

May 22, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

May 22, 2006 (3:12pm)

In the Matter of)
)
)
ENTERGY NUCLEAR VERMONT)
YANKEE, L.L.C. and ENTERGY)
NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))
)

Docket No. 50-271
ASLBP No. 04-832-02-OLA
(Operating License Amendment)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**ENTERGY'S RESPONSE TO BOARD'S MAY 10, 2006 ORDER REGARDING DPS'S
AMENDED NOTICE OF WITHDRAWAL**

On May 10, 2006, the Atomic Safety and Licensing Board ("Board") in the above captioned proceeding issued an Order stating that any comments on the Amended Notice of Withdrawal and Request for Dismissal of Contentions filed by the Vermont Department of Public Service ("DPS") on May 9, 2006 be submitted by May 22, 2006.¹ Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations (collectively, "Entergy") hereby file their comments.

I. INTRODUCTION AND SUMMARY

On May 2, 2006, DPS filed a "Notice of Withdrawal and Request for Dismissal of Contentions of the Vermont Department of Public Service" ("Notice") in this proceeding. In it, DPS notified the Board that it was voluntarily withdrawing from the proceeding. Notice at 1. As an explanation for its decision, DPS stated that it and Entergy "have agreed to a mutually satisfactory resolution of the issues raised by" DPS, "as evidenced" by a Memorandum of

¹ Order (Granting Joint Motion to Suspend Certain Filing and Discovery Obligations and Setting Certain Deadlines), slip op. at 1 (May 10, 2006).

Understanding (“MOU”) between DPS and Entergy, which was attached to the Notice. Notice at 1. Neither the Notice nor the accompanying MOU requested any action by the Board with respect to the MOU. The MOU was provided to the Board, therefore, only for information purposes.

The following day, the Board convened a teleconference with the parties to discuss the Notice and the MOU.² The teleconference focused on whether 10 C.F.R. § 2.338 (“§ 2.338”) applied to the MOU and, if so, whether the terms of the MOU met the formal requirements of § 2.338(h). The Board offered two options to the parties: either (1) Entergy and DPS submit a revised MOU incorporating the provisions of § 2.338(h) so as to satisfy that section’s formal requirements, or (2) all participants file briefs on the questions raised during the teleconference, including whether the MOU was a “settlement agreement” under § 2.338, whether § 2.338 applied to the MOU, and whether the Board has any authority over approving or disapproving settlement agreements. Tr. at 943-44, 957.

On May 9, 2006, Entergy and DPS filed an “Addendum to MOU,” which added four paragraphs to the MOU. These added paragraphs incorporated the provisions of § 2.338(h). That same day, DPS filed its Amended Notice of Withdrawal and Request for Dismissal of Contentions of the Vermont Department of Public Service (“Amended Notice”), which was essentially identical to DPS’s initial Notice except that it referenced and attached the Addendum to MOU.

On May 10, 2006, the Board ordered that any supporting or objecting comments with regard to the Amended Notice and/or the proposed settlement be submitted by May 22, 2006. The

² Teleconference Transcript (May 3, 2006) (“Tr.”) at 916 (Chairman Karlin).

Board directed that any such comments be focused on “the public interest” as specified in § 2.338(i).³

As discussed below, Entergy’s position is that the requirements of § 2.338 do not apply to the agreement between DPS and Entergy that is memorialized in the MOU.⁴ First, the MOU is not a “settlement” within the meaning of § 2.338. Second, § 2.338 is intended to apply only in cases where either (1) there is a formal settlement process under the auspices of the Chief Administrative Judge and the Licensing Board, including the appointment of a Settlement Judge to facilitate resolution of a dispute (i.e., a contention in the context of the proceeding) between two or more parties; and/or (2) the settling parties seek that a proposed resolution reached through formal or informal means be “binding in the proceeding,” as specified in § 2.338(i). Neither of these criteria applies here. Without the aid of a third party neutral, Entergy and DPS have reached and consummated a private contractual agreement, which is governed by Vermont law, totally outside of the supervision of or enforcement by the Board. MOU at 4, ¶ 10. As a result of this agreement, DPS voluntarily withdrew from the proceeding. Pursuant to well-established Commission precedent, the voluntary withdrawal of DPS from the proceeding had the effect of withdrawing DPS’s contentions from the case. Under Commission precedent, these actions require neither approval by the Board, nor any determination(s) of the public interest, only an acknowledgment by the Board that the contentions were dismissed.

³ 10 C.F.R. § 2.338(i) states: “Approval of settlement agreement. Following issuance of a notice of hearing, a settlement must be approved by the presiding officer or the Commission as appropriate in order to be binding in the proceeding. The presiding officer or Commission may order the adjudication of the issues that the presiding officer or Commission finds is required in the public interest to dispose of the proceeding. In an enforcement proceeding under subpart B of this part, the presiding officer shall accord due weight to the position of the NRC staff when reviewing the settlement. If approved, the terms of the settlement or compromise must be embodied in a decision or order. Settlements approved by a presiding officer are subject to the Commission’s review in accordance with § 2.341.”

⁴ The fact that the Addendum to MOU incorporates the provisions of 10 C.F.R. § 2.338(h) does not reflect an agreement or concession on the part of DPS and Entergy that § 2.338 applies. Rather, the parties were exercising the simplest of the choices made available to them by the Board. See Tr. at 950-51.

Notwithstanding the fact that § 2.338 does not apply, Entergy believes that, if the MOU is examined against the public interest criterion of § 2.338(i), it will readily be found to satisfy it. Should the Board, however, rule that additional proceedings are required to determine whether the public interest is satisfied, or if the Board decides not to promptly dismiss the DPS contentions, Entergy respectfully requests that the Board certify the entire question of the applicability of § 2.338 to the Amended Notice and the MOU to the Commission for resolution pursuant to 10 C.F.R. § 2.323(f)(2).

II. 10 C.F.R. § 2.338 DOES NOT APPLY TO THE MOU

A. There is no “proposed settlement” within the meaning of 10 C.F.R. § 2.338

The availability of the procedures provided in 10 C.F.R. § 2.338 is outlined in subsection (a), as follows:

Availability. The parties shall have the opportunity to submit a proposed settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution under paragraph (b) of this section.

10 C.F.R. § 2.338(a). Thus, subsection (a) contemplates two scenarios under which § 2.338 applies: (1) if parties have reached a “proposed settlement” which they want to submit for approval by the Board in accordance with the provisions of § 2.338(i); or (2) if the parties seek the assistance of the Board and the Chief Administrative Judge in establishing a formal alternative dispute resolution process under § 2.338(b) which, if successful, will lead to a “proposed settlement” that will then be submitted for approval under § 2.338(i).

Neither situation applies here. The MOU is a private settlement between DPS and Entergy of certain concerns raised by DPS about the operation of Vermont Yankee Nuclear Power Station (“VY”) and the contentions arising from them. It is a finalized, binding agreement, not a

“proposed settlement” of the issues subject to being “approved by the presiding officer in order to be binding in the proceeding.” Section 2.338(i). The MOU is neither a “proposed settlement” nor a settlement intended to be “binding in this proceeding.” Thus, it is not a “settlement” for purposes of Board action.

The second alternative, a request for institution of an alternative dispute resolution (“ADR”) proceeding, has not been invoked, so it has not resulted in a “proposed settlement” within the meaning of § 2.338.

In short, there is no “proposed settlement” between DPS and Entergy that falls under the provisions of § 2.338, hence the Board approval process contemplated in § 2.338(i) does not apply.

