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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before the Commission

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

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

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

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

In the Matter of)
USEC, Inc.) Docket No. 70-7004
(American Centrifuge Plant))

**DOMINION'S BRIEF IN RESPONSE TO CLI-05-09
REGARDING MANDATORY HEARING REQUIREMENTS**

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**DOMINION'S BRIEF IN RESPONSE TO CLI-05-09
REGARDING MANDATORY HEARING REQUIREMENTS**

I. INTRODUCTION

As permitted by the Commission's April 20, 2005 Memorandum and Order,¹ Dominion Nuclear North Anna, LLC ("Dominion") hereby submits this brief on the certified questions regarding mandatory hearing requirements in construction permit and early site permit (considered a partial construction permit²) proceedings. Dominion submits that both as a matter of policy, and consistent with the NRC's Rules of Practice, mandatory hearings on uncontested issues should be a summary review to determine whether the application and the record contains sufficient information, and whether the review by the Staff has been adequate to support the Staff's proposed findings. Consistent with its adjudicatory role, the Atomic Safety and Licensing Boards (the "Licensing Boards" or "Boards") may rely on the uncontroverted testimony of the applicant and the NRC Staff, and should not conduct a *de novo* review or make independent findings.

The Chief Administrative Judge of the Atomic Safety and Licensing Board Panel ("ASLBP") certified to the Commission questions common to the conduct of four construction or early site permit proceedings currently underway before four separate Licensing Boards.³ Each Licensing Board in these proceedings had solicited from the respective applicant and the NRC

¹ *Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site)*, CLI-05-09, 61 NRC ___, slip op. (Apr. 20, 2005).

² 10 C.F.R. § 52.21.

³ *Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site)*, LBP-05-07, 61 NRC ___, slip op. at 2 (Mar. 18, 2005) ("Certification Memorandum"). In setting a briefing schedule on the issues, the Commission granted USEC's separate request to present its own views on the certified questions, thus involving a fifth separate proceeding on the resolution of the certified questions. CLI-05-09, slip op. at 2.

Staff proposed procedures that might be adopted by that Board for the mandatory hearing.⁴ Upon consultation with the Licensing Boards, the Chief Administrative Judge concluded that inconsistencies existed between the joint proposals, the NRC's hearing notices for these proceedings, and the procedural regulations governing these proceedings.⁵ In addition, the Chief Administrative Judge expressed concern over the impact that the hearing procedures could have on ASLBP scheduling, staff, and resource allocation.⁶ Indeed, the Chief Administrative Judge estimated that a "full review" of an application would require at least 1,000 person hours, if not double that amount depending on the complexity of the issues involved, to be performed primarily by the technical members of each Licensing Board, and that the mandatory hearing would require somewhere in the neighborhood of 1.5 person-years of work.⁷

Dominion has already submitted a Joint Memorandum with the NRC Staff on the appropriate conduct of the mandatory hearing on an ESP application⁸ and will not re-brief those issues here. Accordingly, consistent with the Commission's Memorandum and Order,⁹ this brief is limited to addressing certain points raised in LBP-05-07. Dominion presents below its views that (1) the Commission should as a matter of policy set mandatory hearing procedures that are efficient and avoid unnecessary duplication of the Staff's technical review; (2) as the NRC Staff and all of the applicants have agreed, the regulations clearly do not require a *de novo* review or independent findings but authorize the Licensing Board to rely on uncontroverted testimony; and

⁴ See Certification Memorandum at 7.

⁵ *Id.* at 7-8; see also CLI-05-09, slip op. at 3.

⁶ Certification Memorandum at 14.

⁷ *Id.* at 14 n.15.

⁸ *Dominion Nuclear North Anna, LLC, Joint Memorandum on the Mandatory Hearing Process* (Oct. 8, 2004) ("Dominion Joint Memorandum").

⁹ CLI-05-09, slip op. at 3.

(3) the *Calvert Cliffs* decision requires a licensing board to act no differently with respect to its review of the NRC Staff's environmental findings than it does with respect to its review of the NRC Staff's safety findings.

