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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

Dated: May 4, 2005

In the Matter of
EXELON GENERATION COMPANY, LLC
(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

In the Matter of
DOMINION NUCLEAR NORTH ANNA, LLC
(Early Site Permit for North Anna ESP Site)

Docket No. 52-008-ESP

In the Matter of
SYSTEM ENERGY RESOURCES, INC.
(Early Site Permit for Grand Gulf ESP Site)

Docket No. 52-009-ESP

In the Matter of
LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

Docket No. 70-3103-ML

In the Matter of
USEC Inc.
(American Centrifuge Plant)

Docket No. 70-7004

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**USEC INC. BRIEF IN RESPONSE TO
COMMISSION MEMORANDUM AND ORDER (CLI-05-09)**

I. INTRODUCTION

USEC Inc. (“USEC”) hereby submits its brief in response to the Nuclear Regulatory Commission’s April 20, 2005 Memorandum and Order in the above-captioned proceedings.¹ In that Memorandum and Order, the Commission granted USEC’s March 28, 2005 “Motion for Leave to Submit Views on 10 CFR Part 2 Certified Questions.” Presented below are USEC’s views on the questions certified to the Commission by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (“ASLBP”) relating to the “mandatory hearing” requirements in NRC regulations and applicable case-specific Notices of Hearing.²

II. SUMMARY OF USEC’S POSITION

The applicants and NRC Staff in each of the above-captioned proceedings (except for the USEC American Centrifuge Plant (“ACP”) proceeding) have already expressed their initial views to their respective Atomic Safety and Licensing Boards (hereafter “Licensing Board” or “Board”) on appropriate procedures to be used in conducting mandatory hearings. According to the Chief Administrative Judge, the Licensing Boards designated for those proceedings requested such views in order to “develop a unified approach” for the conduct of those proceedings.³ In the ASLBP Memorandum, the Chief

¹ *Exelon Generation Company, LLC et al.*, CLI-05-09, 61 NRC ___, slip op. (Apr. 20, 2005).

² *Exelon Generation Company, LLC et al.*, LBP-05-07, 61 NRC ___, slip op. (Mar. 18, 2005) (“ASLBP Memorandum” hereafter).

³ *Id.* at 7.

Administrative Judge indicated that “three distinct” views were propounded in those submittals, some in “stark contrast” with others.⁴

USEC’s review of these prior submittals indicates that there is a broad consensus (with which USEC strongly agrees) on the fundamental procedures to be utilized in conducting mandatory NRC hearings: (1) *de novo* reviews of the relevant applications and licensing records are unnecessary, inappropriate and inconsistent with the Licensing Board’s traditional role in licensing proceedings; (2) the Licensing Board’s primary role is to confirm that the license application and overall record are sufficient to support the NRC Staff’s licensing determination and that the Staff’s review has been adequate; (3) the Licensing Board can and should primarily rely on summary-level testimony submitted by the applicants and NRC Staff in making the findings needed to support a licensing decision; and (4) the Licensing Board need not and should not engage in a costly and time-consuming review process that duplicates the detailed NRC Staff review effort.⁵ USEC encourages the Commission to provide direction to the ASLBP consistent with the principles set forth above.

III. USEC POSITION ON CERTIFIED QUESTIONS

Before responding to the specific certified questions, it is important to recognize that when a Licensing Board is designated to preside over a particular licensing proceeding, it is not “writing on a clean slate” as it begins its deliberations. NRC Staff review of a license application involves a careful evaluation of detailed licensing

⁴ *Id.* at 7-8.

⁵ In addition to the views of the applicants and NRC Staff in the above-captioned proceedings, the Intervenor in the *Dominion* case also submitted their views. See “Intervenors’ Memorandum on the Mandatory Hearing Process” (Oct. 8, 2004). Intervenor’s position in that case is generally consistent with the applicant and Staff views discussed above.

documents submitted by the applicant. That review is performed by Staff members with unique expertise in their respective areas of review. To the extent that questions or concerns arise from that review, the Staff propounds specific Requests for Additional Information, to which responses satisfactory to the Staff must be provided if the applicant is to obtain a favorable licensing decision. Furthermore, with respect to National Environmental Policy Act (“NEPA”) issues, overlaying this process is a separate public participation process that includes public meetings and opportunities to submit public comments on the scope of the draft Environmental Impact Statement (“EIS”) and on the draft EIS itself. While the NRC Staff is structured and staffed to perform these detailed review functions, the Licensing Board is not.

