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November 8, 2002

Mr. Michael Lesar
Chief, Special Projects and Inspection Branch
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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Rules and Directives

RE: Docket No. 70-3103, Louisiana Energy Services Gas Centrifuge
Enrichment Facility Request for Comment 76 Fed. Reg. 61932

Dear Mr. Lesar:

The Nuclear Energy Institute (NEI)¹ is pleased to submit the following comments in response to the subject Federal Register notice concerning the proposed Louisiana Energy Services (LES) Gas Centrifuge Enrichment Facility. LES submitted six "white papers" to the NRC on April 24, 2002, requesting clear Commission direction on the issues set forth in the papers, because their resolution would be essential to the conduct of an efficient review process.

NEI notes that two separate entities, LES and USEC Inc., (USEC) are in the process of preparing license application submittals for gas centrifuge enrichment facilities in the United States. NEI fully supports the deployment of new advanced technology commercial uranium enrichment facilities in the United States. We believe that deployment of advanced enrichment technology in this country is

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry

Open file = ADM-013

EX-1175 = ADM-03
ADM = T. Johnson (TEJ)



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essential to ensuring that sufficient competitively produced enrichment services will be available for current and future nuclear generation facilities.

The establishment of a reasonable, evenhanded, predictable and timely licensing process is a necessary step to ensure that new facilities can be deployed. This may entail the NRC reconsidering many of its approaches to issues that had their genesis in the electric utility industry of five decades ago, but which no longer represent the best way to address these matters (e.g., how the requirements of the National Environmental Policy Act (NEPA) can be more effectively met). The NRC has exhibited responsible leadership with predictable and timely procedures for license renewal applications for generating facilities. NEI and the industry look forward to working with the NRC to achieve the same effectiveness in the licensing process for enrichment facilities.

Our specific comments on the issues raised by LES are provided below.

Issue 1: Analysis of Need and No-Action Alternative under NEPA

NRC regulations currently require that the NRC include in an Environmental Impact Statement a description of the need for a proposed project and an analysis of the no-action alternative (10 CFR Part 51, Appendix A). The Commission's comprehensive decision in the *Claiborne Enrichment Center* proceeding (CLI-98-3) in 1998 contained a thoughtful analysis of the "need" and the "no-action alternative" issue evaluations conducted pursuant to 10 CFR Part 51 for the Claiborne project. The bases for the conclusions with respect to the proposed Claiborne uranium enrichment facility at that time appear to be still material today to LES's proposed Hartsville, Tennessee facility. However, a number of developments have occurred in the ensuing four years (e.g., the inclusion of nuclear energy as a cornerstone in the President's National Energy Plan; the potential for new orders of nuclear power plants, including the development of three different applications for early site permits under 10 CFR Part 52; the continually improving performance of the current fleet of nuclear power plants that results in an increased demand for fuel; the reduction in operating and maintenance costs of nuclear power plants that results in fuel costs becoming a larger proportion of production costs) that have made the need for a competitive fuel market even stronger. Thus, there is even a greater "need" now than there was four years ago for a competitive nuclear fuel market, which necessarily requires reliable and cost-competitive uranium enrichment capacity.

In addition, it would be appropriate for the Commission to reconsider its responsibilities under NEPA to determine the "need" for any facility for which a license application is filed requesting approval under the Atomic Energy Act. NEPA does not require an agency to consider the "need" for a facility. However, the

NRC determined that it should consider “need” as a part of its evaluation of the proposed major federal action (i.e., issuing a license) and the consideration of alternatives thereto, including the no-action alternative.

Fundamentally, whether a facility is “needed” should be a business decision, not a licensing decision; it is not the NRC’s responsibility under the Atomic Energy Act, or NEPA, to determine whether a proposed facility represents a wise business decision, or not. In fact, under the Atomic Energy Act, it remains the U.S. national policy to develop the peaceful uses of nuclear energy. Any facility that contributes to the attainment of that objective should be encouraged, assuming that it meets applicable NRC rules and regulations.

NEI believes that the approach recommended by LES is one reasonable way to address this issue. However, given the developments described above, we recommend that the Commission reevaluate the much broader issue of the NRC’s responsibilities under NEPA as documented in the industry’s petition for rulemaking designated PRM-52-2 filed July 18, 2001.

Issue 2: Environmental Justice

NEPA established the process by which Federal agencies, including the NRC, are to consider the environmental and health implications of a proposed major federal action. The NRC’s regulations codifying its responsibilities are contained in 10 CFR Part 51, *Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions*. NEPA has not been amended since its enactment in 1969.

However, in 1994, President Clinton issued Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*, 3 CFR 859 (Executive Order). The President also issued an accompanying “Memorandum for the Heads of All Departments and Agencies,” *Memorandum on Environmental Justice*, (Presidential Memorandum). The Commission has applied that Executive Order in two major cases; the *Claiborne Enrichment Center* (CLI-98-3); and more recently in *Private Fuel Storage LLC* (CLI-02-20). In both cases, the Commission observed that the Executive Order, by its explicit terms, established no new rights or remedies. That admission notwithstanding, the Commission has chosen to allow contentions filed under claims of “environmental justice” to be litigated in licensing proceedings, thereby violating the very principle it has acknowledged applies.