II. AS A MATTER OF POLICY, THE MANDATORY HEARING PROCEDURES SHOULD BE EFFICIENT AND AVOID UNNECESSARY DUPLICATION OF THE STAFF'S TECHNICAL REVIEW

How the mandatory hearing rules should be interpreted is fundamentally a policy issue, and the Commission should interpret these rules in a manner that makes the most sense today. The Chief Judge's Certification Memorandum focused on the wording of the NRC rules and hearing notices, and has not addressed the policy considerations.¹⁰ As a matter of policy, the mandatory hearing on uncontested issues should neither attempt to duplicate the NRC Staff's extensive technical and environmental review, nor substitute the Board's judgment for that of the Staff. Rather, the mandatory hearing process should simply serve as a check that the NRC Staff has reviewed those matters requiring review, and has developed a sufficient basis for its findings.

The Atomic Energy Act ("AEA") gives the Commission great latitude in establishing its requirements and procedures. Indeed, the regulatory scheme set forth in the AEA is "virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives."¹¹ Clearly, then, the Commission has the authority to establish a reasonable mandatory hearing process – one that is both effective and efficient. Here, the existing rules are subject to interpretation, as evidenced by the Chief Judge's certified questions, and the

¹⁰ This is not intended as a criticism of the Chief Judge's Certification Memorandum. The Chief Judge properly sought to determine the meaning and intent of the current regulations. Policy direction is appropriately provided by the Commission.

¹¹ *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968) (citing *Power Reactor Dev. Co. v. Int'l Union of Elec., Radio, & Mach. Workers*, 367 U.S. 396 (1961)).

Commission may, therefore, interpret those rules in a manner that makes the most sense. Even if the rules were not susceptible to interpretation, the Commission has the authority to change its rules by order, after giving appropriate notice to the parties.¹² Thus, the Commission has the ability to establish procedures that best serve its policy.

There is no question that the Commission's policy stresses the importance of conducting hearings in an efficient and effective manner.¹³ The Commission's recent amendments to 10 C.F.R. Part 2 and the promulgation of model milestones further emphasize the importance of efficient adjudications.¹⁴ The Chief Judge's estimate that it might take 1,000 person-hours, if not 2,000, for the ASLB to review an ESP application, and in the neighborhood of 1.5 person-years of work on the mandatory hearing portion of the proceeding¹⁵ is inconsistent with this policy.

The NRC's policy of conducting efficient adjudications is particularly important to the development of new plants. As the President recently stated, the development of new nuclear capacity is important not only to meet the nation's future energy needs and reduce dependence on foreign sources, but also to keep the air clean.¹⁶ However, there are concerns that the development of new nuclear capacity faces barriers, including perceived risks of regulatory delays. Both the Commission and the current Administration recognize the importance of

¹² *National Whistleblower Ctr. v. NRC*, 208 F.3d 256, 258 (D.C. Cir. 2000).

¹³ *Statement of Policy on the Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

¹⁴ *Final Rule, Changes to Adjudicatory Procedures*, 69 Fed. Reg. 2,182, 2,182, 2,232 (Jan. 14, 2004) ("[t]he [NRC] is amending its regulations concerning its rules of practice to make the NRC's hearing processes more effective and efficient."); *Final Rule, Model Milestones for NRC Adjudicatory Proceedings*, 70 Fed. Reg. 20,457, 20,458 (Apr. 20, 2005) ("[t]he purpose of the model milestones and accompanying changes to Subpart C are to enhance the efficiency and effectiveness of NRC adjudications....").

¹⁵ Certification Memorandum at 14 n.15.

¹⁶ President George W. Bush, Remarks on Energy at National Small Business Conference (Apr. 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050427-3.html>.

addressing the concerns, as reflected in the Commission's initiatives to improve its procedures¹⁷ and the Administration's consideration of the need for regulatory risk insurance.¹⁸ It is therefore in the national interest to avoid regulatory processes that are either unnecessary or unduly burdensome.

