

UNITED STATES OF AMERICA
BEFORE THE U.S. NUCLEAR REGULATORY COMMISSION

In the Matter of)

Louisiana Energy Services)

(Claiborne Enrichment Center))

) Docket No. 70-3070

) November 6, 1996

**CITIZENS AGAINST NUCLEAR TRASH'S
REPLY TO LES' AND NRC STAFF'S OPPOSITIONS
TO MOTION FOR PARTIAL RECONSIDERATION OF CLI-96-08
AND CONDITIONAL MOTION TO PERMIT LATE FILING**

Citizens Against Nuclear Trash ("CANT") hereby replies to the Answer of Applicant Louisiana Energy Services In Opposition to Intervenor's Motion for Partial Reconsideration of CLI-96-08 (October 28, 1996) (hereinafter "LES' Opposition") and NRC Staff's Answer Opposing Intervenor's Motion for Partial Reconsideration of CLI-96-08 (October 29, 1996) (hereinafter "NRC Staff's Opposition"). As discussed below, their arguments in opposition to CANT's request for reconsideration are without merit.

I. CANT PROPERLY SEEKS RECONSIDERATION OF ISSUES RAISED IN ITS PETITION FOR REVIEW AND EMBRACED BY CLI-96-08.

LES and the NRC staff first argue that CANT may not question the adequacy of the offsite volunteer fire department to undertake primary responsibility for a severe fire at the Claiborne Enrichment Center ("CEC"), because it did not specifically raise that issue in its Petition for Review. LES' Opposition at 4, NRC Staff's Opposition at 6.¹ This argument mis-

¹ The NRC staff also argues that CANT's Motion may not question whether the offsite volunteer fire department's preparedness to carry out its primary fire fighting responsibilities satisfies Regulatory Guide 3.67, because CLI-96-08 rejects CANT's argument that regulatory guides prescribe requirements. NRC Staff's Opposition at 5. This is patently

construes the nature of CANT's Petition for Review and CANT's grounds for seeking reconsideration. In its Petition for Review, CANT argued that the Licensing Board could not assign the NRC staff responsibility for post-hearing resolution of LES' inconsistent representations regarding who has primary responsibility for fighting onsite fires. Petition for Review at 5. Instead, CANT argued, the Board must resolve the question "on the record, after giving the parties an opportunity to comment or otherwise be heard." Id. at 6. CANT contended that the deficiencies to be corrected "are not purely administrative," giving as an "example" the potential need for adjustments to the training and size of the onsite fire brigade. Id. at 7.

Thus, the gravamen of CANT's Petition for Review was that the issue of who is primarily responsible for fighting onsite fires should be remanded, with an opportunity for the parties to comment on the implications of whatever change or clarification to the record LES might make. CANT could not, nor was it required to, list every one of the implications on which it sought to comment during the remand, within the ten-page limit imposed by 10 C.F.R. 2.786(b)(2). Rather, CANT satisfied its

(continued)

incorrect. All that the Commission concluded in CLI-96-08 was that CANT's "other" arguments in its Petition for Review, regarding issues not directly related to the volunteer fire department's primary responsibility for fighting onsite fires, did not meet the standard for granting a petition for review. CLI-96-08, slip op. at 1 note 1.

burden of demonstrating that a remand and opportunity for comment by the parties was needed.

CANT also notes that the unusual procedural course taken by the Commission in this case gave CANT only the narrowest opportunity to elaborate on the implications of LES' clarification as to who has primary responsibility for fighting onsite fires. Commission regulations require a party filing a petition for review to address a multi-pronged standard within a ten-page limit. 10 C.F.R. § 2.786(b)(2) and (4). If the Commission grants a petition for review, it generally provides for a full briefing of the issues which, by necessity, are only touched upon in the Petition for Review. See 10 C.F.R. § 2.786(b)(6). In this case, however, the Commission granted CANT's Petition for Review without conducting any further briefing, and instead attempted to resolve the case based on the very limited briefing contained in the Petition for Review and opposing briefs. As a result, CANT respectfully submits, the Commission failed to recognize the fundamental issue inevitably raised by its own decision: once the Commission resolved the ambiguity and confusion with respect to which organization has primary responsibility for fighting onsite fires, it became necessary to examine whether the record supports a finding that the entity is trained and qualified to assume that primary responsibility.

