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 ASLBP No. 04-821-01-ESP
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
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
In the Matter of LOUISIANA ENERGY SERVICES, L.P. (National Enrichment Facility)	Docket No. 70-3103-ML ASLBP No. 04-826-01-ML
In the Matter of USEC, INC. (American Centrifuge Plant)	Docket No. 70-7004-ML ASLBP No. 05-838-01-ML

NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES

Robert M. Weisman
Counsel for NRC Staff

Darani M. Reddick
Counsel for NRC Staff

Lisa B. Clark
Counsel for NRC Staff

Marian L. Zobler
Counsel for NRC Staff

May 25, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JUDICIAL DECISIONS

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER NOTICES

May 25, 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 ASLBP No. 04-821-01-ESP
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
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
In the Matter of LOUISIANA ENERGY SERVICES, L.P. (National Enrichment Facility)	Docket No. 70-3103-ML ASLBP No. 04-826-01-ML
In the Matter of USEC, INC. (American Centrifuge Plant)	Docket No. 70-7004-ML ASLBP No. 05-838-01-ML

NRC STAFF BRIEF IN RESPONSE TO
COMMISSION MEMORANDUM AND ORDER (CLI-05-09)
ON MANDATORY HEARING PROCEDURES

INTRODUCTION

Pursuant to the Commission's Order dated April 20, 2005,[1] the Staff of the Nuclear Regulatory Commission ("Staff") herein addresses the questions certified to the Commission in the Atomic Safety and Licensing Board Panel Chairman's Memorandum of March 18, 2005 (Certifying Questions Regarding Mandatory Hearing Procedures) ("Board Certification")[2] and accepted for review by the Commission. As directed by the Commission, the Staff also addresses the arguments presented in the briefs of the parties or petitioners in the captioned proceedings.

BACKGROUND

I. Early Site Permit Proceedings

On September 25, 2003, Dominion Nuclear North Anna, L.L.C. ("Dominion") submitted to the NRC an application pursuant to 10 C.F.R. Part 52, Subpart A, in which it requested an Early Site Permit ("ESP") for a site within the existing site of the North Anna Power Station. *See* Letter from D.A. Christian, Dominion, to J.E. Dyer, NRC, "North Anna Early Site Permit Application," dated Sept. 25, 2003 (ADAMS ML No. 032731511). On the same day, Exelon Generation Company, L.L.C. ("Exelon") also submitted to the NRC an application in which it requested an ESP for property co-located with the existing Clinton Power Station facility near Clinton, Illinois. *See* Letter from Marilyn Kray, Exelon, to NRC, "Early Site Permit Application," dated Sept. 25, 2003 (ADAMS ML No. 032721599). On October 16, 2003, System Energy Resources, Inc. ("SERI") submitted an application requesting an ESP for a site within the existing site of the Grand Gulf Nuclear Station. *See* Letter from William A. Eaton, SERI, to NRC, "Early Site Permit Application," dated

---

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

[2] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-07, 61 NRC ___, slip op. (Mar. 18, 2005).

Oct. 16, 2003 (ADAMS ML No. 032960370). Notices of Hearing initiating the proceedings on the North Anna, Clinton, and Grand Gulf ESP applications were published in the *Federal Register* on December 2, 2003, December 12, 2003, and January 16, 2004, respectively.[3] Each Notice of Hearing offered an opportunity to petition for leave to intervene, and, as described in detail in Background Section III, below, each defined the issues in the proceeding in identical terms. *North Anna,* 68 Fed. Reg. at 67,489; *Clinton* 68 Fed. Reg. at 69,427; *Grand Gulf*, 69 Fed. Reg. at 2636. In response to the Notices of Hearing, petitions to intervene were filed in the North Anna, Clinton, and Grand Gulf proceedings.[4]

On March 22, 2004, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel designated an Atomic Safety and Licensing Board ("Board" or "Licensing Board") to preside over each of the three ESP proceedings.[5] The three Boards subsequently granted

---

[3] *See* Dominion Nuclear North Anna, LLC; Notice of Hearing and Opportunity to Petition for Leave to Intervene; Early Site Permit for the North Anna ESP Site, 68 Fed. Reg. 67,489 (Dec. 2, 2003); 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. 69,426 (Dec. 12, 2003); System Energy Resources, Inc; Notice of Hearing and Opportunity to Petition for Leave to Intervene; Early Site Permit for the Grand Gulf ESP Site, 69 Fed. Reg. 2636 (Jan. 16, 2004).

[4] In response to the North Anna Notice of Hearing, on January 2, 2004, the Blue Ridge Environmental Defense League ("BREDL"), Nuclear Information and Resource Service ("NIRS"), and Public Citizen ("PC") (collectively, "North Anna Petitioners") filed a petition requesting leave to intervene in the North Anna ESP proceeding. *See* "Hearing Request and Petition to Intervene by [North Anna Petitioners]" (Jan. 2, 2004). On January 12, 2004, BREDL, NIRS, PC, the Environmental Law and Policy Center ("ELPC") and the Nuclear Energy Information Service ("NEIS") (collectively, "Clinton Petitioners"), requested leave to intervene in the Clinton ESP proceeding. *See* "Hearing Request and Petition to Intervene by [Clinton Petitioners]" (Jan. 12, 2004). In the Grand Gulf matter, the National Association for the Advancement of Colored People (Claiborne County, Mississippi Branch) ("NAACP"), NIRS, PC, and the Mississippi Chapter of the Sierra Club ("Sierra Club") (collectively, "Grand Gulf Petitioners") requested leave to intervene on February 12, 2004, as supplemented on February 17, 2004. *See* "Hearing Request and Petition to Intervene by [Grand Gulf Petitioners]" (Feb. 12, 2004); "Amended Hearing Request and Petition to Intervene by [Grand Gulf Petitioners]"(Feb. 17, 2004).

[5] Dominion Nuclear North Anna, LLC; Establishment of Atomic Safety and Licensing Board, (continued...)

intervention in the North Anna and Clinton proceedings, and denied intervention in the Grand Gulf proceeding. *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 234 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 258 (2004); *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 282 (2004).

II. Enrichment Facility Applications

A. Louisiana Energy Services

On December 12, 2003, Louisiana Energy Services, L.P. ("LES") filed an application for authorization to possess and use source, byproduct, and special nuclear material ("SNM") in order to enrich natural uranium by the gas centrifuge process. The Commission, on January 30, 2004, issued a Notice of Hearing on the LES application, and offered an opportunity to petition for leave to intervene in the proceeding. *Louisiana Energy Serv., LP* (Nat'l Enrichment Facility), CLI-04-03, 59 NRC 10, 12-13 (2004) (69 Fed. Reg. 5873 (Feb. 6, 2004)). The New Mexico Environment Department ("NMED") and the New Mexico Attorney General ("NMAG") each filed its own petition to intervene, while NIRS and PC filed a joint intervention petition. "[NMED] Request for Hearing and Petition for Leave to Intervene" (Mar. 23, 2004); "[NMAG] Request for Hearing and Petition for Leave to Intervene" (Apr. 5, 2004); "Petition to Intervene by [NIRS/PC]" (Apr. 6, 2004). The presiding Board subsequently ruled that the Petitioners had established the requisite standing to intervene in this proceeding, and that each had submitted at least one admissible contention concerning the LES application. *Louisiana Energy Serv., LP* (Nat'l Enrichment Facility), LBP-04-14, 60 NRC 40 (2004).

---

[5](...continued)
69 Fed. Reg. 15,910 (Mar. 26, 2004); Exelon Generation Co., LLC; Establishment of Atomic Safety and Licensing Board, 69 Fed. Reg. 15,910 (Mar. 26, 2004); System Energy Resources, Inc.; Establishment of Atomic Safety and Licensing Board, 69 Fed. Reg. 15,911 (Mar. 26, 2004).

B. USEC, Inc.

On August 23, 2004, USEC, Inc. ("USEC") filed an application for a license to possess and use source, byproduct and SNM and to enrich natural uranium to a maximum of 10 percent U-235 by the gas centrifuge process at the American Centrifuge Plant. On October 18, 2004, the Commission issued an order noticing receipt of the license application and consideration of issuance of the license, and a Notice of Hearing and opportunity to petition to intervene in the proceeding. *USEC, Inc.* (American Centrifuge Plant), CLI-04-30, 60 NRC 426 (2004) (69 Fed. Reg. 61,411 (Oct. 18, 2004)). With respect to the provisions relevant to the certified questions, the *USEC* Notice of Hearing is identical to that issued in the *LES* proceeding. *Compare LES*, CLI-04-3, 59 NRC 10, *with USEC* CLI-04-30, 60 NRC 426. In response to the Notice of Hearing, the Piketon/Portsmouth Residents for Environmental Safety and Security ("PRESS") and Geoffrey Sea filed petitions to intervene on February 28, 2005. "Petition to Intervene by [PRESS]" (Feb. 28, 2005); "Petition to Intervene by Geoffrey Sea" (Feb. 28, 2005). On May 12, 2005, the Commission ruled that both PRESS and Mr. Sea had established standing to intervene. *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC ___, slip op. (May 12, 2005). The Commission accordingly referred the petitions to the Board for further consideration. The Board presiding over the *USEC* proceeding was established on May 17, 2005. *USEC, Inc.* (American Centrifuge Plant), "Establishment of Atomic Safety and Licensing Board" (May 17, 2005).