B. The Commission intended 10 C.F.R. § 2.338 to apply in alternative dispute resolutions facilitated by third party neutrals or supervised by the Board

When promulgating § 2.338, the Commission clearly intended that its terms would apply to settlement agreements reached via ADR mechanisms involving third party neutrals. The Commission recognized that “‘unassisted’ negotiation to resolve disputes has long been effectively used in resolving disputed matters before NRC tribunals,”⁵ and did or said nothing to modify this informal process. The Commission, however, did undertake to supplement the informal negotiation between parties by instituting a formal process, parallel to that applied elsewhere in the Federal Government, which encouraged the use of “formal ADR techniques that require the use of a third party neutral.” *Id.* Thus, “[t]he Commission’s consideration of ADR techniques for use in the hearing process also focuse[d] on these formal ADR techniques.” *Id.*

⁵ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,209 (Jan. 14, 2004).

This was not the first time that the Commission had expressed its support for the use of formal ADR techniques. A decade prior to the promulgation of § 2.338, the Commission had issued a Policy Statement on ADR, which encouraged the use of ADR in appropriate situations.⁶ During the promulgation of the changes to 10 C.F.R. Part 2 that included the addition of § 2.338, the Commission twice referred to its earlier Policy Statement on ADR.⁷ The Policy Statement provided that ADR processes include “settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration.” 57 Fed. Reg. at 36,678. In addition, the Policy Statement noted that these processes “usually involve the use of a neutral third party.” *Id.*

Thus, the Commission intended that the requirements of § 2.338 be an implementation of its Policy Statement on the use of ADR and meant that section to be used for “formal” ADR processes, rather than the “unassisted” negotiation that had successfully resolved many disputed issues in NRC adjudications. Nowhere did the Commission express any intent that § 2.338 would supplant the availability of such unassisted techniques for parties to resolve disputes outside of litigation. Indeed, the formal ADR process utilizing a third party neutral is not mandatory. 10 C.F.R. 2.338(a) (“parties shall have the opportunity to submit a proposed settlement....or submit a request for [ADR]” (emphasis added); 69 Fed. Reg. at 2,197 (“it is not appropriate to mandate the use of ADR. The final rule’s provisions provide an opportunity for parties to use ADR, but do not mandate it.”))

Entergy and DPS did not employ a third party neutral in fashioning the terms of the MOU. Rather, they engaged in an unassisted effort, the fruit of which was the MOU. Thus, the MOU is

⁶ Policy Statement, Alternative Means of Dispute Resolution, 57 Fed. Reg. 36,678, 36,678 (Aug. 14, 1992).

⁷ Proposed Rule, Changes to Adjudicatory Process, 66 Fed. Reg. 19,610, 19,626 (Apr. 16, 2001); see also 69 Fed. Reg. at 2,209.

not the result of a “formal” ADR process to which the Commission intended the requirements of § 2.338 to apply.

C. The Commission intended 10 C.F.R. § 2.338 to apply only to proposed dispute resolutions that would be binding in the proceeding

The other situation in which the Commission intended § 2.338 to apply was where parties had reached an agreement to resolve a dispute but desired that the agreement be binding and enforceable in the proceeding; for example, when the agreement called for the imposition of a license condition on a licensee. Section 2.338 would apply in those cases because the parties intended that the settlement agreement would have the full force and effect of a final NRC order issued after an adjudicatory hearing. Application of § 2.338 in those situations presupposes a resolution reached by the parties short of litigation, but culminating in a Board or Commission-issued decision or order that is binding on the parties pursuant to the NRC’s authority under the Atomic Energy Act.

An examination and analysis of § 2.338 bears this out. For example, § 2.338(g) provides that a proposed settlement agreement must “include[] the reasons why it should be accepted” by the Board or the Commission. Subsection (h) requires that the agreement include “a statement that the order has the same force and effect as an order made after full hearing.” 10 C.F.R. § 2.338(h). Lastly, subsection (i): (1) provides that the settlement must be approved by the presiding officer or the Commission “in order to be binding in the proceeding;” (2) orders that the presiding officer or Commission to adjudicate issues “required in the public interest to dispose of the proceeding;” and (3) requires that the agreement be “embodied in a decision or order,” which would be subject to Commission review. 10 C.F.R. § 2.338(i) (emphases added).

The settlement reached in the LES proceeding⁸ illustrates well the use of § 2.338 to effectuate a proposed settlement privately reached by parties to an NRC licensing proceeding. In LES, license applicant LES and intervenors the New Mexico Attorney General (“NMAG”) and the New Mexico Environment Department (“NMED”) reached a settlement agreement that would have imposed license conditions on the National Enrichment Facility (“NEF”) in exchange for the withdrawal of the NMAG and the NMED from the proceeding, along with their contentions.⁹ The NRC Staff opposed the settlement agreement because (1) consent and approval of the NRC Staff had not been obtained for the agreement, which the NRC Staff was nonetheless expected to oversee and to enforce; (2) the agreement imposed license conditions that were unenforceable by the NRC; and (3) the agreement contained provisions which “would be difficult, if not impossible, to realistically inspect and enforce.”¹⁰ LES, NMED, and NMAG then revised the settlement agreement to address the NRC Staff’s concerns,¹¹ and the NRC Staff approved of the revised agreement.¹² The Board, in approving the revised agreement, concluded that (1) the revised agreement “ensure[d] the subject NEF license conditions are enforceable by the NRC;” (2) the revised agreement was “sufficiently unambiguous and specific to permit NRC inspectors to determine with reasonable specificity whether LES is complying with the relevant license condition”; (3) a portion of the agreement was rewritten as an agreement between the parties to the settlement, rather than as a potentially unenforceable license condition; (4) the agreement was revised so that NRC had authority over state participation in inspections conducted at the NEF; and (5) portions of the agreement were rewritten to it make clear that only the NRC could enforce

⁸ Louisiana Energy Services, L.P. (National Enrichment Facility), Docket No. 70-3101-ML, ASLBP No. 04-826-01-ML (“LES”).

⁹ LES, Joint Motion for Approval of Settlement Agreement (June 23, 2005).

¹⁰ LES, NRC Staff Response to Joint Motion for Approval of Settlement Agreement (July 5, 2005) at 2-6.

¹¹ LES, Joint Motion for Approval of Settlement Agreement (July 27, 2005).

¹² LES, NRC Staff Response to Joint Motion for Approval of Settlement Agreement (July 29, 2005).

the terms of any NEF license – not any other terms of a settlement agreement between LES and NMAG and NMED -- and that those license conditions could be enforced only through petition to the NRC.¹³ The Board concluded by finding that the settlement agreement, the withdrawal of NMAG and NMED, and the dismissal of their contentions were in the public interest pursuant to 10 C.F.R. § 2.338(i).¹⁴

In stark contrast to the LES situation, neither Entergy nor DPS intended that the MOU would become part of a binding final decision or order in the Extended Power Uprate proceeding to be enforced by the NRC. Nor does the MOU include any license conditions that would need to be imposed on the Vermont Yankee operating license. Rather, Entergy and DPS entered into a private contractual arrangement that, by its terms, is governed by Vermont law, MOU at 4, not the NRC's regulations. The MOU imposes no obligations, whether by inspection, enforcement or otherwise, on the NRC Staff. The MOU does not bestow on the Board or any other branch of the NRC any oversight responsibility. DPS simply withdrew from the proceeding and requested that its contentions be dismissed because it concluded there was nothing that it needed to accomplish by further participation in the proceeding. Because the MOU contains no license conditions that would affect the NRC Staff, or other obligations on Entergy's part that would need to be reflected in a Board order, the MOU is not "binding in the proceeding." Therefore, § 2.338 does not apply to it.

¹³ LES, Memorandum and Order (Approving Settlement Agreement and Accepting Withdrawal of Parties), slip op. at 6 (Aug. 12, 2005), ML052270036 (copy attached as Exhibit 1).

¹⁴ Id. at 7.

