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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

LBP-05-07

**DOCKETED 03/18/05**

**SERVED 03/18/05**

Before the Chief Administrative Judge:

G. Paul Bollwerk, III

In the Matter of

EXELON GENERATION COMPANY, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

ASLBP No. 04-821-01-ESP

March 18, 2005

In the Matter of

DOMINION NUCLEAR NORTH ANNA, LLC

(Early Site Permit for North Anna ESP Site)

Docket No. 52-008-ESP

ASLBP No. 04-822-02-ESP

March 18, 2005

In the Matter of

SYSTEM ENERGY RESOURCES, INC.

(Early Site Permit for Grand Gulf ESP Site)

Docket No. 52-009-ESP

ASLBP No. 04-823-03-ESP

March 18, 2005

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

March 18, 2005

MEMORANDUM

(Certifying Questions Regarding Mandatory Hearing Procedures)

Four different Licensing Boards currently have before them proceedings in which the agency's initial public notice mandated that the Boards hold a hearing and make certain

mandatory findings.<sup>1</sup> These will be the first mandatory hearings held by a Licensing Board in more than two decades. Three of these proceedings -- the Clinton and North Anna 10 C.F.R. Part 52 early site permit (ESP) proceedings and the Louisiana Energy Services, L.P. (LES) 10 C.F.R. Part 70 uranium enrichment facility proceeding -- are contested (i.e., have admissible contentions that are being litigated, see 10 C.F.R. § 2.4 (definition of “contested proceeding”)) while one -- the Grand Gulf ESP proceeding -- is uncontested (i.e., had no admissible contentions). After consultation with the members of the four Boards, the Chairmen of these Boards have conferred and determined that, pursuant to 10 C.F.R. §§ 2.319(l), 2.323(f), these four proceedings involve certain common and novel questions relative to the proper conduct of the mandatory hearings that merit Commission review at the earliest opportunity. Accordingly, pursuant to 10 C.F.R. § 2.341(f), the Chief Administrative Judge certifies these questions, which are set forth in more detail in section II below, for authoritative resolution by the Commission.

## I. OVERVIEW

### A. Statutory and Regulatory Provisions

The statutory genesis of the “mandatory” hearing that is applicable in all these proceedings is the second sentence of section 189a(1)(A) of the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2239(a)(1)(A), providing that “[t]he Commission shall hold a hearing after thirty days’ notice and publication once in the Federal Register, on each application . . . for a construction permit for a [production or utilization] facility . . . .” To implement this mandatory

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<sup>1</sup> See Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004); Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 250 n.10 (2004); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 274 n.10 (2004); System Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 298 (2004).

hearing requirement, which is applicable to both the ESP and the LES proceedings,<sup>2</sup> the Commission has promulgated a regulatory provision, 10 C.F.R. § 2.104(b), regarding the content of a notice of hearing. Section 2.104(b) provides as follows:

1. For an uncontested proceeding, “[w]ithout conducting a de novo evaluation of the application,” the Board “will determine” if:

(1) “the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission’s staff has been adequate to support affirmative findings on” whether:

(i) “in accordance with the provisions of § 50.35(a)” whether:

(a) “[t]he applicant has described the proposed design of the facility, including, but not limited to, the principal architectural and engineering criteria for the design, and has identified the major features or components incorporated therein for the protection of the health and safety of the public”;

(b) “[s]uch further technical or design information as may be required to complete the safety analysis, and which can reasonably be left for later consideration will be supplied in the final safety analysis report”;

(c) “[s]afety features or components, if any, which require research and development, have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to resolve any safety questions associated with such features or components”; and

(d) “[o]n the basis of the foregoing [(i.e., (1)(i)(a)-(c) above)], there is reasonable assurance that (1) such safety questions will be satisfactorily resolved at or

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<sup>2</sup> See 10 C.F.R. §§ 52.21, 70.23a, 70.31(e).

before the latest date stated in the application for completion of the proposed facility; and (2) taking into consideration the site criteria contained in part 100 of [10 C.F.R.], the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public”;

(ii) “the applicant is technically qualified to design and construct the proposed facility”;

(iii) “the applicant is financially qualified to design and construct the proposed facility”;

and

(2) “the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission’s staff has been adequate to support . . . a negative finding” on whether “the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public;” and

(3) “the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate.”

