18116

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'96 DEC 19 P1:36

In the Matter of	)	Docket No. 70-3070-ML
LOUISIANA ENERGY SERVICES, L.P.	)	ASLBP No. 91-641-02-ML
(Claiborne Enrichment Center)	)	December 19, 1996

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

LOUISIANA ENERGY SERVICES ("LES")
10 C.F.R. § 2.786(b)(1)
PETITION FOR REVIEW OF LBP-96-25

I. INTRODUCTION

LES petitions the Commission for review of LBP-96-25.[1/] This is a first of a kind 10 C.F.R. Part 70 proceeding. LES worked with the NRC Staff to assure a full understanding of the existing regulatory regime prior to submission of the application. LES provided the requisite information as confirmed by the Staff in its Safety Evaluation Report ("SER") and Final Environmental Impact Statement ("FEIS"). The Board chose, however, to depart from the established regulatory regime.[2/] Such Board action compels Commission review in order to assure that the policy and regulatory regime it created are followed.[3/] Further, the Commission issued a case-specific Order that identified the regulatory requirements

---

1/ Atomic Safety and Licensing Board's ("Board") second partial initial decision in Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-25, slip op. (December 3, 1996).

2/ See LBP-96-25 at 152-158 (as well as 159-181) for financial qualifications, 98-102 for the no action alternative and 83-92 for need (benefit).

3/ See 56 Fed. Reg. 29,403, 29,405 (June 27, 1991), which states that a Board's disagreement with NRC Staff's findings and recommendations "might likely merit Commission review."

D503

governing this proceeding.[4/] The Commission also should take review to assure the integrity of its Order is maintained.

II. SUMMARY OF THE DECISION

The Board held that LES is not financially qualified to construct the CEC in that it has not demonstrated that it, its partners' corporate affiliates or financial institutions have committed to provide the necessary construction funds. LBP-96-25 at 164. The Board found that the Staff's treatment of the no-action alternative was inadequate and required additional Staff review. Id. at 98, 106. The Board concluded that the Staff's treatment of the need for the facility was inadequate and modified the FEIS accordingly. Id. at 91.

III. ARGUMENT

A. Contention Q — Financial Qualifications

The Board's decision that LES is not financially qualified addresses a matter of first impression, and raises a substantial and important question of law, policy or discretion which should be reviewed by the Commission. 10 C.F.R. § 70.23(a)(5), the governing regulation, requires a finding that the applicant "appears to be financially qualified." Yet the Board's decision imposes, in a rigid and undifferentiated fashion, a much more stringent Part 50 standard. LBP-96-25 at 178.[5/] The Board's interpretation is at

---

[4/] 56 Fed. Reg. 23,310 (May 21, 1991) which implements the 1990 mandate of Congress to distinguish enrichment facilities from power reactors for purposes of NRC licensing. See 104 Stat. 2834, 2835.

[5/] The Board's conclusion that resorting to Part 50 is permissible since Parts 50 and 70 financial reviews were historically the same is based upon a manifest (continued...)

odds with the Commission's case-specific Order (see n.4 supra) excluding 10 C.F.R. Part 50 from this proceeding.[6/]

If the Board's decision is permitted to establish NRC law and policy, the important purposes of the Atomic Energy Act -- to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with public health and safety and to encourage free competition in private enterprise -- will be frustrated. 42 U.S.C. §§ 2013(d), 2011(b). Consistent with the concept of free enterprise is recognition of commercial realities; a licensing decision that ignores these realities is at odds with the Act. The commercial reality is that the financial community will not commit funds for this type of project while awaiting a license, but rather requires that such projects receive regulatory approvals and permits before firm financing is made available.[7/] See Doudiet-Arnold at 31 fol. Tr.563. It is for this reason that LES has

---

[5/](...continued)
misinterpretation of a 1967 statement by the then Director of Regulation to Congress. LBP-96-25 at 139-140. Further, the very fact that the decision goes to such lengths in seeking to rationalize its interpretation indicates that a substantial question of law and policy is raised which requires the Commission's consideration.

[6/] The parties' positions on the legal standard for financial qualifications review of LES are detailed in memoranda filed in this proceeding at the Board's request. See Memoranda dated April 21 and May 1, 1995 (referred to in LBP-96-25 at 127-128).