III. THE WITHDRAWAL OF DPS AND ITS CONTENTIONS FROM THE PROCEEDING REQUIRES NO FURTHER ACTION BY THE BOARD

Longstanding Commission precedent dictates that, upon DPS's voluntary withdrawal from the proceeding, its contentions are also withdrawn. Houston Lighting & Power Co. (South Texas Project Units 1 & 2), ALAB-799, 21 N.R.C. 360, 382-83 (1985) (“[w]here there is more than one intervenor in a case, the withdrawal of one does not terminate the proceeding. Under NRC procedure, however, it does serve to remove the withdrawing party’s contentions from litigation. The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.”) (Footnotes omitted) (citing Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 N.R.C. 383, 391-92 (1976)); see also Power Authority of the State of New York (James A. Fitzpatrick Nuclear Power Plant; Indian Point Nuclear Generating Unit 3), 52 N.R.C. 361, 363 (2000) (referring to “the general NRC precedent to the effect that, when an intervenor withdraws, its issues are also withdrawn”).

Commission case law also holds that when an intervenor’s withdrawal from a proceeding is based on a settlement agreement, Board review and approval of the agreement is not required. Arizona Public Service Company (Palo Verde Nuclear Station, Unit Nos. 1, 2 and 3), LBP-91-37A, 34 N.R.C. 199 (1991) (holding that where the settlement agreement between the intervenors, licensees, and NRC Staff “is founded on the voluntary withdrawal of the Intervenor’s only contention, there is nothing for this Board to approve or disapprove.”) See also International Uranium (USA) Corp. (Receipt of Additional Material from Tonawanda, New York), LBP-00-11, 51 N.R.C. 178, 180 (2000) (“In light of the resolution of the State’s concerns and the lack of opposition to its motion for withdrawal, there are no longer any issues for the Presiding Officer to resolve. Therefore, there state’s motion for withdrawal is granted. . . .”); Public Service Electric

and Gas Co. (Hope Creek Generating Station), LBP-85-6A, 21 N.R.C. 468, 468-69 (1985) (approving the withdrawal of the intervenor and dismissing its contentions); Public Service Co. of Colorado (Fort St. Vrain Independent Spent Fuel Storage Installation), CLI-91-13, 34 N.R.C. 185, 190-91 (1991) (accepting the notice of withdrawal of the proceeding's lone intervenor and closing the proceeding, per the terms of the agreement that resolved the intervenor's concerns); Tennessee Valley Authority (Browns Ferry Nuclear Plant Units 1, 2, and 3), LBP-73-43, 6 A.E.C. 1062, 1062-63 (1973) (terminating the proceeding upon the withdrawal of the sole intervenor pursuant to a settlement reached with the applicant because there were "no issues in controversy remaining, [and] there is no obligation of warrant to hold a hearing").¹⁵ Nor is it required that a licensing board take any action other than dismiss the settled and withdrawn contentions.¹⁶

¹⁵ In some instances, Boards have reviewed settlement agreements -- such, as for instance, when the parties have submitted them to the Board seeking the Board's approval, see Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-89-24, 30 N.R.C. 152, 153 (1989)) or where the settlement agreement by its own terms require Board approval to be effective, see Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-88-18A, 28 N.R.C. 101, 101-02 (1988); LBP-88-18B, 28 N.R.C. 103-44 (1988) -- but we are aware of no case in which a Licensing Board found that it had to review a settlement agreement to decide whether the contentions tendered by an intervenor should be dismissed. Cf. Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 N.R.C. 59, 61, 63, 65 (1996) (a case in which a Board, after hearings were concluded and an initial decision was being prepared, was advised that the parties had entered into a settlement and wished to have the proceeding terminated. The Board wrote: "Generally, settlement agreements have been filed with licensing boards and considered by them," but then dismissed the proceeding without reviewing the settlement agreement, which the parties declined to provide); Sequoyah Fuels Corporation (Gore, Oklahoma Site), LBP-04-30, 60 N.R.C. 665, 666-67 (2004) (where the intervenors filed a joint motion to terminate the proceeding prior to the preparation and presentation of their written presentations, neither the presiding officer nor the licensing board in the two related proceedings "paused to consider whether approval of the [settlement] agreement as a whole is required as a condition precedent to the grant of the dismissal motion," yet nonetheless finding that the agreement's provisions were "consistent with the public interest," citing to the former 10 C.F.R. § 2.1241 and the current 10 C.F.R. § 2.338).

¹⁶ In the recently concluded Private Fuel Storage ("PFS") proceeding, the State of Utah ("State") argued that the proposed draft ISFSI license was deficient, in part, because three contentions remained pending before the licensing board, which had failed to take action on those three contentions after the State and PFS had filed joint motions to dismiss them pursuant to the settlement agreements that resolved the contentions. Letter from Denise Chancellor, Assistant Attorney General, State of Utah, to Stewart W. Brown, Spent Fuel Project Office, NRC (Feb. 15, 2006). The next day, Judge Farrar, who had presided over part of the PFS proceeding, responded to the State's concern by pointing the proceeding's participants to the two licensing board decisions that reflected the Board's view at those times that those contentions "had been resolved in accordance with the parties' settlement agreements." E-mail from Michael C. Farrar, Administrative Judge, NRC, to Sherwin Turk, NRC Staff, et al., (Feb. 16, 2006) (citing LBP-03-04, 57 NRC 69, 81 n. 6; and LBP-05-29, 62 NRC 635, 698, 708, 710 n. 12) (copy included as Exhibit 2). No separate orders dismissing the three contentions were ever issued by the licensing board.

Promulgation of § 2.338 has not altered the above-described precedent but is consistent with it. The Commission expressly “intend[ed] no change in the bases for accepting a settlement by” the addition of § 2.338. 66 Fed. Reg. at 19,626. Indeed, the Commission intended § 2.338 to “have consolidated the former provisions in part 2 on settlement,” referring to the then existing 10 C.F.R. §§ 2.759 and 2.1241. 69 Fed. Reg. at 2,210.¹⁷ Under the former §§ 2.759 and 2.1241, only where the tendered settlement agreement was to become binding or dispositive in the proceeding would approval by the presiding officer or licensing board be required. Northern States Power Company (Pathfinder Atomic Plant), LBP-90-19, 31 N.R.C. 579, 580 (1990) (“under 10 C.F.R. § 2.1241, [the settlement] would have had to be approved by the Presiding Officer in order for the settlement to be binding in the proceeding. The unilateral withdrawal by SDRC [the intervenor] eliminates action by the Presiding Officer under the section.”); see also, Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-84-14, 19 N.R.C. 834 (1984) (granting, pursuant to § 2.759, a joint motion of the parties for entry of an order authorizing issuance of an amendment to the operating license, thus disposing of the proceeding, where the intervenors had withdrawn their requests for a hearing and all of their contentions pursuant to an agreement with the applicant, and the joint motion reflected that agreement. The Board did not separately approve or disapprove of the agreement with respect to the granting the motions to withdraw the hearing requests and contentions).

¹⁷ The Statement of Considerations also refers to 10 C.F.R. § 2.203, which pertains to NRC enforcement proceedings, not operating license or amendment proceedings, such as in the instant case. Section 2.203 requires approval by the presiding officer of settlement agreements reached “[a]t any time after the issuance of an order designating the time and place of a hearing... .” The regulation provides a role for the licensing board in reviewing settlement agreements in enforcement proceedings, whereas the regulations “are less clear about reviewing settlements in operating license and amendment cases. . . .” Vogtle, LBP-96-19, 44 N.R.C. at 65.

Since the MOU is founded upon the voluntary withdrawal of DPS, there is nothing for the Board to approve or disapprove. Palo Verde, LBP-91-37A, 34 N.R.C. at 199. Thus, the Board should simply accept the withdrawal of DPS and its contentions from the proceeding.