10 C.F.R. § 2.104(b)(2).

2. For a contested proceeding, the Board “will consider” -- albeit absent the uncontested proceeding directives that it do so (1) “without conducting a de novo evaluation of the application”; and (2) based on whether “the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission’s staff has been adequate to support affirmative findings” -- items (1) (i) (a), (b), (c), and (d), (ii), and (iii) above, as well as whether:

(iv) “the issuance of a permit for the construction of the facility will be inimical to the common defense and security or to the health and safety of the public”;

(v) “in accordance with the requirements of subpart A of part 51 of [10 C.F.R.], the construction permit should be issued as proposed.”

10 C.F.R. § 2.104(b)(1).

3. Regardless of whether the proceeding is contested or uncontested, in accordance with Part 51,<sup>3</sup> the Board will make the following three basic or “baseline” NEPA findings:

(i) “[d]etermine whether the requirements of section 102(2)(A), (C) and (E) of [NEPA] and subpart A of [10 C.F.R. Part 51] have been complied with in the proceeding”;

(ii) “[i]ndependently consider the final balance among the conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken”; and

(iii) “[d]etermine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.”

10 C.F.R. § 2.104(b)(3).

Additionally, relative to the general question of the scope of mandatory hearings, it previously was the Commission’s established policy that “[a]s to matters pertaining to radiological health and safety which are not in controversy, boards are neither required nor expected to duplicate the review already performed by the staff and [Advisory Committee on Reactor Safeguards (ACRS)], and they are authorized to rely upon the testimony of the staff, the applicant, and the conclusions of the ACRS, which are not controverted by any party.” That policy, which was codified at 10 C.F.R. Part 2, App. A, § V(f)(1) (contested proceeding), see also id. § V(f)(2) (uncontested proceeding), was deleted when Part 2 was revised in January 2004. See 69 Fed. Reg. 2182, 2274 (Jan. 14, 2004).

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<sup>3</sup> Specifically, the provision of 10 C.F.R. Part 51 that is implicated is section 51.105(a)(1)-(3).

B. Hearing Notices in ESP and LES Proceedings

As its reference to section 50.35(a) makes apparent, the focus of the existing section 2.104 is power reactor proceedings, in particular construction permit proceedings. While the LES and ESP proceedings involve construction authorization, they differ from the classic reactor construction permit proceeding with respect to the type of facility construction being authorized (i.e., LES is a uranium enrichment facility) or the scope of the authorization (i.e., an ESP authorizes only site preparation activities, subject to a site redress plan). In its hearing notices, however, the agency set forth instructions regarding the conduct of mandatory hearings that are specific to these two types of proceedings, which we have summarized in the table that accompanies this memorandum.

With respect to AEA safety matters in the contested and uncontested ESP proceedings, the notices label as Safety Issues 1 and 2 what are essentially the elements of section 2.104(b)(1)(i)(d)(2) (10 C.F.R. Part 100 criteria) and section 2.104(b)(1)(iv) that clearly are pertinent to ESP applications.<sup>4</sup> See, e.g., 69 Fed. Reg. 2636, 2636 (Jan. 16, 2004). So too, in its section II.F regarding contested cases, the LES notice references the standards in section II.C of the LES notice. See Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-3, 59 NRC 10,13 (2004). In turn, section II.C of the LES notice references the specific AEA safety provisions in Parts 30, 40, and 70 that apply to uranium enrichment facilities. See id. at 12. As to NEPA matters, both the ESP and LES notices reference what

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<sup>4</sup> Because an ESP is a partial nuclear power plant construction permit, see 10 C.F.R. § 52.21, the notices generally follow the requirements of 10 C.F.R. § 2.104(b)(1)-(3) for facility construction permits. At the ESP stage, however, the applicant is not required to know or to specify the type or design of a nuclear reactor to be used at the site, but must provide the parameters of the types of reactor or reactors for which it seeks site approval. See id. § 52.17(a)(1). Accordingly, the ESP notices need not provide an outline of a proposed facility design, major features or components, safety features of components, and technical qualifications, that otherwise would need to be specified for a construction permit application under 10 C.F.R. § 2.104(b)(1)(i)-(iii). See also id. § 52.79.

has been referred to above as the three “baseline” NEPA findings that, in accord with 10 C.F.R. § 51.105(a) (1)-(3) (see also id. § 2.104(b)(3)), must be made in either a contested or uncontested proceeding. Additionally, both notices reference the NEPA mandatory hearing findings that are required, depending upon whether a proceeding is contested or uncontested. See id. §§ 2.104(b)(1)(v), 51.105(a)(5) (contested proceeding); id. §§ 2.104(b)(2)(ii), 51.105(a)(4) (uncontested proceeding).

