

183/3

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED  
USNRC

97 MAY 15 A11:40

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
Louisiana Energy Services, L.P.	)	Docket No. 70-3070-ML
	)	
(Claiborne Enrichment Center)	)	
	)	

---

NRC STAFF'S REPLY TO OPPOSITION BRIEF OF  
INTERVENOR, CITIZENS AGAINST NUCLEAR TRASH,  
ON APPEAL OF LBP-96-25

---

Richard G. Bachmann  
Eugene Holler  
Counsel for NRC Staff

May 15, 1997

9705190135 970515  
PDR ADOCK 07003070  
C PDR

DS07

May 15, 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REPLY TO OPPOSITION BRIEF OF  
INTERVENOR, CITIZENS AGAINST NUCLEAR TRASH,  
ON APPEAL OF LBP-96-25

INTRODUCTION

On February 13, 1997, the Commission issued an Order granting petitions filed by Louisiana Energy Services, L.P. (LES or Applicant) and the staff of the Nuclear Regulatory Commission (Staff) for review of a Partial Initial Decision (Resolving Contentions J, K, and Q) by the Atomic Safety and Licensing Board (Board) designated to preside over this proceeding.<sup>1</sup> On March 13, 1997, the Staff, LES, and the Nuclear Energy Institute (NEI) each filed briefs in support of Commission reversal of LBP-96-25.<sup>2</sup> On April 30, 1997, intervenor Citizens Against Nuclear Trash (CANT) filed

---

<sup>1</sup> *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-3, 45 NRC 49 (1997), *granting review of LBP-96-25*, 44 NRC 331 (1996).

<sup>2</sup> NRC Staff's Brief in Support of Commission Reversal of LBP-96-25 (Staff Brief), Applicant's Brief in Support of Its Petition for Review of LBP-96-25 (LES Brief), and NEI Amicus Brief on Review of Licensing Board Decision LBP-96-25 (NEI Brief). The Commission granted NEI's motion for leave to file an *amicus curiae* (continued...)

"Opposition Brief of Intervenor, Citizens Against Nuclear Trash, on Appeal of LBP-96-25" (Opposition Brief). The Staff hereby files its reply to CANT's Opposition Brief. For the reasons set forth below, and in the Staff's March 13, 1997 brief, the Board's Partial Initial Decision in LBP-96-25, resolving Contentions J.4, K, and Q, should be reversed.

### BACKGROUND

In this combined construction permit-operating license proceeding, LES seeks a 30-year license to possess and use byproduct and source materials, and special nuclear material (SNM), to enrich uranium using a gas centrifuge process at the proposed Claiborne Enrichment Center (CEC) to be constructed in Claiborne Parish, Louisiana. CANT opposes issuance of the license and, after establishing standing and proposing several admissible contentions, was granted leave to intervene and admitted as a party to the proceeding. On December 3, 1996, the Board issued a partial initial decision, LBP-96-25, resolving three of these contentions.<sup>3</sup> The Board sustained Contentions J.4 and

---

<sup>2</sup>(...continued)

brief in this matter. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-4, 45 NRC \_\_\_\_ (March 21, 1997).

<sup>3</sup> This was the second of four partial initial decisions in this proceeding. In its first partial initial decision, the Board resolved three safety contentions in favor of the Applicant. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996); *petition for review granted in part and denied in part*, CLI-96-8, 44 NRC 107 (1996); *motion for partial reconsideration denied*, CLI-97-2, 45 NRC 3 (1997). In its third partial initial decision, resolving Contentions B and J.3, the Board sustained the contentions to the extent that, in the Board's view, LES's cost estimate for the conversion of  $\text{DUF}_6$  to  $\text{U}_3\text{O}_8$  was not a reasonable one given LES's failure to include the costs of neutralizing the conversion process byproduct hydrofluoric acid. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center),  
(continued...)

K, dealing with LES's environmental report (ER), by concluding that the Staff's treatment of the need for the facility and the no-action alternative in the final environmental impact statement (FEIS) is inadequate. LBP-96-25, 44 NRC at 404. The Board also sustained Contention Q which challenged LES's financial qualifications to construct the CEC. *Id.*

### DISCUSSION

#### A. The FEIS's Discussion of Need

In its brief supporting reversal of LBP-95-25, the Staff asserted that the Board applied the wrong legal standard in that the Board relied on reactor cases which held that the need for power was "shorthand" for the benefit side of the cost-benefit analysis. The Board applied this standard to an enrichment facility and determined that need for additional separative work units (SWUs) was the "shorthand for the need of the facility." Staff Brief at 3-6. The Staff asserted that the Board ignored the Staff's and Applicant's positions that the "need" was for an additional supplier using more efficient and secure production methods. *Id.* Further, the Staff argued that the Board disregarded relevant evidence in that the Board ignored Applicant's evidence regarding diversity of producers and security of supply. Staff Brief at 7.

