

June 19, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

June 20, 2006 (7:48am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

APPLICANT'S ANSWER TO NIRS/PC MOTION FOR A STAY OF THE LICENSING BOARD'S THIRD PARTIAL INITIAL DECISION PENDING COMMISSION REVIEW

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.342(d), Louisiana Energy Services, L.P. ("LES") hereby opposes the application for a stay pending review filed on June 12, 2006 by Nuclear Information and Resource Service and Public Citizen ("NIRS/PC" or "Petitioners").¹ NIRS/PC seek to stay the effectiveness of the Atomic Safety and Licensing Board's ("Board") Third Partial Initial Decision (LBP-06-15) and the forthcoming issuance of a license to LES to construct and operate the proposed National Enrichment Facility ("NEF"). LES respectfully requests that the Board deny the stay motion because Petitioners have failed to satisfy any of the Section 2.342(e) factors required to support the extraordinary relief sought in their request. Moreover, such a stay would cause irreparable injury to LES, its utility customers, and the public.

II. BACKGROUND

On May 31, 2006, the Board issued its Third Partial Initial Decision (Safety-Related Contentions). See LBP-06-15, 63 NRC __ (slip op. May 31, 2006). That decision

¹ "Motion on Behalf of Nuclear Information and Resource Service and Public Citizen for Stay of Initial Decision Pending Review" (June 12, 2006) (filed as proprietary) ("Motion").

resolved all contested issues in this proceeding. The Board is expected to issue its partial initial decision regarding the uncontested, mandatory hearing portion of this proceeding this month. If the Board's forthcoming decision authorizes issuance of a license to LES, then pursuant to 10 C.F.R. § 2.340(c), the Staff will issue a license to LES. NIRS/PC now seek to preclude license issuance by seeking to stay the effectiveness of LBP-06-15, which directs the Staff to "utilize, in toto, the cost estimates attendant to the 'plausible strategy' of the United States Department of Energy ["DOE"] providing disposition services in accordance with section 3113 of the USEC Privatization Act, 42 U.S.C. § 2297h-11." LBP-06-15, slip op. at 122. NIRS/PC seek a stay pending Commission action on a NIRS/PC petition for review also filed on June 12, 2006, in which NIRS/PC allege that the Board erred in (1) barring "any challenge to the basis or reliability of the DOE cost estimates" and (2) finding that LES has shown a "plausible strategy" for near-surface disposal of depleted uranium ("DU"). Motion at 4, 6.

III. LEGAL STANDARDS GOVERNING STAY REQUESTS

The Commission treats the issuance of a stay as "an extraordinary equitable remedy."² In evaluating an application to stay the effectiveness of a Board decision, the reviewing tribunal will consider whether: (1) the moving party has made a *strong showing* that it is likely to prevail on the merits; (2) the moving party will be *irreparably* injured unless a stay is granted; (3) granting the stay will harm other parties; and (4) a stay will best serve the public interest. *See* 10 C.F.R. § 2.342(e). These are the same criteria traditionally applied by federal courts in judicial proceedings.³ The party seeking a stay has the burden of persuasion with

² *See U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-05-27, 62 NRC 715, 718 (2005) (citation omitted). *Cf. Massachusetts Coal. of Citizens With Disabilities v. Civil Defense Agency & Office of Emergency Preparedness of the Commonwealth of Massachusetts*, 649 F.2d 71, 74 (1st Cir. 1981) ("Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined.").

³ *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (analyzing factors for the grant of emergency stay of low power testing at the Shoreham Nuclear Power Station); *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (noting that "[t]hese factors are the same ones

respect to the four criteria enumerated above. Since no one of the four stay criteria is dispositive, the strength or weakness of a movant's showing on a particular factor will determine how strong its showing must be on the other factors.⁴ The "most crucial" of the four factors, however, is whether the movant will suffer "irreparable injury" absent a stay.⁵ *NRC tribunals will not ordinarily grant a stay absent a showing of irreparable injury.*⁶ If the moving party fails to meet its burden on the first two factors -- likelihood of success on the merits and irreparable injury -- then it is not necessary to give lengthy consideration to the latter two factors.⁷

IV. ARGUMENT

Petitioners have failed to satisfy any of the four factors in Section 2.342(e). They have neither demonstrated that they are likely to prevail on the merits, nor shown that they will suffer irreparable injury if the Board denies their request for a stay. However, other parties, including LES and its utility customers, will suffer irreparable injury if a stay is granted. Finally, timely completion of the NEF project clearly is in the public interest.

A. Petitioners Have Not Demonstrated a Strong Likelihood of Success on the Merits

To make the "strong showing" that they are likely to prevail on the merits, Petitioners "must do more than establish possible grounds" for success.⁸ The level of certainty required to demonstrate "likelihood of success on the merits" varies according to the strength of

considered in evaluating the granting of a preliminary injunction"); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (per curiam) (same).

⁴ See *Cleveland Elec. Illuminating Co.*, (Perry Nuclear Power Plant, Units 1 & 2), ALAB-820, 22 NRC 743, 746 n.8 (1985).

⁵ *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2), CLI-81-27, 14 NRC 795, 797 (1981).

⁶ See *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-481, 7 NRC 807, 808 (1978) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968)).

⁷ See *Nuclear Fuels, Inc.* (Erwin, Tennessee), LBP-04-2, 59 NRC 77, 83 (2004) (citing *Sequoyah Fuels Corp. and Gen. Atomic*s (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 8 (1994)).

⁸ *Farley*, CLI-81-27, 14 NRC at 797.

the showing on the other factors.⁹ Absent a showing of irreparable injury -- as is the case here -- Petitioners must show "that a reversal of the decision under attack is not merely likely, but a *virtual certainty*."¹⁰ Stated differently, "an '*overwhelming showing* of likelihood of success on the merits' is necessary to obtain a stay where the showing on the other three factors is weak."¹¹

Petitioners fall far short of clearing this high hurdle. NIRS/PC first argue that "[t]he Board's refusal to scrutinize [the DOE] cost estimates is very likely to be reversed." Motion at 6. However, it is clear from their motion and Dr. Makhijani's Declaration that Petitioners' sole objective in contesting the DOE cost estimate is to lambaste DOE for its alleged "history of poor performance." Motion at 9. This Board has previously excluded purported concerns regarding "DOE program and licensing delay costs" as improperly challenging the Commission's initial hearing order and lacking materiality.¹² Such rulings are unlikely to be overturned on review, given the division of responsibilities between DOE and NRC.