USEC’s views on the specific certified questions are presented below.

A. Scope of Licensing Board Review

Two questions were raised in the ASLBP Memorandum with respect to the “Scope of Licensing Board Review” in a mandatory hearing. First, the ASLBP notes that for uncontested proceedings the Early Site Permit (“ESP”) Hearing Notices only require the Licensing Board to make determinations regarding the sufficiency of the information in the license application and record and the adequacy of the NRC Staff review, while in contested proceedings, the ASLBP questions whether those Notices call for a “merits” determination on the relevant safety and NEPA issues. In the latter case of a contested proceeding, the ASLBP states that “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.”⁶ The ASLBP characterizes this difference in language between contested

⁶ ASLBP Memorandum, slip op. at 9.

and uncontested proceedings as “the difference between a Board acting as an initial decision maker as opposed to being a reviewer of the activities of the applicant and staff.”⁷

The ASLBP’s concern is based upon the following language in the ESP Hearing Notices:

If the hearing is contested as defined by 10 CFR 2.4, the presiding officer will consider Safety Issues 1 and 2 and the issue pursuant to NEPA set forth above.⁸

From this language the ASLBP questions whether a full “merits” review by the Licensing Board acting as an “initial decision maker” is warranted in a contested proceeding.

The quoted language does not appear in the USEC ACP proceeding Hearing Notice⁹ (or for that matter in the Louisiana Energy Services (“LES”) Hearing Notice).¹⁰

On the contrary, the USEC Hearing Notice makes clear that regardless of whether the proceeding is contested or uncontested, the Licensing Board’s review of the safety and environmental standards for license issuance is to focus on the sufficiency of the ACP License Application and record and on the adequacy of the Staff review process. In particular, Section II.D of the USEC Hearing Notice states:

D. If this proceeding is not a contested proceeding, as defined by 10 CFR 2.4, the Board will determine . . . (1) whether the application and record of the proceeding

⁷ *Id.* at 10.

⁸ See e.g., Exelon Generation Company, LLC; Notice of Hearing and Opportunity to Petition for Leave to Intervene Early Site Permit for the Clinton ESP Site, 68 Fed. Reg. 69426, 69427 (Dec. 12, 2003).

⁹ USEC Inc. (American Centrifuge Plant); Notice of Receipt of Application for License; Notice of Availability of Applicant’s Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order, 69 Fed. Reg. 61,411 (Oct. 18, 2004). (“USEC Hearing Notice” hereafter).

¹⁰ Even if the quoted language had been in the USEC Hearing Notice, we do not believe that the nature of the Board’s review should be materially different than discussed herein.

contain sufficient information and whether the NRC staff's review of the application has been adequate to support [safety] findings to be made by the Director with respect to the matters set forth in paragraph C of this section and (2) whether the review conducted by the NRC staff pursuant to 10 CFR Part 51 has been adequate.¹¹

Similarly, even in a contested proceeding, the USEC Hearing Notice states:

With respect to matters set forth in paragraph C of this section but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D. . . .¹²

Since the determinations set forth in paragraph D explicitly focus on the sufficiency of the application and record, and on the adequacy of the NRC Staff review process, it is clear that a full merits determination (in which the Board acts as an “initial decision maker” without regard to the extensive NRC Staff technical review) is not required, and that the Licensing Board should focus on assessing the sufficiency of the application and record, and the adequacy of the NRC Staff review effort.

The second question raised by the ASLBP under “Scope of Licensing Board Review” is whether use of the term “determine” versus “consider” warrants a distinction in the Licensing Board’s review responsibilities. In particular, the ASLBP notes that in an uncontested proceeding, 10 CFR § 2.104(b) directs the Board to “determine” whether the application and record are sufficient and the Staff review is adequate, but only directs the Board to “consider” certain matters in a contested proceeding.