---

<sup>3</sup>(...continued)

LBP-97-3, 45 NRC \_\_\_\_ (March 7, 1997). Both LES and CANT have filed petitions for review of LBP-97-3. In its fourth partial initial decision, resolving Contention J.9, which the Board styled the Final Initial Decision, the Board sustained the contention and denied the Applicant's request for a construction and operating license, without prejudice to the Applicant amending the license application. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC \_\_\_\_ (May 1, 1997). The time within which parties may petition for review of LBP-97-8 has not expired yet.

In its Opposition Brief, CANT argues that the Board applied the correct standard citing the "shorthand" argument at LBP-96-25, 44 NRC at 348-349. Opposition Brief at 9. In light of the guidance which is directly applicable to materials licensees, CANT fails to explain why the Board's standard should be applicable to materials license applicants. Thus, for the reasons set out in the Staff's March 13, 1997 brief, CANT's argument should be rejected. See Staff Brief at 3-6.

CANT asserts that the Board did not ignore the "benefits" of diversity of producers and security of supply but found that those benefits could not be realized if LES could not enter the market. Opposition Brief at 12-16. CANT further argues that the Board found as a factual matter that LES would not be able to enter the enrichment market. Opposition Brief at 12-13. Relying on *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403 (1976), CANT argues that it is not enough for LES to take issue with these factual matters, but must present "substantial" evidence compelling a different result. Opposition Brief at 16.

Although CANT is correct with regard to the substantial evidence rule's application to a reviewing court, the *Duke Power* Appeal Board made clear that, "the substantial evidence rule's constraints on court review do not fetter the agency's decision-making authority." *Duke Power Co.*, ALAB-355, 4 NRC at 403. The Appeal Board left no doubt that

the APA [Administrative Procedures Act] does not bind any agency to accede to its examiner's - or licensing board's - initial decision because it is unsupported by 'substantial evidence' or it is not 'clearly erroneous.' Where the administrative record considered as a whole will fairly sustain a result deemed preferable by the agency to the one selected by its initial decision

maker, the law is clear that the agency may substitute its judgment for its subordinate's.

*Duke Power Co.*, ALAB-355, 4 NRC at 403, *citations omitted*.<sup>4</sup>

LES presented its evidence regarding its assessment of the market place and how it intended to compete, and CANT presented its evidence regarding LES's potential for success. As discussed above, the Commission, once it has this matter under review, is not constrained by the Board's assessment of that potential. Further, the chances of LES being able to enter the market place is a separate matter from determining what constitutes the "need" for the facility. The success or failure of LES to enter the market place, does not change the fact that the "need" for the facility is as presented by the Applicant and supported by the Staff: diversity of producers and security of supply.

B. The FEIS's Discussion of the No-Action Alternative

In its brief supporting reversal of LBP-96-25, the Staff asserted that the FEIS must be read as a whole and that the FEIS meets the legal standard of allowing the agency to take a hard look at the environmental consequences of the decision. Staff Brief at 12-14. The Staff also argued that the Board erroneously applied reactor law in concluding that secondary benefits must be excluded from the cost-benefit analysis. Staff Brief at 7-9. The Staff relied on the fact that the regulatory guide for enrichment facilities specifically

---

<sup>4</sup> See also *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1087 n.12 (1983) (although the Board is the primary fact finder, Commission's own view of the record will determine the outcome of the case on appeal). Cf. *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (demonstrating that the record may support a view different from that of the Board is insufficient for a petition for review resting *solely* on the clearly erroneous criterion of 10 C.F.R. § 2.786(b)(4(i)).

includes secondary benefits and that their inclusion is consistent with federal practice. Staff Brief at 7-8. Further, the Staff observed that it was not aware of any materials licensing cases holding to the contrary. Staff Brief at 11.

CANT argues that other provisions of NRC and Council on Environmental Quality (CEQ) regulations strike a careful balance between brevity and completeness and that alternatives must be discussed "in comparative form." Opposition Brief at 24. CANT asserts that the no-action alternative fails to identify a single specific avoided impact. Opposition Brief at 25. CANT further argues that the FEIS discussion of the no-action alternative is so lopsided as to violate the rule of reason. Opposition Brief at 26.

