

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103

ASLBP No. 04-826-01-ML

NRC STAFF RESPONSE TO APPLICANT'S PETITION FOR REVIEW OF LBP-06-15

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June 26, 2006

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), the Nuclear Regulatory Commission Staff ("Staff") responds to the Petition¹ filed by Louisiana Energy Services, L.P. ("LES") requesting Commission review of certain findings of the Licensing Board in the Third Partial Initial Decision.² As discussed below, the Staff submits that the determinations which LES seeks to have the Commission review are not material to the determination of whether a license may be issued under the Commission's regulations given other Board rulings and are therefore moot. However, because the Board established a new and improper standard for review of decommissioning cost estimates having the potential for impacts beyond this proceeding, the Staff requests that the Commission accept review and vacate the standard adopted by the Board.

BACKGROUND

This proceeding involves the application by LES to construct and operate a uranium enrichment facility to be known as the National Enrichment Facility ("NEF"). The Third PID

¹ Applicant's Petition for Review of LBP-06-15, June 15, 2006 ("Petition").

² *Louisiana Energy Services, L.P. (National Enrichment Facility) LBP-06-15*, 63 NRC ____ (slip op. May 31, 2006). ("Third PID")

resolved the remaining issues in the contested portion of the proceeding after issuance of the first two initial decisions. The contested issues considered in the Third PID concern the strategy for dispositioning the tails, or depleted uranium, which will be generated by the NEF.

From the outset, LES proposed two options for dispositioning of the tails, which require conversion from depleted uranium hexafluoride (“DUF₆”) to a more stable form, before final disposal. LES’s preferred option was to transfer the tails to a private deconversion facility followed by transfer to a licensed disposal facility. Alternatively, LES could transfer the tails to the Department of Energy (“DOE”) for dispositioning pursuant to the USEC Privatization Act.³

The strategy utilized is the premise for determining the cost of the dispositioning of the tails, a necessary component of decommissioning of the facility. Under 10 C.F.R. § 70.25 (e) and similar regulations governing Part 30 and 40 licenses⁴, LES must have a decommissioning funding plan that contains a cost estimate for decommissioning and a description of the method of assuring funds for that amount. The plan must also contain certification that financial assurance for the cost of decommissioning has been provided in the manner specified in § 70.25(f) as demonstrated by a signed original of the financial instrument obtained.

The contested issues considered by the Board in the Third PID involved whether LES’s private strategy for dispositioning the tails was plausible and, if so, whether LES’s cost estimate for that strategy provided a sufficient initial estimate for decommissioning funding. Third PID at 41. The Board noted that the overall purpose of the decommissioning funding requirements is to ensure that an applicant has presented a credible, site specific cost estimate for those activities and has set aside sufficient financial assurance to cover those costs should a third party have to

³ The USEC Privatization act of 1996, 42 U.S.C. § 2297h-11 provides that DOE shall accept for disposal depleted uranium generated by a uranium enrichment facility provided it is determined to be low-level radioactive waste subject to reimbursement in amount equal to the Secretary’s costs, including a pro rata share of any capital costs.

⁴ 10 C.F.R. §§ 40.36(d) and 30.35(e).

take responsibility for decommissioning. Third PID at 32.

Although the sufficiency of the DOE cost estimate was not considered in the context of the admitted contentions, the Board noted that the DOE disposal option had been determined to be plausible by the Commission.⁵ Third PID at 40. With regard to LES's private disposition option, the Board found that although LES has established that its private strategy was plausible, LES had not demonstrated that its cost estimate for that strategy was sufficiently reliable to form the basis of the decommissioning cost estimate for disposition of the tails which would be produced by the NEF. Third PID at 42. In reaching that decision the Board applied what it termed a "reliability" standard which requires either (1) a third party estimate from a knowledgeable experienced provider of the cost for the deconversion service or (2) a thorough analysis from a qualified credible source of what it would cost LES or a third party to build, own, operate, and decommission a deconversion facility at the proposed NEF or some other site. Third PID at 62.