At the same time, the notices create some uncertainty about the exact scope of the review that is required of Licensing Boards for mandatory proceedings. For example, in contrast to section 2.104(b)(2) and the LES notice that explicitly state uncontested proceedings are not to involve a de novo application review, there is no mention of such a review limitation in the ESP notices. See, e.g., 69 Fed. Reg. at 2636. So too, in accord with section 2.104(b)(3)(iii), the ESP notices indicate that the NEPA review for either contested or uncontested cases is to include a determination of whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values. These notices, however, contain an additional clause not set forth in section 2.104(b)(3)(iii) directing that such a determination should be arrived at “after considering reasonable alternatives.” Id.

#### C. Parties’ Suggested Approaches to Conduct of Mandatory Hearings

In an effort to develop a unified approach, each of the Licensing Boards currently involved with mandatory hearings requested that the applicant and the staff propose procedures that might be adopted by that Board for the mandatory hearing. The resulting recommendations fall into three distinct categories. The applicant and the staff have proposed in the LES hearing that the Board’s conclusion can be based solely upon summary documents provided by the applicant and the staff, coupled with a hearing involving questions raised by the

Board on those summaries.<sup>5</sup> In stark contrast, the applicants and the staff in the Clinton and Grand Gulf ESP cases have suggested that such a conclusion must rest upon a thorough review of the application, the safety evaluation report (SER) and final environmental impact statement (FEIS) and the ACRS recommendations, followed by a hearing on questions from the Board.<sup>6</sup> For the North Anna ESP proceeding, however, the applicant and the staff have suggested an approach that appears to be fall somewhat between these two, noting that the Board “does not make the findings itself but rather determines whether the application and the record contain sufficient information, and the review of the application by the Staff has been adequate to support the Staff’s proposed findings.”<sup>7</sup>

## II. ANALYSIS AND CERTIFIED QUESTIONS

Given the seeming ambiguity between portions of the various notices and the underlying regulations, and the substantial amount of judicial resources necessary to implement a number of the interpretations of the conduct of the mandatory hearings suggested by the parties,<sup>8</sup>

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<sup>5</sup> See Joint Status Report Regarding the Parties’ Proposed Discovery Plan and Other Adjudicatory Process Issues (July 29, 2004) at 8-9 [hereinafter LES Joint Status Report]. See also the suggestion by the applicant and staff in the North Anna ESP proceeding that “the Board should . . . [rely] on the testimony of the Staff and the applicant and the conclusions of the ACRS rather than duplicating the NRC Staff’s review.” Joint Memorandum on the Mandatory Hearing Process (Oct. 8, 2004) at 5 [hereinafter North Anna Joint Memorandum].

<sup>6</sup> See, e.g., Joint Response of Exelon Generation Company and the NRC Staff to Licensing Board Request Regarding Mandatory Hearing Procedures for the Clinton Early Site Permit (Sept. 17, 2004) at 3-5 [hereinafter Clinton Joint Response].

<sup>7</sup> See North Anna Joint Memorandum at 4.

<sup>8</sup> For example, as was noted earlier, in the contested North Anna proceeding the applicant and the staff suggested that “the Board should . . . [rely] on the testimony of the Staff and the applicant and the conclusions of the ACRS rather than duplicating the NRC Staff’s review.” North Anna Joint Memorandum at 5. Likewise, in LES, which is a contested proceeding, the applicant and the staff propose to provide the Licensing Board with an

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acting on behalf of the Licensing Boards conducting these four proceedings, I certify the following issues to the Commission. Early determination of these matters will materially advance the orderly disposition of each proceeding.