CANT's argument fails to demonstrate that the avoided impacts associated with the no-action are not identified. CANT's argument does not explain why referring to the avoided impacts, listed in another section of the FEIS, is not sufficient to satisfy the "comparative form" requirement. As the Staff asserted in its brief supporting reversal of LBP-96-25, the purpose of an FEIS is to allow the agency to take a hard look at the environmental impacts of the alternatives. Staff Brief at 14. This purpose is satisfied by the FEIS's treatment of the no-action alternative.

Regarding the inclusion of secondary benefits in the ultimate cost-benefit balance, CANT argues in its brief that there is "no plausible rationale" offered for throwing out 30 years of reactor law regarding secondary benefits. Opposition Brief at 27. Citing *Citizens Awareness Network v. NRC*, 59 F.3d 284, 291 (1st Cir. 1995), CANT argues that the Staff must announce and explain the basis for any proposed change regarding how secondary benefits are considered in an FEIS. *Id.*

Again, CANT fails to recognize that the CEC is not a nuclear power plant. Contrary to CANT's assertion, the Staff was not changing the rules for a materials license applicant, such as LES. Staff Brief at 9. The exception for power reactor licenses was made in 1975. At that time, the regulatory guide for power reactor license applications was revised to account for secondary benefits only to the extent that those benefits offset the socioeconomic impact the proposed plant might have upon local communities. Staff Brief at 9. Thus, rather than changing the rules as CANT argues, the Staff, in fact, was following the long established rules for materials licensees.

Notable is CANT's failure to confront federal practice regarding secondary benefits. As the Staff demonstrated in its brief supporting reversal of LBP-96-25, including secondary benefits in the ultimate cost-benefit analysis is not contrary to federal law, and is, in fact, consistent with federal practice. Staff Brief at 7-8.

In summary, the guidance for reactor and materials license applicants started the same in that both required the inclusion of secondary benefits in the cost-benefit analysis. The practice of not including such benefits was initiated for reactor license applicants only. Thus, the change for reactor license applicants was a departure from the normal practice; not the opposite as CANT argues.

#### C. The Requisite Financial Qualification

In its brief supporting reversal of LBP-96-25, the Staff asserted that the Board erroneously rejected the Applicant's assertion that the Part 70 financial qualifications standard is less prescriptive than the Part 50 standard. Staff Brief at 15. The Staff also argued that the Board erroneously rejected the Staff's assertion that Part 50, Appendix C,

should be used only as a guide in determining financial qualifications of an applicant and that not all of its provisions are suitable, particularly regarding newly formed entities. Staff Brief at 19.

CANT argues that the subject matter at issue is financial qualifications, not what kind of facility is involved. Opposition Brief at 32. According to CANT, this means that the Part 50 and Part 70 requirements must be construed *in pari materia*. *Id.* Therefore, CANT asserts, the Part 50 requirements must apply because the Commission has only interpreted the Part 50 regulations. *Id.*

CANT still refuses to recognize two different standards. If the Commission wanted the regulations to be the same, it would have made them the same when it was revising the Part 50 regulations. The Commission's regulations contain examples in which the Commission has either repeated a regulation in various parts or specifically modified the regulation. For example, the requirement for completeness and accuracy of information submitted to the Commission contained in Part 50 for reactor licensees (10 C.F.R. § 50.9) is repeated verbatim in other parts of the regulations, including Part 30 for byproduct material licensees (10 C.F.R. § 30.9), Part 40 for source material licensees (10 C.F.R. § 40.9) and Part 70 for special nuclear material licensees (10 C.F.R. § 70.9). By contrast, the Commission's requirement that "special circumstances" must be present for the Commission to consider granting a specific exemption to the Part 50 regulations (10 C.F.R. § 50.12(a)(2)), is not a requirement for the Commission to consider granting a specific exemption to, among others, the Part 30 regulations (10 C.F.R. § 30.11), the Part 40 regulations (10 C.F.R. § 40.14), or the Part 70 regulations (10 C.F.R. § 70.14).

In the statement of considerations accompanying the revision of the Part 50 regulations to include the need for "special circumstances," the Commission considered the need for "similar and consistent language throughout its regulations." 50 Fed. Reg. 50764, 50775 (1985). The Commission stated "exemptions from the provisions of each part of the regulations must be evaluated and granted under the exemption provisions contained in that part." *Id.* Similarly, the provisions for financial qualification must be considered under the financial qualification provisions contained in that part.