Additionally, the Board *correctly* noted that Section 3113 of the USEC Privatization Act "gives DOE the exclusive authority to determine the amount of reimbursement required for disposition of [] DU waste" that it accepts from NRC-licensed uranium enrichment facilities pursuant to that provision. LBP-06-15, slip op. at 41. It is unlikely that the Commission would in this proceeding, in this NRC forum, direct further proceedings on DOE

⁹ See *Pub. Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-437, 6 NRC 630, 632 (1977) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977)).

¹⁰ *Kerr-McGee Chem. Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) (citations omitted) (emphasis added).

¹¹ *Farley*, CLI-81-27, 14 NRC at 797 (citation omitted) (emphasis added).

¹² See LBP-04-14, 60 NRC 40, 64 (2004); Memorandum and Order (Rulings on NIRS/PC Late-Filed Contention Amendments) (June 30, 2005) at 13 n.13.

cost-related determinations -- past or present.¹³ Thus, Commission reversal of LBP-06-15 is not only less than a "virtual certainty" -- *i.e.*, the necessary showing here -- it is unlikely.

Petitioners' argument that the Board erred in finding that near-surface disposal of DU at a commercial low-level radioactive waste disposal facility is "plausible" also lacks force. Commission reversal of the Board's finding is, in reality, quite *unlikely*, insofar as Petitioners' argument is predicated on three erroneous propositions. First, NIRS/PC claim that the Board improperly based its plausibility finding on "the fact that the current Part 61 regulations mandate that DU is Class A waste." Motion at 6. However, in this very proceeding, the Commission stated unequivocally that "section 61.55(a) makes no exception for depleted uranium from enrichment facilities" and that, "under a plain reading of the regulation, depleted uranium is a Class A waste." CLI-05-20, 62 NRC 523, 535-36 (2005). CLI-05-20 is not contestable here.

Second, NIRS/PC argue that "there is no NEPA support for classification of such waste." Motion at 6. However, the plausibility and cost contentions ruled on by the Board in LBP-06-15 do not concern the NRC's NEPA evaluation of disposal impacts. The Commission already found that the agency has conducted an adequate NEPA evaluation of the environmental impacts of disposing of DU from the NEF. CLI-06-15, 63 NRC __ (slip op. June 2, 2006), *aff'g* LBP-06-08 and LBP-06-09. CLI-06-15 is not challengeable here.

Finally, NIRS/PC contend that the Commission has demanded "a *detailed examination* of whether a chosen disposal method would meet the limits of 10 C.F.R. Part 61, before deeming it a plausible strategy." Motion at 8 (emphasis in original). The Commission has stated exactly the opposite, noting that this is "*not* a proceeding to license a near-surface

¹³ See, e.g., *Wabash Valley Power Assoc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), DD-81-18, 14 NRC 925, 927 (1981) (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 23-24 (1978) (stating that "while the decisions of sister agencies may be relevant to the administration of the [NRC's] regulatory program, [the agency] will not institute proceedings to determine whether other agencies have carried out their own unique responsibilities."). See also *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998)) (noting the need to avoid "Commission interference or oversight in areas outside its domain").

disposal facility," and that it would be "inappropriate" for the Commission to undertake "a Part 61 compliance review." CLI-06-15, slip op. at 3. The Board appropriately found that near-surface disposal of DU is plausible based on ample record evidence, including representations made by a licensed disposal vendor (Envirocare), an NRC Agreement State (Utah), and the DOE (in its PEIS). See LBP-06-15, slip op. at 96-99. There is no "clear error" warranting reversal.

B. Petitioners Will Not Be Irreparably Injured If Their Stay Request Is Denied

The showing of probable irreparable harm is "the single most important prerequisite" for the issuance of injunctive relief.¹⁴ In NRC cases, "the award of preliminary injunctive relief can and should be predicated only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are *actual and imminent*."¹⁵ To evaluate the level of harm, reviewing tribunals examine three factors: (1) the substantiality of the alleged injury; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided.¹⁶ Failure to meet this burden of irreparable harm is sufficient grounds for denying relief even if the other stay criteria are met.¹⁷ Petitioners have failed to meet the heavy burden of demonstrating immediate irreparable harm, *i.e.*, the likelihood of "certain harm" that is necessary to sustain a stay of the effectiveness of the Board's decision and a stay of license issuance pending review.

¹⁴ *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983) (quoting 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948, at 431 (1973)); *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7 (1994).

¹⁵ *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 755 (2d Cir. 1977) (emphasis added); see also *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that the harm alleged must be both certain and immediate, rather than speculative or theoretical); *Punnett v. Carter*, 621 F.2d 578, 586 (3d Cir. 1980) ("The moving party on a motion for a preliminary injunction bears the burden of demonstrating an imminent threat of irreparable harm.")

¹⁶ *Cuomo*, 772 F.2d at 977 (citing *Wisconsin Gas*, 758 F.2d at 674). In *Cuomo*, for example, the D.C. Circuit found that the likelihood of occurrence of some alleged radiological harm from operation of a nuclear power plant was too small to rise to the level of irreparable harm. *Cuomo*, 772 F.2d at 976.

¹⁷ *Arthur Guinness & Sons, PLC v. Sterling Publ'g Co., Inc.*, 732 F.2d 1095, 1099-1100 (2d Cir. 1984).

1. *Petitioners' Reliance on NEPA Precedent Is Misplaced*

NIRS/PC seek a stay pending review of LBP-06-15, arguing that "[w]hen an agency has not correctly analyzed the environmental impacts of a project, a court will bar the agency from proceeding until it has first carried out the correct analysis. This is because once a project has been begun, it acquires a momentum that is hard to change." Motion at 8. In point of fact, LBP-06-15 has nothing to do with the agency's environmental review under NEPA. Rather, it addresses the plausibility and estimated cost of LES's "private sector" DU disposition strategy. Indeed, NIRS/PC describe their petition for review as concerning "the amount of money that the Applicant must make available for decommissioning funding assurance," *not* NEPA-related concerns *already decided* by the Board and the Commission in previous rulings on Contention NIRS/PC EC-4. For this reason, petitioners' effort to analogize the *Watt* and *Gambell* cases to the instant case is misplaced. In *Watt*, the court considered an alleged agency violation of NEPA. In *Gambell*, the Court considered an alleged "environmental injury" cognizable under another environmental statute, and found that "an injunction to protect the environment" could issue only if such injury was found to be "sufficiently likely."¹⁸ As discussed below, here, no such injury is likely, let alone likely to occur during administrative (or possible judicial) review.