IV. THE MOU IS IN THE PUBLIC INTEREST

As discussed above, Entergy's position is that the Board is neither required nor empowered to review the terms of the MOU to determine whether they are consistent with the public interest, since the provisions of § 2.338(i) do not apply. However, should the Board decide to make such a determination, the Board must recognize that "the adjudicator's 'function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.'" Sequoyah Fuels Corp., (Gore, Oklahoma Site Decontamination Facility), CLI-97-13, 46 N.R.C. 195, 215 (1997) (emphases in original) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (internal quotation marks omitted, emphases in original)). The Board should "not reject a settlement merely because one of the parties might have received a more favorable result had the case been fully litigated." Sequoyah Fuels, CLI-97-13, 46 N.R.C. at 215 & n.8 (citing, inter alia, City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 n.2 (2d. Cir. 1974) ("In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."))

Indeed, a settlement will be rejected only if one of the four negative situations set forth in Sequoyah Fuels, CLI-97-13, 46 N.R.C. at 209 is present: (1) if the settlement result appears unreasonable; (2) if the terms of the settlement appear incapable of effective implementation and enforcement; (3) if the settlement jeopardizes the public health and safety; or (4) if the settlement approval process deprives interested parties of meaningful participation.

None of these four negative situations exists here. First, the result embodied by the MOU certainly is not unreasonable. Entergy has agreed to undertake actions requested by DPS. These actions might not have resulted (or, perhaps, could not have resulted) from the adjudication of DPS's contentions on their merits. Second, the terms of the MOU can be readily implemented and are governed by Vermont law. Third, the MOU does not jeopardize the public health and safety but enhances it by having Entergy perform additional inspection activities. The MOU has no impact on VY's operating license, which has already been amended to reflect the extended power uprate request, as approved by the NRC Staff – i.e., found to be consistent with the public health and safety. Lastly, the MOU does not deprive interested parties of meaningful participation. The other intervenor in this proceeding, the New England Coalition (“NEC”) has already failed in its attempt to adopt DPS's contentions and is therefore not an “interested party” with respect to those contentions. See Memorandum and Order (Denying Incorporation By Reference And Additional Discovery Disclosure) (February 16, 2005).¹⁸ NEC, however, remains a party to the proceeding and its participation rights as to its contentions remain unaffected. Thus, the MOU meets the four public interest criteria test set forth in Sequoyah Fuels.

In addition, the execution of the MOU and DPS's consequent withdrawal has relieved the Board and the parties from litigating the withdrawn contentions. This result should not only lead to a reduction of costs and burdens that typically result from litigation, but has also allowed Entergy and DPS to reach a mutually agreeable and practical resolution of their differences. See CFC Logistics, Inc., LBP-04-24, 60 N.R.C. 475, 483 (2004).

¹⁸ Providing “an equal right to pursue contentions earlier put forth by another party would frustrate the Commission's policy of encouraging legitimate efforts by applicants and intervenors to reach good faith, mutually satisfactory resolution of issues without the need for litigation.” South Texas, ALAB-799, 21 N.R.C. at 383 (footnote omitted).

V. SHOULD THE BOARD DECLINE TO DISMISS THE DPS CONTENTIONS WITHOUT FURTHER PROCEEDINGS, ENTERGY REQUESTS THAT THE BOARD CERTIFY THE ENTIRE MATTER TO THE COMMISSION FOR RESOLUTION

If the Board concludes that additional proceedings are required to rule on the public interest of the MOU, or otherwise decides not to dismiss promptly the DPS contentions, then Entergy respectfully requests that the Board certify these matters to the Commission for resolution pursuant to 10 C.F.R. 2.323(f)(2). That provision states:

A party may petition the presiding officer to certify an issue to the Commission for early review. The presiding officer shall apply the alternative standards of § 2.341(f) in ruling on the petition for certification. No motion for reconsideration of the presiding officer's ruling on a petition for certification will be entertained.

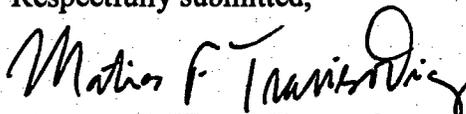
The Commission encourages licensing boards to certify to it novel legal or policy questions related to admitted issues "as early as possible in the proceeding." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 23 (1998). In addition, the Commission encourages certification of questions or issues that would, among other things, "affect the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.341(f)(2)(ii); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 N.R.C. 307, 310 (1998) ("PFS"). In PFS, the Commission ruled that the licensing board's decision to create a second board, although "not unheard of in [its] practice," qualified as "an unusual event" that met the certification requirements of § 2.341(f)(2)(ii). PFS, CLI-98-7, 47 N.R.C. at 310. With respect to the issues here, a Board action that kept the DPS contentions from being dismissed would, in effect, require the adjudication of contentions for which there is no longer a sponsor. Such a result would certainly be unusual and affect the basic structure of the proceeding, thus triggering the need for certification to the Commission. See Vogtle, LBP-96-16, 44 N.R.C. at 67 n.2 ("Faced with a petition to withdraw . . . where the proceeding is not finished, a

Board might have the additional problem of proceeding with an unwilling party or even without the assistance of a party.”¹⁹

VI. CONCLUSION

For the reasons set forth above, the Board should find that § 2.338 does not apply to the MOU. Rather, the Board should recognize DPS’s withdrawal from the proceeding, as well as its withdrawal of its contentions. Should the Board conclude otherwise, then Entergy respectfully requests that the Board certify the matter to the Commission for its review pursuant to 10 C.F.R. § 2.323(f)(2).

Respectfully submitted,



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LLC and Entergy Nuclear Operations, Inc.

Dated: May 22, 2006

¹⁹ Without a willing and properly admitted sponsor, the Board could continue the proceeding as to the DPS contentions only by declaring a sua sponte issue and notifying the Commission. Vogtle, LBP-96-16, 44 N.R.C. at 67 n.2. If the Board attempted to take up the withdrawn the DPS contentions sua sponte, it would have to obtain the Commission’s consent which, in effect, would amount to a certification of these issues to the Commission for interlocutory review. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41 (1998). The Board would then have to await the Commission’s approval to do so. Id. See also Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 N.R.C. 45, 55 (1998) (the extent of a licensing board’s “authority to raise contentions sua sponte is a matter within the Commission’s supervisory authority”).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
ENTERGY NUCLEAR VERMONT)	Docket No. 50-271
YANKEE, LLC and ENTERGY)	
NUCLEAR OPERATIONS, INC.)	ASLBP No. 04-832-02-OLA
(Vermont Yankee Nuclear Power Station))	(Operating License Amendment)
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Response to Board's May 10, 2006 Order Regarding DPS's Amended Notice of Withdrawal" and "Notice of Appearance of Scott A. Vance" were served on the persons listed below by deposit in the U.S. mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 22nd day of May, 2006.

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*Secretary
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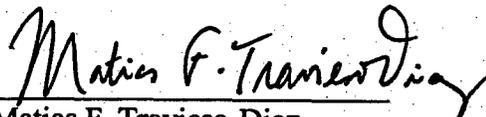
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Matias F. Travieso-Diaz

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USNRC

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

August 12, 2005 (1:31pm)

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

SERVED August 12, 2005

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

Docket No. 70-3103-ML

LOUISIANA ENERGY SERVICES, L.P.

ASLBP No. 04-826-01-ML

(National Enrichment Facility)

August 12, 2005

MEMORANDUM AND ORDER
(Approving Settlement Agreement and
Accepting Withdrawal of Parties)

Before the Licensing Board is a July 27, 2005 joint motion by intervenors New Mexico Environment Department (NMED) and the Attorney General of New Mexico (AGNM), and applicant Louisiana Energy Services, L.P., (LES) for approval of a settlement agreement relative to several contentions the Board admitted to this proceeding on behalf of NMED and the AGNM. Finding the settlement agreement consistent with the public interest, the Board approves that settlement agreement and accepts the withdrawal of NMED and the AGNM from this proceeding.

