4: ANTITRUST REVIEW

In LES's white paper on the antitrust issue, LES is seeking confirmation from the Commission of what we believe to be a simple, straight-forward matter: In view of the statutory changes adopted by Congress in Public Law 101-575 (the "Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990"), the Commission is no longer required (nor, we would submit, authorized) to conduct an antitrust review, in light of the decision by Congress to provide for the licensing of such facilities under sections 53 and 63 of the Atomic Energy Act, rather than under sections 103(d) or 104(d).

ISSUE 5: FOREIGN OWNERSHIP

With regard to the issue of foreign ownership, LES has proposed in its white paper that the Commission confirm that, in view of the statutory changes adopted by Congress in Public Law 101-575 (the "Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990"), the appropriate statutory framework for analyzing and addressing the issue of foreign involvement with respect to an enrichment facility licensed under sections 53 and 63 of the Atomic Energy Act is the so-called "inimicality" finding required under section 57 of the Atomic Energy Act. Indeed, in the initial order issued at the outset of the LES-1 proceeding, the Commission specifically acknowledged that it must find that issuance of the license would not be inimical to the common defense and security of the United States. We are seeking a similar statement in the Commission's order upon submission of our license application. We further asked that the Commission confirm that this provision does not, as a matter of law, prohibit the Commission from issuing a license to an entity that is foreign owned, controlled, or dominated (including up to 100 percent foreign ownership, control, or domination), so long as the Commission concludes that the issuance of the license would not be inimical to the common defense and security. LES recognizes that a review of this matter by the Commission pursuant to section 57 will be required at the point that the partners in the partnership that will be applying for the license are formally identified, upon the submission of our license application. In short, we are not seeking an *a priori* determination with regard to the review that the Commission must conduct. We are, however, seeking confirmation that, as a legal matter, foreign ownership (including foreign ownership, control, or domination) is not barred, as a legal matter, under section 57.[4]

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[4] In comments submitted by USEC, USEC appears to take the position that the statute requires domestic ownership of enrichment facilities and, absent this, national security would be adversely impacted: "In view of the statutory importance of maintaining a reliable and economic, domestically owned enrichment capability, ignoring those market realities altogether could carry an adverse national security and energy policy cost in

ISSUE 6: TAILS DISPOSITION

With regard to the issue of tails disposition, LES is seeking clarification from the Commission that the statutory provision in section 3113 of the USEC Privatization Act requiring the Department of Energy to accept for disposal depleted uranium from NRC-licensed enrichment facilities constitutes a "plausible strategy." In this context, LES recognizes that any such material accepted by DOE must first be determined to be low-level waste. Further, LES recognizes that it must reimburse DOE for the disposal of such tails, including a pro rata share of any capital costs. Subject to satisfying these two conditions, we believe that section 3113 constitutes a "plausible strategy," as that term has been defined by the Commission in the LES-1 proceeding.

This would not, of course, foreclose the consideration of other plausible strategies by the applicant. Indeed, as an applicant, we may wish to present one or more plausible strategies, following a careful evaluation of the alternatives available to us. In this regard, we recognize that it is our responsibility to present a plausible strategy for the ultimate disposition of tails and, in so doing, ensure that the tails generated by this facility will not be stored on-site indefinitely. Indeed, it is our obligation and intent to present one or more plausible strategies for disposing of the tails in a safe and environmentally sound manner. We are further obligated to ensure -- and will ensure-- that any interim storage of tails pending ultimate off-site disposition will be done in an environmentally acceptable and safe manner, as approved by the NRC, in the licensing process.

In this regard, we note that in LES-1, the applicant presented an approach that called for the ultimate disposition of tails, in a deep underground mine, following the conversion of DUF_6 to U_3O_8 . Based upon a thorough review by the NRC staff of the safety and

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several future scenarios." *See* "USEC Comments on Policy Issues Related to Licensing a Uranium Enrichment Facility (67 FR 61932)," pp. 5-6 (November 4, 2002). To the extent that this is intended to suggest that the Atomic Energy Act requires enrichment facilities to be domestically owned and, unless domestically owned, the Commission will be unable to make the inimicality finding, we believe that this is an incorrect interpretation of the Atomic Energy Act. To the extent that this comment is intended to suggest that any foreign ownership of domestic enrichment facilities is inconsistent with the national security interests of the United States, both Congress and the Administration have spoken to the contrary. (*See* comments under Issue 1.)

environmental issues associated with disposal of tails in a deep underground mine, the staff and the Licensing Board concluded that this approach constituted an acceptable plausible strategy. On this basis, we believe that, in addition to the approach provided for in section 3113, the Commission could also deem disposal in a deep underground mine to constitute a plausible strategy for the ultimate disposition of depleted tails, and so reflect this conclusion in its order upon the initiation of its review of our license application.

CONCLUSION

We welcome the opportunity to clarify our purpose in seeking guidance from the Commission on the foregoing policy issues. As we noted when we submitted our white papers to the Agency last April, clarity from the Commission on the applicable licensing standards for the review of our application will be essential to the conduct of a disciplined, efficient licensing process.

Sincerely yours,

George E. Dials
President and CEO

cc: T. C. Johnson, NRC Project Manager
Steven P. Kraft