III. Notices of Hearing

Each Notice of Hearing specifies the particular safety and environmental matters before the Licensing Board in each proceeding.[6] In addition, each Notice of Hearing sets forth provisions for

[6] The matters before the Boards in the proceedings depend on the type of permit or license requested in the application. The ESP Notices of Hearing state two safety issues pursuant to the Atomic Energy Act of 1954, as amended, as follows:

(continued...)

the Board to apply in the event the proceeding is uncontested or becomes contested, and includes provisions relating to the determinations necessary to satisfy the National Environmental Policy Act ("NEPA") and the Commission's regulations implementing NEPA in 10 C.F.R. Part 51. Each of these provisions in the ESP and enrichment facility Notices of Hearing is set forth, in turn, below.

A. Provisions Governing Uncontested Proceedings

The Notices of Hearing for both the ESP and enrichment facility proceedings contain a provision to be applied if the hearing is not a contested proceeding as defined by 10 C.F.R. § 2.4. Given such circumstances, the ESP Notices state that:

> the presiding officer will determine: whether the application and record of the proceeding contain sufficient information, and the

---

[6](...continued)

> (1) Whether the issuance of an ESP will be inimical to the common defense and security or to the health and safety of the public (Safety Issue 1); and, (2) whether, taking into consideration the site criteria contained in 10 CFR 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).

See North Anna, 68 Fed. Reg. at 67,489; *Clinton*, 68 Fed. Reg. at 69,427; *Grand Gulf*, 69 Fed. Reg. at 2636.

Additionally, the ESP Notices of Hearing identified an environmental issue pursuant to the National Environmental Policy Act ("NEPA)" of 1969, as amended, namely, "[w]hether, in accordance with the requirements of subpart A of 10 CFR part 51, the ESP should be issued as proposed." *Id.*

The *LES* and *USEC* Notices of Hearing stated the issues as follows:

> C. The matters of fact and law to be considered are whether the application satisfies the standards set forth in this Notice and Commission Order and applicable standards in 10 C.F.R. §§ 30.33, 40.32, and 70.23, and whether the requirements of 10 C.F.R. Part 51 have been met.

LES, CLI-04-3, 59 NRC at 12; *USEC*, CLI-04-30, 60 NRC at 428. These portions of the Notices of Hearing are not the subject of the questions certified to the Commission, which are discussed *infra*.

> review of the application by the Commission's staff has been adequate to support a negative finding on Safety Issue 1 [stated in n.6], and an affirmative finding on Safety Issue 2 [stated in n.6], as proposed to be made by the Director, Office of Nuclear Reactor Regulation; and whether the review conducted by the Commission pursuant to NEPA has been adequate.

See North Anna, 68 Fed. Reg. at 67,489; *Clinton*, 68 Fed. Reg. at 69,427; *Grand Gulf*, 69 Fed. Reg. at 2636. The corresponding provision in the enrichment facility notices states as follows:

> D. If this proceeding is not a contested proceeding, as defined by 10 C.F.R. § 2.4, the Board will determine the following, without conducting a de novo evaluation of the application: (1) 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, 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 C.F.R. Part 51 has been adequate.

LES, CLI-04-3, 59 NRC at 12 (emphasis added); *USEC*, CLI-04-30, 60 NRC at 428. The Notices for the ESPs and the enrichment facilities all state that, in uncontested proceedings, the Board will determine whether the application, the record in the proceeding, and the NRC Staff's review are adequate to support the findings made by the appropriate office director with respect to the safety issues set forth in the notices, and whether the environmental review of the application has been adequate. The ESP Notices, however, differ from the enrichment facility Notices in that the latter explicitly state that the Board will make such determinations "without conducting a de novo evaluation of the application," while the ESP Notices omit this phrase.

B. Provisions Governing Contested Proceedings

With respect to contested proceedings, the ESP Notices state that "[i]f the hearing is contested as defined by 10 C.F.R. § 2.4, the presiding officer will consider Safety Issues 1 and 2 and the issue pursuant to NEPA set forth above [*see* n.6, *supra*]."

North Anna, 68 Fed. Reg. 67,489; *Clinton*, 68 Fed. Reg. 69,427; *Grand Gulf*, 69 Fed. Reg. 2636. In contrast, the enrichment facility Notices state:

> 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 but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D without conducting a de novo evaluation of the application.

LES, CLI-04-3, 59 NRC at 13; *USEC*, CLI-04-30, 60 NRC at 428. While the enrichment facility Notices clearly separate the contentions involved in the contested part of the proceeding from the remaining uncontested portion of the application, the ESP Notices are silent on this point. Similarly, the enrichment facility Notices clearly state that the Board should make its determinations with respect to matters not covered by contentions without conducting a *de novo* evaluation, but the ESP Notices do not make such a distinction.

C. Provisions Relating to NEPA and 10 C.F.R Part 51

Whether or not a proceeding is contested, NEPA and the Commission's regulations require certain determinations relating to environmental matters. In this regard, the ESP Notices state as follows:

> Regardless of whether the proceeding is contested or uncontested, the presiding officer will: (1) Determine 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; (2) 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; and (3) determine, after considering reasonable alternatives, whether the ESP should be issued, denied, or appropriately conditioned to protect environmental values.

North Anna, 68 Fed. Reg. at 67,489 (emphasis added); *Clinton*, 68 Fed. Reg. at 69,427 (emphasis added); 69 Fed. Reg. at 2636 (emphasis added). With a few minor differences not relevant to the questions certified to the Commission and discussed herein, the enrichment facility Notices are

identical to the ESP Notices, except that, in directing the Board to "determine whether a license should be issued, denied, or conditioned to protect the environment," they omit the phrase "after considering reasonable alternatives." *LES*, CLI-04-3, 59 NRC at 12-13; *USEC*, CLI-04-30, 60 NRC at 428.

IV. Staff Views on Mandatory Hearing Provisions Presented to the Licensing Boards

In each of the ESP proceedings and in the *LES* proceeding, the Boards requested that the applicant and the NRC Staff provide their views on how the Board should proceed relative to the mandatory hearing findings required under the Notices of Hearing. *See North Anna*, LBP-04-18, 60 NRC at 274 n.10; *Clinton*, LBP-04-17, 60 NRC at 250 n.10; *Grand Gulf*, LBP-04-19, 60 NRC at 298 and n.7; *LES*, LBP-04-14, 60 NRC at 76 n.20. The Staff's views presented to the Boards in each of the proceedings are set forth chronologically as follows, beginning with the *LES* proceeding.[7]

A. Staff and Applicant Views Presented in *LES* Proceeding

On July 29, 2004, LES and the NRC Staff jointly filed their views in response to the Board's request in that proceeding. "Joint Status Report Regarding the Parties' Proposed Discovery Plan and Other Adjudicatory Process Issues" (July 29, 2004) ("LES Joint Report"). The Staff and the Applicant summarized the *LES* Notice of Hearing as containing three overarching principles governing the mandatory hearing in that proceeding. These three principles were stated as follows:

> • 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

[7] Although a Board was recently established to preside over the *USEC* proceeding on May 17, 2005, no request has been issued by this Board for the participants to file their views on mandatory hearing procedures. However, the Commission, in response to USEC's petition, granted it leave to file its views on the mandatory hearing provisions of the *USEC* Notice of Hearing, and also permitted the USEC petitioners to file their views. *Clinton et al.*, CLI-05-09, 61 NRC ___, slip op. (Apr. 20, 2005).

> application. It is not, however a *de novo* review of the application.
>
> • The particular substantive areas to be reviewed by the Board will generally coincide with the standards set forth in 10 C.F.R. §§ 30.33, 40.32, and 70.23, 10 C.F.R. Part 51, and the Commission's Hearing Order [in CLI-04-3, 59 NRC 10].
>
> • The Licensing Board's review, however, should be confined to matters "not already covered by admitted contentions." If there is an admitted contention on an issue, a determination on that admitted contention will suffice.

LES Joint Report at 8.

In light of the foregoing principles, the Staff proposed to provide an executive summary of the key areas of the Staff's review and findings, with reference to the Staff's final Safety Evaluation Report ("SER") and Environmental Impact Statement ("EIS"). *Id*. at 9. The Staff and LES further proposed that the Board hold a prehearing conference to discuss specific questions the Board might have following its review of the executive summary, the key issues the Board would consider at the hearing, and the scope of further evidentiary presentations necessary to support the Board's mandatory determinations. *Id.* The Staff and LES proposed that at the hearing, they would respond to questions issued by the Board on key issues underpinning the Board's required legal determinations. *Id*. Staff and LES witnesses would be available at the hearing to provide additional clarification or information necessary to support the Board's findings. *Id*. LES would submit proposed findings of fact and conclusions of law on the mandatory hearing issues, and the NRC Staff would then submit any revised or supplemental findings it deemed necessary. *Id*. Finally, the Board would issue a partial initial decision on the mandatory hearing determinations after review of the record and proposed findings. *Id*.

B. Staff and Applicant Views Presented in ESP Proceedings

The Board in the ESP proceedings requested that the applicants and the Staff provide views outlining their proposal for how the Board should proceed regarding the "uncontested" portion of the proceeding and their views on the difference, if any, between what was required under the ESP mandatory hearings and that for the *LES* proceeding relative to matters that are not the subject of admitted contentions. *See Grand Gulf*, 60 NRC at 298 and n.7; *North Anna*, 60 NRC at 274 n.10; *Clinton*, 60 NRC at 250 n.10.