2. *Because Petitioners Have Alleged No Legitimate Pre-Operational Harm, They Have Not Demonstrated Any Likely Injury, Let Alone Irreparable Injury*

NIRS/PC suggest that they may be irreparably harmed because "analysis establishes that near-surface disposal will violate Part 61," and, consequently, that "the cost estimate for the DOE option is likely to be seriously inadequate."¹⁹ Motion at 9. However, that

¹⁸ See *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987).

¹⁹ As noted above, the Commission has stated unequivocally that the Petitioners' asserted need for "a Part 61 compliance review" is outside the scope of this proceeding. See CLI-06-15, slip op. at 3. The other issue on which Dr. Arjun Makhijani focuses in his supporting declaration -- the DOE's alleged "history of poor performance" -- has also been found to be outside the scope of this proceeding. Arguments regarding DOE's "track record" clearly do not establish "irreparable injury" to NIRS/PC or the public.

argument presupposes the immediate generation of DU from the NEF upon issuance of the license. In fact, LES will not begin to enrich uranium (and generate DU) until December 2008. Affidavit of E. James Ferland at ¶ 6. Under a proposed license condition, LES will not be required to submit *final executed* copies of its financial assurance instruments until it is ready to receive licensed material. (Final copies of the *proposed* instruments must be submitted at least six months prior to that date.)²⁰ Therefore, assuming *arguendo* that the DOE cost estimate were remanded by the Commission for further consideration, there would be more than sufficient time to undertake any required proceedings as to the adequacy of that cost estimate, and to make any necessary modifications to LES's financial assurance instruments -- *prior* to the date that final executed instruments must be submitted to the NRC.²¹ As such, there is no basis for Petitioners' argument that a denial of their stay motion "would tend to prevent an objective assessment of actual decommissioning costs." Motion at 9. Insofar as *no possible injury* could occur to them before this date, NIRS/PC have failed to show irreparable injury pending review.

C. LES and Its Customers Will Suffer Irreparable Injury If the Stay Is Granted

In contrast to Petitioners, LES can demonstrate that both it and other parties stand to suffer irreparable injury if the Board stays its decision and license issuance. First and foremost, Urenco, the sole LES general partner, must provide LES with authorization to proceed with construction of the facility. The Urenco Board will not authorize LES to proceed in the absence of an NRC-issued license. In this regard, a protracted delay in license issuance could have the effect of terminating the NEF project altogether. Ferland Affidavit at ¶¶ 6-8.

²⁰ NUREG-1827 (NEF Safety Evaluation Report) at 10-15.

²¹ Assuming conservatively that the Commission were to remand LBP-06-15 for further proceedings in the October-December 2006 timeframe, the Board would have approximately 13-15 months to consider and resolve any admitted NIRS/PC contention concerning the DOE cost estimate *before* the final executed instruments would need to be submitted by LES to the NRC (the planning assumption is to have executed instruments in place in February 2008, the earliest projected time of UF6 being brought onsite).

Even if LES receives a license from the NRC and authorization to proceed from Urenco, an NRC-mandated stay of otherwise authorized site preparation and construction activities would result in measurable fiscal harm to LES. The "carrying cost" associated with keeping LES's current workforce "on hold" (*i.e.*, fully engaged and ready to work) would be approximately \$1 million per week. Ferland Affidavit at ¶ 9. Also, a stay of licensed activities would impose additional costs of approximately \$1 million per week resulting from the mobilization and demobilization of contractors and subcontractors working on the NEF project. *Id.* at ¶ 10. Those entities are needed to provide an array of services that are essential to site preparation and timely construction of the facility. Those services include, among others, civil and structural engineering services, work on the electrical substation, relocation of a CO₂ pipeline, treatment of archaeological sites located on the NEF site, and upgrading of the Eunice water system. *Id.* at ¶¶ 10-11. Given that much of the NEF's capacity is already under contract, LES will be unable to recover the bulk of these increased costs. *Id.* at ¶ 12.

A stay also would harm LES and its utility customers by interfering with LES's ability to deliver enrichment services pursuant to previously executed contracts. For each day that NEF license issuance is delayed beyond August 1, 2006, there will be at least a day-to-day slippage in the construction schedule. Such slippages in the construction schedule would cause commensurate delays in the start of facility operation. Ferland Affidavit at ¶ 13.

Any extended delay in NEF operation resulting from a stay would irreparably harm LES's utility customers and, ultimately, consumers of electricity. If LES customers are forced to enter the enrichment services market to replace delayed supplies from the NEF, then they likely will need to rely on USEC, the sole U.S. supplier of enrichment services, to fill the void. Given the increase in market prices for long-term enrichment services that has occurred during the past two years, LES customers will be forced to pay more than the prices set forth in their contracts with LES. This also will put additional upward pressure on rising market prices

and affect the cost of electricity. Affidavit of Kerry L. Baseshore at ¶¶ 4-6. It also would undercut the diversity and assurance of supply sought by Dominion and other utilities with respect to enrichment services. *Id.* at ¶¶ 7-10 & Exhibit 1 (attached thereto) at 1-3.

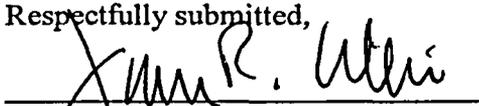
D. Timely Construction and Operation of the NEF is in the Public Interest

It is beyond dispute that timely construction and operation of the NEF is in the public interest. As confirmed by both the DOE and the Department of State, operation of the NEF will promote U.S. energy and national security by contributing substantially to the development of diverse, reliable domestic enrichment capacity. This public benefit has been recognized by the Staff, the Board, and the Commission in this licensing proceeding. *See* NUREG-1790 (Final Environmental Impact Statement), Vol.1 at xxiii, 1-2 to 1-4; LBP-05-13, 61 NRC 385, 442-43 (2005), *aff'd*, CLI-05-28, 62 NRC 721, 725-26. Moreover, construction and operation of the NEF will have positive socioeconomic impacts on the local communities in the vicinity of the NEF, such as the City of Eunice, NM. *See* Affidavit of Johnnie M. White.

V. CONCLUSION

For the foregoing reasons, the Board should deny Petitioners' request to stay the effectiveness of LBP-06-15 and issuance of the NEF license.