LES has proposed one method to demonstrate compliance with current NRC guidance related to environmental justice. However, separate from this proceeding, the Commission should reconsider its entire approach to the issue of environmental justice. The Executive Order and the accompanying Presidential Memorandum

make it clear that the Executive Order applies only to recipients of Federal funding, which NRC licensees or license applicants clearly are not, and the process by which NRC allows contentions on environmental justice grounds to be litigated is also inconsistent with the explicit terms of the Executive Order.

Although no one would disagree with the fundamental precepts of the Executive Order, the reasonableness of the underlying societal principle does not transform the Executive Order into something it is not – a potential basis for litigating, and perhaps even denying, what might otherwise be an activity that meets all pertinent NRC rules and regulations. Finally, the NRC does not have the authority under existing law to enforce discrimination against one sector of the local community to relieve what might be seen to be an adverse impact against another sector of the local community, or to deny a license outright to a facility that otherwise meets all applicable rules and regulations but might be determined to have an adverse impact (other than environmental or health impacts) on one sector of the local community.

Issue 3: Financial Qualifications

The issue of financial qualification was contested in the initial LES licensing proceeding. In that proceeding, the Commission rejected a negative ASLB decision on financial qualifications. In CLI-97-15, the Commission established two conditions that needed to be satisfied by LES prior to constructing or operating the proposed facility:

1. Construction of the facility shall not commence before funding is fully committed, and LES must have in place before construction a minimum of equity contributions of 30 percent of project costs from parents and affiliates of LES partners, as well as firm commitments ensuring funds for remaining project costs.
2. LES shall not proceed without long term enrichment contracts (i.e., 5 years) with prices sufficient to cover both construction and operating costs, including return on investment, for the entire term of the contracts.

LES now requests that the Commission's initial hearing order in the current proceeding should set forth these two conditions and state that, if satisfied, they constitute the required showing for purposes of demonstrating that the applicant is financially qualified.

NEI supports the LES request that the incorporation of Commission determinations from the previous proceeding is appropriate and would aid in improving the efficiency of this specific licensing proceeding. We agree that the foregoing criteria,

if satisfied, would constitute one method of making the required showing. However, we also agree with USEC's comment that alternative means of demonstrating financial qualification may be available and preferred by other applicants. Hence, the Commission also should note that these criteria do not constitute the sole method of demonstrating financial qualification.

Issue 4: Antitrust Review

The uranium enrichment facility proposed by LES must comply with all Federal laws enacted to prohibit antitrust activities. Under Section 105 of the Atomic Energy Act, *Antitrust Provisions*, the NRC is responsible for reporting promptly to the Attorney General any information it may have with respect to any potential violation of the antitrust laws and to take such action as it may deem necessary with respect to any license issued by the Commission. The pertinent federal laws include those listed in Section 105a. However, the proposed LES facility does not fall within the strictures of Section 105c. Thus, no NRC antitrust review is required in this proceeding.

Issue 5: Foreign Ownership

The licensing of a uranium enrichment facility does not require the NRC to determine if the facility is to be "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government" as would be required for the licensing of a production or utilization facility under Section 103 of the Atomic Energy Act. Rather, as in the case of all NRC licensing actions, the overarching purpose of the Atomic Energy Act is to promote the development and use of atomic energy for peaceful purposes "to the maximum extent consistent with the common defense and security and with the health and safety of the public." Thus, the test the Commission should apply in this context is whether the issuance of the license requested would be inimical to the common defense and security.

Issue 6: Tails Disposition

Management of the depleted uranium hexafluoride (DUF_6) produced in the enrichment operation may entail conversion to a stable form followed by beneficial commercial use or disposal. Conversion of the DUF_6 may be performed under contract by the DOE at one of its proposed facilities planned for the Paducah, KY or Portsmouth, OH facilities. The resulting depleted uranium oxide (DUO_2) or depleted uranium metal (DU) constitutes source material that can be used in numerous commercial applications, such as radioactive shielding, downblending of highly-enriched DOE and military orphan uranium materials or non-proliferation derived HEU, or in the formulation of U_3O_8 feedstock for uranium recovery mills. Alternatively, the NRC may authorize disposal of stable forms of depleted uranium

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in licensed radioactive waste facilities. The Commission should consider such disposal as constituting a "plausible strategy" as noted by LES. However, other strategies that preserve the potential beneficial value of the tails material are also possible.

We would be happy to discuss the above comments with the NRC if you have any questions. Again, we look forward to working with you to achieve an effective licensing process for uranium enrichment facilities.

Sincerely,


Steven P. Kraft