The relevant portions of the USEC (and LES) case-specific Hearing Notices consistently utilize the term “determine.” Section II.C identifies the matters of fact and law to be “considered,” but Sections II.D-F consistently use the term “determine” or

¹¹ USEC Hearing Notice at Section II.D (emphasis added).

¹² *Id.* at Section II.F (emphasis added).

“determinations” in describing how the Licensing Board is expected to address those matters of fact and law. Thus, this issue does not pertain to the USEC proceeding.¹³ In any event, USEC believes that the use of the term “determine” should be accorded its typical meaning (*i.e.*, to decide or resolve),¹⁴ and that it simply indicates the need for the Licensing Board to make appropriate regulatory findings of fact and conclusions of law, rather than connoting any particular level or standard of review.

With these general principles in mind, USEC provides the following additional specific views on how the Licensing Board should conduct its reviews:

1. No de novo review is required. This is clear and explicit for both uncontested and contested proceedings in the USEC Hearing Notice.¹⁵
2. In either a contested or uncontested proceeding, the determinations that the Licensing Board is required to make relate explicitly to the sufficiency of the application and record and the adequacy of the Staff review effort. This is, in effect, a “sufficiency” review and not an opportunity to second guess the technical judgment of the NRC Staff. In other words, this language focuses on whether the application and record (including for example the Environmental Report (“ER”), Safety Evaluation Report (“SER”), and EIS and applicant responses to Requests for Additional Information) contain sufficient information in the areas where licensing findings must be made¹⁶ to enable the Director to have reached the findings reached on the application.¹⁷ It also focuses on whether the NRC Staff review process has been adequate.

¹³ The requirement in the USEC Hearing Notice for the Licensing Board to independently “consider” the final balance among conflicting factors under NEPA is discussed in Section III.D below.

¹⁴ See The American Heritage College Dictionary (3rd ed. 2000).

¹⁵ USEC Hearing Notice at Sections II.D and F.

¹⁶ Those findings include, for example, that the applicant is technically and financially qualified, has adequate equipment, facilities and procedures, and has submitted adequate safeguards, security and emergency plans. See *e.g.*, 10 CFR § 70.23(a).

¹⁷ This view is supported by the decision of the Court of Appeals for the District of Columbia Circuit in *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (D.C. Cir. 1974). In that decision, the court considered language virtually identical to the Commission’s instructions to the Licensing

3. The Licensing Board should make these determinations primarily by relying on summary-level pre-filed testimony submitted by the applicant and Staff summarizing the application and other record materials and describing how such materials are responsive to the requisite regulatory findings. Licensing documents such as the application, ER, SER and EIS would be introduced as exhibits.
4. Where the Board has questions as to whether the testimony and other record materials are sufficient to support the Staff findings or as to whether the Staff review process has been adequate, it may, of course, propound questions in writing or orally at a prehearing conference or hearing as necessary to permit it to make the requisite determinations. However, no extensive re-review of the application or other record materials is required.¹⁸

This approach is fully consistent with traditional Licensing Board practice in analogous proceedings – mandatory power reactor construction permit proceedings. Review of initial decisions in such cases clearly demonstrates that, with respect to uncontested matters in both contested and uncontested proceedings, the Licensing Board

Board in Section II.D of the USEC Hearing Notice (*i.e.*, determine “whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission’s regulatory staff has been adequate, to support the findings proposed by the Director of Regulation”). *Id.* In rejecting the Union of Concerned Scientists’ argument that the Licensing Board was required to review *de novo* and independently evaluate the evidence before ruling on the applicant’s reactor operating license application, the court drew an analogy to the function of an appellate court applying the substantial evidence test, *id.*, and clarified that the “role of the ASLB is not to compile a record; it is to review a record already compiled by the Staff and [Advisory Committee on Reactor Safeguards (ACRS)], who have responsibility for the sufficiency of that record,” *id.* at 1078. Furthermore, the court added that, from a practical perspective, “it would simply not be possible for the two technical members of the panel to evaluate in detail the totality of material relevant to safety matters that the Staff and ACRS have generated through many months of work.” *Id.* at 1077 (footnote omitted).