In accordance with the Licensing Boards' orders, the NRC Staff filed a response in each proceeding. *See* "Joint Filing of System Energy Resources, Inc. and the Nuclear Regulatory Commission Staff Regarding Mandatory Hearing" (Sept. 7, 2004) ("Grand Gulf Joint Response"); "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) ("Clinton Joint Response"); "Joint Memorandum on the Mandatory Hearing Process" (Oct. 8, 2004) ("North Anna Joint Response"). The approach proposed by the Applicant and the Staff in the *LES* proceeding was the model for the approach proposed by the Applicants and Staff in the ESP proceedings.

In particular, the Staff specifically stated that the Board should not conduct a *de novo* review with respect to an uncontested proceeding or the uncontested portions of a proceeding in which contentions had been admitted. *See* Grand Gulf Joint Response at 4 n.5; Clinton Joint Response at 3; North Anna Joint Response at 3, 5. In regard to whether the Board should conduct a *de novo* review, the joint responses in the Clinton and North Anna proceedings explicitly relied on the Commission's Notice of Hearing in the *LES* proceeding regarding the scope and content of the mandatory hearing. *See* Clinton Joint Response at 4 n.2, *citing LES*, CLI-04-3, 59 NRC 10; North Anna Joint Response at 3, *citing LES*, CLI-04-3, 59 NRC 10.

The one aspect of the ESP responses that differs from the *LES* recommendation is that the Staff did not adopt the approach taken in *LES*, as indicated above, that the Staff would provide an executive summary of the key areas of the Staff's review and findings to the Board. Rather, as relevant here, each joint response indicated that the Staff did not propose to provide an executive summary of the SER or EIS to the Board, although the Staff in the North Anna proceeding did clarify that such an executive summary would be provided upon request. *See* Grand Gulf Joint Response at 5; Clinton Joint Response at 5; North Anna Joint Response at 9. This distinction was not intended to suggest that the Board should conduct a more limited review in the *LES* case than in the ESP proceedings. In *LES*, the provision of an executive summary was intended to serve as an aid to the Board by providing an overall review of the issues of significance. The Staff in *LES* did not intend to propose that the Board's review would be limited only to the executive summary. In fact, the LES Joint Report stated that the Applicant and Staff would respond to the Board's questions "by way of written testimony, affidavits, exhibits, and/or live testimony . . . ." LES Joint Report at 9.

Moreover, each of the ESP joint responses indicated that each Board, in reaching its decision in the uncontested portion of the proceeding, should consider the entire record, including the application, the Staff's SER and EIS, and any evidence admitted at hearing. *See* Grand Gulf Joint Response at 3-4; Clinton Joint Response at 3; North Anna Joint Response at 3-5. In addition, the Staff indicated that the Board should consider, as relevant, any report of the Advisory Committee on Reactor Safeguards ("ACRS"), as required by 10 C.F.R. § 2.337(g)(1). Clinton Joint Response at 3.

V. The Certified Questions

On March 18, 2005, the Chief Administrative Judge issued a Memorandum which highlighted the differences in the Notices of Hearing for the ESP and *LES* proceedings, and called

attention to what appeared to be differences in the Staff and applicant joint recommendations on mandatory hearing procedures. He therefore certified the following questions regarding mandatory hearing procedures to the Commission:

> 1. What is 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? Board Certification at 10.
>
> 2. 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. *Id.* at 11.
>
> 3. Should the Licensing Board's determinations regarding (a) the sufficiency of the information in the application and record of the proceeding 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? *Id*. at 11-12.
>
> 4. What is the scope of review for Licensing Boards in making the three "baseline" NEPA findings required by 10 C.F.R. §§ 51.105(a)(1)-(3) and 2.104(b)(3)? *Id.* at 13.
>
> 5. a. 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? *Id.* at 14.
>
> b. 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? *Id.*

The Commission authorized the other parties in the proceedings at hand and the USEC applicant and petitioners to file briefs, and required that the Staff's response address these briefs.

Id. at 3. The Staff's response to the Board's certified questions, as well as its response to the briefs filed on behalf of the other parties and petitioners, is set forth below.

DISCUSSION

I. Legal Standards

The requirements for conducting mandatory hearings are found in the Atomic Energy Act of 1954, as amended ("AEA") and 10 C.F.R. Part 2, and have been elaborated upon through NRC jurisprudence. The legal requirement that the Commission hold mandatory hearings in ESP cases is derived from section 189a(1)(A) of the AEA, 42 U.S.C. § 2239(a)(1)(A), which states 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[.]" Applications for ESPs are subject to certain procedural requirements in 10 C.F.R. Part 2 that implement the provisions of section 189a(1)(A) of the AEA since ESPs are considered to be partial construction permits. 10 C.F.R. § 52.21. The Commission must also conduct a mandatory hearing for a license to construct and operate a uranium enrichment facility pursuant to AEA section 193(b)(1), 42 U.S.C. § 2243(b). *See* 10 C.F.R. §§ 70.23a, 70.31(e). For a construction permit, the notice of hearing is governed by 10 C.F.R. § 2.104(b).[8] For a contested

[8] The Board Certification states that the regulatory provision governing the mandatory hearing requirement applicable to both the ESP and *LES* proceedings (and presumably the *USEC* proceeding), is 10 C.F.R. § 2.104(b). The Staff notes, however, that section 2.104(b) applies only "[i]n the case of an application for a construction permit for a [production or utilization] facility[.]" Neither the *LES* nor the *USEC* proceeding involves an application for a construction permit for a of "production or utilization" facility. *See LES*, 69 Fed. Reg. at 5878; *see also USEC*, 69 Fed. Reg. at 61,415. It appears, therefore, that section 2.104(b) may not literally apply to these enrichment fuel cycle facility applications. This consideration, however, appears relevant only to the substantive issues for hearing, as set forth, *supra*. Moreover, the *LES* and *USEC* Notices of Hearing differ significantly from the ESP Notices of Hearing only as set forth above in Background Section III. Inasmuch as the *LES* and *USEC* Notices of Hearing provide that the Board not conduct a *de novo* review of the application in an uncontested proceeding, they are consistent with the requirements of section 2.104(b). Accordingly, the applicability of section 2.104(b) to the enrichment facility notices does not appear to be relevant to the certified questions.

proceeding, 10 C.F.R. § 2.104(b)(1) provides that the presiding officer "will consider" the issues set forth in that section.[9] In addition, section 2.104(b)(2) states that for an uncontested proceeding,

---

[9] 10 C.F.R. § 2.104(b)(1) states that, for contested proceedings, the presiding officer will consider:

i. "[w]hether, in accordance with 10 C.F.R. § 50.35(a)":

   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)(a)-(c) above], there is reasonable assurance that (1) such safety questions will be satisfactorily resolved at or 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. "[w]hether the applicant is technically qualified to design and construct the proposed facility";

iii. "[w]hether the applicant is financially qualified to design and construct the proposed facility";

iv. "[w]hether 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";

(continued...)

the presiding officer "will determine" the issues stated in that section.[10] The regulations also state, at section 2.104(b)(3), that for both contested and uncontested proceedings, the presiding officer will make the three NEPA "baseline" findings.[11]

---

[9](...continued)

v. "[i]f the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether, in accordance with the requirements of subpart A of part 51 of this chapter, the construction permit should be issued as proposed."

[10] 10 C.F.R. § 2.104(b)(2) states that, for uncontested proceedings, the presiding officer will determine:

i. "[w]ithout conducting a de novo evaluation of the application, 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 on [(i)-(iii) of n.8, above] and a negative finding on [(iv) of n.8, above] proposed to be made and the issuance of a construction permit proposed by the Director of Nuclear Reactor Regulation or Direction of Nuclear Material Safety and Safeguards, as appropriate"; and

ii. "[i]f the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact on the environment, whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate."

[11] 10 C.F.R. § 2.104(b)(3) states that, for contested and uncontested proceedings, the presiding officer will:

i. "[d]etermine whether the requirements of section 102(2) (A), (C) and (E) of the National Environmental Policy Act and subpart A of part 51 of this chapter have been complied with in the proceeding";

ii. "[i]ndependently 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

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

A notice of hearing defines the issues which the Licensing Board has the power to explore in a particular proceeding, and a Licensing Board may not explore matters beyond those which are embraced by the notice of hearing. *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290 n.6 (1979). Moreover, a Board's jurisdiction is defined by the Commission's notice of hearing. *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20-21 (1991).