Second, LES claims that CANT's Motion is barred because the Commission did not specifically take up the question of the

qualifications of offsite firefighters to take primary responsibility for fighting onsite fires. LES' Opposition at 4. As it did with the Petition for Review, LES misconstrues CLI-96-08. CANT's Motion is embraced by CLI-96-08 because the Commission did take up the question of whether the clarification of fire fighting responsibility could be referred to the staff or must be resolved on the record. CLI-96-08, slip op. at 1. The Commission decided to resolve the issue on the record, but declined to allow any comment or briefing by the parties on the implications of LES' clarification, as CANT sought. CANT's Motion legitimately seeks reconsideration of the Commission's failure to allow further comment by the parties on the implications of LES' clarification.

Finally, LES claims that CANT's Motion must be denied because the Licensing Board has already ruled on the qualifications of offsite fire fighters to respond to an onsite fire at the CEC. LES' Opposition at 6-9. LES' argument, however, begs the question. As both the Licensing Board and the Commission have noted, the question of who has primary onsite responsibility for fighting a severe onsite fire is "important." CLI-96-08, slip op. at 3, quoting LBP-96-7, 43 NRC at 161. All of the Licensing Board's findings cited by LES, with respect to qualifications and training of offsite fire fighters, were made under the cloud of confusion and uncertainty created by LES' ambiguous statements about the division of responsibility for

fighting severe fires at the plant. There is no record basis for a finding that offsite fire fighters are specifically trained and qualified to take primary responsibility for a severe onsite fire at the CEC. In the absence of such a finding, the concept of onsite emergency planning for the CEC or any other such facility is rendered a sham: a license applicant could satisfy NRC regulations by simply assigning its own emergency responsibilities to some offsite agency.

II. CANT'S MOTION IS TIMELY.

Both LES and the NRC staff contend that CANT's Motion is untimely. LES' Opposition at 2 note 2, NRC Staff's Opposition at 4. They contend that, pursuant to 10 C.F.R. § 2.771, CANT was required to file its Motion within ten days of "the date of the decision," October 2, 1996. Because the due date -- October 12 -- was a Saturday, October 13 was a Sunday, and October 14 was a federal holiday, they contend that the Motion was due October 15.

However, in filing its Motion on October 17, within fifteen days of service of CLI-96-08, CANT reasonably read § 2.771 in conjunction with §§ 2.710 and 2.712(a). Section 2.710 adds five days to the response period:

[w]henver a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon by mail.

This regulation must be read in conjunction with 10 C.F.R. § 2.712(a), which requires the Commission to "serve all orders, decisions, and other notices" it issues on all parties. CANT

reasonably interpreted these regulations, taken together, to provide that CANT's obligation to file a Motion for Reconsideration was not triggered until it received service of the Commission's decision, which the Commission presumes to occur five days after service under 10 C.F.R. § 2.710.

Thus, the narrow reading of 10 C.F.R. § 2.771 suggested by LES and the NRC staff improperly ignores the Commission's other regulations which oblige the Commission to serve its decisions upon all parties by mail, and which provide those parties with a fair opportunity to respond by compensating for the unpredictability of the mail service. CANT can see no basis for carving out an exception to these procedural protections.²

III. EVEN IF THE COMMISSION DETERMINES THAT CANT'S MOTION IS LATE, THE COMMISSION SHOULD ALLOW IT.

In the alternative, should the Commission find that CANT's Motion was untimely, CANT requests that the Commission nevertheless accept it. The ten-day time limit on seeking reconsideration is not jurisdictional, and thus may be extended by the Commission.