During the course of the hearing, testimony on the underlying basis for the private cost estimate provided by LES and the Staff's review of the cost estimate was provided. While the regulations contemplate that full funding of the decommissioning cost estimate must be demonstrated, the Staff explained that it had granted an exemption requested by LES to allow funding for the dispositioning of the tails over the life of the facility rather than entirely up front and based the amount to be accumulated on LES's preferred option of private disposal. LES Ex. 121 at 1-9 to 1-10; see *also* "Testimony of Timothy Johnson," Tr. at 3430-35 (Feb. 13, 2006). The Staff explained that it had granted the exemption based on the understanding that a

⁵ The Board noted that the Commission stated in the original notice of hearing that transfer to DOE constituted a plausible strategy provided that the depleted uranium tails constituted low-level waste. "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," CLI-04-03, 59 NRC 10, 69 Fed. Reg. 5873 (February 6, 2004) ("Notice of Hearing"). The Commission thereafter determined that depleted uranium is properly considered low-level waste. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-5, 61 NRC 22, 34 (2005).

private deconversion facility would be available in the United States to perform that service during the life of the NEF and that LES would be charged a fee commensurate with the cost of the service to the deconverter. *Id.*

During the hearing, however, LES explained that the Staff's understanding was not correct. LES testified that a private deconversion facility to handle the tails produced by the NEF would not be constructed until after the end of the projected operating life of the NEF. "LES Expert Testimony," Tr. at 2284-85, 2289 (October 25, 2005). Thus, LES expected to accumulate the total amount of funding necessary to construct the deconversion facility during the life of the NEF, thereby obviating the need to acquire capital for construction through other means such as borrowing. *Id.* For this reason, LES did not account for the cost of capital which would be incurred if a private deconversion facility were constructed before the full funding had been acquired by LES. *Id.* Accordingly, LES has explained that under the private deconversion strategy it did not intend to obtain full funding of the cost of dispositioning the tails until the end of the operating life of the NEF. See "Supplemental Prefiled Direct Testimony of Rod Krich on Behalf of Louisiana Energy Services, L.P. Regarding Cost of Cylinder Management and Cost of Capital Issues," at 17-18 (December 29, 2005).

Should decommissioning be necessary before the end of life of the facility, LES observed that the DOE option would be available and fully funded. "Testimony of Rod Krich," (Proprietary), Tr. at 3321, 3365-66, 3379-80, 3434-35, 3442 (February 13, 2006); *see also* "Testimony of Timothy Johnson," Tr. at 3435. Thus, while not its preferred strategy, LES relied upon the cost estimate for the option of transferring the tails to DOE for dispositioning should decommissioning be required before the end of the full operational life of the NEF. *Id.* The cost estimate for the DOE option was based on a cost estimate provided by DOE. The Staff undertook a review of the DOE cost estimate and issued a supplement to the Safety Evaluation Report approving the cost estimate. Staff Exhibit 77-M. Further, the Staff proposed a license

condition requiring that LES provide annual updates of the DOE cost estimate and adjust its funding as necessary to account for those cost estimates. *Id.* at 5. While the Board did not consider the adequacy of the DOE cost estimate in its decision, it noted that the estimate provided by DOE represented the type of arms-length third party cost estimate that would be acceptable under its reliability standard. Third PID at 42.

LES asks that the Commission take review of the Board's decision because the Board has created and applied a novel legal standard for reviewing the decommissioning cost estimate and therefore presents a substantial question of law, policy or discretion that may impact future license applicants. Petition at 2. Further, LES asks the Commission to examine the record before the Board and resolve the issues on the contentions entirely in LES's favor. *Id.* at 7. As discussed below, the Staff agrees that the Board has created a novel standard which presents a substantial question of law and policy which would be expected to affect future licensing reviews and therefore warrants Commission review. The Board's ultimate approval of LES's decommissioning funding was predicated on approval of the DOE cost estimate, rendering any error of the Board as harmless error with respect to the LES proceeding.⁶ However, the Staff believes, as discussed below, that the novel issue raised by the Board's elicitation of the standard for acceptability of decommissioning funding cost estimates has the potential for impacts in the future that is the type of issue the Commission should review in spite of mootness. For the reasons described below, the Staff believes the Commission should vacate the Board's decision as regards the standard applicable to cost estimates.