Respectfully submitted,



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Dated at Washington, District of Columbia
this 19th day of June 2006

June 14, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
	)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
	)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

AFFIDAVIT OF E. JAMES FERLAND

I, E. James Ferland, being duly sworn, state as follows:

1. I am the President and Chief Executive Officer ("CEO") of Louisiana Energy Services, L.P. ("LES"), and have held that position since July 2003. I have substantial training and experience relevant to both technical and business aspects of the nuclear energy industry. I hold a B.S. in Nuclear Engineering from Rensselaer Polytechnic Institute and an M.B.A. from the University of Virginia's Darden School of Business. Prior to becoming President and CEO of LES, I served as Director of Strategic Business at Westinghouse Electric Company, Vice President of Business Development (Nuclear) at Duke Engineering & Services, Senior Operations Supervisor at Carolina Power & Light's Brunswick Nuclear Station, and Nuclear Test Supervisor at General Dynamics (Electric Boat Division).

2. LES is a Delaware limited partnership that was formed solely to provide uranium enrichment services to commercial nuclear power plants. Urenco Investments, Inc. is the sole LES general partner. Urenco Investments, Inc. is a Delaware corporation and wholly-owned subsidiary of Urenco Limited, which, in turn, is owned in equal shares by BNFL Enrichment

Limited ("BNFL-EL"), Ultra-Centrifuge Nederland NV ("UCN"), and Uranit GmbH ("Uranit") – companies formed under English, Dutch and German law, respectively.

3. LES submitted an application to the U.S. Nuclear Regulatory Commission ("NRC") on December 12, 2003, for a license to construct and operate a uranium enrichment facility near Eunice, New Mexico. The proposed facility is known as the National Enrichment Facility ("NEF"). In accordance with the 30-month milestone schedule imposed by the Commission for the LES licensing proceeding, issuance of a license for the NEF is currently anticipated to occur no later than the end of June of 2006.

4. As LES President and CEO, I am ultimately responsible for overseeing the licensing, construction, and operation of the proposed NEF. This includes responsibility for the company's financial policy and business model, including its financial planning, cash management, and risk management activities. As such, I am responsible for ensuring that the NEF project proceeds according to schedule, and that there is adequate capital to meet the company's short-term and long-term financial requirements.

5. The purpose of this affidavit is to describe the proposed construction and operation schedules for the NEF, with particular focus on the logistical, financial, and commercial consequences that are likely to result from either (a) a delay in the issuance of an NRC license to LES, or (b) a delay or interruption in planned site preparation/construction activities to be undertaken pursuant to that license.

6. Like other nuclear facility projects, successful completion of the NEF project is heavily contingent upon scheduling and resource loading considerations. Indeed, a substantial delay in the issuance of the required NRC license could actually result in the project's demise. In short, LES's ability to proceed with the NEF project depends directly on LES's ability to adhere to the schedule it has proposed for facility licensing, construction, and operation. Under that

schedule, LES will begin site preparation and construction activities immediately following license issuance. LES plans to complete initial facility infrastructure by June 2008 and to start commercial enrichment operations by December 2008. As discussed further below, strict adherence to the project schedule is essential to ensuring the continued viability of the NEF project and to managing construction-related costs.

7. As the sole general partner in the LES partnership, Urenco Investments, Inc. will be the sole source of funding for the project. In this regard, to proceed with construction of the NEF, LES must also obtain authorization to proceed from the Urenco Limited Board of Directors ("Urenco Board").

8. The Urenco Board will not authorize LES to proceed in the absence of an NRC-issued license. Therefore, in my view, license issuance is a "critical path" event.

9. Additionally, even if the NRC issues the license to LES and the Urenco Board authorizes LES to proceed with facility construction, any NRC-mandated stay or suspension of authorized construction activities would have a substantial negative financial impact on LES. LES has estimated that each week of delay in facility construction would cost the company approximately \$1 million. This amount represents the "carrying cost" associated with keeping the current LES workforce (employees, consultants, and contractors) on hold -- *i.e.*, fully engaged and ready to work -- pending NRC authorization to commence or resume construction activities. Stated differently, maintenance (but nonuse) of the personnel resources necessary to support facility construction during the period of delay would result in a sizable cost for LES.

10. Also, upon receiving a license from the NRC, LES will execute several construction-related contracts. These include contracts for civil/structural engineering services and for work on the electrical substation. In addition, LES will promptly contract with other entities to perform various activities that are necessary to permit facility construction. Those

activities include relocation of the CO₂ pipeline that traverses the NEF site, "remediation" of archaeological sites located on the NEF site, and upgrading of the Eunice water system. While it is not possible to predict exactly the cost of putting contracted services on hold (*i.e.*, directing the contractor to stop work and to remain mobilized), LES estimates that such cost would be substantial (*i.e.*, in excess of \$1 million).

11. Other site preparation and construction activities that will take place shortly after license issuance include surface grading and excavation of soils for utility lines, erection of fences, installation of a water supply, a cement batch plant, excavation and excavation and construction of building/facility foundations. To the extent LES that must put contracted services on hold with respect to these activities, it would incur additional substantial monetary costs.

12. As such, staying the issuance of the NEF license would cause irreparable injury to LES. Indeed, given that much of the NEF's capacity is already under contract, LES will be unable to recover the bulk of these increased costs, at least in the near-term. Specifically, LES already has executed long-term "take-or-pay" enrichment services contracts with numerous utilities. To date, those contracts account for over 80 percent of the NEF's output through its first 10 years of production. Many of those contracts require the timely completion of the NEF and delivery of enrichment services beginning as early as 2009.

13. Furthermore, site preparation and construction activities are prerequisites to the start of NEF enrichment operations. Any delay in the completion of those activities will work to the detriment of both LES and its utility customers. For each day that NEF license issuance is delayed (or NEF license effectiveness is stayed) beyond August 1, 2006, there will be at least a day-to-day slippage in the construction schedule. Such slippages in the construction schedule would cause commensurate slippages in the schedule for facility operation, thereby delaying the

delivery of uranium enrichment services to LES's customers, as well as LES's receipt of payments for those services. As set forth in the affidavit of Kerry L. Basehore, Director of Nuclear Analysis and Fuel at Dominion Resources, a prolonged delay in NEF operation would cause irreparable financial harm to LES's utility customers and consumers of electricity.

14. The information presented above is true and correct to the best of my knowledge and belief.



E. James Ferland

Sworn and subscribed to before me this 14th day of June 2006.