A. Scope of Licensing Board Review

As an initial matter, of concern to the current ESP Licensing Boards are those aspects of the ESP mandatory hearing provisions that define the review responsibilities of the presiding officer. Of particular note is the fact that, for the two ESP AEA safety issues and the NEPA issue, the provisions of the ESP notices suggest there is a fundamental difference between a presiding officer's responsibilities in contested proceedings and uncontested proceedings. In uncontested proceedings, relative to these safety and NEPA issues, a presiding officer is to "determine" if "the application and the record contain sufficient information" and whether "the review by the staff is adequate" to support the necessary findings. In contested proceedings, on the other hand, although the presiding officer is directed to "consider" the merits of the two safety issues and the NEPA issue, there is no indication that the presiding officer's task is to be limited to an assessment of the sufficiency of the record or the adequacy of the staff review.

Besides this difference in wording relative to these reviews, agency regulations employ the term "determine" with regard to both the safety and NEPA reviews by the Board in an uncontested proceeding, see 10 C.F.R. § 2.104(b)(2), while utilizing the term "consider" in connection with making such findings in an contested proceeding, albeit without any express

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<sup>8</sup>(...continued)

executive summary of the key areas of review and the staff findings, with reference to the final SER and EIS, after which the Licensing Board would merely develop questions to be answered by the applicant and the staff. See LES Joint Status Report at 9. Such a process would require considerably less involvement on the part of the Licensing Board members, and therefore, would require materially different judicial resources than the review apparently being suggested for the uncontested Grand Gulf and the contested Clinton ESP proceedings. See Clinton Joint Response at 3-5.

direction to make any “determination” based upon that consideration, see id. § 2.104(b)(1). In conformity with the general rules of construction for statutory and regulatory provisions, these are different terms and thus should be accorded different meanings, see Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 73 (1994), but as a practical matter it is not apparent what, if any, distinction was intended to exist between them as they are used to describe a Board’s review responsibilities regarding the two safety issues and the NEPA issue.<sup>9</sup>

Given the potential differences in the scope of Board review for these proceedings that these differences in wording could portend, i.e., the difference between a Board acting as an initial decisionmaker as opposed to being a reviewer of the activities of the applicant and staff, I certify to the Commission the question of the scope of the responsibility that the Licensing Boards are to undertake in connection with their findings concerning the two ESP AEA safety issues and the NEPA issue.

B. Contested Proceeding v. Contested Matter

Additionally, it should be noted that although the regulations refer to contested or uncontested “proceedings,” the parties in some of the ESP proceedings have suggested that presiding officers should bifurcate contested proceedings into contested or uncontested “portions.” See also CLI-04-3, 59 NRC at 13 (LES notice distinguishes between Board findings necessary for admitted contentions and determinations on matters that are not covered by admitted contentions). The plain language of the agency’s regulations does not, however, distinguish between the “portions” of a contested proceeding. These readings of the ESP

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<sup>9</sup> In this regard, the use of these words in these two provisions can be compared to their use in section 2.104(b)(3), in which there appears to be a comprehensible differentiation between the use of both terms relative to the NEPA “baseline” findings required in either contested or uncontested proceedings.

notices could result in significantly different assignments of presiding officer review authority depending on whether the proceeding (as opposed to a portion of the proceeding) is contested or uncontested.

The question of whether a proceeding as a whole should be considered as “contested” or “uncontested,” or whether those categorizations instead should be applied to portions of a proceeding, depending on whether or not they encompass matters that were the subject of admitted party contentions, thus is worthy of further explication. I certify that question for Commission consideration.

C. De Novo Licensing Board Review of Applications

Another central concern of the ESP Licensing Boards relative to the review responsibilities of the presiding officer is the difference between the language in the notices for the LES and ESP cases relative to whether the Board is to conduct a de novo application evaluation. In the LES case, in apparent accord with section 2.104(b)(2), all determinations concerning uncontested AEA safety matters (the equivalent of ESP Safety Issue 1 items<sup>10</sup>) and the non-“baseline” NEPA matter are to be made “without conducting a de novo review.” In contrast, in the notices for the ESP proceedings, the phrase “without conducting a de novo review” is absent, suggesting that the presiding officer’s duty is not simply to assess the adequacy of the staff’s review, but to consider (and/or determine) the merits of any AEA safety and NEPA issues that it unearths following its own de novo review of the application.