DISCUSSION

I. Legal Standards Governing Commission Review

⁶ *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-17, 63 NRC __ (June 23, 2006) ("Final PID").

The Commission's regulations in 10 C.F.R. § 2.341(b)(4) provide that the Commission may, in its discretion, grant a petition for review upon consideration of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 422 (2003).

In addition to review pursuant to 10 C.F.R. § 2.341(b)(4), the Commission, through its inherent supervisory authority, may take *sua sponte* review of any matter before an NRC tribunal. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998). The Commission may also direct the presiding officer to certify particular questions for Commission consideration under 10 C.F.R. § 2.319(i). In fact, the Commission has long expressed a desire to review novel issues arising in adjudicatory proceedings, and has “encouraged [boards] to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding.” *Policy on Conduct Of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); see also *Notice of Hearing*, CLI-04-03, 59 NRC at 15-16. Although the Commission as a general rule avoids review of moot issues, the Commission, because it is not bound by the constitutional “case or controversy” requirement applicable to the federal courts, may, under extraordinary circumstances, such as where it is

necessary to clarify an important issue for the future, take review of issues that are not currently part of active controversies. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), *citing Northern States Electric Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979); see also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), 2005 WL 4131564 at *2 (2005) (unreported Commission Decision) (taking review of security requirements imposed by the Board although the issue had been mooted “to avoid any implication that [the Commission] approve[s] the Board-imposed security conditions.”). Although unreviewed Board decisions do not create binding precedent, where unreviewed decisions involve complex issues, the Commission, as a matter of policy, may choose to vacate them in order to prevent future confusion and dispute over their meaning or effect. *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999).

II. The Private Deconversion Strategy Cost Estimate Cannot Satisfy the Decommissioning Funding Requirements

As the Board recognized, the overall purpose of the decommissioning funding requirements is to ensure that sufficient funding is in place to cover the cost of all aspects of decommissioning in the event that the licensee is unable to meet its financial obligations. Third PID at 32; see also Staff Deconversion Testimony at 11-12. In order to satisfy this requirement, an applicant must demonstrate that sufficient funding is in place to cover those costs at any time during construction or operation, not only at the end of the expected operating life of the facility. However, under LES’s plan for private dispositioning of the tails, sufficient funding to carry out the plan will not be accumulated until after the NEF’s operating life. Therefore, to satisfy the regulatory requirements, including 10 C.F.R. § 70.75(e), LES must

demonstrate that it will have sufficient funding to cover the costs of the DOE option.

In recognition of this fact, the Staff conducted a review of the DOE cost estimate and found it to be satisfactorily documented and reasonable. Staff Exhibit 77-M at 5. Further, to ensure that the funding continues to remain adequate even if there are adjustments to the DOE cost, the Staff has imposed a license condition requiring annual updates to the DOE cost estimate and adjustments to the funding level to account for those changes. *Id.* The Staff review was subject to the Board's review in the mandatory portion of the hearing.

The Board, in the Final PID, agreed with the Staff's determination, finding that issuance of the NEF license must be conditioned upon LES providing decommissioning funding in an amount sufficient to cover, at any point during the life of the NEF, the cost of DOE providing dispositioning services for the depleted uranium generated at the NEF pursuant to section 3113 of the USEC Privatization Act, 42 U.S.C. § 2297h-11. Further, the Board found that the Staff's review of this aspect of LES's decommissioning funding plan and associated financial assurance was sufficient, and that the Staff had a reasonable basis for concluding that the DOE cost estimate is reasonable and reliable and should provide the baseline for that portion of LES's decommissioning funding/financial assurance associated with dispositioning depleted uranium from the NEF. Final PID *slip op.* at 40.

Because decommissioning funding was premised upon the DOE option for dispositioning the tails which will be generated by the NEF, the Board's findings as to the adequacy of the private disposal strategy are not necessary to determine compliance with the decommissioning funding requirements and are therefore not material to the decision of whether to license the NEF. For this reason, the Commission could decline LES's request to review the evidentiary record in order to make an independent determination as to whether LES's private cost estimate is adequate. Motion at 6. As discussed below, however, the Staff believes the Commission should exercise its discretion to review the standards applied by the Board in

rejecting the Applicant's private disposal option cost estimate.