¹⁸ In *Consumers Power Co.*, the Intervenors argued that the function of a Licensing Board was to independently evaluate the license application – as the Appeal Board put it – “completely disregarding the review already undertaken by the regulatory staff.” *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 334 (1973), *rev’d on other grounds*, *Aeschliman v. NRC*, 547 F.2d 622 (D.C. Cir. 1976), *rev’d*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The Appeal Board, however, properly recognized that the Licensing Board’s role was to assure that the Staff’s review has been adequate “and to inquire further into areas where it may perceive problems or find a need for elaboration. If it finds itself not satisfied with the adequacy or completeness of the staff review, or of the evidence presented . . . it may . . . reject the application, or may require further development of the record to support the application.” *Id.* at 335.

has consistently focused and heavily relied on Staff and applicant testimony and the fundamental licensing documents, and has been able to render all of the requisite licensing findings without either a *de novo* review of the application materials or an extensive and time consuming hearing process.¹⁹ USEC sees no reason why the same approach should not be used in the Commission's current suite of mandatory licensing hearings.

B. Contested Proceeding v. Contested Matter

The ASLBP next asks the Commission for direction on "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."²⁰ The ASLBP points out that the "plain language of the agency's regulations does . . . not distinguish between the 'portions' of a contested proceeding."²¹

For the USEC ACP proceeding, this question is again addressed clearly and explicitly in the Hearing Notice as follows:

F. If the proceeding becomes a contested proceeding, the Board shall make findings of fact and conclusions of law on admitted contentions. With respect to matters set forth in paragraph C of this section [*i.e.*, the regulatory "findings" that are prerequisites for the issuance of the license] but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D

¹⁹ *E.g.*, *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit No. 2), LBP-72-26, 5 AEC 120 (1972); *Georgia Power Co.* (Edwin I. Hatch Nuclear Power Plant, Unit No. 2), LBP-72-36, 5 AEC 242 (1972); *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), LBP-74-64, 8 AEC 339 (1974); and *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), LBP-78-4, 7 NRC 92 (1978).

²⁰ ASLBP Memorandum at 11.

²¹ *Id.* at 10.

without conducting a *de novo* evaluation of the application.²²

Thus, the USEC Hearing Notice does distinguish between contested “matters” and uncontested “matters” in a single proceeding. Uncontested matters should be addressed by the Licensing Board as discussed in Section III.A above. Furthermore, this approach, as well, is consistent with long-standing practice in mandatory NRC reactor construction permit hearings.²³

C. De Novo Licensing Board Review of Applications

The ASLBP next requests Commission direction on whether the Licensing Board should undertake a *de novo* review of certain matters in an uncontested ESP proceeding. The ASLBP raises this issue because, while the LES Hearing Notice makes clear that no *de novo* review is contemplated, the ESP Hearing Notices are silent in this regard. Again, as the ASLBP recognizes with respect to the LES Hearing Order, the USEC Hearing Order clearly states that there will be no such *de novo* review, and this approach is consistent with longstanding practice in mandatory NRC hearings.²⁴

D. NEPA Requirements

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

The next question raised by the ASLBP relates to the following three “baseline” NEPA findings which the Licensing Board is required to make:

²² USEC Hearing Notice at Section II.F. (The LES Hearing Notice contains identical language).

²³ See generally cases cited at note 19, *supra*. In addition, in *Gulf States Utilities Co. (River Bend Station, Units 1 and 2)*, ALAB-444, 6 NRC 760, 774, n.26 (1977) (emphasis in original), the Appeal Board recognized that the appropriate distinction to be drawn “is between *issues* in contest and *matters* which have not been placed in controversy,” *i.e.*, “portions” of proceedings, and not entire proceedings.

²⁴ See USEC Hearing Order at Section II.D.