I. BACKGROUND

On June 23, 2005, the AGNM, NMED, and LES submitted a joint motion to the Board requesting approval of a settlement agreement agreed to by those parties. See Joint Motion for Approval of Settlement Agreement (June 23, 2005). On July 5, 2005, the NRC staff and intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) each filed

responses to the joint motion of the AGNM, NMED, and LES. For its part, the staff requested that the agreement not be approved, specifically objecting to the fact that (1) the settlement agreement did not represent all affected parties because the consent and approval of the staff was not obtained; and (2) the settlement agreement attempted to impose license conditions unenforceable by the NRC. See NRC Staff Response to Joint Motion for Approval of Settlement Agreement (July 5, 2005) at 2-3. NIRS/PC, on the other hand, did not expressly object to any of the terms of the proposed settlement, but urged the Board to consider the staff's objections and to ensure that NIRS/PC's interests in the proceeding are not affected by any settlement agreement between other parties to the litigation. See Memorandum on Behalf of Intervenors [NIRS/PC] In Response to Joint Motion for Approval of Settlement Agreement (July 5, 2005).

In response to the staff's objections to the proposed settlement agreement, on July 7, 2005, LES filed with the Board an unopposed motion requesting that the Board defer ruling on the motion for approval of the settlement agreement to allow time for LES to evaluate the staff's objections and continue discussion with all interested parties in an attempt to resolve those concerns. See Motion on Behalf of [LES] To Defer Ruling on Settlement Agreement (July 7, 2005). The Board granted that motion and directed the parties to the settlement agreement to file a status report regarding the agreement by July 22, 2005. See Licensing Board Order (Granting Ruling Deferral and Filing Extension Requests and Conforming Prior Scheduling Order to General Schedule) (July 11, 2005) at 1 (unpublished). Pursuant to that order, on July 22, NMED and the AGNM filed a status report informing the Board that NMED, the AGNM, and LES had resolved the staff's objections, attaching a draft revised settlement agreement as an exhibit to that report, and informing the Board that a final, fully executed version of that agreement would be forwarded to the Board the following week. See NMAG's and NMED's

Status Report on Settlement Agreement (July 22, 2005) at 3. That same day, LES filed a response to that status report supporting the revised settlement agreement attached to that report and requesting the Board to approve the revised agreement. See [LES] Response to the [AGNM]'s and [NMED]'s Status Report on Settlement Agreement (July 22, 2005) at 2.

On July 25, 2005, the Board issued an order directing the AGNM, NMED, and LES that (1) a joint motion for approval of the revised settlement agreement accompany the executed settlement agreement those parties had indicated they intended to forward to the Board; and (2) along with that motion and revised agreement, the parties should provide a "redline" version of the revised agreement reflecting the changes from the initial settlement agreement filed with the Board on June 23. See Licensing Board Order (Filing and Responding to Joint Motion to Approve Revised Settlement Agreement) (July 25, 2005) at 1 (unpublished). The Board further called for party responses to the revised settlement, and ordered that any staff response to the July 22 motion should discuss how the revised settlement agreement addressed the concerns raised by the staff in its July 5 response. See id. at 2.

On July 27, 2005, NMED, the AGNM, and LES filed a joint motion as requested by the Board, requesting approval of the revised settlement agreement and including as attachments a fully executed version of the settlement agreement as well as a "redline" version. See Joint Motion for Approval of Settlement Agreement (July 27, 2005) [hereinafter July 27 Motion]. In a July 29, 2005 response to the July 27 joint motion, the staff declared that it supports Board approval of the revised agreement and delineated which portions of the revised settlement address the staff's previously-raised concerns, and how they do so. See NRC Staff Response to Joint Motion for Approval of Settlement Agreement (July 29, 2005) [hereinafter July 29 Staff Response]. For its part, NIRS/PC filed a response on August 1, 2005, repeating its belief that, on its face, none of the terms of the revised settlement agreement prejudice NIRS/PC. See

Memorandum on Behalf of Intervenors [NIRS/PC] in Response to Renewed Joint Motion for Approval of Settlement Agreement (Aug. 1, 2005) at 1. NIRS/PC does, however, repeat its concerns that the Board ensure the settlement agreement does not impact the interests of NIRS/PC in the proceeding, and further requests that the Board specifically state in any order approving the agreement that the agreement would not restrict the future authority of any State of New Mexico agencies to raise issues relative to the proposed LES National Enrichment Facility (NEF). See id. at 2-3.

II. TERMS OF THE SETTLEMENT AGREEMENT

Under the terms of the settlement agreement, LES has agreed to adopt conditions to its license, should one be issued, for the construction and operation of the NEF. Among other things, LES has agreed to:

- (1) limit the number of cylinders of depleted uranium hexafluoride (DUF_6) generated at the NEF that will be stored there at any given time to 5,016 type 48Y cylinders;
 - (2) limit the length of time any particular cylinder can be stored at the NEF to fifteen years;
 - (3) never store DUF_6 from the NEF at any site in New Mexico other than the NEF;
 - (4) never construct or operate a deconversion facility in New Mexico, nor permit DUF_6 from the NEF to be disposed of in New Mexico, nor permit the United States Department of Energy (DOE) to take possession of the DUF_6 at the NEF site and store it there indefinitely;
 - (5) provide financial assurance for offsite disposal of DUF_6 from the NEF using a minimum contingency factor of twenty-five percent;
 - (6) increase the contingency factor to fifty percent upon reaching onsite storage of
-

4,000 48Y cylinders of DUF_6 unless (a) an application for construction and operation of a facility for deconversion of NEF DUF_6 has been docketed with the relevant agency; (b) an application for such a facility has been approved by the relevant agency; or (c) LES is using another method for removing DUF_6 stored at the NEF;

- (7) automatically increase the contingency factor to fifty percent upon reaching onsite storage of 5,016 48Y cylinders of DUF_6 , if not already applicable, and maintain the contingency factor at fifty percent until the number of cylinders stored onsite is reduced to ninety-eight percent of 5,016 and either (a) an application for construction and operation of a facility for deconversion of NEF DUF_6 has been docketed with the relevant agency; (b) an application for such a facility has been approved by the relevant agency; or (c) LES is using another method for removing DUF_6 from New Mexico;
- (8) provide triennial reports on LES's periodic adjustments of the decommissioning cost estimate for the NEF, and allow NMED and the AGNM to review and comment on those reports in advance of their submission to the NRC;
- (9) provide financial assurance for disposition of DUF_6 at the minimum amount of \$7.15 per kilogram of uranium (kgU), and not propose to the NRC that such amount be reduced to \$5.85/kgU unless LES has a contractual agreement for removal of DUF_6 out of New Mexico;
- (10) allow NMED access to information about, and support its participation in, NRC inspections of the NEF radiation protection program; and
- (11) provide to the State the NEF physical security plan.

See July 27 Motion, Exh. A, at 1-7. In addition, the settlement agreement states that nothing in

the agreement precludes NMED or the AGNM from requesting that the NRC initiate an enforcement action relative to the NEF license conditions resulting from the settlement agreement. See id. Exh. A, at 7-9.