Elizabeth A. Kenney
Notary Public

My Commission expires: July 31, 2007

June 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
	)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
	)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

AFFIDAVIT OF KERRY L. BASEHORE

I, Kerry L. Basehore, being duly sworn, state as follows:

1. I am Director of Nuclear Analysis and Fuel at Dominion Resources Services ("Dominion"). I have held that position since 1997. Prior to that date, I served as Supervisor of Nuclear Safety Analysis. I hold B.S. and M.S. degrees in Nuclear Engineering. I have official and personal knowledge of the matters discussed herein.

2. As Director of Nuclear Analysis and Fuel, I am responsible for overseeing Dominion's nuclear fuel cycle activities, including the procurement of nuclear fuel and fuel-related services to support the operation of seven nuclear reactors. Fuel-related services include uranium enrichment services of the type to be provided by Louisiana Energy Services, L.P. ("LES") at the proposed National Enrichment Facility ("NEF"). Therefore, I am familiar with the principal strategic and economic considerations that inform a nuclear utility's purchase of uranium enrichment services.

3. The purpose of this affidavit is to describe the likely commercial consequences of a substantial delay in the commencement of NEF enrichment operations from the perspective of

an LES utility customer. I can offer this perspective because Dominion has executed a contract with LES for enrichment services from the proposed NEF.

4. Dominion signed a contract with LES in December 2003, about two and a half years ago, and approximately five years before the scheduled start of NEF enrichment operations. The contract is a "take-or-pay" contract that is intended to meet approximately one-fourth of the enrichment requirements of Dominion's seven nuclear reactors over a ten-year period beginning in 2009.

5. In December 2003, published market prices for long-term enrichment contracts were \$105/separative work unit ("SWU"). Today, published market prices for long-term enrichment contracts are \$127-\$130/SWU. A fair representation of the minimum commercial consequence of a delay in expected fuel supplies from NEF is the difference in these prices times the quantities of SWU delayed. However, the exact extent of this *minimum* commercial consequence of a delay in NEF operation would depend on the availability and cost of other enrichment supplies that might be used to replace those supplies expected from the NEF.

6. At present, USEC is the sole U.S. supplier of enrichment services. The enriched uranium actually produced by USEC is produced at its aged gaseous diffusion plant ("GDP") in Paducah, Kentucky. Approximately one-half of the GDP's operating cost is for electricity, and USEC has just announced a new electricity supply contract with Tennessee Valley Authority that will increase electric costs by 50% beginning in June 2006. This will force Dominion and other LES customers into the enrichment services market to replace delayed supplies from the NEF. Since other European-based enrichment services suppliers may not have additional capacity available during this time period, this will likely result in reliance on this sole U.S. supplier, and put additional upward pressure on already rising market prices.

7. Any delay in commencement of enrichment at NEF will also delay achieving domestic diversity of supply. As Dominion and numerous other utilities observed in connection with LES's pre-application activities, USEC currently has a near monopoly in the U.S. with respect to uranium enrichment services. See Letter from J. O'Neill, Shaw Pittman LLP, to M. Lesar, NRC (Nov. 13, 2002) (submitting comments on LES pre-application "white papers" on behalf of various utilities and their associated operating companies) (Exh. 1). A new uranium enrichment facility (*i.e.*, the NEF) will assure that there are two separate uranium enrichment facilities in the U.S. without a common mode of failure. As the utilities further observed, one or even two separate facilities owned by the same company may be shut down at the same time due to technical, regulatory or commercial factors. The availability of multiple facilities -- owned by different entities and deploying different enrichment technologies -- substantially lessens the likelihood of an interruption in the supply of uranium fuel. It also promotes greater competition among commercial suppliers of uranium enrichment services, competition which can yield real economic benefits to nuclear utilities and their downstream customers.

8. Assurance of supply is central to Dominion's nuclear fuel procurement program. At this juncture, Dominion has confidence in LES's ability to provide enrichment services pursuant to the terms of the parties' 2003 contract. This confidence stems largely from the stability and predictability of the NEF licensing process to date. Any decision by the NRC to stay issuance of a license to LES, or to materially delay construction of the NEF, would greatly undermine that confidence.

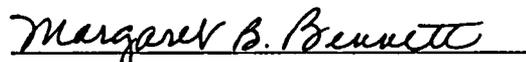
9. Although LES does not plan to begin delivering enrichment services to customers until 2009, any legal action that would halt or substantially delay construction and operation of the NEF would cause tangible harm to Dominion and other LES customers. As set forth above,

such a scenario would, at a minimum, increase the price paid for enrichment services, delay attainment of domestic diversity of supply, and reduce assurance of supply.

10. The need for a secure and diverse supply of domestic enrichment services (including those to be provided by the NEF) is likely to take on even greater importance in the near future. Specifically, three utilities are seeking early site permits ("ESPs") for possible new nuclear construction, and eight utilities have announced plans to seek combined construction and operating licenses ("COLs") for new nuclear power plants. Dominion, which is one of the three utilities seeking an ESP (for its North Anna site), is currently planning to submit a COL application to the NRC in late 2007. This planned new U.S. nuclear generation will further necessitate domestic diversity and assurance of supply.


Kerry L. Baschore

Sworn and subscribed to before me this 1st day of June 2006.


Notary Public

My Commission expires: August 31, 2008

County of Henrico
State of Virginia

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

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Rules and Directives

November 13, 2002

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Mr. Michael Lesar
Chief, Rules Review and Directives Branch
Division of Administrative Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
Louisiana Energy Services Gas Centrifuge Enrichment Facility
(67 Fed. Reg. 61,932)

Dear Mr. Lesar:

On October 2, 2002, the U.S. Nuclear Regulatory Commission ("NRC") published in the Federal Register a request for comments on a series of "white papers" presented to the NRC by Louisiana Energy Services ("LES") addressing licensing issues for a gas centrifuge uranium enrichment facility to be located in the area of Hartsville, Tennessee. 67 Fed. Reg. 61,932 (2002). The white papers address the following six subjects: (1) analysis of need for the facility and the no-action alternative under the National Environmental Policy Act ("NEPA"); (2) environmental justice; (3) financial qualifications; (4) anti-trust review; (5) foreign ownership; and (6) disposition of depleted uranium tails. Comments on these papers previously supplied by the U.S. Department of Energy ("DOE") and the United States Enrichment Corporation ("USEC") were also made available. On October 25, 2002, the NRC extended the opportunity to provide public comments to November 13, 2002. 67 Fed. Reg. 65,613 (2002).¹

In response to the opportunity to comment, we are submitting these comments on behalf of Ameren Corporation, Dominion Resources, (and its operating companies Virginia Power and Dominion Nuclear Connecticut), Florida Power & Light Company, Nuclear Management Company, LLC (operating company on behalf of Alliant Energy, Wisconsin Public Service, Xcel Energy, and Wisconsin Electric Power Co.) as well as Progress Energy (and its operating companies Carolina Power & Light Company and Florida Power Corporation). The companies own and operate commercial nuclear power plants and purchase uranium enrichment services

¹ We also refer to certain comments submitted by USEC on November 4, 2002.
www.usec.com/v2001_02/Content/News/NewsFiles/NRCLetter-11-04-02.pdf (visited Nov. 6, 2002).