Regardless of whether the proceeding is contested or uncontested, the Board will, in its initial decision, in accordance with Subpart A of 10 CFR Part 51: Determine whether the requirements of Sections 102(2)-(A), (C), and (E) of NEPA and Subpart A of 10 CFR Part 51 have been complied with in the proceeding; independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and determine whether a license should be issued, denied, or conditioned to protect the environment.²⁵

The ASLBP requests direction, in particular, on whether it is appropriate for the Licensing Board to act as the “reviewer” of the NRC Staff and applicant conclusions on these baseline NEPA findings, or whether in light of the *Calvert Cliffs* decision²⁶ the Licensing Board 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.²⁷

As discussed further below, USEC does not see any inconsistency or mutual exclusivity between the Licensing Board acting as a “reviewer” of the NRC Staff and applicant conclusions on the baseline NEPA findings, and the Board exercising its authority to examine the record as appropriate, pose questions to the Staff and applicant as necessary, and make an independent decision on the “baseline” NEPA issues. USEC believes that the Licensing Board’s appropriate role is that of a reviewer of the NRC Staff

²⁵ USEC Hearing Notice at Section II.E. There are some minor editorial differences between the USEC and LES Hearing Notices in Section II.E that do not affect the legal analysis.

²⁶ *Calvert Cliffs Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

²⁷ ASLBP Memorandum at 13.

and applicant conclusions on the baseline NEPA findings, and that the actions it should take and standard of review it should use are essentially the same as those it should use in making the requisite safety and “non-baseline” NEPA findings discussed above. No extensive, time consuming, or wholesale reexamination of the record is required. Moreover, there is nothing in the *Calvert Cliffs* decision that requires a different conclusion.

Through the preparation and issuance of the ER and the EIS, the applicant and Staff engage in a detailed assessment of the environmental impacts of the proposed licensing action, its benefits and costs, and reasonable alternatives. It is neither appropriate nor necessary for a Licensing Board to duplicate the considerable effort involved in the preparation of those documents, and to in effect, ignore much of the work performed by the applicant and Staff. It is appropriate for the Board to review the applicant and Staff’s work in order to enable it to make the requisite baseline NEPA findings.

However, the Licensing Board can and should perform that task primarily on the basis of the applicant and Staff testimony. The Board may, of course, pose questions to the applicant and Staff, and engage in additional hearings if, for example, the basis for a Staff determination is not clear. However, this does not require a *de novo* review or a replication of applicant and Staff efforts, and the Board should proceed essentially as it would in making findings on the safety and non-baseline NEPA issues. Thus, there is no inconsistency or mutual exclusivity in the question posed by the ASLBP, and no need to depart from the approach recommended above for the safety and non-baseline NEPA findings.

The ASLBP's question to the Commission is driven by its reading of the *Calvert Cliffs* case. In *Calvert Cliffs* the D.C. Circuit reviewed a newly adopted set of Atomic Energy Commission (AEC) regulations designed to comply with NEPA, which had been promulgated only about two years earlier. While the AEC rules provided for the preparation of an ER by an applicant and an EIS by the NRC Staff, the rules precluded the Licensing Board from reviewing the applicant and Staff conclusions in an uncontested proceeding. In particular, those rules provided that:

When no party to a proceeding . . . raises any [environmental] issue . . . such issues will not be considered by the Atomic Safety and Licensing Board. [The ER and EIS] will not be received in evidence, and the Commission's responsibilities under [NEPA] will be carried out *in toto* outside the hearing process.²⁸

Thus, the court considered "whether the Commission is correct in thinking that its NEPA responsibilities may 'be carried out *in toto* outside the hearing process.'"²⁹

In reviewing the Commission's interpretation of its NEPA responsibilities, the court ruled that a regulation prohibiting any Licensing Board review of applicant and Staff NEPA conclusions in an uncontested proceeding was inconsistent with NEPA. Thus, *Calvert Cliffs* is clearly distinguishable in this regard from the question now being posed by the ASLBP.

Furthermore, in describing what it viewed as the appropriate role of the Licensing Board in an uncontested proceeding, the court repeatedly made clear that the Board should act in a "reviewer" mode, should not duplicate the NRC Staff effort, and should

²⁸ *Calvert Cliffs*, 449 F.2d at 1117 (quoting 10 CFR Part 50, Appendix D at 249) (1971) (emphasis added).