Further, an extensive ASLB review is neither necessary nor practical. The NRC Staff has the resources and support necessary to conduct comprehensive review of applications. In the ESP proceedings, the NRC Staff is undertaking a two-year technical and environmental review. The NRC Staff's review is performed by numerous subject-matter experts including support from the national laboratories. For example, forty-two experts, including twenty-three from Pacific Northwest National Laboratory, contributed to the Staff's environmental review of the North Anna ESP application. See NUREG-1811 at A-1.¹⁹ Based on NRC Staff review fees, Dominion estimates that on the order of 7,500 person-hours was spent produce the draft SER and 12,000 person-hours was spent preparing the DEIS in the North Anna ESP proceedings (and obviously, additional time will be required to finalize these documents and complete the NRC Staff's review). As part of the environmental review, the NRC Staff has consulted with federal and state agencies, has held public meetings to obtain comments on the scope of the review and later on the draft EIS, and has received and reviewed hundreds of written comments.

¹⁷ 69 Fed. Reg. at 2,188 ("The Commission believes that there is a need to take some action to improve the management of the adjudicatory process to avoid needless delay and unproductive litigation."); *Final Rule, Early Site Permits; Standard Design Certifications; & Combined Licenses for Nuclear Power Reactors*, 54 Fed. Reg. 15,372, 15,373 (Apr. 16, 1989) ("On the other hand, the Commission is told that the licensing process is 'the reason' for 'the loss of the nuclear option', and the reform of that process is the 'sine qua non' of the viability of that option....The Commission's intent with this [Part 52] rulemaking is only to have a sensible and stable procedural framework in place for the consideration of future designs....").

¹⁸ *Supra*, note 16.

¹⁹ NUREG-1811, *Draft Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site, Draft Report for Comment* (Nov. 2004).

In addition to the NRC Staff's review, both the initial and final safety evaluation reports are provided to the Advisory Committee on Reactor Safeguards ("ACRS") for its comments and recommendations.²⁰ The ACRS consists of eleven members with a wide variety of engineering expertise and decades of experience in their fields. The Committee reviews and reports on reactor facility license applications, advises the Commission on the hazards of proposed facilities, and initiates reviews of specific generic matters of nuclear facility safety-related items.²¹ The ACRS is independent of the NRC staff and reports directly to the Commission.²²

On top of the NRC Staff and ACRS reviews, members of the public as well as State and local agencies may raise and litigate admissible contentions in the contested portion of the proceeding. Such contested matters are adjudicated and decided by the ASLB and may thereafter be appealed to the Commission and the courts.

In light of the extensive reviews conducted by the NRC Staff and ACRS as well as the opportunity given to members of the public to litigate their concerns, it would make no sense for a licensing board to attempt to duplicate the entire technical and environmental review or make its own independent findings on uncontested issues, even if the licensing board had the resources to do so, which it does not. The NRC Staff has the "dominant role in assessing the radiological health and safety aspects" of an application.²³ Unnecessary duplication of the Staff's work would undermine the NRC Staff's role in the NRC's licensing framework.²⁴ Licensing boards are adjudicatory tribunals established and organized to decide matters in controversy based on

²⁰ 10 C.F.R. § 52.23.

²¹ 42 U.S.C. § 2039 (2005).

²² *Id.*

²³ *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981).

²⁴ *See id.*

evidence presented in the hearings. Therefore, it is appropriate for the licensing boards to rely on the testimony of the applicant and the NRC Staff in deciding uncontested issues, because that testimony will constitute the evidence in the proceeding.²⁵

Further, there is nothing in the nature of these proceedings that dictates another layer of detailed substantive review. The nuclear industry and its technology are mature, and the risks and impacts of nuclear power plants are well known. This is particularly true of the three early site permit proceedings, which are assessing the suitability of three sites that are already used for nuclear generation. The Commission and its regulatory standards are similarly mature. Unlike the licensing of the earliest plants, the technical standards that must be met are well established in the NRC rules and in the acceptance criteria in the Standard Review Plan. For example, as stated in the Draft Safety Evaluation ("DSER") for the North Anna ESP,²⁶

The NRC Review Standard (RS)-002, "Processing Applications for Early Site Permits," provides additional details on the scope and bases of the NRC staff's reviews of radiological safety and emergency planning aspects of the review of a proposed nuclear power plant site. This review standard contains regulatory guidance based on NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants" (hereinafter referred to as the Standard Review Plan). The Standard Review Plan reflects many years of experience the NRC staff has had in establishing and promulgating guidance to enhance the safety of nuclear facilities, as well as in evaluating safety assessments.