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which could be affected by NRC action on the proposed application. These companies have no connection to the LES project.

In brief, we strongly support NRC action to license an additional uranium enrichment facility in the U.S. because such action is important to both security of nuclear fuel supply and competition in the nuclear fuel supply industry.

Security of nuclear fuel supply is critical to the stability and reliability of nuclear plants. It can be achieved, in part, by diverse and reliable suppliers to ensure that unexpected interruptions in fuel supply from a particular supplier do not result in unforced outages. Presently, USEC has a near monopoly position in the U.S. for supply of uranium enrichment. USEC's near monopoly position was further strengthened by the imposition of duties on the sales of enrichment services by USEC's European competitors in the United States.² The current situation places nuclear electricity generation at risk to supply interruptions from the single, near monopoly uranium enrichment supplier. Neither public health and safety derived from the reliable supply of electricity nor the public interest in a competitive market benefits from the dependence of nuclear utilities on the present single, near monopoly supplier.

A new uranium enrichment facility will assure that there are two separate uranium enrichment facilities in the United States without a common mode of failure. One plant or even two separate facilities owned by the same company may be shut down at the same time due to technical, regulatory or commercial reasons. It is far less likely that two separate enrichment facilities that rely on different technologies will be shut down at the same time.

Two facilities under separate management will also promote effective commercial competition for uranium enrichment services and reduce the price of nuclear-generated electricity to customers.

Some may raise a concern that competition could lead to cost savings that reduce safety. The experience in the nuclear industry has been to the contrary. This issue was widely discussed when the electric industry was restructured to promote competition. At that time the NRC determined that it did not need to impose restrictions that would have reduced competition.³ Furthermore, a uranium enrichment facility in a competitive environment cannot assume that it will not be sanctioned for safety concerns because of the effect on national security. A uranium enrichment facility in a competitive market must show its customers that it is free of any conditions that could lead to production restrictions in the future.

² See, *Notice Of Amended Final Determination Of Sales At Less Than Fair Value And Antidumping Duty Order: Low Enriched Uranium From France*, 67 Fed. Reg. 6,680 (2002); *Notice of Amended Final Determinations and Notice of Countervailing Duty Orders: Low Enriched Uranium From Germany, the Netherlands and the United Kingdom*, 67 Fed. Reg. 6,688 (2002); *Notice of Amended Final Determination and Notice of Countervailing Duty Order: Low Enriched Uranium From France*, 67 Fed. Reg. 6,689 (2002).

³ *Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry*, 62 Fed. Reg. 44,071 (1997).

Because competition is enhanced by the existence of one or more new market entrants, the NRC should avoid actions that unreasonably limit the benefits of competition, such as requiring thirty percent equity funding or five-year revenue-based contracts with customers to demonstrate financial assurance. These license conditions apparently have been proposed by LES simply because they were accepted by the NRC in *Louisiana Energy Services, L.P.* (Clairborne Enrichment Center) CLI-97-15, 46 NRC 294, 299 n.2, 308 (1997) (*hereinafter* "LES I") under a specific set of circumstances. The thirty percent equity funding may not be appropriate for every applicant and the requirement of five-year contracts is anti-competitive. The license conditions related to financial assurance that have been proposed by LES should not be accepted as a requirement without justification. One producer now dominates the industry. The NRC should not participate in establishing licensing conditions that limit the competition between LES and the current enricher.

In addition to comments on competition, this letter sets forth our comments in support of efforts to appropriately streamline any hearings on LES licensing. Efficiency in the licensing process will decrease costs to the consumer and will encourage competition, without impacting the ability of concerned parties to appropriately raise issues within the scope of the proceeding.

A. The Federal Action for Purposes of the National Environmental Policy Act is the Grant of a License and the Evaluation of the Need For the Facility Should Reflect the Policy Decision Made by the Executive Branch

An Environmental Impact Statement ("EIS") is required in connection with the issuance of a license for a uranium enrichment facility. 10 CFR § 51.20(b)(10). The scope of that EIS is determined early in the process to eliminate from detailed study issues that are peripheral, not significant, or covered elsewhere. 10 CFR § 51.29(a) and (a)(3). The scoping process should be used regarding the LES application to narrow the review of the proposed action, as appropriate, to avoid duplication and delay. 10 CFR § 51.29(a)(1) *referencing* 40 CFR § 1502.4(d); *see generally*, 66 Fed. Reg. 48,828-48,832 (2001).

The DOE comment letter supports a narrow scope for this EIS stating, "In interagency discussions, led by the National Security Council, concerning the domestic uranium enrichment industry, there was a clear determination that the United States should maintain a viable, competitive, domestic uranium enrichment industry for the foreseeable future." The DOE comments state that the decision to maintain a viable, competitive, domestic uranium enrichment industry has already been made at a level appropriately excluded from NEPA's jurisdiction.⁴

It would be inappropriate for the NRC to revisit this policy decision in the guise of a NEPA analysis. In accordance with NRC regulations (10 CFR § 51.29(a)(3)), the no action alternative can be evaluated with a brief discussion as to whether it meets the policy objectives

⁴ *See generally, Public Citizen v. Office of U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993) (stating that Presidential decisions are not subject to NEPA review).

without the complex balancing of price, benefit and environmental cost performed in the previous LES licensing proceeding.⁵

B. The Need for the Facility Should Not Be Based upon Speculation Concerning the DOE Nonproliferation Programs.

The danger in extending the scope review of the facility's need is exemplified by one of USEC's comments. USEC states that any need for the facility should consider the potential impacts on the U.S.-Russia nonproliferation program to down-blend weapons-grade uranium to make low-enriched uranium ("LEU") for use as commercial fuel (the Megatons-to-Megawatts Program). Any connection between licensing LES and a potential impact on the Megatons-to-Megawatts Program is hardly direct, if foreseeable at all.⁶ USEC's role is limited to acting as the executive agent of DOE for this program. This role as a broker need not be performed by an enrichment facility because the material is already enriched in Russia and is delivered directly to the fuel fabricator. The DOE could terminate USEC's role as the executive agent and perform its duties directly. It could appoint an alternate executive agent or have LES share in the role of executive agent. It could expand the program, as suggested by the Russian Federation and name additional executive agents. The U.S. utilities may offer to buy the Russian uranium directly and to pay a higher price than USEC.⁷ A new enrichment facility is unlikely to have a major affect on these decisions