In this regard, because many of the certified questions pertain to the scope and standard of review in mandatory hearings, insight into the history of the applicable regulations in Part 2 regarding notices of hearing is warranted. In 1966, the Atomic Energy Commission ("AEC") added a new section 2.104(b) to its regulations to set out the issues that were to be specified in notices of hearing for construction permit applications. Miscellaneous Amendments, 31 Fed. Reg. 12,774 (Sept. 30, 1966). The Statement of Consideration ("SOC") accompanying this revision referred to a seven-member Regulatory Review Panel ("Review Panel"), which the AEC had appointed to study the programs and procedures for licensing and regulation of reactors and the decision-making process in the AEC's regulatory program. *Id*. The SOC further stated that the amended rule generally reflected the report produced by the Review Panel, which included, *inter alia,* recommendations with respect to the conduct of uncontested licensing proceedings at the construction permit stage. *Id*; *see also* "Proposed Amendments to Part 2 – Proposed Statement of General Policy Pertaining to Conduct of Proceeding by Atomic Safety and Licensing Boards," AEC-R 4/38 (January 10, 1966) ("AEC-R 4/38"), at Appendix A.[12]

[12] AEC-R 4/38 was released to the public in 1992 and is available at the NRC's Public Document Room (Microform Addresses: 63569:308-63570:013). As a convenience, a copy of AEC-R 4/38 and its appendices are attached to this brief.

The SOC reflected the Review Panel's recommendation that the Board would make findings on the issues specified in the notice of hearing for a contested proceeding. 31 Fed. Reg. 12,774; *see also* AEC-R 4/38 2-3; AEC-R 4/38, App. A at 9. The Review Panel emphasized that the Board's principal functions in contested proceedings would be to "determine the controversies between the parties, to make findings pertinent to the application, and to order issuance of, or deny, the provisional construction permit." AEC-R 4/38, App. A at 9. However, the Review Panel clearly stated that, even in contested cases, uncontested matters would not be subject to a *de novo* review by the Board, and that in such cases, the Board's review would be limited to "ascertaining whether the application and the record are sufficient, and the staff review has been adequate, to support its findings on the issues." *Id*. at 9-10. Thus, inasmuch as the Review Panel's recommendations were reflected in the amendments to section 2.104(b), they effectively demonstrate the intent behind section 2.104(b) as currently written.

Established case-law also elaborates upon past Commission practice regarding the conduct of mandatory hearings. The Atomic Safety and Licensing Appeal Board ("Appeal Board") ruled that in a contested construction permit proceeding, the Licensing Board's role is "to evaluate independently and resolve the appropriate contentions of the various parties, to assure itself that the regulatory staff's review has been adequate, and to inquire further into areas where it may perceive problems or find a need for elaboration." *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 335 (1973). However, "for the Board to duplicate the role of the staff . . . is inconsistent with its adjudicatory role[.]" *Id.* In the *River Bend* construction permit proceeding, the Appeal Board, discussing the role of the Licensing Board, stated that with respect to uncontested matters, "licensing boards are explicitly not required to duplicate the review already performed by the staff and the ACRS[.]" *Gulf States Utils. Co.* (River Bend Station Units 1 and 2), ALAB-444, 6 NRC 760, 766, 774 (1977). The Appeal Board in

River Bend also referred to 10 C.F.R. Part 2, former Appendix A, V(f)(2), which stated that for uncontested proceedings/ matters, the Licensing Board's role is "to decide 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."[13] 10 C.F.R. Part 2, App. A (2004). While the Court of Appeals in *Union of Concerned Scientists v. AEC* drew an analogy between the role of the Licensing Board and the function of an appellate court applying the substantial evidence test, 499 F.2d 1069, 1076 (D.C. Cir. 1974), it noted that a Licensing Board looks not only to the information in the record but also to the thoroughness of the review that the Staff has given it. *Id*.

Furthermore, in *Watts Bar*, an uncontested construction permit proceeding, the Licensing Board found that the Staff's review of the application was adequate after having "given careful consideration to all documentary and oral evidence in the proceeding . . . and [b]ased on [its] *review of the entire record*[.]" *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), LBP-72-35, 5 AEC 230, 238-39 (1972) (emphasis added). Similarly, the Appeal Board upheld the Licensing Board's decision in *AIChemIE*, in which the Licensing Board held a mandatory hearing on two uncontested construction permit applications. *All Chemical Isotope Enrichment, Inc.* (AlChemIE Facility-1 CPDF), ALAB-913, 29 NRC 267, 268 (1989). The Appeal Board reiterated that "the [Licensing] Board received evidence and made findings on the adequacy of the applicant's safety analysis . . . as well as the adequacy of the NRC Staff's review of each of these matters and its environmental assessment," and ruled that the Licensing Board's decision was well supported by the record. *Id.* In summary, the Commission's intent that Boards conduct no *de novo* review of uncontested matters has been clearly established through Commission practice and case-law.

---

[13] Although Appendix A was removed by the 2004 revision to Part 2 (*see* 69 Fed. Reg. 2182, 2272 (Jan. 14, 2004)), it still provides useful guidance on the scope of mandatory hearings because it reflects contemporaneous Commission statements made in connection with the promulgation of section 2.104(b).

II. Staff Responses to Certified Questions

A. Scope of Board Review

The Chief Administrative Judge certified to the Commission the question of the scope of the Board's review in connection with its findings concerning the two AEA safety issues and the NEPA issue. Board Certification at 10. The language of the Commission's regulations state that, for a contested proceeding, "the presiding officer *will consider*" the AEA safety issues and the NEPA issue. 10 C.F.R. § 2.104(b)(1) (emphasis added). For an uncontested proceeding, however, the regulations state that "the presiding officer *will determine*" whether the application and the record "contain sufficient information" and whether the review by the Staff "has been adequate" to support its findings. 10 C.F.R. § 2.104(b)(2) (emphasis added). The Staff believes that the distinction between the two terms is a practical difference which is immaterial to the question certified by the Board. In contested proceedings, because a party has been granted leave to intervene based upon specific contentions, the Board is then able to "consider" the AEA safety issues and NEPA issues in relation to the admitted contentions. In uncontested proceedings, however, the Board must "determine" whether the regulatory standards have been met. The Staff submits that, for the purposes of the mandatory hearings in the ESP, *LES* and *USEC* proceedings, the terms "will consider" and "will determine" do not create different obligations with respect to the scope of the Board's review depending on whether a particular proceeding is the subject of admitted contentions. Therefore, the Staff answers the Board's certified question by submitting that the terms "will consider" and "will determine" do not create different obligations with respect to the scope of the Board's review.

B. Contested Proceeding v. Contested Matter

The distinction between a contested or uncontested "proceeding" as opposed to a "matter" is the subject of the Chief Administrative Judge's second certified question to the Commission.

Board Certification at 10. Although the regulations do not distinguish between the two, the *LES* and *USEC* Notices of Hearing both differentiate between matters that are the subject of admitted contentions and those which are not.[14] For the reasons discussed below, the Staff submits that the Board's review in making its mandatory determinations should be conducted according to individual "matters" rather than entire "proceedings." For example, the Board should not subject uncontested matters in contested proceedings to the same standard of review as contested matters just because they are both under the umbrella of a contested proceeding.

In an uncontested proceeding, the regulations instruct the Board not to conduct a *de novo* review. 10 C.F.R. § 2.104(b)(2). Instead, the Board is to look to the application and the record to determine the adequacy and sufficiency of the Staff's review.[15] In doing so, the Board may also solicit testimony to support the record. Commission practice has established that uncontested matters within contested proceedings shall be reviewed under this same standard. "In contested proceedings . . . [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 ACRS, and are authorized to rely upon the testimony of the staff, the applicant, and

---

[14] "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 but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D without conducting a *de novo* evaluation of the application." *LES*, 69 Fed. Reg. at 5874; *USEC*, 69 Fed. Reg. at 61,412.

[15] Although not explicitly raised in the certified question, the Board Certification highlighted the differences in approach suggested by the applicants and Staff with respect to providing an executive summary of the Staff's final review documents to the Board. Board Certification at 7-8. As discussed above, the proposal to provide the Board with an executive summary was not intended to suggest that the Board could not or should not rely on the underlying Staff final review documents in making its mandatory hearing determinations. Rather, as discussed in the Staff's filings, the Board, in reaching its decision in the uncontested portion of the proceeding, should consider the entire record, including the application, the Staff's SER and EIS, the ACRS recommendations, and any evidence admitted at the hearing.

the conclusions of the ACRS, which are not controverted by any party."[16] In *River Bend*, a contested construction permit proceeding, the Appeal Board distinguished issues not put into contest by a party, and set forth a standard of review for these uncontested matters. ALAB-444, 6 NRC at 766 (holding that with regard to uncontested matters, the Board's role is "'to decide whether the application and the record . . . contain sufficient information, and the review of the application by the Commission's staff . . . has been adequate' to support the findings requisite to issuance of a construction permit," *citing* 10 C.F.R. Part 2, Appendix A, V(f)(2) (1977). *See also Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1111 (1983); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 806 (1983). Adhering to the principle set forth in *River Bend*, the Licensing Board in the *Shoreham* proceeding held that a Licensing Board need not apply the same degree of scrutiny to uncontested issues as is applied to issues subject to the adversarial process. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 465 (1983). Such an approach is fully consistent with the rationale for the AEC's original promulgation of section 2.104(b), which is set forth in AEC-R 4/38 and its appendices, as described above.

Matters subject to contentions, in contrast, are subject to a more thorough – or *de novo* – review by the Board.[17] Commission practice is clear that only the specific issues raised by admitted

---

[16] 10 C.F.R. Part 2, former Appendix A (V)(f)(1) (emphasis added). As noted *supra*, although Appendix A was removed by the 2004 revision to Part 2, it still provides useful guidance on the scope of mandatory hearings.