Accordingly, in connection with an uncontested ESP proceeding, such as Grand Gulf, I certify to the Commission the following question: Should the Licensing Board’s determinations regarding (a) the sufficiency of the information in the application and record of the proceeding

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<sup>10</sup> In the context of the LES proceeding, there does not seem to be an analogue to ESP Safety Issue 2, which concerns the 10 C.F.R. Part 100 siting criteria.

and the adequacy of the staff's review of the application to support a negative finding on Safety Issue 1 and an affirmative finding on Safety Issue 2; and (b) the adequacy of the review conducted by the Commission pursuant to NEPA and subpart A of 10 C.F.R. Part 51, be made by conducting a de novo evaluation of the applications at issue?<sup>11</sup>

D. NEPA Requirements

1. Scope of Board Review Responsibility Regarding Three NEPA "Baseline" Findings

Regardless of whether the hearing is contested, the Board in the mandatory hearings for the ESP and LES proceedings must make determinations regarding what have been labeled as the three 10 C.F.R. § 51.105(a)(1)-(3) "baseline" NEPA findings. In this regard, although the North Anna applicant and the staff again take the view, as they did with regard to non-NEPA matters, that the Board should rely upon "the testimony of the Staff and the applicant and the conclusions of the ACRS, rather than duplicating the NRC Staff's review,"<sup>12</sup> it is not apparent that such a "reviewer" role is the correct approach. In the landmark Calvert Cliffs decision,<sup>13</sup> the United States Court of Appeals for the District of Columbia Circuit held that in making its NEPA findings in connection with a power reactor construction permit authorization, a hearing board must "examine the [EIS] carefully" to determine whether the staff review was adequate and "must independently consider the final balance among conflicting factors that is struck in the

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<sup>11</sup> Relative to the term "de novo," we note that even in instances when such a review is appropriate, we would not interpret this term as requiring that a presiding officer "start from scratch" in reviewing the application. Rather we would assume this means that the presiding officer would be authorized to conduct an application review that is plenary in scope and would aggressively probe the underlying basis for the principal health and safety and NEPA conclusions upon which the application (and the staff's application review findings) are footed.

<sup>12</sup> North Anna Joint Memorandum at 5.

<sup>13</sup> Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

staff's recommendation." It is arguable, therefore, that for those "baseline" NEPA matters that are not the subject of a contested issue, the Licensing Boards must study the relevant parts of the record, such as the applicant's environmental report and the staff's FEIS, pose written or oral questions to the staff and applicant, request that they submit additional information, and conduct whatever hearings that may be deemed necessary to resolve any questions or concerns, so that the Board can make an independent initial decision on each "baseline" NEPA Issue.

Accordingly, I certify to the Commission the question of the appropriate scope of review for Licensing Boards in making the three "baseline" NEPA findings required by 10 C.F.R. § 51.105(a)(1)-(3); see also id. § 2.104(b)(3).

2. Scope of NEPA "Baseline" Finding Three

As was noted previously, consistent with section 2.104(b)(3)(iii) and the ESP and LES hearing notices, one of the determinations the presiding officer must make in both contested and uncontested proceedings is whether the license should be issued, denied, or appropriately conditioned to protect environmental values. The ESP notices declare that this finding is to be made "after considering reasonable alternatives," a reference that is not included in the LES notice. Moreover, section 51.105(a)(1)-(3) seems to further expand on this responsibility to consider reasonable alternatives by stating that the Board must "[d]etermine, after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives, whether the construction permit or license to manufacture should be issued, denied, or appropriately conditioned to protect environmental values."<sup>14</sup> See also 10 C.F.R. § 70.23(a)(7) (enrichment facility construction and operation

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<sup>14</sup> In this regard, however, we note that 10 C.F.R. § 52.18 states that in the ESP context the draft and final EIS "need not include an assessment of the benefits (for example, need for  
(continued...)

license cannot be issued until Director of the Office of Nuclear Materials Safety and Safeguards concludes “after weighing the environmental, economic, technical, and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values.”)

Therefore, I also certify to the Commission the following questions: (1) was the failure to include the phrase “after considering reasonable alternatives” in the LES notice intended to create a distinction between the responsibilities of the LES and the ESP Licensing Boards with regard to their findings on NEPA “baseline” issue three; and (2) was the failure to include the additional wording of section 51.105(a)(3) in both the ESP and LES notices intended to narrow further the scope of review required to be undertaken by the Licensing Boards in the mandatory hearings in these proceedings?