The Commission should be cautious in expanding its review to consider such speculative nonproliferation effects of its licensing actions. It is not certain that USEC will continue to be the sole executive agent. Whether LES or another entity will have a role as executive agent in lieu of or in addition to USEC is a discretionary decision of DOE. Such a decision would be very difficult to analyze due to the broad range of possible outcomes and the effect of the outcomes on national security.⁸ USEC's argues that the Megatons-to-Megawatts program "requires a stable enrichment market in order to facilitate its \$8 billion of ongoing purchases by USEC of LEU from Russia on sustainable commercial terms and that the building of the LES

⁵ DOE's position is far more reasonable than that suggested by USEC, which would unnecessarily require a complex analysis of the no action alternative.

⁶ DOE comments emphasize the need to reverse the current trend where supply of domestic enrichment services has fallen to less than half the domestic demand. DOE states that Executive branch priorities for nuclear power as part of the Nation's energy future mandate implementing a policy objective of encouraging private sector investment in new uranium enrichment capacity. While half the uranium that is sold in the United States is enriched in Russia and sold by USEC under the Megatons-to-Megawatts Program, the supply of enriched uranium under that program will ultimately come to an end and new uranium enrichment capacity will need to be in place before then.

⁷ See e.g., *Russia's MINATOM Said to Want Meeting With DOE in Light of Stalled SWU Talks*, PLATTS NUCLEAR FUEL, Jan. 21, 2002, at 1; *DOE Tells Utilities: Don't Try to Buy HEU SWU Now; USEC Says New Deal With TENEX Close*, PLATTS NUCLEAR FUEL, Feb. 18, 2002, at 1.

⁸ See e.g., *Romer v. Carlucci*, 847 F.2d 445, 447 (8th Cir. 1988) (en banc) (identifying that an EIS is unsuited for grappling with complex issues of foreign relations and national security, especially where environmental factors are of limited decisional significance).

plant in the United States could destabilize industry pricing for [low enriched uranium].” This argument assumes as its unstated premise that an enrichment plant built by anyone except USEC would destabilize the market. There is no basis in fact for that assertion. Indeed, U.S. utility companies and other companies have expressed interest in serving as the executive agent or buying enriched uranium directly from the Russians. In any event, NRC reevaluation of broad policy decisions concerning national security is inappropriate since such an impact is not an environmental effect amendable to NEPA analysis.⁹

C. The Need For the Facility Should Reflect the Need for Competition in the Uranium Enrichment Market

Granting the license fosters competition in the domestic uranium enrichment market. The benefits of competition can be balanced against the environmental costs under NEPA without determining the economic benefits of operating the facility. At this point, no uranium enrichment facility has been licensed in the U.S. and the only commercial entity that tried was not successful after almost seven years of proceedings. The length and uncertainty of the NRC licensing process reduces competition by creating a barrier to entry into the market by new suppliers.¹⁰ Granting a license to LES not only obviously reduces its barrier to market entry, but also to the extent the licensing process is efficient and predictable, will make the entry of others more credible. The increased likelihood that LES or others will enter the enrichment services market will have a moderating effect on current market participants' behavior. We believe that by lowering the barrier to market entry, granting a license to LES would immediately increase competition for enrichment services and produce other benefits, including better labor relations to stop the loss of highly-skilled employees, upgrades of facilities to increase efficiency and reliability, and a move toward more environmentally safe processes to limit the potential of future regulatory action.

D. Financial Qualifications License Conditions Should Be the Least Intrusive Necessary Considering the Relatively Limited Risks Involved

The NRC may, but is not required to, consider financial qualifications of applicants for a materials license “[w]here the nature of the proposed activities is such as to require consideration by the Commission, that the applicant appears to be financially qualified to engage in the

⁹ The Commission is currently evaluating whether this longstanding practice should be changed. See, *Private Fuel Storage LLC* (Independent Spent Fuel Storage Facility), CLI-02-3, 55 NRC 155 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) CLI-02-4, 55 NRC 158 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), CLI-02-5, 55 NRC 161 (2002); and *Duke Energy Corp* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station Units 1 and 2), CLI-02-6, 55 NRC 164 (2002).

¹⁰ Despite the privatization of the enricher and a market that could support as many as four three-million-SWU facilities, there is still only one antiquated, energy-intensive enricher in the U.S. The absence of modern, efficient competitors suggests either that privatization is a misguided policy or that there exist significant barriers to market entry.

proposed activities in accordance with the regulations." 10 CFR § 70.23(a)(5). We recommend that the financial qualifications determination be based on a general review of financial statements, business plans, and projected cash flows, similar to that performed in connection with a Part 50 license transfer.

LES however, asks that the Commission establish two license conditions:

(1) construction of any capacity increment not commence unless funding is fully committed, including a minimum 30% contributed as equity; and (2) the project not proceed unless there are long-term enrichment contracts in place to cover all costs, including return on investment. We strongly believe that these proposed conditions are unnecessary and the second is against public policy. The first condition, if considered a precedent, may be viewed as a barrier to others who may want to enter the market. The second condition would effectively eliminate price competition in the enrichment market with no significant benefit to health or safety.

The Commission has never ruled on whether a uranium enrichment facility license is in the nature of an activity that requires consideration of financial qualifications. In the only proceeding on such a license, the Commission stated, "the hearing notice establishing this proceeding was silent as to whether LES must satisfy the financial qualification standards of Part 70, but the Staff required the applicant to do so. The Board found the Part 70 financial qualifications provisions applicable and no party contests this finding." LES I, 46 NRC at 299 n.2, 308.¹¹ With this background, we provide additional analysis of the two proposed conditions for financial assurance below.