DSER at 1-2 to 1-3. Furthermore, in developing RS-002, the Staff "carefully evaluated what information is needed from an applicant, and what the staff's evaluation should address to support issuance of an ESP."²⁷ In sum, the NRC Staff's ability to review early site permit

²⁵ *Sumner*, ALAB-663, 14 NRC at 1156.

²⁶ *Draft Safety Evaluation of Early Site Permit Application in the Matter of Dominion Nuclear North Anna, LLC for the North Anna Early Site Permit* (Dec. 2004), at 1-1 to 1-2.

²⁷ *Id.*

applications and new plant applications subject to mandatory hearings is based on decades of knowledge and experience, which minimizes the need for additional adjudicatory oversight.

The extensive NRC Staff and ACRS reviews, the well established standards and experience that underlie those reviews, and the strong public interest in effective and efficient licensing, militate strongly against a protracted or redundant review of uncontested issues. Rather, the licensing board's inquiry should be a summary review to confirm that the NRC Staff has looked at the matters specified in the regulations and has developed a record to support its decision, and the uncontroverted testimony should be accorded considerable weight.

III. BROAD CONSENSUS EXISTS AMONG THE APPLICANT AND STAFF JOINT PROPOSALS ON THE CONDUCT OF THE MANDATORY HEARINGS

The limited nature of the mandatory hearing on uncontested issues is entirely consistent with the current rules. While the Chief Administrative Judge apparently perceived some inconsistency between the joint memoranda submitted by the applicants and Staff in proceedings below,²⁸ a review of those memoranda,²⁹ as well as the May 4, 2005 filing of USEC,³⁰ indicates that there is in fact broad consensus among the parties on what the rules require.

In every case, the joint memoranda submitted by the applicant and NRC Staff indicate that the licensing boards' review of uncontested issues should determine whether the application

²⁸ Certification Memorandum at 7.

²⁹ Louisiana Energy Services, L.P. (National Enrichment Facility), Joint Status Report Regarding the Parties' Proposed Discovery Plan and Other Adjudicatory Process Issues (July 29, 2004) ("LES Joint Memorandum"); System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), Joint Filing of System Energy Resources, Inc. and the Nuclear Regulatory Commission Staff Regarding Mandatory Hearing (Sept. 7, 2004) ("SERI Joint Memorandum"); Exelon Generation Company, LLC (Early Site Permit for the Clinton ESP Site), 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) ("Exelon Joint Memorandum"); Dominion Joint Memorandum, *supra*, n.15.

³⁰ USEC Inc. (American Centrifuge Plant), USEC Inc. Brief in Response to Commission Memorandum and Order (CLI-05-09) (May 4, 2005) ("USEC Brief").

and the record contain sufficient information and whether the NRC Staff's review has been adequate to support the NRC Staff's findings.³¹ In every case, the memoranda conclude that licensing boards are neither required nor expected to duplicate the NRC Staff's review or conduct a *de novo* review of the applications at issue.³² The memoranda further indicate that the licensing boards are authorized to rely on the applicant's and NRC Staff's testimony.³³

These conclusions are entirely consistent with the former Appendix A to Part 2, which provides a relatively contemporaneous³⁴ explanation of the meaning and intent of the mandatory hearing rules. Appendix A to Part 2 stated:

The board will determine the matters in controversy and may be called upon to make technical judgments of its own on those matters. As 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 ACRS, and they are authorized to rely upon the testimony of the staff, the