### III. CONCLUSION

Because the manner in which the Licensing Boards address these upcoming mandatory hearings likely will have a large impact upon Atomic Safety and Licensing Board Panel scheduling, staffing, and resource allocation,<sup>15</sup> on behalf of the Licensing Boards in the ESP

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<sup>14</sup>(...continued)  
power) of the proposed action, but must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed.”

<sup>15</sup> For example, we estimate that a full review of an application, including the SER, FEIS, and ACRS recommendations, followed by hearings on issues raised by such a review will consume not less than 1000 person hours (and, perhaps, double that for complicated applications). Thus, unless some more summary form of review is undertaken, the three ESP cases should be expected to expend a total somewhere in the neighborhood of 1.5 person-years of work on the mandatory hearing portion of those proceedings. In addition, we note that this work must be performed in large measure by the technical members of each Board, further concentrating the workload.

and LES proceedings,<sup>16</sup> I respectfully request the Commission's prompt guidance on the certified questions specified in section II above.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD PANEL<sup>17</sup>

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G. Paul Bollwerk, III  
CHIEF ADMINISTRATIVE JUDGE

Rockville, Maryland

March 18, 2005

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<sup>16</sup> Additionally, the Commission responses to these questions could impact the conduct of future hearings regarding the application by United States Enrichment Corporation to construct and operate a uranium enrichment facility, see 69 Fed. Reg. 61,411, 61,411-12 (Oct. 18, 2004); and the possible Department of Energy application for authorization to construct a high-level waste geologic repository at Yucca Mountain, Nevada, see 10 C.F.R. § 51.109(e).

<sup>17</sup> Copies of this memorandum were sent this date by Internet e-mail transmission to counsel or the representatives for the parties in (1) the Clinton, North Anna, and Grand Gulf ESP cases; and (2) the LES proceeding.

**Comparison of Notice Provisions Regarding Mandatory Hearing Determinations  
for Early Site Permit (ESP) and Louisiana Energy Services, L.P., (LES) National Enrichment Facility (NEF) Proceedings<sup>1</sup>**

(ATTACHMENT TO LBP-05-07)

<p style="text-align: center;"><b>Contested ESP Proceedings</b> (<u>North Anna</u> and <u>Clinton</u> Proceedings, 68 Fed. Reg. 67,489 (Dec. 2, 2003); 68 Fed. Reg. 69,426 (Dec. 12, 2003))</p>	<p style="text-align: center;"><b>Uncontested ESP Proceeding</b> (<u>Grand Gulf</u> Proceeding, 69 Fed. Reg. 2636 (Jan 16, 2004))</p>	<p style="text-align: center;"><b>LES NEF Proceeding (Contested)</b> (69 Fed. Reg. 5873 (Feb. 6, 2004))</p>
<p><b>Safety Issue 1:</b> Consider whether the issuance of the ESP will not be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1).<sup>2</sup></p>	<p><b>Safety Issue 1:</b> Determine whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support a negative finding on Safety Issue 1 as proposed to be made by the Director, Office of Nuclear Reactor Regulation (NRR).<sup>3</sup></p>	<p><b>Safety Issue 1 (Contested):</b> With respect to matters such as whether the application satisfies the standards set forth in this Notice (but not covered by admitted contentions) determine, without conducting a de novo evaluation of the application, whether the application and record of the proceeding contain sufficient information and whether the NRC staff's review of the application has been adequate to support the findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards (NMSS).</p>
<p><b>Safety Issue 2:</b> Consider whether, taking into consideration the site criteria contained in 10 C.F.R. part 100, a reactor or reactors, having characteristics that fall within the parameters for the site, can be constructed and operated without undue risk to the health and safety of the public (Safety Issue 2).<sup>4</sup></p>	<p><b>Safety Issue 2:</b> Determine, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate to support an affirmative finding on Safety Issue 2 as proposed to be made by the Director, NRR.</p>	<p><b>Safety Issue 2 (Contested):</b> No comparable provision</p>

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<sup>1</sup> Section 189a(1)(A) of the Atomic Energy Act of 1954 (AEA) states that the Commission shall hold a hearing on each application under AEA section 103 or 104b for a construction permit. Early site permits are a form of construction permit. See 10 C.F.R. § 52.21. AEA section 193 requires that the Commission conduct an on the record adjudicatory hearing with regard to the licensing of a uranium enrichment facility. See id. § 70.23a.