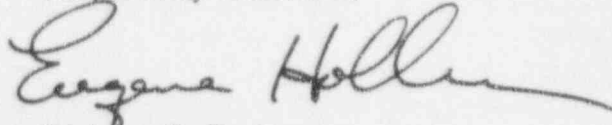
CANT argues that it is not legally significant that the Hearing Order for this proceeding does not reference the Part 50 regulation in that the Commission has long applied the same criteria in a Part 70 financial qualifications review as in a Part 50 review. Opposition Brief at 34-36. However, CANT cites no examples to support this theory that the Commission has applied the same standard to Part 70 applicants. CANT also argues that "if the Commission had intended that financial qualifications for newly formed Part 70 license applicants mean something different than financial qualifications for Part 50 applicants, it would have said so in promulgating the Part 50 regulations -- but it did not." Opposition Brief at 40. As the Staff noted in its brief supporting reversal at 20, interpretation of any regulation must begin with the language and structure of the provision itself. *Long Island Lighting Company* (Shoreham Nuclear power Station, Unit 1), ALAB-900, 28 NRC 275, 288, *reviewed declined*, CLI-88-11, 28 NRC 603 (1988). The language of the Part 70 regulation and the Part 50 regulation are different, and the plain language of the Part 70 regulation indicates a less restrictive standard than that imposed by the language of the Part 50 regulation.

CANT also argues that LES has failed to demonstrate reasonable assurance even under the standard proposed by LES and the Staff. Opposition Brief at 49. To support its assertion, CANT cites a statement made by an LES official to the press about obtaining financing. Opposition Brief at 50, n.50. CANT argues that to be reasonable, the Applicant's financial plan must be probable of success. If the LES official did not think the financial plan would be successful when he made the referenced statement, the plan was not reasonable. Further, according to CANT, nothing has changed since the statement was made, therefore, the plan remains unreasonable. *Id.* The Staff maintains its position that a statement by an LES official to the press regarding financing of the project which expresses apprehension about obtaining financing, does not reflect on the "reasonableness" of the financing plan. Staff Brief at 23. The provisions of the plan are what must be assessed to determine whether the plan is reasonable or not.

#### CONCLUSION

For the reasons set forth above, the Commission should reverse the Board's decision in LBP-96-25.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Eugene Holler".

Richard G. Bachmann  
Eugene Holler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 15th day of May 1997

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'97 MAY 15 A11:40

BEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(Claiborne Enrichment Center)

)  
)  
)  
)  
)

Docket No. 70-3070-ML

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO OPPOSITION BRIEF OF INTERVENOR, CITIZENS AGAINST NUCLEAR TRASH, ON APPEAL OF LBP-96-25" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk or by facsimile transmission, as indicated by a double asterisk, or by hand delivery, as indicated by a triple asterisk, this 15th day of May, 1997:

Office of the Secretary (16)\*\*\*  
ATTN: Rulemakings and Adjudications  
Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Thomas S. Moore, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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

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

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

J. Michael McGarry, III, Esq.\*\*  
Winston & Strawn  
1400 L Street, N.W.  
Washington, DC 20005

Robert G. Morgan\*  
Duke Engineering & Services, Inc.  
P.O. Box 1004  
Charlotte, NC 28201-1004

Marcus A. Rowden, Esq.\*  
Fried, Frank, Harris  
Shriver & Jacobsen  
1101 Pennsylvania Avenue, N.W.  
Suite 900 South  
Washington, DC 20004

Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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

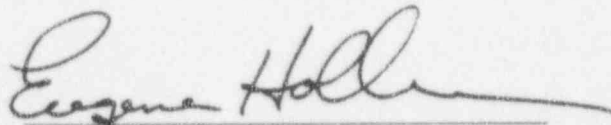
David S. Bailey, Esq.\*  
Thomas J. Henderson, Esq.  
Lawyers' Committee for Civil  
Rights Under Law  
1450 G Street N.W., Ste. 400  
Washington, DC 20005

Roland J. Jensen\*  
Louisiana Energy Services, L.P.  
2600 Virginia Avenue, N.W.  
Suite 608  
Washington, DC 20037

Office of the Commission Appellate  
Adjudication  
Mail Stop: 16-G-15 OWFN  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Nathalie M. Walker, Esq.\*\*  
Sierra Club Legal Defense Fund  
400 Magazine Street, Ste. 401  
New Orleans, LA 70130

Joseph DiStefano, Esq.\*  
Urenco Investments, Inc.  
Suite 610  
2600 Virginia Ave., N.W.  
Washington, DC 20037



Eugene Holler  
Counsel for NRC Staff