Nuclear Information and Resource Service

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

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Rules and Directives Branch

Dear Mr. Lesar:

The Nuclear Information and Resource Service (NIRS) hereby submits our comments to the notice published as 67 Federal Register 61932-61933, otherwise known as the Louisiana Energy Service (LES) "white papers."

THE NRC MUST REFUSE TO MAKE PRE-HEARING DECISIONS ON THE ISSUES PROPOSED BY LES IN THE "WHITE PAPERS."

The NRC Commissioners have no choice but to reject LES' request for a pre-hearing decision on several key issues that may come up in licensing hearings on its proposed uranium enrichment plant. The LES proposals should have been rejected at the Staff level; they must now be rejected utterly and completely by the Commissioners. There are a number of reasons why the Commission should reject the request:

1. We are aware of no authority or recognized procedure under which the NRC may decide the issues in a case before the case has begun. NRC regulations provide that a licensing proceeding cannot commence until the application has been docketed and notice provided to the affected public of their opportunity to be heard. If an applicant could get the NRC to anticipate and

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prejudge all of the significant issues in a prospective case, this would transform the hearing guaranteed by the Atomic Energy Act into a total mockery.

2. It would violate basic notions of common sense for the Commission to rule on basic issues such as those outlined in the LES "white papers" before an application is even submitted, and before any substantive information about the proposed LES plant is provided to the Agency.

3. If the NRC is treating the White Papers as a request for rulemaking, it must comply with relevant procedural requirements of the Administrative Procedures Act as well as NRC's own regulations. The NRC must publish a *Federal Register* notice which alerts the public that it is proposing to issue a rule, provides the text of the proposed rule, and discusses the agency's own rationale for the proposed rule. Merely publishing the White Papers and giving the public an opportunity to comment on them does not provide sufficient notice of any proposed action by the Commission.

4. If LES does ultimately file a license application and a hearing is granted, the Commission will become the appellate body for Atomic Safety and Licensing Board (ASLB) decisions. If the Commissioners now propose to prejudge issues that are likely to be centrally important in the licensing case, they will taint the entire proceeding. How could the Commissioners serve as dispassionate appeals judges if they already have taken substantive positions on important issues that might arise before the ASLB? To what body would members of the public and state and local governments be able to appeal ASLB decisions not to hear certain issues, based on NRC Commissioner determination that these issues should not be heard in a licensing case? Clearly, the only recourse would be federal appeals court, an unwieldy option that would have the unintended effect (by LES anyway) of actually slowing down the licensing process while an appeals court heard whether certain issues can be heard by an ASLB.

5. Members of the ASLB are not wild-eyed radicals or anti-nuclear activists. They are, in fact, employees of the Nuclear Regulatory Commission with legal and technical expertise whose entire jobs are exactly to determine and judge issues such as those which LES is asking the NRC to pre-determine. Undercutting the ASLB's authority on the very basics of the Board's function—determining what contentions that may be offered by intervenors are valid and meet the agency's regulations—would go beyond any reasonable level of involvement by the Commission in the ASLB decisionmaking process, and would completely undercut the credibility of the ASLB as a tribunal for hearing licensing disputes that are raised before the NRC.

We note that the ASLB has, in every instance in every initial licensing hearing of a major nuclear facility ever brought before it, ultimately ruled in favor of the applicant; i.e. the ASLB ultimately has allowed the applicant to be granted a construction and/or operating license, save one. That one, was of course, LES, when the company sought to build a similar uranium enrichment plant near Homer, Louisiana.

We understand LES' chagrin over the outcome of the licensing hearings on that proposed facility. But the mere fact that a nuclear entity actually, for once, lost a case is not sufficient grounds to attempt to circumvent the rules for public hearings. In other words, just because the public actually won one does not give LES the right to try to shut the public out the second time around. We note that the issues that LES wants the NRC to rule on, before a hearing is noticed, before an application even is submitted, are many of the exact issues that LES had problems with in its previous incarnation. But the proper response for LES is to prepare its application properly, follow the rules properly, propose to build a plant only if it is needed, not engage in environmentally racist activities, and so forth—in other words, to do exactly what every existing nuclear facility has managed to do: play by the rules. That LES is seeking to change the rules before the game has begun is itself evidence that this company has learned nothing from its previous experience, other than taking the art of being self-serving to new heights. It also suggests that the company's character may itself be worthy of examination before the ASLB. That LES wants the NRC Commissioners to go along with this arrogant and self-serving approach should be a personal affront to each Commissioner.

6. It certainly would be comforting for LES, and any potential applicant, to know before even submitting a license application that all potentially controversial issues that may come up in the public hearing process already have been considered and determined. Enron two years ago probably would have welcomed a decision that its practices weren't cheating California ratepayers. WorldCom would have liked a court somewhere to determine that its accounting practices were sound before they were investigated. By their very nature, contentions submitted by intervenors—who are members of the public, and their government officials—are controversies. That these issues are controversial therefore should be no surprise to anyone. Resolving controversies is the entire function of the judicial process. In the case of the NRC, the process consists of an "independent" Atomic Safety and Licensing Board appointed to hear and resolve contentions, or controversies (as ASLB employees are NRC employees, their independence is open to question). The ASLB must follow NRC regulations and legal precedent in determining whether contentions may be heard. This is an established and known process for all major nuclear facility applicants. The simple, and in this case obvious, desire of an applicant to avoid this established process is not sufficient reason to destroy literally decades of regulation and legal precedent. We also would suggest that acceding to LES in this fashion would surely bring about considerable legislative oversight, with potentially far-reaching consequences.