²⁹ *Id.* at 1117.

treat the baseline NEPA findings much like the other regulatory findings it is required to make. In particular, the court stated:

- Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to *consider* environmental issues just as they consider other matters within their mandates.³⁰
- Of course, consideration which is entirely duplicative is not necessarily required. But independent review of Staff proposals by hearing boards is hardly a duplicative function.³¹
- The Commission's regulations provide that in an uncontested proceeding the hearing board shall on its own "determine whether the application and the record of the proceeding contain sufficient information, and the review . . . by the . . . Staff has been adequate, to support affirmative findings on" various nonenvironmental factors. NEPA requires at least as much automatic consideration of environmental factors.³²
- In uncontested hearings, the board need not necessarily go over the same ground covered in the "detailed statement." But it must at least examine the statement carefully to determine whether "the review . . . by the Commission's regulatory staff has been adequate."³³

Thus, it is clear that *Calvert Cliffs* stands for the proposition that the Licensing Board should, in essence, review the adequacy of the NRC Staff findings. It can and should do so as described in Section III.A above.

Indeed, since *Calvert Cliffs*, the Licensing Board has adopted this very approach for environmental matters in uncontested power reactor construction permit proceedings. An examination of initial decisions in these cases demonstrates that the Board has not

³⁰ *Id.* at 1112.

³¹ *Id.* at 1118 (emphasis added).

³² *Id.* at 1118 (emphasis added). Note that the court drew a direct parallel to the standard for Licensing Board review of safety findings.

³³ *Id.* (emphasis added).

engaged in extensive and duplicative reviews on these NEPA baseline findings, has generally relied on applicant and Staff determinations, and has been able to make the requisite baseline NEPA findings without lengthy or complex proceedings.²⁴ The same approach used in these uncontested construction permit cases can and should be applied to the cases currently before the NRC.

With these general principles in mind, we discuss below the nature of the appropriate Licensing Board review process for the three baseline NEPA findings.

- a. The Licensing Board Must Determine Whether the Requirements of NEPA Sections 102(2)(A), (C), and (E) and 10 CFR Part 51, Subpart A Have Been Complied With

NEPA Sections 102(2)(A), (C), and (E) in essence require federal agencies to: (1) “utilize a systematic, interdisciplinary approach” in their decisions that may affect the environment; (2) prepare an EIS for major federal actions significantly affecting the quality of the human environment addressing impacts, alternatives and various other considerations; and (3) study and develop alternatives where there are “unresolved conflicts concerning alternative uses of available resources.”²⁵ Part 51, Subpart A elaborates on these procedural requirements. To meet its obligation to determine if these procedural requirements have been met, the Licensing Board should rely primarily on the NRC Staff and applicant testimony, and additional questions or record reviews as needed. Such an approach has in the past been, and should be today, sufficient to determine if the Staff evaluation process satisfies these procedural requirements.

²⁴ See generally cases cited at n.19.

²⁵ 42 U.S.C. § 4332(2)(A), (C), and (E) (2005).

b. The Licensing Board Must “Independently Consider the Final Balance Among Conflicting Factors Contained in the Record of the Proceeding With a View to Determining the Appropriate Action to be Taken”

To meet its obligation to “independently consider” the balance among conflicting factors, the Licensing Board must conduct this review based upon “the record of the proceeding” (*i.e.*, the application, ER, EIS and testimony).²⁶ Where that record reflects “conflicting factors,” it must then make its own independent evaluation of the facts in the record “with a view to determining the appropriate action to be taken.”²⁷ In other words, the Board must determine, based on its review of the given facts, if it would reach the same determination as the Staff on the appropriate licensing action to be taken. Based on that effort, the Board would then address the third baseline NEPA issue discussed below.

c. The Licensing Board Must Determine Whether the License Should Be Issued, Denied, or Conditioned to Protect the Environment

Here, the Board would simply determine whether, based upon the “independent consideration” of conflicting factors above, it concurs with the Staff decision to issue, deny, or condition the license based on environmental considerations.

2. Scope of NEPA “Baseline” Finding Three

Finally, the ASLBP poses two questions related to the scope of the Board’s determination as to whether a license should be “issued, denied, or appropriately conditioned to protect environmental values.”