³¹ Dominion Joint Memorandum at 4 ("a licensing board . . . 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"); Exelon Joint Memorandum at 3 ("the Board should consider the findings made by the NRC staff, determine whether the application and record contain sufficient information, and determine whether the staff's review has been adequate"); LES Joint Memorandum at 8 ("The Licensing Board's 'mandatory' review is to focus on the completeness of the license application and hearing record, and on the adequacy of the Staff's evaluation of the application"); SERI Joint Memorandum at 3-4 ("the Licensing Board must be satisfied that the application and the record support the Staff's safety and environmental findings"). Because the Grand Gulf ESP proceeding is uncontested, the SERI Joint Memorandum discussed only uncontested proceedings. *Accord* USEC Brief at 2, 6.

³² Dominion Joint Memorandum at 3 ("The Board should not duplicate the review of the staff or perform basic independent research"); Exelon Joint Memorandum at 3 ("The Licensing Board is not required to conduct a *de novo* review"); LES Joint Memorandum at 8 ("It is not . . . a *de novo* review of the application"); SERI Joint Memorandum at 3 (no *de novo* review in an uncontested hearing). *Accord* USEC Brief at 2, 6.

³³ Dominion Joint Memorandum at 3; Exelon Joint Memorandum at 3; LES Joint Memorandum at 9; SERI Joint Memorandum at 4. *Accord* USEC Brief at 2, 7-8. The applicants and Staff further agreed that, at the mandatory hearing, they might be required to respond to pre-hearing questions by the Board, via written testimony, affidavits, exhibits, or live testimony, and that the Licensing Board might subject Staff or applicant witnesses to questioning at the hearing itself. SERI Joint Memorandum at 4; Exelon Joint Memorandum at 4-5; USEC Brief at 7; Dominion Joint Memorandum at 5.

³⁴ The Appendix was promulgated in 1966. See 31 Fed. Reg. 12,777 (Sept. 30, 1966).

applicant, and the conclusions of the ACRS, which are not controverted by any party.³⁵

While this Appendix was removed in the recent amendments to Part 2, this contemporaneous explanation of the mandatory hearing procedures is still indicative of the intended meaning.

Similarly, the positions of the parties are entirely consistent with longstanding case law.

As the Atomic Safety and Licensing Appeal Board explained long ago in a contested construction permit proceeding,

with respect to uncontroverted matters, the board is neither required nor expected to duplicate the review already performed by the regulatory staff and the ACRS and they are authorized to rely upon the testimony of the regulatory staff and the applicant, and the conclusions of the ACRS, which have not been controverted by any party.³⁶

The Appeal Board explained that a licensing board is to assure itself that the Staff's review has been adequate, and to inquire further into areas where it may perceive problems or a need for elaboration, but held that for a licensing board to duplicate the roles of the Staff or for it to perform independent research "is inconsistent with its adjudicatory role and beyond the scope of its delegated authority."³⁷

³⁵ 10 C.F.R. Part 2, Appendix A § V(f)(1) (2003). Importantly, this guidance has not been replaced by conflicting guidance (or any guidance for that matter) that would call into question the continued relevance of former Part 2 Appendix A. Thus, this is not a situation where more recent, conflicting guidance must prevail over an earlier version of that guidance. See *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 367 (2001) ("As the latest expression of the rulemakers' intent, the more recent regulation prevails if there is a perceived conflict with an earlier regulation."). Therefore, the guidance formerly contained in Appendix A on the explanation of a Board's role in the proceeding is still germane.

³⁶ *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 335 (1973) (footnote omitted).

³⁷ *Id.*

The Chief Administrative Judge also perceived ambiguity between portions of the various hearing notices and the underlying regulations.³⁸ His concern results from the failure of the ESP hearing notices to state that all determinations concerning uncontested safety and environmental matters are to be made without conducting a *de novo* review as stated in the *LES* hearing notice and in accord with 10 C.F.R. § 2.104(b)(2).³⁹ For the several reasons below, the minor wording differences do not alter the scope or nature of the licensing boards' review.