<sup>2</sup> See id. § 2.104(b)(1)(iv).

<sup>3</sup> See id. § 2.104(b)(2)(i).

<sup>4</sup> See id. § 2.104(b)(1)(i)(d)(2).



<b>Contested ESP Proceedings</b> (North Anna and Clinton Proceedings, 68 Fed. Reg. 67,489 (Dec. 2, 2003); 68 Fed. Reg. 69,426 (Dec. 12, 2003))	<b>Uncontested ESP Proceeding</b> (Grand Gulf Proceeding, 69 Fed. Reg. 2636 (Jan 16, 2004))	<b>LES NEF Proceeding (Contested)</b> (69 Fed. Reg. 5873 (Feb. 6, 2004))
<b>NEPA Issue:</b> Consider whether, in accordance with the requirements of subpart A of 10 C.F.R. Part 51, the ESP should be issued as proposed. <sup>5</sup>	<b>NEPA Issue:</b> Determined whether the review conducted by the Commission pursuant to NEPA has been adequate. <sup>6</sup>	<b>NEPA Issue (Contested):</b> Determine, without conducting a de novo review, whether the requirements of 10 C.F.R. Part 51 have been met.
<b>Baseline NEPA Issue 1:</b> Determine whether the requirements of NEPA § 102(2)(A), (C), and (E) and subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding. <sup>7</sup>	<b>Baseline NEPA Issue 1:</b> Same.	<b>Baseline NEPA Issue 1:</b> Same. <sup>8</sup>
<b>Baseline NEPA Issue 2:</b> Independently consider the final balance among the conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken. <sup>9</sup>	<b>Baseline NEPA Issue 2:</b> Same.	<b>Baseline NEPA Issue 2:</b> Same. <sup>10</sup>
<b>Baseline NEPA Issue 3:</b> Determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values. <sup>11</sup>	<b>Baseline NEPA Issue 3:</b> Same.	<b>Baseline NEPA Issue 3:</b> Determine whether a license should be issued, denied, or appropriately conditioned to protect the environment. <sup>12</sup>

<sup>5</sup> See id. § 2.104(b)(1)(v).

<sup>6</sup> See id. §§ 2.104(b)(2)(ii), 51.105(a)(4).

<sup>7</sup> See id. § 51.105(a)(1); see also Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1117-19 (D.C. Cir. 1971) [hereinafter Calvert Cliffs].

<sup>8</sup> See id.

<sup>9</sup> See 10 C.F.R. § 51.105(a)(2); see also Calvert Cliffs, 449 F.2d at 1117-19.

<sup>10</sup> See id.

<sup>11</sup> See 10 C.F.R. § 51.105(a)(5); see also Calvert Cliffs, 449 F.2d at 1117-19.

<sup>12</sup> See id.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
EXELON GENERATION COMPANY, LLC ) Docket No. 52-007-ESP  
 )  
 )  
(Early Site Permit for Clinton ESP Site) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CERTIFYING QUESTIONS REGARDING MANDATORY HEARING PROCEDURES (LBP-05-07) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
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U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
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Docket No. 52-007-ESP  
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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of March 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
DOMINION NUCLEAR ) Docket No. 52-008-ESP  
NORTH ANNA, LLC )  
)  
)  
)  
(Early Site Permit for North Anna ESP Site) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CERTIFYING QUESTIONS REGARDING MANDATORY HEARING PROCEDURES) (LBP-05-07) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 52-008-ESP  
LB MEMORANDUM (CERTIFYING  
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HEARING PROCEDURES) (LBP-05-07)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of March 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
SYSTEM ENERGY RESOURCES, INC. ) Docket No. 52-009-ESP  
 )  
 )  
(Early Site Permit for Grand Gulf ESP Site) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CERTIFYING QUESTIONS REGARDING MANDATORY HEARING PROCEDURES) (LBP-05-07) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
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U.S. Nuclear Regulatory Commission  
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Docket No. 52-009-ESP  
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of March 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
LOUISIANA ENERGY SERVICES, L.P. ) Docket No. 70-3103-ML  
 )  
 )  
(National Enrichment Facility) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM (CERTIFYING QUESTIONS REGARDING MANDATORY HEARING PROCEDURES) (LBP-05-07) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Washington, DC 20555-0001

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Docket No. 70-3103-ML  
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of March 2005