[17] The Chief Administrative Judge noted that the term *de novo* in this context does not mean "start from scratch." Board Certification at 12 n.11. Rather, the Board Certification stated that *de novo* was assumed to mean "that the presiding officer would be authorized to conduct an application review that is plenary in scope and would aggressively probe the underlying basis [.]" *Id*. This statement seems to imply that in a contested proceeding, the presiding officer would examine the entire record with respect to each uncontested issue, and determine whether the (continued...)

contentions should be subject to *de novo* review. Although the admission of contentions means that the proceeding is "contested," it does not mean that the Board must review every issue in the proceeding under the *de novo* standard. Doing so would require the Board to review the entire proceeding as if all matters were the subject of contentions, and would force a consideration of the merits on issues not in controversy. The Board would be required to make an independent evaluation on uncontroverted matters, thereby duplicating the Staff's review efforts. This approach is contrary to the requirement that, for uncontested proceedings (and hence, uncontested matters), the Board need only determine the sufficiency of the information and adequacy of the Staff's review. *See, e.g., River Bend*, ALAB-444, 6 NRC at 766. In other words, the Board, with respect to uncontested matters, does not have to decide whether the Staff's position on the uncontested matters are correct, but rather whether the information in the record is adequate to support the Staff's findings.

Previous cases and former Appendix A to 10 C.F.R. Part 2 demonstrate that Commission practice differentiates between contested and uncontested matters, rather than just proceedings. It is also clear from the *LES* and *USEC* Notices of Hearing that, with regard to matters that are not the subject of admitted contentions, the Board is to proceed as required by 10 C.F.R. § 2.104(b)(2) (i.e. without conducting a *de novo* review). *LES*, 69 Fed. Reg. at 5874; *USEC*, 69 Fed. Reg. at 61,412. A consistent interpretation of the mandatory hearing requirements mandates that the Board should also follow this approach in the contested ESP proceedings. Thus, the classification of "contested" and "uncontested" should apply to matters within mandatory

---

[17](...continued)
applicant had carried its burden of persuasion on each issue. The Staff, however, disagrees that the Board should consider uncontested matters in a contested proceeding in the same fashion as it considers the contentions in the proceeding. Rather, the standard of review for such uncontested matters is whether the application and the record contain sufficient information, and whether the Staff's review has been adequate to support its findings. *See* 10 C.F.R. § 2.104(b)(2).

proceedings, depending on whether or not they are the subject of admitted contentions. Therefore, the Board's approach to contested ESP (and uranium enrichment) proceedings should be bifurcated according to contested versus uncontested matters.

This certified question also raises the related issue of the role that intervenors have in mandatory hearings. The Staff submits that the intervenors' participation in mandatory hearings should be limited to those issues that are the subject of admitted contentions. In a construction permit proceeding, the Licensing Board has the authority to "regulate the course of the proceeding and limit an intervenor's participation to issues in which it is interested." *United States Dept. of Energy* (Clinch River Breeder Reactor Plant), ALAB-761, 19 NRC 487, 492 (1984). Moreover, the Appeal Board has stated that to allow an intervenor the right to participate "on issues beyond those which have been put in contest" in a construction permit proceeding would "almost certainly run counter to" the objectives of the Commission's contention requirements. *Northern States Power Co.* (Prairie Island Nuclear Generating Station, Units 1 and 2), ALAB-244, 8 AEC 857, 870 (1974), *aff'd*, CLI-75-1, 1 NRC 1 (1975); *see, e.g., Northern States Power Co*. (Tyrone Energy Park, Unit 1), LBP-76-34, 4 NRC 348, 350 (1976) (Board did not afford intervenors opportunity to demonstrate interest in plant security where intervenors did not assert plant security contentions); *cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 358 n.110 (1989) (appellant in a contested proceeding ordinarily precluded from pressing issues or advancing arguments not presented to the trial tribunal).[18]

---

[18] The Commission decision in *LES* does not affect the *Prairie Island* line of decisions insofar as it addresses the role of an intervenor with respect to uncontested matters. Rather, *LES* applies to *Prairie Island* only in regard to the matter of an intervenor's adoption of another intervenor's contention, which is now addressed in 10 C.F.R. § 2.309(f)(3). *See Louisiana Energy Services, LP* (National Enrichment Facility), Docket No. 70-3103-ML, unpublished Memorandum and Order (Clarification Requests Ruling and Commission Referral) at 4-5 (Sept. 14, 2004).

The 1989 amendments to the Commission's rules of practice limited an intervenor's filing of proposed findings and its appeals to issues that the party had actually placed in controversy, in order "to ensure that the parties and adjudicatory tribunals focus their interests and adjudicatory resources on the contested issues as presented and argued by the party with the primary interest in, and concerns over the issue." Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process; Final Rule, 54 Fed. Reg. 33,168, 33,177-78 (Aug. 11, 1989). The contention admissibility rules themselves also support the position that intervenor participation should be limited to further the idea that "the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2189-90. The rules of conduct governing Subpart L proceedings reinforce this notion by permitting the submission of written testimony on *admitted contentions* (10 C.F.R. § 2.1207), and limiting proposed findings of fact and conclusions of law to those contentions addressed in the oral hearing (10 C.F.R. § 2.1209). Past Commission practice and current NRC regulations, therefore, support limiting intervenor participation in mandatory hearings to admitted contentions.

C. *De Novo* Board Review of Applications

The standard of review to be employed by the Board in reviewing the application is the subject of the third certified question. Board Certification at 11-12. The Chief Administrative Judge inquired as to whether the Board's determinations regarding certain uncontested matters should be made by conducting a *de novo* evaluation of the applications at issue. *Id.* The language in the Notices of Hearing for the *LES* and *USEC* proceedings differs from that in the ESP cases with respect to whether the Board is to conduct a *de novo* evaluation of the application. In the *LES* and *USEC* proceedings, the Notices state that if the proceeding is uncontested, the Board will make a determination on the AEA safety matters and the non-"baseline" NEPA matter without conducting

a *de novo* evaluation of the application. *LES*, 69 Fed. Reg. at 5874; *USEC*, 69 Fed. Reg. at 61,411. The Notices in the ESP cases, however, omit the phrase "without conducting a *de novo* evaluation of the application."[19]

The Staff believes that the *LES* and *USEC* Notices set forth the appropriate standard upon which the Board should proceed for uncontested matters as well as uncontested proceedings. The presiding Board in the *LES* proceeding, for example, has separated its hearings into three parts; two relating to contested matters (one for contested environmental issues and one for contested safety issues), and the third relating to the remaining uncontested matters (*i.e.*, the mandatory hearing). In the *LES* case, the Board scheduled the mandatory hearing to be conducted upon conclusion of the hearings dealing with contested matters. Moreover, the regulations at 10 C.F.R. § 2.104(b)(2) clearly support this approach and confirm that the Board shall not conduct a *de novo* review of the application in an uncontested proceeding with respect to (1) the sufficiency of the information in the application and record of the proceeding, and the adequacy of the Staff's review of the application to support its findings on the safety issues; and (2) the adequacy of the review conducted by the Staff relative to environmental issues. Furthermore, "in the absence of a contest on a particular safety matter, the board need not duplicate the staff's review." *River Bend*, ALAB-444, 6 NRC at 774. Thus, with respect to uncontested matters in contested proceedings, the Board is similarly not required to conduct a *de novo* review.[20]

---

[19] Although the ESP Notices omit the phrase "without conducting a *de novo* examination of the application" from the provision identifying the issues before the Board in an uncontested proceeding, section 2.104(b)(2) requires that the Board conduct uncontested proceedings without such a *de novo* examination of the application.

[20] The Staff views the term *de novo* as akin to the Board's normal practice in contested proceedings, in which the Board takes evidence (*i.e.,* SER, EIS, testimony and other evidence presented by the Staff as well as other parties) on contested matters and renders its own conclusions on those matters based on this evidence, regardless of the Staff's conclusions. A *de novo* review is unlike the Board's review in uncontested proceedings, in which the Board's only

(continued...)