Relative to the objections and/or concerns raised by the staff and/or NIRS/PC in their responses to the June 23 and July 27 joint motions for approval of the settlement agreement, the Board finds these concerns are adequately addressed by the revised settlement agreement and/or the NRC adjudicatory process. In this regard, as the staff notes in its July 29 response, the objections raised by the staff in its July 5 response have been addressed to the staff's satisfaction. See July 29 Staff Response at 2-3. Specifically, the staff's concerns relative to sections 2 and 3 are addressed in that those sections of the agreement that ensure the subject NEF license conditions are enforceable by the NRC because they refer only to actions taken by LES with respect to DUF_e generated at the NEF. See id. at 2. As to section 4, paragraphs 2 and 3, those paragraphs, as rewritten, are sufficiently unambiguous and specific to permit NRC inspectors to determine with reasonable specificity whether LES is complying with the relevant license condition. See id. at 3. Section 5, which the staff might have considered an unenforceable license condition, is no longer proposed as an NEF license condition, but instead takes the form of a simple agreement between the parties to the settlement. See id. at 3. Section 10 permits access by NMED to the NEF for inspection purposes, but only to the extent allowed by a specific agreement between the NRC and the State that would ensure the NRC, rather than LES, would determine the conduct of NMED inspections of the NEF. See id. at 3. Finally, sections 13 and 18 make clear that the NRC can only enforce the terms of any NEF license, not any other terms of a settlement agreement between LES and the New Mexico parties, and that the proper course for requesting enforcement of those license conditions is by petition to the agency, not by requesting enforcement by the Board. See id. at 3.

As to NIRS/PC's concerns, Board approval of the settlement agreement does not impact the right of NIRS/PC to make or pursue any of its admitted or admissible contentions to this proceeding, does not preclude the adoption of license conditions different from those contained in the settlement agreement, and does not restrict the authority of New Mexico state agencies over future issues arising in connection with the NEF,¹ except to the extent NMED and the AGNM have agreed to be bound by the terms of the settlement agreement.

III. CONCLUSION

Pursuant to 10 C.F.R. § 2.338(i), the Board has reviewed the proposed settlement agreement between NMED, the AGNM, and LES to determine whether approval of the revised agreement, dismissal of the admitted AGNM and NMED contentions, and withdrawal of the AGNM and NMED from this proceeding are in the public interest. Based on that review, and according due weight to the positions of the staff and NIRS/PC, the Board has concluded that those actions are in the public interest. Accordingly, we grant the NMED, AGNM, and LES joint motion to approve the settlement agreement; dismiss contentions NMED TC-3/EC-4 – Radiation Protection Program and AGNM TC-ii – Disposal Cost Estimates from this proceeding; modify contention NIRS/PC EC-5/TC-2 - AGNM TC-i – Decommissioning Costs to delete the

¹ Cf. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 NRC 59, 66 (1996) (nothing in settlement agreement prohibits, restricts, or discourages intervenor from reporting any safety concern or suspected improper activity to the NRC or any other state or federal agency).

words "AGNM TC-i" from the title; and accept NMED's and the AGNM's withdrawal from this proceeding.

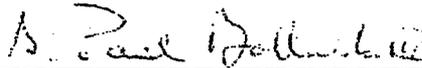
For the foregoing reasons, it is this twelfth day of August 2005, ORDERED, that:

1. The July 27, 2005 joint motion of NMED, the AGNM, and LES is granted and their July 27, 2005 settlement agreement is approved, a copy of which is attached to and incorporated by reference in this memorandum and order.

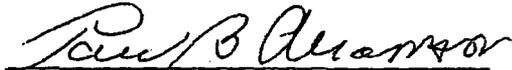
2. Contentions NMED TC-3/EC-4 – Radiation Protection Program, and AGNM TC-ii – Disposal Cost Estimates, are dismissed from this proceeding, and contention NIRS/PC EC-5/TC-2 - AGNM TC-i – Decommissioning Costs is modified to delete "AGNM TC-i" from the title.

3. The withdrawal of intervenors NMED and the AGNM from this proceeding is approved.

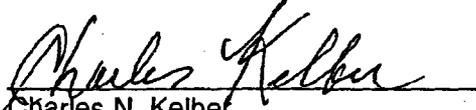
THE ATOMIC SAFETY
AND LICENSING BOARD²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Paul B. Abramson
ADMINISTRATIVE JUDGE



Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 12, 2005

² Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors NMED, the AGNM, and NIRS/PC; and (3) the staff.

ATTACHMENT

SETTLEMENT AGREEMENT

WHEREAS, the New Mexico Environment Department ("NMED") and the Attorney General of New Mexico ("NMAG") have requested and been granted a hearing before the Atomic Safety and Licensing Board ("Board") relating to certain matters concerning the application filed by Louisiana Energy Services, L.P. ("LES" or "licensee") for a license from the United States Nuclear Regulatory Commission ("NRC") to construct and operate the National Enrichment Facility ("NEF"), Docket No. 70-3103 ("NRC Proceeding");

WHEREAS, NMED, NMAG and LES have determined that it is in the public interest for LES to be bound by enforceable conditions limiting the storage and disposal of depleted uranium hexafluoride ("DUF₆") generated at the NEF;

WHEREAS, NMED, NMAG and LES have determined that it is in the public interest to insure that LES reduces the amount of DUF₆ stored onsite by 289 million pounds from the amount originally requested in LES' license application and to limit the length of time that DUF₆ is stored onsite at the NEF;

WHEREAS, NMED, NMAG and LES have determined that it is in the public interest to prohibit the disposal of DUF₆ in the State of New Mexico;

WHEREAS, NMED, NMAG and LES have determined that it is in the public interest to require LES to establish adequate financial assurances for the storage and offsite disposal of DUF₆;

WHEREAS, NMED, NMAG and LES have determined that an appropriate contingency factor should be applied to the financial assurances to be established by LES; and

WHEREAS, NMED, NMAG and LES have reached agreement regarding the issues raised by NMED and NMAG in the NRC Proceeding;

THEREFORE, IT IS HEREBY STIPULATED AND AGREED by NMED,

NMAG and LES that:

1. NMED, NMAG and LES admit that the NRC has jurisdiction over the parties and the subject matter of this Settlement Agreement.

2. NMED, NMAG and LES agree to the following condition:

Onsite storage of DUF_6 generated at the NEF shall be limited to a maximum of 5,016 48Y cylinders (or the equivalent amount of uranium stored in other NRC accepted and Department of Transportation ("DOT") certified cylinder types) of DUF_6 . The generation of any additional DUF_6 to be stored onsite by LES beyond this limit shall constitute noncompliance with this Settlement Agreement and the license. LES shall suspend production of any additional DUF_6 for onsite storage until this noncompliance is remedied. In no event shall LES store DUF_6 generated at the NEF in New Mexico other than at the NEF.

NMED, NMAG and LES agree that this condition shall be included in the NEF license when issued by the NRC.

3. NMED, NMAG and LES agree to the following condition:

Onsite storage of any one cylinder of DUF_6 generated at the NEF shall be limited to a maximum of 15 years, beginning from the date that each cylinder is filled in accordance with LES' standard procedures. The storage of any one DUF_6 cylinder beyond this limit by LES shall constitute noncompliance with this Settlement Agreement and with the license. LES shall suspend production of any additional DUF_6 for onsite storage until this noncompliance is remedied. In no event shall LES store DUF_6 generated at the NEF in New Mexico other than at the NEF.

NMED, NMAG and LES agree that this condition shall be included in the NEF license when issued by the NRC.

4. NMED, NMAG and LES agree to the following condition:

LES shall provide financial assurance for the offsite disposal of DUF₆ from the NEF using a minimum contingency factor of twenty-five percent (25%).

Upon reaching 4,000 cylinders of DUF₆ in 48Y cylinders (or the equivalent amount of uranium stored in other NRC accepted and DOT certified cylinder types) in onsite storage, LES shall immediately increase the financial assurance to provide a fifty percent (50%) contingency factor for disposition of DUF₆ stored at the NEF unless: (a) an application to construct and operate a deconversion facility outside of New Mexico that is specifically designated to deconvert the DUF₆ stored onsite at the NEF has been docketed by the agency responsible for reviewing the application; (b) an application for such a facility has been approved by the agency responsible for reviewing the application; or (c) LES is using another alternate method for removing the DUF₆ stored onsite.