[7/] The fact that it has so far taken LES nearly six years to reach this as yet incomplete stage in the NRC licensing process, with no end in sight, confirms the wisdom of the financial markets in requiring a borrower, in a project such as this, to have regulatory approvals in hand before making financial commitments.

pursued a "venture phase", during which the project evolves from engineering to licensing, then to contracting for construction and marketing of project capacity and finally to obtaining financing.[8/] LBP-96-25 at 130-131, 160.[9/]

The policy implications of the decision are likewise significant. If this decision is permitted to stand, it will have a chilling effect on future Part 70 ventures.

B. Contention K — No Action Alternative

LES and the Staff maintain that the no-action alternative is the converse of the cost-benefit and environmental impact analyses. LBP-96-25 at 96. Consistent with this view, the Staff's consideration of the no-action alternative directs the reader to the environmental impacts contained in other parts of the FEIS. Id. at 96. The Board, however, judged the adequacy of the no-action analysis in isolation, refusing to refer to any other portion of the FEIS. Id. at 94, 98-104. The Board's approach is at odds with NEPA's rule of reason, as well as both NRC licensing

---

[8/] Any question as to whether LES's financing plan will be realized will be answered by the financial markets and will act as a sufficient *de facto* precondition to construction and operation.

[9/] The Board's finding that public health and safety considerations are "equally involved regardless of whether the financial qualifications review is conducted under Part 70 or Part 50" (LBP-96-25 at 150) is at odds with the Commission's view, as reflected for example in the emergency planning requirements applicable to the CEC, which are less stringent than those applied to power reactors in light of the acknowledged diminished risk. See 54 Fed. Reg. 14,051, 14,052, and 14,057 (1989). For the same reason that the CEC emergency plan may be approved prior to finalization of implementing procedures, the NRC may conclude that LES "appears to be financially qualified" prior to the actual commitment of funds for construction, based on its financial plan.

and federal court decisions,[10] and thereby warrants Commission review.

In refusing to review the impact analysis in the FEIS, the Board found erroneously that "the Staff chose to ignore the avoided environmental impacts that must be addressed in an analysis of the no-action alternative." Id. at 101. The FEIS (pp. 4-1 through 4-76) fully evaluates the impacts that would be avoided in a no-action scenario, including surface and ground water and air quality impacts and disposal of tails.[11]

---

[10] See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 198 n.7 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991) (EIS demonstrates that the discussion of the socioeconomic and environmental impacts of *inaction* is the flip side of the discussion of the impacts of *action*; information the dissent argues is lacking in the no action alternative discussion is already available for consideration elsewhere in the FEIS); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-74-22, 7 AEC 659, 672 (1974)("Direct environmental benefits of not building are, of course, the absence of the direct environmental costs of building and operating the plant. These environmental costs were thoroughly described and analyzed in the FES and were found by the Staff to be acceptable. The societal, economic and environmental costs of not constructing a plant of any kind were also discussed in the FES, there in terms of benefits of providing the plant."); Farmland Preservation Assoc. v. Goldschmidt, 611 F.2d 233, 238-39 (8th Cir. 1979) (two paragraph discussion of "no action" alternative was adequate because "there was not much to say about the alternative. The adoption of the [no action] alternative would simply have left things as they were ...."; opinion quotes the two paragraphs of the EIS, which state "[the no action alternative] obviously would avoid the direct costs incurred in construction but, at the same time, project goals remain unfulfilled."); Sierra Club v. Adams, 578 F.2d 389, 396 (D.C. Cir. 1978) (court reads the FEIS "as a whole" to conclude that it is adequate); Tongass Conservation Society v. Cheney, 924 F.2d 1137 1143 (D.C. Cir. 1991) (court finds that Petitioner's charge that only one paragraph of the FEIS evaluates socioeconomic issues is without merit in that "[t]he main body of the FEIS" addresses the issue).

[11] The Board's finding that the FEIS incorrectly relies upon secondary benefits such as jobs creation is at odds with long-

(continued...)

C. Contention J.4 — Need For The Facility

The CEC would be the first privately owned, federally license ., domestic uranium enrichment plant and would bring to the U.S. the benefits of safe and efficient advanced centrifuge technology which has been employed for 25 years abroad. When compared to the aging, energy intensive gaseous diffusion plants of the only existing U.S. supplier, this element is significant both to the national interest in fostering competition and maintaining a secure source of domestic supply and to the environmental interest in minimizing emissions.