D. Scope of Board Review Regarding Three NEPA "Baseline" Findings

In the mandatory hearings for both contested and uncontested proceedings, the Board must make determinations on the three NEPA findings required under 10 C.F.R. § 51.105(a)(1)-(3), referred to as the "baseline" NEPA findings. *See also* 10 C.F.R. § 2.104(b)(3). As set forth in the North Anna Joint Response, uncontested environmental issues in ESP proceedings should be dealt with by the Board in the same way that uncontested safety issues are approached. North Anna Joint Response at 5. The three baseline NEPA findings, if uncontested, should be dealt with by the Board by relying on the Staff's underlying review documents, and Staff and applicant testimony. *Id.*

The *Calvert Cliffs* decision by the United States Court of Appeals for the District of Columbia Circuit addressed the requirements of a Board when making its NEPA findings in connection with a power reactor construction permit authorization. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *quoting* 10 C.F.R. § 2.104(b)(1971). The Court held that in an uncontested hearing, NEPA requires a hearing board to "at least examine the [EIS] carefully to determine whether 'the review . . . by the Commission's regulatory staff has been adequate.'" *Id.* at 1118. However, the Court also held that in such a hearing, "the board need not necessarily go over the same ground covered in the [EIS]." *Id.* Although this ruling also requires a hearing board to "independently consider the final balance among conflicting factors that is struck in the staff's

---

[20](...continued)
determinations are whether it is satisfied that the information is sufficient and the Staff's findings are supported by the record; it does not make its own conclusions independent of the Staff's. *See, e.g., Detroit Edison Co.*, (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-77, 5 AEC 315, 317 n.6 (1972) (the Staff has the primary responsibility to furnish technical estimates, particularly in uncontested cases, where the role of the Board is to determine the sufficiency of the information in the record and the adequacy of the Staff's review.) Thus, for uncontested matters, the Board's review is similar to that of an appellate court's consideration of the record of agency's decision, in which the court applies a "substantial evidence" standard of review. *See Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1076 (D.C. Cir. 1974).

recommendation," the Board does so in the context of ensuring that the Staff's review has been adequate. *Id.*

In *Consumers Power*, the Atomic Safety and Licensing Appeal Board, in discussing *Calvert Cliffs,* held that the *Calvert Cliffs* decision requires "an 'independent review of staff proposals' by the Board, and conclusions independently arrived at on the basis of evidence in the record . . . ." *Consumers Power*, 6 AEC at 335-36, *citing Calvert Cliffs*, 449 F.2d at 1118. The *Calvert Cliffs* decision, as explained by the Appeal Board, "require[d] no independent research by the Board" nor did it "require the Board to duplicate the analysis previously performed by the staff." *Consumers Power*, 6 AEC at 335. Therefore, the scope of the Board's review regarding the three "baseline" NEPA findings is defined essentially the same as it is for uncontested safety issues: the Board is to review the information in the record and determine whether the Staff's consideration, review, and evaluation of that information has been satisfactorily performed. *See* Clinton Joint Response at 7, *citing generally Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-4, 7 NRC 92 (1978).

E. Scope of NEPA "Baseline" Finding Three

The certified questions also addressed the scope of the Board's review with respect to the third NEPA "baseline" finding, and whether the omission of certain phrases from the respective Notices of Hearing were intended to affect the scope of the Board's responsibilities in this regard. Board Certification at 13. The Staff first addresses the Board Certification in regard to the omission of portions of 10 C.F.R. § 51.105(a)(3) from all the notices under consideration, and then turns to the significance of the inclusion of the phrase regarding reasonable alternatives in the ESP Notices.

1. Significance of Additional Wording in 10 C.F.R. § 51.105(a)(3)

The third "baseline" finding in 10 C.F.R. § 2.104(b)(3) is reiterated with added detail 10 C.F.R. § 51.105(a)(3), which states that the presiding officer will:

> [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.

None of the Notices of Hearing in the ESP, *LES*, or *USEC* proceedings fully quote this language. The ESP Notices omit "after weighing the environmental, economic, technical, and other benefits against environmental and other costs," while the *LES* and *USEC* Notices omit "after weighing the environmental, economic, technical, and other benefits against environmental and other costs, and considering reasonable alternatives." *North Anna,* 68 Fed. Reg. at 67,489; *Clinton*, 68 Fed. Reg. at 69,427; *Grand Gulf*, 69 Fed. Reg. at 2636; *LES*, 69 Fed. Reg. at 5874; *USEC*, 69 Fed. Reg. at 61,412. The certified questions address whether the omission of the additional wording of 10 C.F.R. § 51.105(a)(3) in the third "baseline" NEPA finding in all of the Notices of Hearing was intended to narrow the scope of the Board's review. Board Certification at 14.

With respect to this question, there is a fundamental difference between weighing benefits and costs for ESPs and weighing them for uranium enrichment facility licenses. As set forth in 10 C.F.R. § 52.17(a)(2), ESP environmental reports need not include an assessment of the benefits of construction or operation of a facility. Similarly, section 52.18 does not require that such benefits be assessed in the EIS. Rather, because an ESP proceeding relates narrowly to the scope of the "activity" authorized by the issuance of the ESP itself, viz., the approval of a site for possible future use, *see* 10 C.F.R. §§ 52.23(b) and 52.11, weighing the environmental costs and benefits of constructing and operating a reactor is not necessary and may even be impossible. Therefore, the omission of this additional language from the ESP Notices of Hearing should be interpreted to narrow the scope of the Board's review in the ESP proceedings.

In the case of the *LES* and *USEC* Notices, however, the failure to include this language does not narrow the scope of the Board's review. Rather, the *LES* and *USEC* Notices appear to be modeled after 10 C.F.R. § 2.104(b)(3), which makes a general statement regarding NEPA "baseline" finding three. Nothing in this regulation specifically states that the weighing of these factors should not be done, and in fact, it must be done in accordance with section 51.105(a)(3). Therefore, the Staff concludes that the omission of the language of section 51.105(a)(3) from the *LES* and *USEC* Notices is not meant to narrow the scope of the Board's review in those proceedings.

2. Significance of Phrase "After Considering Reasonable Alternatives"

Section 2.104(b)(3)(iii) states the third of the required NEPA "baseline" findings and requires that the presiding officer will, in accordance with 10 C.F.R. Part 51, "[d]etermine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values." This provision is cited in the ESP, *LES* and *USEC* Notices of Hearing. The ESP Notices of Hearing state that this finding is to be made "after considering reasonable alternatives," whereas the *LES* and *USEC* Notices omit this language. *North Anna*, 68 Fed. Reg. at 67,489; *Clinton*, 68 Fed. Reg. at 69,427; *Grand Gulf*, 69 Fed. Reg. at 2636; *LES*, 69 Fed. Reg. at 5874; *USEC*, 69 Fed. Reg. at 61,411. The ESP Notices appear to draw their additional language from § 51.105(a)(3), which is set forth above. In contrast, the *LES* and *USEC* Notices more closely reflect the language set forth at 10 C.F.R. § 2.104(b)(3)(iii), which makes no mention of considering reasonable alternatives.

The inclusion of the provision for consideration of alternatives in the ESP Notices appears to be rooted in the Commission decision to require that ESP environmental reports ("ERs") and EISs focus "on the environmental effects of construction and operation of a reactor" at the proposed ESP site, rather than the benefits of such construction and operation.

10 C.F.R. §§ 52.17(a)(2), 52.18. As discussed above, sections 52.17(a)(2) and 52.18 do not require consideration of the benefits of construction and operation of a reactor in an ESP application or an EIS prepared on such an application. Similarly, the Commission determined that an assessment of alternative energy sources need not be included in an ESP application or its associated EIS. *See* Nuclear Energy Institute; Denial of Petition for Rulemaking, 69 Fed. Reg. 55,905 (Sept. 29, 2005). Nonetheless, the Commission's regulations governing ESPs do require that ESP applications include an evaluation of alternative sites. 10 C.F.R. § 52.17(a)(2). Accordingly, in the context of ESPs, "reasonable alternatives" refer not to alternative energy sources, but to the required consideration of alternative sites.[21] The inclusion of "reasonable alternatives" in the ESP Notices, therefore, appears to be limiting, and excludes the consideration of alternative energy sources and the weighing of benefits of reactor construction and operation against its costs from the Board's required determinations, except in a case in which an ESP applicant chooses to evaluate one or both of these matters in its ER.[22]

The requirement to include an assessment of alternatives in proceedings for uranium enrichment facilities, however, is much broader than for ESPs, and is not limited to an evaluation of alternative sites. Accordingly, the phrase "reasonable alternatives," included in the ESP Notices to limit the required determination, was not included in the *LES* and *USEC* Notices. The omission of this phrase from those Notices, however, does not mean that consideration of reasonable alternatives it is not necessary. To the contrary, there is nothing in the language of

---

[21] Alternatives having a bearing on the environmental effects of construction and operation of a reactor at the proposed ESP site, *e.g.*, alternative cooling systems, may also be included in an ER and EIS. Such alternatives would be considered by a Board under 10 C.F.R. § 51.105(a)(3).

[22] The ESP Notices might have more clearly limited the Board's required determination by stating, for example, that it be made "after considering whether there is an obviously superior site to the site proposed and other reasonable alternatives proposed in the application," as opposed to "after considering reasonable alternatives." *Compare* 10 C.F.R. § 52.17(a)(2) *with* 10 C.F.R. § 51.105(a)(3).

10 C.F.R. § 2.104(b)(3), which these Notices follow, that excludes the consideration of reasonable alternatives. The omission of the phrase "after considering reasonable alternatives" from the *LES* and *USEC* Notices, therefore, does not appear intended to create a limitation on the responsibilities of the *LES* and *USEC* Licensing Boards with respect to their findings on NEPA "baseline" issue three.

III. Response to Other Filings

The Commission invited the parties in all the captioned proceedings and the USEC petitioners to file responses to its Order, and ordered the Staff to respond to any such filings in this brief. The following discusses the Staff's responses to the various party filings, to the extent not already covered in the discussion above. The focus of the Staff's responses is on suggestions made by the parties or petitioners with which the Staff is not in agreement.

A. *USEC* and *LES*

In response to the Commission's Order regarding the Board's certified questions, USEC and LES filed separate responses setting forth their views on the mandatory hearing procedures. "USEC, Inc. Brief in Response to Commission Memorandum and Order (CLI-05-09)" (May 4, 2005) ("USEC Response"); "Louisiana Energy Services, L.P. Brief in Response to Commission Memorandum and Order (CLI-05-09)" (May 18, 2005) ("LES Response"). Because LES "concur[red] fully with the views expressed by USEC in its brief," it did not provide a detailed response to the certified questions. LES Response at 3. Therefore, the Staff's assessment of the USEC Response, below, will also serve as its response to the LES Response.