In addition, upon reaching the limit of 5,016 cylinders of DUF₆ in 48Y cylinders (or the equivalent amount of uranium stored in other NRC accepted and DOT certified cylinder types) in onsite storage, LES shall immediately increase the financial assurance to provide a fifty percent (50%) contingency factor for disposition of DUF₆ stored at the NEF if the contingency factor has not already been increased to fifty percent (50%). The contingency factor shall remain at fifty percent (50%) until the number of cylinders stored onsite is reduced to ninety-eight percent (98%) of the 5,016 limit and either: (a) an application to construct and operate a deconversion facility outside of New Mexico that is specifically designated to deconvert the DUF₆ stored onsite at the NEF has been docketed by the agency responsible for reviewing the application; (b) an application for such a facility has been approved by the agency responsible for reviewing the application; or (c) LES is using another alternate method for removing the DUF₆ from New Mexico.

Nothing herein shall release LES from other financial assurance obligations set forth in applicable laws and regulations.

NMED, NMAG and LES agree that this condition shall be included in the NEF license when issued by the NRC.

5. NMED, NMAG and LES agree that

In no event shall DUF₆ from the NEF be disposed of in the State of New Mexico and in no event shall LES construct or operate a deconversion facility in the State of New Mexico.

LES agrees that if it decides to submit a request to the Secretary of the United States Department of Energy ("DOE") pursuant to Section 3113 of Public Law 104-134 (42 U.S.C. § 2297h-11), such a request will be made only if both LES and DOE determine that the NEF is not and will not be considered an "existing DUF₆ storage facility" within the meaning of Section 311 of Public Law 108-447.

6. NMED, NMAG and LES agree that LES shall provide a draft copy of the periodic adjustment of the decommissioning cost estimate required by 10 C.F.R. § 70.25(e) (hereinafter referred to as the "Triennial Report") to the Attorney General of the State of New Mexico and to the Secretary of the New Mexico Environment Department at least 60 days prior to the submission of Triennial Report in final form to the NRC. NMED, NMAG and LES further agree that they will work together in good faith to resolve any comments regarding the Triennial Report. Notwithstanding any efforts by LES to resolve any comments regarding the Triennial Report, NMED or NMAG may submit their comments directly to the NRC. Lastly, LES agrees to reimburse NMED and NMAG (or to pay directly as requested by NMED and NMAG) to hire expert(s) and/or outside counsel to evaluate, review, and provide comments to the draft Triennial Report subject to a maximum of no greater than \$20,000 per Triennial Report.

7.A. NMED, NMAG and LES agree that LES will provide financial assurance in the minimum initial amount of \$7.15/kgU for the disposition of DUF₆ situated at the NEF from the date when financial assurance is required by the NRC until LES notifies the NRC of any revision pursuant to applicable NRC regulatory requirements and guidance, but no revision shall be submitted for review sooner than the first Triennial Report.

7.B. In addition to the DUF₆ disposition cost estimate and contingency factor submitted by LES in Section 10.3 of its Fourth Revision to the Safety Analysis Report in its License Application (April 2005), NMED, NMAG and LES agree that to address and resolve NMAG's financial assurance concerns, an additional \$1.30/kgU will be included in the initial amount of financial assurance for the disposition of DUF₆ situated at the NEF, bringing the minimum initial amount to a total of \$7.15/kgU as provided in Paragraph 7.A of this Settlement Agreement. NMED, NMAG and LES further acknowledge that LES maintains that the additional \$1.30/kgU to address NMAG's financial assurance concerns is over and above the amount that LES maintains is required by applicable NRC regulatory requirements and guidance.

7.C. NMED, NMAG and LES further agree that in the first, or subsequent, Triennial Report(s), LES may not submit for NRC review the elimination of the \$1.30/kgU amount provided for in Paragraph 7.B of this Settlement Agreement unless LES has in place a contractual arrangement for the out-of-state processing and/or removal of DUF₆ situated onsite at the NEF. Nothing herein shall preclude NMED or NMAG, in accordance with the provisions in Paragraph 6 of this Settlement Agreement, from advocating at the first, or subsequent, Triennial Report(s), any issues with respect to financial assurance, including, but not limited to, the \$1.30/kgU provided for in Paragraph 7.B of this Settlement Agreement.

8. NMED, NMAG and LES agree that LES shall provide a yearly report to the Attorney General of the State of New Mexico and to the Secretary of the New Mexico Environment Department, on or before January 15th of each year that the NEF is producing DUF₆, that identifies the number of DUF₆ cylinders stored on the storage pad at the NEF as of the end of the preceding year, the number of DUF₆ cylinders anticipated to be filled during the next year, and the lengths of time all the DUF₆ cylinders have been stored onsite. In addition, NMED, NMAG and LES agree that in each such yearly report LES shall include any findings resulting from the cylinder management program (as required in LES' Environmental Report at Section 4.13.3.1.1) for the preceding year.

9. NMED, NMAG and LES agree that LES shall provide NMED and the NMAG the same access to documents and materials relating to LES' radiation protection program that is required to be provided to the NRC.

10. NMED, NMAG and LES agree that LES shall support and shall not object to NMED accompanying NRC staff on any of its inspections of the NEF radiation program and conducting inspections as permitted by any agreements between NMED and NRC that are executed in accordance with applicable NRC policy and guidance. In this regard, LES shall allow NMED staff the same access to its facilities, documents, materials and personnel to which NRC is entitled. NMED shall execute any confidentiality agreement necessary to participate in such inspections and shall comply with all appropriate NEF rules (e.g., safety, security) and any applicable NRC requirements when participating in such inspections.

11. NMED, NMAG and LES agree that the NEF shall comply with all safeguards requirements of the International Atomic Energy Agency ("IAEA") as imposed by the NRC to ensure proliferation protection.

12. NMED, NMAG and LES agree that LES shall provide to the New Mexico Department of Public Safety the Physical Security Plan for the NEF subject to the execution by the appropriate officials, employees or representatives of the New Mexico Department of Public Safety of all required non-disclosure agreements.

13. NMED, NMAG and LES agree that all NMED and NMAG matters presently pending in the NRC Proceeding shall be deemed to be withdrawn upon the Board's or NRC's approval of this Settlement Agreement in its entirety. NMED and NMAG reserve the right to reappear before the Board or NRC during the pendency of the NRC Proceeding upon the discovery of significant information that was not known by NMED or NMAG at the time they executed this Settlement Agreement and, in the event the NMED or NMAG make such an appearance, they shall comply with any applicable NRC rules regarding late-filed contentions. Prior to reappearing before the Board or NRC, NMED and NMAG shall make good faith efforts to resolve the issues or claims with LES. Nothing herein shall be construed to prohibit NMED or NMAG from filing a request that the NRC initiate a proceeding to enforce the conditions of the license issued as a result of this Settlement Agreement. Finally, NMED and NMAG agree that neither NMED nor NMAG will judicially challenge or seek to join a judicial challenge of a decision by the Board or NRC in this NRC Proceeding unless such challenge is based solely on a matter which was the subject of a reappearance by NMED and/or NMAG as provided for herein.

14. This Settlement Agreement does not resolve matters not raised by NMED or NMAG in the NRC Proceeding or matters outside the NRC Proceeding. NMED and NMAG reserve the right to enforce and seek relief under any other applicable laws and regulations. Moreover, nothing in this Settlement Agreement waives or releases LES from its obligation to comply with all applicable laws and regulations.