The Board's decision is fundamentally flawed. In focusing exclusively on "need" in terms of price competition, the Board ignored the singular importance U.S. utilities attach to the presence of an alternate domestic supplier of enrichment services. LES has made repeated reference to this "need" for the CEC (see Schwartz-LeRoy at 12, 13, 38, 39-40), as has the NRC Staff (see, e.g., FEIS § 1.4). Numerous licensees, representing approximately half of the Nation's licensed power reactors, made similar statements in their comments on the DEIS. See, e.g., FES, Vol. 2 at 3-37, 39, 98 and 119. The Board utterly disregarded the salutary benefits of a second domestic supplier upon security,

---

11/ (...continued)
standing regulatory guidance (Reg. Guide 4.9, Rev. 1 at 4.9-25, 26), is premised on unique and inapplicable power reactor case law, and is inconsistent with federal case law. See Robinson v. Knebel, 550 F.2d 442 (8th Cir. 1977) (FEIS cost-benefit analysis held adequate where loss of productive farmland was offset by favorable effects on the economy, including employment, produced by the proposed project); Citizens Against Burlington, 938 F.2d at 197 which specifically references with approval the FEIS' consideration of employment and wages.

diversity and reliability of supply, and ignored the "free competition in private enterprise" which the CEC will foster. 42 U.S.C. § 2011(b). The Board also ignored the benefits of centrifuge technology, particularly its reduced environmental impacts as compared to existing domestic facilities. These clear errors deserve Commission review.[12/]

With respect to the benefit the Board did address, it did so in a fashion that erroneously characterizes the enrichment market.[13/]

12/ The Board's reliance on Intervenor's witness is misplaced. Case law permits an appellate body, such as the Commission, to review the Board's determination of the weight to be given to expert witnesses. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 732-33 (1985). Intervenor's expert witness Mr. Osterberg's credentials are noted in LBP-96-25 at 21-23; LES's expert witness Mr. Schwartz's credentials are noted in LBP-96-25 at 19-20 (see also Schwartz-LeRoy at 2-4, 22, 28-33 fol. Tr. 383); importantly, Mr. Schwartz works in the enrichment market; Mr. Osterberg does not.

13/ Some examples of this error are:

- The Board mischaracterizes a $2-3 reduction in SWU price as "pocket change". LBP-96-25 at 87-88. A $2-3 reduction would result in a $600 million - $900 million savings to U.S. rate payers over the life of the CEC.

- The Board erroneously discredited LES's caveat that if any major sources of enrichment services were interrupted, then the expected level of world demand would exceed supply. Id. at 55. The Commission need only consider the political instability of Russia.

- The Board improperly found that currency exchange risks will not limit European producers' ability to lower prices to compete for American business. Id. at 90. Currency exchange risks are added to European suppliers' costs, thereby limiting their ability to reduce price.

- The Board erroneously assumed that existing suppliers will reduce prices such that LES, with high capital costs, will not be able to compete. Id. at 85, 88.

(continued...)

In addition, The Board's consideration of need was improper. LES has maintained that it will be a new source of consistent service and will be price competitive in the marketplace, and the Board agreed. See, e.g., LBP-96-25 at 40-42, 44, 73-74, 76-77, 91. The Board, however, focused on a different issue, viz., whether the CEC will operate at "significantly lower costs that translate into significantly lower prices." LBP-96-25 at 85. But the CEC need not cause lower prices in order to demonstrate that it is "needed". The reasonable test under NEPA is whether the CEC can compete in the marketplace and thus increase competition, not whether prices

---

13/(...continued)
Since the market is already competitive, significant price reductions could not likely be sustained.

- The Board improperly discounted LES's assumption that "USEC will not act aggressively to keep LES from entering the market" Id. at 88. USEC did not suggest it would act aggressively to keep LES from entering the market. Further, the Board's surmise that competitors would act "to keep LES from entering the market" (emphasis added) suggests predatory pricing action by those competitors in violation of Section 2 of the Sherman Act.

- The Board was in error in discrediting ERI's demand forecast. Id. at 82, 86. ERI's forecast revision was caused by unusual developments, e.g., Russia's subsequent very significant reduction in the expansion of its nuclear power program, which was unknown at the time of ERI's 1990 demand forecast.