The Commission has good cause to issue an extension and allow the filing of CANT's motion. As the Licensing Board and

² CANT is aware of no Commission decision which directly addresses the timeliness argument raised by LES and NRC. The case cited by the NRC staff in support of its position, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 2 (1988), is inapposite, because the motion for reconsideration in that case was filed 19 days after the decision. It might have been considered timely had it been filed within 15 days.

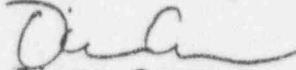
the Commission have both observed, the question of who has primary responsibility for fighting a fire at the CEC is an "important" one. CLI-96-08, slip op. at 3, quoting LBP-96-7, 43 NRC at 161. Where the Commission is "concerned with the substance of the matter," it has full authority to review a motion for reconsideration, even where the movant has failed to satisfy all procedural requirements. Tennessee Valley Authority (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 462 (1978) (endangered species issue taken up by Appeal Board).

Moreover, as the NRC staff acknowledges, CANT's motion is only two days out of time. NRC Staff's Opposition at 5, note 7. Thus, the impact of CANT's lateness is de minimis. Indeed, given that the bulk of this operating license proceeding is still pending before the Licensing Board, a delay of two days should have no effect whatsoever on the timing of a final decision or the issuance of a license to LES. Accordingly, the Commission should exercise its discretion to allow the late filing of CANT's Motion for Partial Reconsideration of CLI-96-08.

IV. CONCLUSION

For the foregoing reasons, CANT's Motion for Partial Reconsideration of CLI-96-08 should be granted.

Respectfully submitted,



Diane Curran
Harmon, Curran, and Spielberg
2001 "S" Street N.W.
Suite 430
Washington, D.C. 20009
(202) 328-3500

Nathalie M. Walker
Sierra Club Legal Defense Fund
400 Magazine Street, Suite 401
New Orleans, LA 70130
(504) 522-1394

Counsel to Citizens Against
Nuclear Trash

November 6, 1996

CERTIFICATE OF SERVICE

I, Diane Curran, certify that on November 6, 1996, copies of the foregoing CITIZENS AGAINST NUCLEAR TRASH'S MOTION FOR LEAVE TO FILE REPLY TO LES' AND NRC STAFF'S OPPOSITIONS TO MOTION FOR PARTIAL RECONSIDERATION OF CLI-96-08 and CITIZENS AGAINST NUCLEAR TRASH'S REPLY TO LES' AND NRC STAFF'S OPPOSITIONS TO MOTION FOR PARTIAL RECONSIDERATION OF CLI-96-08 AND CONDITIONAL MOTION TO PERMIT LATE FILING were served by by first-class mail on the following parties:

Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Off. of Appellate Adjudication
U.S. Nuclear Regulatory Comm.
Washington, D.C. 20555

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

Peter G. LeRoy
Duke Engineering
230 South Tron Street
P.O. Box 1004
Charlotte, NC 28201-1004

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

W.H. Arnold, President
LES, L.P.
2600 Virginia Ave. N.W.,
Suite 608
Washington, D.C. 20037

Secretary of the Commission
Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Nathalie M. Walker, Esq.
SCLDF
400 Magazine St., Suite 401
New Orleans, LA 70130

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

Marcus A. Rowden, Esq.
Fried, Frank, Harris, etc.
1101 Pennsylvania Av. N.W.,
Suite 900S
Washington, D.C. 20004

J. Michael McGarry, III, Esq.
Robert L. Draper, Esq.
Winston & Strawn
1400 L Street N.W.
Washington, D.C. 20005-3502

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

Ronald Wascom, Deputy Asst. Secretary
Office of Air Quality & Radiation Protection
Department of Environmental Quality
P.O. Box 82135
Baton Rouge, LA 70884

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

96 NOV 12 AM 01

DOCKETED
USNRC

Shirley Ann Jackson, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Kenneth C. Rogers, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Diane Curran