First, USEC suggested that the Board should "primarily rely on summary-level testimony submitted by the applicants and NRC Staff in making the findings needed to support a licensing decision." USEC Response at 2, 7. The Staff agrees that the Board can solicit and rely upon applicant and Staff testimony, but the level of detail of the testimony should be up to the Board.

In fact, the Staff believes that the Board could rely primarily on the Staff's review documents, and that the purpose of eliciting Staff and applicant testimony is to aid the Board in areas in which more information is needed.

USEC also suggested that the Board's role, in both contested and uncontested proceedings, is partly to focus on the adequacy of the Staff's review process. *Id.* at 4. The Staff takes issue with two portions of this statement. First, the Board does not focus upon the Staff's review *process*, but rather on the substantive determinations of the Staff's review. In other words, the Board is to ensure that the Staff's final review documents are adequate to support the Staff's findings, but it would be inappropriate for the Board to examine the *process* used by the Staff to conduct its review. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22, (1995) ("As a general matter, the Commission's licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews"), *citing Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); *see also Duke Energy Corp.* (Catawba Nuclear Station Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) (Licensing Boards have no authority to direct nonadjudicatory Staff activities such as Staff regulatory reviews). Second, the Board's determination of the adequacy of the Staff's review is specific to uncontested proceedings (and uncontested matters in contested proceedings). For contested matters, the Board is to consider the issues as stated in 10 C.F.R. § 2.104(b)(1), and not the adequacy of the Staff's review.

Furthermore, USEC recommends that the Board conduct no *de novo* review, regardless of whether the proceeding is contested. The Staff agrees that a *de novo* review is not appropriate for uncontested matters, but disagrees that a *de novo* review, as the Staff has defined it, should not be conducted for contested matters. As discussed above, the Staff believes that the Board should determine contested matters at a level that would allow the Board to decide whether the

applicant has satisfied its burden of proof with respect to the admitted contentions, based on the evidence of record. This is in contrast to the Board's review of the adequacy of the Staff's review of uncontested matters, as described above.

Lastly, the USEC Response suggests that "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[.]" *Id.* at 16-7. As stated above, there is a fundamental difference between weighing benefits and costs for ESPs and weighing them for uranium enrichment facility licenses, since, for an ESP, any weighing of costs and benefits is done with regard to the issuance of the ESP, not for construction or operation of a facility. For the reasons set forth in section II.E.1. of the Discussion, above, an assessment of the environmental costs and benefits of constructing and operating a reactor is not necessary in an ESP proceeding and may be impossible. USEC and LES, however, do not acknowledge the difference between the ESP and enrichment facility proceedings.

B. Exelon and SERI

The Staff does not take issue with any portions of the brief filed by Exelon and wishes to discuss only one statement in the SERI brief. "Exelon Brief in Response to Commission Memorandum and Order (CLI-05-09)" (May 17, 2005); "System Energy Resources, Inc. Brief in Response to Commission Memorandum and Order (CLI-05-09)" (May 18, 2005) ("SERI Response"). "The Licensing Board," SERI contends, "does not perform a *de novo* review of safety or environmental matters, regardless of whether the mandatory hearing is contested or uncontested." SERI Response at 3 (SERI makes similar statements in its response at 4 and 6). As explained throughout this brief, the Board's review of contested matters is not *de novo* in the sense of repeating the Staff's review, but is *de novo* in the sense that the Board does not defer to the Staff with respect to admitted contentions, and makes decisions on each such contention considering the evidence of record admitted with respect to it. SERI's general statements to this

effect, however, do not result in any disagreements with the Staff with respect to the certified questions.[23]

C. Dominion

The Staff generally agrees with Dominion's views on the mandatory hearing procedures. "Dominion's Brief in Response to CLI-05-09 Regarding Mandatory Hearing Requirements" (May 18, 2005). In its analysis of *Calvert Cliffs*, Dominion, summarizes that this case "requires neither a *de novo* review nor an independent decision." *Id*. at 12. However, Dominion then describes *Calvert Cliffs* as requiring the Board to conduct an "independent review of staff proposals . . . and conclusions independently arrived at on the basis of the evidence in the record [.]" *Id.* at 13. Based upon this elaboration of the *Calvert Cliffs* decision, the Staff believes that Dominion's position is consistent with that of the Staff, as discussed in section II.D. of the Discussion, *supra*.

D. Intervenors

The Intervenors in the ESP and *LES* proceedings, and one petitioner, Geoffrey Sea, in the *USEC* proceeding filed a joint response to the Commission's Order.[24] "Intervenors' Response to Certified Questions (CLI-05-09)" (May 18, 2005) ("Intervenors' Response"). Although the Staff is in agreement with the general principles articulated by the Intervenors, the Staff takes issue with several proposals set forth in the Intervenors' Response and addresses points that warrant further clarification, as discussed below.[25]

---

[23] The Staff notes that SERI defines "de novo" as "[a]new; afresh; a second time," which may be inconsistent with the definition provided by the Board in n.11 of its Board Certification. *See* SERI Response at 3, 4, 6, 9 n.30. Using SERI's definition of *de novo*, the Staff agrees that no *de novo* review would be required or appropriate for uncontested or contested matters.

[24] *LES* Intervenors NMAG and NMED are not signatories to the Intervenors' Response.

[25] The Intervenors repeatedly refer to the Commission's "fundamental responsibility for protecting the health and safety of the public in any licensing proceeding." Intervenors' Response at 1, 4, 8. To the extent the Intervenors refer to the NRC's duty, before granting a license, to (continued...)

First, the Intervenors suggest that the Board must conduct "some substantive review" of uncontested issues using a "slightly deferential standard of review." Intervenors' Response at 2. Although the Staff finds these phrases ambiguous, the Staff is generally in agreement with the Intervenors' description of the scope of the Board's review, except as discussed in the following paragraph. The Staff has already discussed the appropriate standard of review for uncontested issues, and will not reiterate that position here.

Second, the Intervenors state that, where the Staff adopts or defers to Applicant information to support a finding, "the Board should scrutinize such information and finding *much more closely than normal*." *Id.* at 3 (emphasis added). The Staff strongly disagrees that the Board should apply a heightened standard of review on matters for which the Staff directly adopts the Applicant's information to support the Staff's findings. The Staff conducts an independent review of all information in the application that is relevant to its findings, and if the Applicant articulates a cogent analysis on a particular subject, the Staff is free to adopt it as part of its review. The Staff's adoption of the Applicant's analysis does not suggest that it has not conducted the requisite independent evaluation, and thus, a heightened level of review is not warranted.

Third, the Staff agrees with the Intervenors that the rules provide for limited appearances at the mandatory hearings. *Id.*; *see also* 10 C.F.R. § 2.315(a). Accordingly, a Board may "allow for submission of oral and written comments or statements by local, state and federal agencies and the public . . . at any public hearing, and for limited appearance statements at the hearing on application," as the Intervenors recommend. Intervenors' Response at 3. Section 2.315(a), however, specifies that limited appearance statements "shall not be considered evidence in the

---

[25](...continued)
require that an applicant provide reasonable assurance that construction and operation will provide adequate protection of the public health and safety, Intervenors are, of course, correct. Should the NRC grant an application, however, it is the licensee's duty to construct and operate the facility so as to provide adequate protection.

proceeding." *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC at 1115 n.12 (holding that limited appearance statements do not constitute evidence and the Board is not obligated to discuss them in its decision). The Staff expects that limited appearance statements would be afforded appropriate consideration by the Board.[26] *See, e.g.,Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 351-52 (1973) (Licensing Board may not base decision on material not admitted into evidence, but such material may form basis for reopening record).

Fourth, the Intervenors propose that the Board consult with "independent outside experts" in areas where it lacks the technical expertise to conduct a review. Intervenors' Response at 3. However, the Intervenors cite no regulations which afford the Board such authority. Thus, contrary to the Intervenors' suggestion, a presiding officer may not consult with independent experts.[27] *See Summer*, ALAB-663, 14 NRC 1140, 1146, 1156 (1981), *review declined*, CLI-82-10, 15 NRC 1377 (1982); *see also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

Fifth, the Staff disagrees with the scope of review proposed by the Intervenors for the NEPA "baseline" issues. *See* Intervenors' Response at 5. While it is true that 10 C.F.R. § 51.105(a)(1)-(3)

---

[26] In this regard, the Intervenors state that "public statements could be viewed as comments on the Final EIS," and cites to Council on Environmental Quality ("CEQ") regulations for support. Intervenors' Response at 3 (emphasis added). The Commission's regulations for commenting on EISs in 10 C.F.R. § 51.73 do not adopt the process envisioned by the CEQ regulations, which is not binding on the NRC. Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments; Final Rule, 49 Fed. Reg. 9352 (Mar. 12, 1984). *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725, 743 (3rd Cir. 1989); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61, 72 n.8 (1991).

[27] Independent consultants should not be called upon to supplement an adjudicatory record except in a most extraordinary situation in which it is demonstrated beyond question that a Board simply cannot otherwise reach an informed decision on the issue involved. *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1146 (1981), *review declined*, CLI-82-10, 15 NRC 1377 (1982).

requires the Board to weigh certain factors in determining whether NEPA has been complied with, the weighing of costs and benefits is not required (and may not even be possible) for ESP applications. *See* 10 C.F.R. §§ 52.17(a)(2), 52.18. This issue has been discussed in sections II.E.1. and III.A., above.