15. All parties hereto agree to exercise due diligence in the performance of their various responsibilities under this Settlement Agreement and to cooperate with each other in carrying out its intent.

16. This Settlement Agreement supersedes all prior representations, negotiations, and understandings of the parties hereto, whether oral or written, and constitutes the entire agreement between the parties with respect to the matter hereof. It is expressly understood, however, that nothing in this Settlement Agreement shall prevent or excuse LES from fulfilling any legal or statutory requirement of the NRC, or its successors, whether contained in the license for the NEF when issued or other requirement or regulation of the NRC, its successors, or representatives, whether oral or in writing.

17. This Settlement Agreement shall not be effective, final and binding on the parties hereto unless this Settlement Agreement is approved in its entirety by the Board or the NRC. If the Board or the NRC does not approve this Settlement Agreement in its entirety, then this Settlement Agreement shall not take effect and shall be deemed null and void. The parties agree that if the Board or the NRC does not approve this Settlement Agreement, they will negotiate in good faith to resolve any outstanding issues necessary to obtain its approval by the Board or the NRC.

18. In the event this Settlement Agreement becomes effective in accordance with the provisions herein, LES, NMED and NMAG agree that the license conditions in this Settlement Agreement are fully enforceable by the NRC. All parties agree not to contest the NRC's jurisdiction to approve and enforce the license conditions in this Settlement Agreement. If any provision of this Settlement Agreement is found by the NRC or any court of competent jurisdiction to be outside the NRC's jurisdiction, and thus unenforceable by the NRC, or should

the NRC refuse or otherwise decline to enforce any provision of this Settlement Agreement, the parties agree that an action to enforce such provision may be filed in the United States District Court for the District of New Mexico (if subject matter jurisdiction exists) or the First Judicial District Court, Santa Fe County, of New Mexico and agree not to object to the jurisdiction of those courts to hear and determine such action. The parties further agree to waive any objection to the standing of any party to this Settlement Agreement to bring an action to enforce the license conditions in this Settlement Agreement before the NRC or, if outside the NRC's jurisdiction, the United States District Court or the First Judicial District Court. Finally, the parties agree to proceed before the NRC prior to bringing an action in court, and further to proceed in United States District Court (if subject matter jurisdiction exists) before proceeding in the First Judicial District Court.

19. In the event of a breach of any provision of Paragraphs 2, 3, 4, 5 or 7 herein, NMED and NMAG shall be entitled to liquidated damages from LES in the amount of \$5,000 per day per breach. This amount is not a penalty but is a reasonable estimate of the damages that would result from any breach. Notwithstanding the foregoing, NMED, NMAG and LES agree that LES shall be entitled to attempt to cure the breach of any provision of Paragraphs 2, 3, 4, 5 or 7 herein within 60 days of receiving written notice from NMED or NMAG of such breach.

20. In the event this Settlement Agreement becomes effective in accordance with the terms herein, the parties agree if any term, section, provision or portion of this Settlement Agreement is subsequently held invalid or unconstitutional by any court of competent jurisdiction, the remaining terms, sections, provisions and portions of this Settlement Agreement shall remain in full force and effect.

21. In the event this Settlement Agreement becomes binding upon the parties in accordance with the terms herein, the Settlement Agreement shall be binding upon the parties' successors, assigns, representatives, employees, agents, partners, subsidiaries, and affiliates.

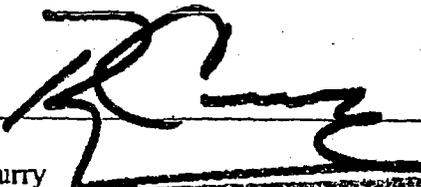
22. NMED, NMAG and LES expressly waive the right to challenge, contest the validity of, or seek judicial review of any order entered as a result of this Settlement Agreement so long as such order is fully consistent with each provision of this Settlement Agreement.

23. When approved by the Board, the order entered as a result of this Settlement Agreement has the same force and effect as an order made after full hearing.

IN WITNESS WHEREOF LES, NMED and NMAG have caused this Settlement Agreement to be executed by their duly authorized representatives on this 27 day of ~~June~~^{July} 2005.



Patricia A. Madrid
Attorney General of New Mexico



Ron Curry
Secretary, New Mexico Environment Department



E. James Ferland
President and Chief Executive Officer
Louisiana Energy Services, L.P.

DC:424436.1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

LOUISIANA ENERGY SERVICES, L.P.)

(National Enrichment Facility))

Docket No. 70-3103-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (APPROVING SETTLEMENT AGREEMENT AND ACCEPTING WITHDRAWAL OF PARTIES) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
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Administrative Judge
Charles N. Kelber
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Tannis L. Fox, Esq.
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Office of General Counsel
Ron Curry, Secretary
New Mexico Environment Department
1190 St. Francis Drive
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Docket No. 70-3103-ML
LB MEMORANDUM AND ORDER (APPROVING
SETTLEMENT AGREEMENT AND ACCEPTING
WITHDRAWAL OF PARTIES)

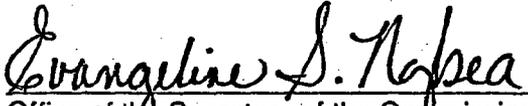
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of August 2005

-----Original Message-----

From: Mike Farrar [mailto:MCF@nrc.gov]
Sent: Thursday, February 16, 2006 12:00 PM
To: Sherwin Turk; Silberg, Jay E.; Gaukler, Paul A.; DCHANCELLOR@utah.gov;
JBRAXTON@utah.gov
Cc: Paul Abramson; Peter Lam
Subject: Re: Draft PFS ISFSI License

To Counsel for PFS, the State of Utah, and the NRC Staff:

The members who served on the PFS Licensing Board received last evening (see incoming e-message, below) a copy of the State's February 15, 2006 letter to the Staff's Stewart Brown regarding the conditions contained in the draft PFS license. Part B of that letter is entitled "Utah Contentions Still Pending Before the Licensing Board" and deals with three matters, one of which -- "Contention Utah DD, Ecology and Species" -- appears, according to the State's letter, to be moot.

As to the other two that the State says are still pending before the Board, "Contention Utah O, Hydrology" and "Contention Utah TT . . . Feasibility and Safety", it is doubtful, in light of the current posture of the matter before the Commission and the Court of Appeals, that the Board (assuming it still exists) would have any jurisdiction to act now to enter even a ministerial order regarding those matters. With regard to those matters (as well as the moot one mentioned above), however, the parties may wish to take note of language in two of the Board's decisions -- LBP-03-04, 57 NRC 69, 81 n. 6; and LBP-05-29, 62 NRC 635, 698, 708, 710 n. 12 -- reflecting the Board's view at those junctures that those matters had been resolved in accordance with the parties' settlement agreements.

Michael C. Farrar
301-415-7467

>>> "Jean Braxton" <JBRAXTON@utah.gov> 02/15/06 5:48 PM >>>
Attached is a letter to Senior Project Manager, Stewart W. Brown, Spent Project Office, with a copy to the PFS service list.

Jean Braxton, Paralegal
Utah Attorney General's Office
160 East 300 South, 5th floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Phone: 801-366-0287

May 22, 2006

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)

ENTERGY NUCLEAR VERMONT)
YANKEE, LLC and ENTERGY)
NUCLEAR OPERATIONS, INC.)
(Vermont Yankee Nuclear Power Station))

) Docket No. 50-271
)
) ASLBP No. 04-832-02-OLA
) (Operating License Amendment)
)
)

NOTICE OF APPEARANCE OF SCOTT A. VANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the State of Virginia, hereby enters his appearance as counsel on behalf of Applicants Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., in any proceeding related to the above-captioned matter.



Scott A. Vance
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Facsimile: (202) 663-8007
Email: scott.vance@pillsburylaw.com

Dated: May 22, 2006