First, the rules and hearing notices should be interpreted so as to be consistent with each other.⁴⁰ Second, the *LES* hearing notice is indicative of the Commission's intent and offers a coherent interpretation of how uncontested matters, even if in a contested proceeding, are to be reviewed by the Board: without a *de novo* review.⁴¹ Indeed, the *LES* hearing notice is consistent

³⁸ Certification Memorandum at 8.

³⁹ *Id.* at 7. The Chief Administrative Judge also perceived ambiguity in the differences in the regulations on use of the word "consider" in relation to the Board's safety and NEPA reviews in a contested proceeding, and the word "determine" in relation to the safety and NEPA reviews in an uncontested proceeding. *Id.* at 9. However, in *UCS v. AEC*, 499 F.2d 1069 (D.C. Cir. 1974), the Court held that,

[w]hether the proceeding is uncontested or contested, [the ASLB's] mandate is to review the sufficiency of the record and the adequacy of the analysis to support the necessary findings. Adding to that responsibility in a contested case the authority to resolve disputes in no way affects the ASLB's authority respecting uncontested matters.

Id. At 1077. As the Court further held, a Licensing Board does not make the findings itself, but determines 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 to be made by the Staff. *Id.* at 1076. Thus, the Board's responsibilities on uncontested matters is no different in a contested proceeding than in an uncontested proceeding, and in both, the Board reviews rather than decides these matters.

⁴⁰ See *Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-92-16A, 36 NRC 18, 20 n.6 (1992) ("[t]raditional rules of statutory interpretation...are fully applicable in construing the Commission's regulations. Those rules require that the Commission's regulations be read as a whole, including later-enacted amendments. Effect is to be given to each part of the regulations and *all* provisions are to be interpreted so they do not conflict."), *rev'd on other grounds*, CLI-92-13, 36 NRC 79 (1992) (emphasis in original).

⁴¹ *In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility); Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of*

with the above-quoted guidance formerly provided in Appendix A to Part 2. Third, while the ESP hearing notices fail to state that a *de novo* review is not necessary for uncontested proceedings, they do not suggest otherwise. They do state that the presiding officer's role is to determine whether the application and the record contain sufficient information, and whether the Staff's review has been adequate to make the mandatory findings.⁴² The description of the presiding officer's role is entirely consistent with *not* performing a *de novo* review. And, in fact, this level of review is exactly what the applicants and Staff proposed.⁴³

IV. CALVERT CLIFFS REQUIRES LICENSING BOARDS TO UNDERTAKE THE SAME LEVEL OF REVIEW FOR ENVIRONMENTAL ISSUES AS IT DOES FOR NON-ENVIRONMENTAL ISSUES

In the Certification Memorandum, the Chief Administrative Judge asks whether the *Calvert Cliffs*⁴⁴ decision holds that NRC 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 may be necessary" for the Board to make an independent initial decision on each baseline NEPA matter that is not part of a contested issue.⁴⁵ *Calvert Cliffs* requires neither a *de novo* review nor an independent decision.

Calvert Cliffs' holding is quite simple: "NEPA requires at least as much automatic consideration of environmental factors" by licensing boards as it does for non-environmental

Consideration of Issuance of License; and Notice of Hearing and Commission Order, 69 Fed. Reg. 5,873, 5,874 (Feb. 6, 2004).

⁴² See, e.g., *Dominion Nuclear North Anna, LLC; Notice of Hearing & Opportunity to Petition for Leave to Intervene; Early Site Permit for the North Anna ESP Site*, 68 Fed. Reg. 67,489 (Dec. 2, 2003).

⁴³ LES Joint Memorandum at 8; SERI Joint Memorandum at 3-4; Exelon Joint Memorandum at 3; USEC Brief at 2; Dominion Joint Memorandum at 3-4.

⁴⁴ *Calvert Cliffs Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

⁴⁵ Certification Memorandum at 13 (emphasis added).

factors.⁴⁶ Thus, the same type of licensing board review required for safety issues should be required of environmental issues. Put another way, *Calvert Cliffs* requires licensing boards to review the NRC Staff's environmental findings in the same manner it would the NRC Staff's safety findings. And, both reviews should focus on the sufficiency of the information contained in the record and the adequacy of the Staff's review.