²⁶ USEC Hearing Notice at Section II.E.

²⁷ *Id.*

a. Consideration of Reasonable Alternatives

The USEC (and LES) Hearing Notices require the Licensing Board to determine whether the licenses should be issued, denied or conditioned to protect environmental values, but neither explicitly states that this determination is to be made “after considering reasonable alternatives.” The ESP Hearing Notices explicitly do call for consideration of such alternatives. The ASLBP has asked whether the Commission intended to draw a distinction between these two types of proceedings.

The consideration of reasonable alternatives is a central element of the overall NEPA review process. To the extent that the Board reviews the NRC Staff’s findings and determinations on NEPA-related matters, it should not exclude consideration of the reasonable alternatives set forth in the ER and EIS. But neither is it required to accord those alternatives any special scrutiny. Thus, the Board should consider those alternatives in the course of its overall review of the Staff NEPA findings.

b. Weighing of Benefits and Costs

Neither the USEC, LES or ESP Hearing Notices specify that the Board should “weigh[] the environmental, economic, technical, and other benefits against environmental and other costs” in determining whether to issue, deny or condition the license. However, 10 CFR § 51.105(a)(3) calls for the “presiding officer” to undertake such a benefit/cost balance in licensing proceedings for “production and utilization facilities.” Section 70.23(a)(7) calls for the Director of Nuclear Material Safety and Safeguards, rather than the presiding officer, to conduct this benefit/cost balance. Since the benefit/cost balance is a central component of the fundamental NEPA process, the Board should consider the benefit/cost balance struck by the Staff in the course of the

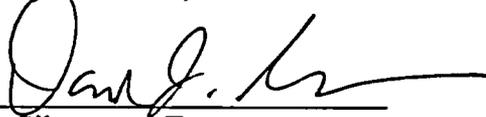
Board's overall review of the Staff NEPA findings, but again, without according this issue any special scrutiny.

IV. CONCLUSION

The questions certified to the Commission by the ASLBP can and should be addressed in a manner that recognizes the distinct roles of the NRC Staff and Licensing Board in the NRC licensing process, and in accordance with past agency practice. There is no requirement or need for the Licensing Board to replicate the detailed NRC Staff technical review or to adopt a hearing process that results in a substantial impact on Licensing Board schedules, staffing and resources.

The Licensing Board may, as needed, examine the record, and obtain additional information or clarification from the applicant and Staff via prehearing conference or hearing procedures, but exercising that authority should not entail *de novo* or time consuming procedures. Instead, the focus should be on the sufficiency of the record to support the Staff's licensing determinations and the adequacy of the Staff's review process.

Respectfully submitted,



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Dated May 4, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

EXELON GENERATION COMPANY, LLC

(Early Site Permit for Clinton ESP Site)

Docket No. 52-007-ESP

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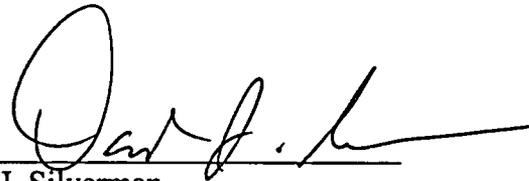
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DOMINION NUCLEAR NORTH ANNA, LLC

(Early Site Permit for North Anna ESP Site)

Docket No. 52-008-ESP

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of

SYSTEM ENERGY RESOURCES, INC.

(Early Site Permit for Grand Gulf ESP Site)

Docket No. 52-009-ESP

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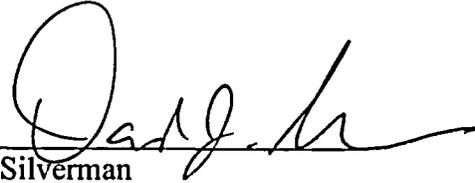
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

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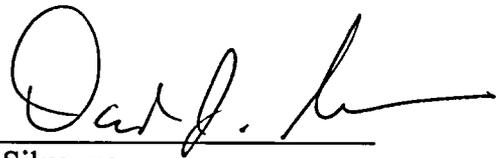
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

USEC Inc.

(American Centrifuge Plant)

Docket No. 70-7004

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