Finally, the Staff notes that the Intervenors devote the last portion of their brief to issues that are beyond the scope of the Commission Order and irrelevant to the certified questions at hand. *Id.* at 6-8. To the extent that the Intervenors engage in this improper discussion, the Staff urges the Commission not to consider these issues.[28]

[28] The issues raised in Section C.3. of the Intervenors' Response are not now before the Commission for review. Should the Intervenors not prevail, they could request review of these issues at that time.

CONCLUSION

For the reasons set forth above, the Staff believes that the mandatory hearings should be conducted by the Board by treating contested and uncontested matters separately in accordance with the standards of review set forth above. Thus, with respect to all uncontested matters, the Board would not perform a *de novo* review.

Respectfully submitted,

Original signed by
Robert M. Weisman
Counsel for NRC Staff

Original signed by
Darani M. Reddick
Counsel for NRC Staff

Original signed by
Lisa B. Clark
Counsel for NRC Staff

Original signed by
Marian L. Zobler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of May, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC.	)	Docket No. 52-007-ESP
	)	
(Early Site Permit for Clinton ESP Site)	)	ASLBP No. 04-821-01-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES" in the above-captioned proceeding have been served on the following through electronic mail, with copies to follow by deposit in the NRC's internal mail system as indicated by a single asterisk, or through electronic mail, with copies to follow by deposit in the U.S. Mail, first class, as indicated by a double asterisk, this 25th day of May, 2005:

Paul B. Abramson, Chair*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: PBA@nrc.gov)

Anthony J. Baratta*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AJB5@nrc.gov)

David L. Hetrick
Administrative Judge**
8740 East Dexter Drive
Tucson, AZ 85715
(E-mail: dlmwh@dakotacom.net)

Thomas S. O'Neill*
Associate General Counsel
Exelon Nuclear
4300 Winfield Road
Warrenville, IL 60555
(E-mail: thomas.oneill@exeloncorp.com)

Office of the Secretary*
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate Adjudication*
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board*
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Howard A. Learner**
Ann Alexander**
Shannon Fisk**
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, Illinois 60601
(E-mail: hlearner@elpc.org, aalexander@elpc.org, sfisk@elpc.org)

Diane Curran**
Harmon, Curran, Spielberg
& Eisenberg LLP
1726 M. Street N.W., Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

Dave Kraft**
Executive Director, Nuclear Energy
Information Service
PO Box 1637
Evanston, IL 60204-1637
(E-mail: neis@neis.org)

Michele Boyd**
Legislative Representative, Public Citizen
215 Pennsylvania Avenue, SE
Washington, D.C. 20003
(E-mail: mboyd@citizen.org)

Janet Marsh Zeller, Executive Director**
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
(Email: bredl@skybest.com)

Paul Gunter**
Director, Reactor Watchdog Project
Nuclear Information and Resource Service
1424 16th Street, N.W. #404
Washington, D.C. 20036
(E-mail: nirsnet@nirs.org)

Stephen P. Frantz**
Paul M. Bessette**
Alex S. Polonsky**
Annette M. Simon**
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(E-mail: sfrantz@morganlewis.com,
pbessette@morganlewis.com,
apolonsky@morganlewis.com,
asimon@morganlewis.com)

Original signed by
Robert M. Weisman
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DOMINION NUCLEAR NORTH ANNA, LLC	)	Docket No. 52-008-ESP
	)	
(Early Site Permit for North Anna ESP Site)	)	ASLBP No. 04-822-02-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 25th day of May, 2005:

Alex S. Karlin, Chairman*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ASK2@nrc.gov)

Thomas S. Elleman**
Administrative Judge
Atomic Safety and Licensing Board Panel
5207 Creedmoor Road, # 101
Raleigh, NC 27612
(E-mail: TSE@nrc.gov)

Richard F. Cole*
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: RFC1@nrc.gov)

Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of Commission Appellate
Adjudication
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Office of the Secretary*
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Diane Curran, Esq.**
Harmon, Curran, Spielberg
& Eisenberg LLP
1726 M Street NW, Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

David R. Lewis, Esq.**
Robert B. Haemer, Esq.**
Timothy J.V. Walsh, Esq.**
Pillsbury Winthrop Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037
(E-mail: david.lewis@pillsburylaw.com
robert.haemer@pillsburylaw.com
timothy.walsh@pillsburylaw.com

Lillian M. Cuoco, Esq.**
Dominion Resources Services, Inc.
Rope Ferry Road
Waterford, CT 06385
(E-mail: Lillian_Cuoco@dom.com)

Paul Gunter**
Director, Reactor Watchdog Project
Nuclear Information and Resource Service
1424 16th Street, NW #404
Washington, DC 20036
(E-mail: nirsnet@nirs.org)

Jonathan M. Rund, Esq.*
Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: JMR3@nrc.gov)

Michele Boyd**
Legislative Representative, Public Citizen
215 Pennsylvania Avenue, SE
Washington, DC 20003
(E-mail: mboyd@citizen.org)

Richard A. Parrish, Esq.**
Morgan W. Butler, Esq.**
Southern Environmental Law Center
201 West Main Street
Charlottesville, VA 22902
(E-mail: rparrish@selcva.org
mbutler@selcva.org)

Original signed by
Robert M. Weisman
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
SYSTEM ENERGY RESOURCES, INC.	)	Docket No. 52-009-ESP
	)	
(Early Site Permit for Grand Gulf ESP Site)	)	ASLBP No. 04-823-03-ESP

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES" in the above-captioned proceeding have been served on the following by electronic mail and with copies by deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), through electronic mail with copies by deposit in the U.S. Mail on this 25TH day of May, 2005:

G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: GPB@nrc.gov)

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: PBA@nrc.gov)

Kathryn Sutton, Esq.*
Patricia L. Campbell, Esq.*
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, DC 20004
(E-mail:ksutton@morganlewis.com,
pcampbell@morganlewis.com)

Anthony J. Baratta
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AJB5@nrc.gov)

Office of Commission Appellate
Adjudication
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail: ELJ@nrc.gov)

Original signed by
Robert M. Weisman
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3103
	)	
(National Enrichment Facility)	)	ASLBP No. 04-826-01-ML
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 25th day of May, 2005.

Administrative Judge * **
G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: gpb@nrc.gov

Administrative Judge * **
Paul Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

Office of the Secretary * **
ATTN: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge * **
Charles Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: cnk@nrc.gov

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Ron Curry, Secretary
Clay Clarke, Assistant General Counsel **
Tannis L. Fox, Attorney **
Melissa Y. Mascarenas, Legal Assistant
New Mexico Environmental Department
1190 St. Francis Drive
Santa Fe, NM 87502-6110
E-mail: clay_clarke@nmenv.state.nm.us
tannis_fox@nmenv.state.nm.us

Patricia A. Madrid, N.M. Attorney General
Glenn Smith, Deputy Attorney General **
David M. Pato, Asst. Attorney General **
Stephen R. Farris, Asst. Attorney General **
Christopher D. Coppin **
P.O. Box 1508
Santa Fe, NM 87504-1508
E-Mail: gsmith@ago.state.nm.us
dpato@ago.state.nm.us
sfarris@ago.state.nm.us
ccoppin@ago.state.nm.us

Mr. Rod Krich, Vice President
Licensing, Safety and Nuclear Engineering
Louisiana Energy Services
2600 Virginia Avenue NW.
Suite 610
Washington, D.C. 20037

Lindsay A. Lovejoy, Jr. **
Nuclear Information and Resource Service
1424 16th Street, NW.
Suite 404
Washington, D.C. 20036
E-mail: lindsay@lindsaylovejoy.com
llovejoy@cybermesa.com

James. R. Curtiss, Esq. **
Dave Repka, Esq. **
Martin O'Neill, Esq. **
Winston & Strawn
1700 K Street, N.W.
Washington, D.C. 20006
E-mail: jcurtiss@winston.com
drepka@winston.com
moneill@winston.com

Original signed by
Lisa B. Clark
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 70-7004
USEC, Inc.	)	
	)	ASLBP No. 05-838-01-ML
(American Centrifuge Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER (CLI-05-09) ON MANDATORY HEARING PROCEDURES" in the above-captioned proceeding has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 25th day of May, 2005.

Administrative Judge * **
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: lgm1@nrc.gov

Administrative Judge * **
Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: pba@nrc.gov

Atomic Safety and Licensing Board Panel *
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Office of the Secretary * **
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge * **
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
E-Mail: rew@nrc.gov

Office of Commission Appellate Adjudication *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Geoffrey Sea **
340 Haven Avenue, Apt. 3C
New York, NY 10033
E-Mail: geoffreyseanyc@aol.com

Dennis J. Scott, Esq. **
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
E-mail: scottd@usec.com

Donald J. Silverman **
Morgan Lewis & Bockius, LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
E-mail: dsilverman@morganlewis.com

Vinna K. Colley (Press) **
3706 McDermott Pond Creek
McDermott, OH 45652
E-mail: vcolley@earthlink.net

Original signed by
Marian L. Zobler
Counsel for NRC Staff