- The Board erred in referring to SWU's as "an historical anachronism". Id. at 45. A SWU remains the accepted unit of reference for sources of enriched uranium.

- The Board was in error in citing to Intervenor witness' statement that on-going worldwide expansion of enrichment production capacity should not be viewed as a justification of the need for additional supply since such expansion is based upon "national policy considerations" Id. at 53. URENCO, one of the cited suppliers, is not expanding for national policy considerations.

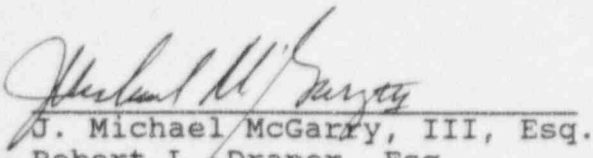
will be reduced. It was error for the Board to erect this straw man and thereby negatively skew the benefit side of the NEPA equation.

IV. CONCLUSION

This application for the use of a safe and environmentally benign advanced technology is about to enter its seventh year of pendency. LBP-96-25 is only a partial decision which leaves three contentions yet to be addressed by the Board despite the fact that the evidentiary hearing on this second phase of the proceeding was completed more than 20 months ago. At that, the decision is incomplete, long overdue, and fraught with error. This calls into question whether this or any applicant for an NRC license may expect prompt and efficient action from the NRC. The Commission should promptly review and reverse this decision as erroneous and thereby reinstill confidence in the NRC licensing process. The Commission is also requested to direct the Board to issue the remainder of the decision promptly.

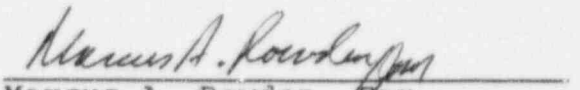
For the reasons stated, the Commission should grant this petition for review.

LOUISIANA ENERGY SERVICES, L.P.



J. Michael McGarry, III, Esq.
Robert L. Draper, Esq.

WINSTON & STRAWN



Marcus A. Rowden, Esq.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

ATTORNEYS FOR LOUISIANA ENERGY SERVICES, L.P.

Dated at Washington, D.C.,
this 19th day of December, 1996

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3070
(Claiborne Enrichment Center)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Louisiana Energy Services 10 C.F.R. § 2.786(b)(1) Petition for Review of LBP-96-25" were served upon the following by deposit in the United States mail, first class, this 19th day of December, 1996:

Administrative Judge
Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(2 copies)

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge
Frederick J. Shon
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Chief, Docketing and Service Section
(Original plus 2 copies)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Eugene Holler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ronald Wascom, Deputy Assistant Secretary
Office of Air Quality & Radiation Protection
P.O. Box 82135
Baton Rouge, LA 70884-2135

Joseph DiStefano, Esq.
Quinn, Racusin & Gazzola
1401 H Street, N.W.
Suite 510
Washington, D.C. 20005

Robert G. Morgan - WC26B
Licensing Manager
Duke Engineering & Services, Inc.
400 South Tryon Street
Charlotte, NC 28201-1004

Diane Curran
Harmon, Curran, Gallagher & Spielberg
2001 S Street, N.W.
Suite 430
Washington,D.C. 20009-1125

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

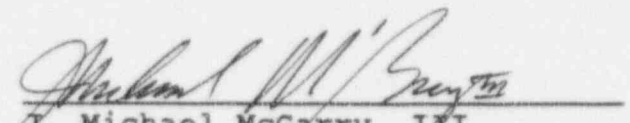
Thomas J. Henderson, Esq.
David S. Bailey, Esq.
Lawyers' Commmittee for Civil Rights Under Law
1450 G Street, N.W.
Suite 400
Washington, D.C. 20555

Marcus A. Rowden
Fried, Frank, Harris, Shriver & Jacobsen
1101 Pennsylvania Avenue, N.W.
Suite 900 South
Washington, D.C. 20004

Nathalie Walker
Sierra Club Legal Defense Fund
400 Magazine St.
Suite 401
New Orleans, LA 70130

Roland J. Jensen
Louisiana Energy Services, L.P.
2600 Virginia Avenue, N.W.
Suite 608
Washington D.C. 20037

LOUISIANA ENERGY SERVICES, L.P.



J. Michael McGarry, III
WINSTON & STRAWN,
ATTORNEYS FOR LOUISIANA ENERGY SERVICES, L.P.

* Hand Delivery