7. We recognize that the public comment period on the LES "white papers" was provided at our request, and we appreciate the Agency's willingness to provide this period. However, our request was made only because the NRC staff already had requested comments from the U.S. Enrichment Corporation and the Department of Energy, and appeared prepared to make recommendations on the contents of the "white papers" without any public input. We believe the NRC staff should have rejected the LES approach outright, and should never have sought

comment from USEC or DOE. Thus, our request for a public comment period should in no way be misconstrued as an agreement that LES' position has any validity whatsoever.

THE NRC NEED NOT RULE UPON THE "SUBSTANCE" OF THE LES "WHITE PAPERS"

Because of our adamant belief that LES' request for a pre-hearing, pre-application determination of basic issues is inappropriate, unwarranted, contrary to regulation and with no basis in law, and is indeed, preposterous, we do not believe it is necessary to provide comments on the "substance" of LES' "white papers" or proposed recommendations.

However, we will note that the "substance" of the "white papers" is slim at best. In effect, LES is asking the Commission to anticipate what will constitute significant contested issues and to make rulings on them, based on only a few paragraphs of discussion for each issue. Not only are the legal and factual arguments extremely thin, but they are not accompanied by any factual details regarding the nature of the application that is to be submitted. How, for example, could the NRC rule that it need not consider an analysis of the need for a facility and No Action Alternative under NEPA when it does not factually know the size of the plant LES wishes to construct?. Is it 1,500,000 SWU, as was proposed in Louisiana? Is it 3,000,000 SWU as some press accounts have reported? Is it 10,000,000 SWU? If the need is established in advance, before LES has made a legal commitment to the size and design of its proposed plant, then what is to prevent LES from building anything it wants to? Moreover, LES has completely failed to mention that NFS, a current NRC license, is proposing to blend down a significant quantity of high-enriched uranium at its Erwin, Tennessee, facility. Any consideration of the need for an LES enrichment plant should also consider whether it would undercut plans to downblend HEU, an activity that has been identified as an important step in reducing international vulnerability to illegal diversion of HEU and fabrication of nuclear weapons. This should be an extremely important consideration in the post-9/11 environment.

Among other things, LES seeks to have the NRC determine that acceptance by DOE of LES's radioactive/hazardous UF6 tailings, or waste, would be a "plausible strategy" for disposal. This argument is ludicrous, given that DOE has no idea what to do with its own billion pounds of this material, which is now lying around at USEC and other facilities. LES also fails to mention the key fact that the tails are not appropriately classified as "low-level" radioactive waste, a determination without which the LES proposal would fail. Finally, LES provides no information regarding the quantity of tails that would be produced—which can factually only be established through the filing of a formal license application and Environmental Impact Statement. Thus, it is impossible to know whether the tails are covered by the USEC Privatization Act, or whether it is "plausible" that DOE could accept this material. We also add that "acceptance" by DOE, if that were to occur, may not mean removal from the proposed LES plant site—a point which neighbors to the site may find of great import and which may be relevant to the ASLB for a variety of reasons.

Similarly, LES seeks to impose its own preferred parameters for determining whether the proposed plant falls under the President's environmental justice order. Again, without a license application, it is not even factually determined where a proposed plant may be located, and what environmental justice considerations may arise. Clearly, LES is looking at a location near Hartsville, Tennessee; at this point, however, it has not received even local permission to construct a facility there. But if it can achieve its own environmental justice parameters before even making application, what is to prevent it from locating elsewhere, say in Northeast Washington DC or perhaps Homer, Louisiana?

In short, what little substance there is to LES' "white papers," and we would point out there is very little substance, is completely irrelevant and without any factual basis. There is no license application. No formal documents have been submitted to the NRC, to the best of our knowledge—and as we are on the Service List for this project, we assume we would have heard of any such submittals. Therefore, there is nothing that would allow the NRC to meaningfully evaluate any claim or assertion in the "white papers."

At the most generous interpretation possible, LES' requests are premature and must at least await factual materials such as a full and detailed license application before any consideration is given. As noted above, however, LES even fails here, because the existing and well-established process requires establishment of an Atomic Safety and Licensing Board, whose entire function is to determine what contentions that the public and their government representatives may raise and seek hearing on are permissible, and then to hear and rule upon those contentions judged permissible.

CONCLUSION

In our view, LES' request itself is evidence that this is the kind of corporation Americans have had enough of—a corporation that wants to cut corners for its own benefit, a corporation that seeks special treatment and privilege unavailable to ordinary citizens, a corporation that prefers backroom deals to open resolution of issues, a corporation that seeks to protect itself from the public, rather than welcoming public scrutiny of its activities. In short, LES already—even before it applies for a license—is continuing its tradition as a company with something to hide.

That in itself should give the NRC Commissioners great pause. The Agency already is under increased examination by the public and elected officials for its unwarranted deference to its licensees, particularly at Davis-Besse. The Agency's licensing processes are about to receive their greatest test yet, as the proposed high-level atomic waste dump at Yucca Mountain, Nevada, draws closer to the licensing and public hearing phase.

To, at this point, demonstrate the kind of blatant favoritism toward LES that the company is seeking would be a mistake that the Commission might not recover from for years, if not

decades. We urge the Commission not to make this far-reaching blunder, and instead to reject all of LES' recommendations and "white papers" completely, thoroughly, and permanently.

NIRS is certainly prepared to take any and all actions necessary to support our views.

Sincerely,

Michael Mariotte
Executive Director

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