III. The Issue Presented Is of the Type the Commission Should Review Even if it Is Moot for This Particular Proceeding

The Applicant has argued that the standard applied by the Board in evaluating the private option for deconversion and disposal cost estimates is contrary to established law and, therefore, should be overturned. Although this issue is now moot, as discussed above, the Commission may exercise its authority to review issues, otherwise moot, that may have an impact on future proceedings. The Staff respectfully submits that the Commission should review the Board's determination with regard to the sufficiency of the deconversion and disposal cost estimates reached through the "reliability standard". Such a fundamental issue as what is the standard to apply to decommissioning cost estimate reviews will have fundamental impacts on future licensing actions. This potential for future impacts, and the apparent inconsistency of the Board's decision with prior Commission decisions as discussed below, makes this issue one on which Commission review should be granted.

IV. The Reliability Standard Utilized by the Board is Too Rigid to Allow for a Case-by-Case Evaluation of Individual License Applications As Contemplated by Prior Commission Decisions

"Reasonable assurance" is well-established as the standard for determining the sufficiency of decommissioning funding cost estimates. 10 C.F.R. § 70.25(e) and similar regulations⁷ mandate that each decommissioning funding plan contain a cost estimate for decommissioning and a description of the method of assuring funds for decommissioning. The Staff has traditionally reviewed decommissioning cost estimates against a standard of "reasonable assurance." See, e.g., NUREG-0584, "Assuring the Availability of Funding for Decommissioning Nuclear Facilities," Revision 3 (Mar. 1983) at 5. This standard was confirmed in the statements of consideration for the final rule revising decommissioning requirements,

⁷ 10 C.F.R. §§ 40.36(d) and 30.35(e).

which states that “it is expected that the requirements contained in amended 10 CFR Parts 30, 40, and 70 will provide reasonable assurance that funds are available for decommissioning nuclear facilities. Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,036 (June 27, 1988).

This standard has since been confirmed numerous times in Commission adjudicatory decisions. For example, in decommissioning a commercial power reactor, “the standard to be applied is whether there is reasonable assurance of adequate funding, not . . . whether that assurance is ‘ironclad.’” *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 259 (1996); see also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 586 (1988). The Commission has stated that while decommissioning cost estimates “must be explained and reasonable” such estimates “need only ‘take into account’ reasonable, common sense judgments on costs one ‘would’ incur.” *Hydro Resources, Inc.*, CLI-04-33, 50 NRC 581, 602 (2004). Reaching a finding of reasonable assurance is not predicated upon having an estimate based upon actual costs incurred on a previous project, nor is it necessary for a cost estimate to have been prepared by an independent contractor providing the actual price expected to charge for completing the proposed decommissioning tasks. *Id.* at 602-603.

The Board, however, has adopted a standard that goes beyond reasonable assurance. According to the Third PID, language in the “Consolidated NMSS Decommissioning Guidance,” NUREG-1757 (2003) stating that decommissioning cost estimates must be based in “documented and reasonable assumptions,” NUREG-1757 at 4-10, “connotes that cost estimate must have a sufficient degree of reliability.”⁸ Third PID at 40. According to the Board, the concept of

⁸ The Board’s reasoning is also based, in part, on its reading of portions of the Staff’s testimony and proposed findings of fact. The Board has to some extent misread the Staff’s testimony and findings. The Staff has been clear that, in reviewing LES’s decommissioning cost estimate, it did not require firm, binding cost estimates. “NRC Staff Rebuttal Testimony Regarding Disposal,” at 7 (October 11, 2005).

“reliability” reflects “an estimate that is sufficiently trustworthy and dependable to be utilized as a basis for making the requisite financial assurance findings.” *Id.* at fn. 30. The Board goes on to state that, in order to put forth a reliable cost estimate, the applicant must submit either: (1) an estimate reflecting the actual price that would be charged for deconversion services from a knowledgeable, experienced third-party; or (2) “a thorough analysis from a qualified, credible source of what it would cost . . . to build, own, operate, and decommission a deconversion facility at the proposed NEF or some other site.” *Id.* at 62.