Indeed, this is exactly how NRC case law has interpreted and applied *Calvert Cliffs*. As held by the Appeal Board, the Commission and its licensing boards are "to consider environmental issues, just as they consider other matters within their mandates."⁴⁷ Thus, the Board should consider environmental issues in the uncontested portion of an ESP proceeding in essentially the same manner as it considers safety issues, by relying on the testimony of the Staff and the applicant and the conclusions of the ACRS, and not by conducting a *de novo* review. "Calvert Cliffs . . . require[s] no independent research by the Board" and does "not require the Board to duplicate the analysis performed by the staff."⁴⁸ Rather, *Calvert Cliffs* requires an "independent review of staff proposals" by the Board, and conclusions independently arrived at on the basis of the evidence in the record, including the Staff's Final Environmental Statement."⁴⁹ This is consistent with the applicants' and Staff's joint memoranda, the hearing notices, and the NRC's regulations.

V. CONCLUSION

As a matter of policy, and as consistent with the NRC's Rules of Practice, licensing boards should not conduct a *de novo* review of an application for a construction or early site

⁴⁶ *Calvert Cliffs*, 449 F.2d at 1118.

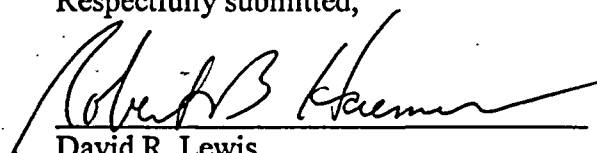
⁴⁷ *Midland*, ALAB-123, 6 AEC at 335 (emphasis in original).

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.* at 335-36 (footnote omitted).

permit. The mandatory hearings on uncontested issues should be a summary review to determine whether the application and the record contains sufficient information, and whether the review by the Staff has been adequate to support the Staff's proposed findings. Consistent with their adjudicatory role, the licensing boards are authorized and should rely on the uncontroverted testimony of the applicant and the NRC Staff in making these determinations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert B. Haemer", is written over a horizontal line.

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**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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Dominion's Brief in Response to CLI-05-09 Regarding Mandatory Hearing Requirements" have been served upon the following persons by electronic mail with conforming copies by U.S. Mail, first class, postage prepaid, this 18th day of May, 2005. Those marked by an asterisk (*) were served only by first class U.S. Mail.

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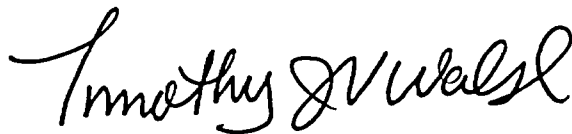
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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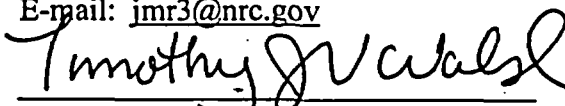
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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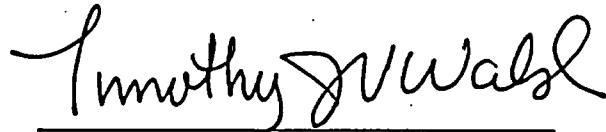
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

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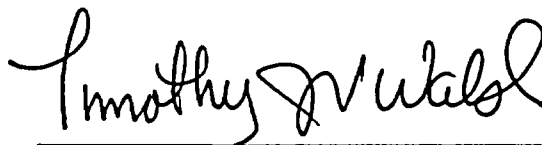
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of

USEC Inc.

(American Centrifuge Plant)

Docket No. 70-7004

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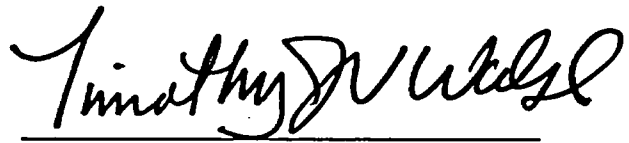
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