The Board’s insistence on either an actual third-party estimate for deconversion services or a thorough analysis from a qualified credible source of the cost to build, own, operate, and decommission a deconversion facility is not consistent with prior Commission decisions, particularly the Commission’s decision in *Hydro Resources*. See *Hydro Resources, Inc.*, CLI-04-33, 50 NRC at 602-603 (stating that applicants need not submit a quote of actual costs of decommissioning services from an independent contractor to show that a decommissioning cost estimate is reasonable). Both the regulations and the Commission’s subsequent decisions are clear that requiring an estimate from such sources is not necessary to meet the reasonable assurance standard. In fact, in some cases, such the objective third party estimate or cost analysis would be impossible for license applicants to obtain, particularly when the estimate is for decommissioning activities for which the applicant may not contract until years in the future. For example, in the instant proceeding, the applicants relied to some extent on statements from Waste Control Specialists and Envirocare in order to support the proposition that LES’s estimate of the cost of disposal of depleted uranium is reasonable. See LES Ex. 105; LES Ex. 106. The Staff reviewed the cost estimate and these supporting statements, and

Rather, the Staff reviewed all the information received from LES in context and, utilizing the Staff experts’ experience and judgment, determined whether the information presented was reasonable. See “NRC Staff Consultant Testimony,” (proprietary), Oct. 25, 2005, Tr. 2957 (October 27, 2005).

determined that the estimate was both documented and reasonable. “NRC Staff Testimony Regarding Disposal,” at 7-9 (September 15, 2005) (Tr. at 2831) (“Disposal Direct”). In contrast, the Board found that neither portion of the supporting information shows that “LES has obtained a true third-party estimate of the cost of near-surface disposal of NEF-generated DU of the type we previously have indicated would be sufficient to constitute a reliable estimate.” Third PID at 104. Specifically, the Board rejected the WCS information under its reliability standard, because, as WCS is not yet licensed, the Board does “not believe that WCS, at this juncture, is in a position to provide a reliable cost estimate for near-surface disposal of NEF-generated DU.” *Id.* Similarly, the Board rejected the supporting information from Envirocare because it “reflects an informal estimate” rather than an exact statement of what Envirocare would charge to dispose of DU from the NEF. *Id.*

While the Board seems to require a cost estimate from third party, it is not always possible to obtain such estimates, as the Staff pointed out in its testimony. Disposal Direct at 8. For example, Envirocare, the only facility in the United States currently licensed to accept depleted uranium in the quantities expected from the NEF, does not provide cost estimates to potential customers, but instead negotiates individual price agreements. *Id.* Requiring cost estimates from third parties could, in many cases, be an insurmountable obstacle to licensing, which is not what was intended by the regulations. While an independent estimate from a qualified and credible third party may be the ideal support for a decommissioning funding estimate, the licensing process must take into account the different circumstances facing individual applicants. The Board’s standard does not allow for a flexible, case-by-case evaluation of decommissioning funding estimates, as envisioned by the Commission. *Hydro Resources, Inc.*, CLI-04-33, 60 NRC at 605-606. Therefore, the Staff submits that the “reliability” standard adopted by the Board is inappropriate, and the Commission should take review of the standard and vacate it.

CONCLUSION

For the reasons stated above, the Staff respectfully submits that the determinations by the Board regarding the decommissioning cost estimate for which LES seeks review are not material to the determinations the Commission must make to issue a license for the NEF and, therefore, are moot. Nevertheless, the Board has advanced a novel standard for reviewing the cost estimate that inappropriately exceeds the previous standard set forth by the Commission. For that reason, the Staff respectfully requests that the Commission take review of the Board's standard and vacate it with regard to the standard for reviewing decommissioning cost estimates.

Respectfully submitted,

/RA by Margaret J. Bupp/

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Dated at Rockville, Maryland
this 26th day of June, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S PETITION FOR REVIEW OF LBP-06-15" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 26th day of June, 2006.

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