1. Requiring a Specific Capital Structure Absent a Fully Developed Record Sets a Precedent that May Discourage Other Market Entrants

The LES proposed license conditions on funding, including requiring a minimum of 30% equity, are not well suited to the NRC's objectives and set an undesirable precedent. We note that such conditions are currently not imposed on new nuclear power plants. *See* 10 CFR § 50.33(f). The Commission has previously concluded that under-funding a uranium enrichment facility is extremely unlikely to present a health, safety, common defense or security risk. LES I, 46 NRC at 306. The nature of a uranium enrichment facility, the NRC's authority to shut down any licensed facility, and the NRC's separate requirements for the decommissioning funding assurance obviate the need for detailed Commission review of the applicant's financial structure. There are no health, safety, common defense or security implications if an increment of a uranium enrichment facility is not built. If the facility or an increment of the facility were not completed, no radioactive material would be processed in that section; therefore, there would be no health, safety, common defense or security implications. Recognizing the lower inherent risk of uranium enrichment facilities compared to a Part 50 production or utilization facility, the NRC

¹¹ The observation that no one objects to considering financial qualifications requirements is of little persuasiveness. The NRC adjudicatory standards deny standing to parties other than the applicant whose sole injury is economic.

regulations at Part 70 allow for flexible case-by-case determination of financial requirements for a uranium enrichment facility rather than the prescriptive requirements for Part 50 licensees. Since funding commitments including minimum equity contributions are not required for a new nuclear power plant under Part 50, *a fortiori*, such conditions are unnecessary for a uranium enrichment facility.

Furthermore, the proposed license conditions are onerous compared to the standard practice applicable to nuclear power plant license transfers. In license transfer cases for licensees other than electric utilities, the NRC staff has routinely concluded there is adequate assurance of public health and safety based on review of financial information. Where the specific circumstances warrant, transfer orders have required less intrusive requirements, such as requiring the licensee to be rated investment grade by standard rating agencies rather than specifying a specific capital structure or requiring a parent guarantee for a special purpose subsidiary that is thinly capitalized. See NUREG 1577. Because there is a lower risk associated with a uranium enrichment facility compared to a power plant, it would be an undesirable precedent for the Commission to impose the onerous financial qualifications conditions proposed by LES without a full record justifying their need.

2. License Conditions Should Be Directly and Effectively Related to Ensuring Health and Safety Not Indirectly and Ineffectively Related Through Revenue-Based Financial Qualifications

The license conditions proposed by LES have little connection to reducing health and safety risks. USEC notes that revenue based conditions are one way to show financial assurance, but not the only way and that those proposed by LES are excessively broad and prescriptive for a uranium enrichment facility. USEC states that an uranium enrichment facility can be financed and built incrementally and the resources available at each stage of activity that are dedicated to public and worker health and safety should be assessed without the pre-existence of long-term contracts. A determination by the NRC that long-term contracts are needed is inconsistent with the intent of the regulations that NRC review financial qualifications for health and safety implications, not commercial viability.

We strongly object to the NRC requiring five-year contracts with prices sufficient to ensure profitability as a condition for LES to proceed. Such conditions stifle competition. Most utilities prefer to have suppliers compete for contracts for enrichment services based on price, service duration, and financing terms. By only allowing the project to proceed if profitable five-year contracts are in place, the NRC is unnecessarily entering into market regulation. This license condition is particularly sensitive in an environment where the only current enricher in the US is reported to have adopted a similar policy.

For the particular conditions to be effective, there would be *de facto* market regulation. The proposed license conditions would eliminate a spot market for enrichment services and effectively create a floor price for LES. It is hard to justify such a condition for a materials licensee where, for example, the NRC has prudently not sought to require long-term power purchase agreements for Part 50 license transfers. Some companies acquiring operating nuclear

plants have relied on long-term power purchase agreements to demonstrate financial assurance and others have elected to operate as a merchant plant. Here LES may seek the license condition, but the condition would adversely impact competition in the market. LES may make a business decision to only enter into long-term contracts. Market conditions could later force LES to change that business decision. The NRC should not lock in any business decision by imposing a license condition that is not required to ensure public health and safety. The NRC should exercise prudence in avoiding such an externality to the nuclear fuel market.

3. The Potential For Health And Safety Impacts Should Be Determined Directly

If the NRC desires to augment assurance of health and safety beyond its existing inspection and enforcement powers, it should use its broad authority in sections 161(o) and (p) of the Atomic Energy Act (42 USC § 2201(o) and (p)) to issue a regulation providing explicitly for reporting of financial information related to the licensee's status as a going concern. Such a provision should provide a direct link to the protection of health and safety, without impairing the market's ability to contract for enrichment services in the most efficient and cost-effective manner. Such reporting would be consistent with the NRC practice in nuclear power plant license transfer cases. *See* NUREG 1577. Where appropriate based on the specific facts involved, the NRC has required the licensee to have access to a contingency fund adequate to cover expenses during an unplanned shutdown prior to a decision to decommission (six months). Such a requirement is directly related to health and safety compared to license conditions requiring profitability. Also, NRC practice with regard to nuclear power plants is instructive on appropriate review of capital structure. Where appropriate based on the specific facts involved, the NRC has required the licensee to maintain an investment grade rating. Such a rating is a better indication of the health of a licensee's capital structure than a condition fixing the minimum equity percentage.¹²

E. Environmental Justice Analysis Should Be Based on a Threshold Test of High and Adverse Environmental Impacts

LES identifies several recommendations for environmental justice reviews to ensure proceedings go forward expeditiously while providing for consideration of all pertinent concerns. These recommendations are: (1) not evaluating racial discrimination in siting absent direct evidence of same; (2) defining the relevant population based on numerical criteria from census data; (3) not subdividing the populations once established; (4) limiting the geographic radius from the facility where analysis is required; and (5) only evaluating incremental impacts over existing facilities. USEC agrees these recommendations have merit, but considering the broader implications, USEC recommends the NRC seek input from the public prior to adoption. We

¹² NRC guidelines currently call for review of financial information of enrichment facilities for reasonableness rather than establishing specific, restrictive criteria. *Staff Review Guidance for Gaseous Diffusion Plant Changes in Ownership or Control*, SECY-02-0122, Attachment 2, Encl. 2 (2002).

propose alternatives that are better fitted to achieving the LES objective of expediting the proceedings without significantly compromising any meaningful hearing opportunity.

The executive order on environmental justice encourages Federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low income populations in the United States." E.O. 12898, 3 CFR 859 (1995). "The executive order, by its own terms, established no new rights or remedies. Its purpose was merely to underscore certain provision[s] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment." *Louisiana Energy Services, L.P. (Clairborne Enrichment Center) CLI-98-3*, 47 NRC 77, 102 (1998) (*hereinafter* "LES II") (internal quotes and citations omitted). The NRC considers environmental justice in conducting its NEPA reviews by determining relevant communities, by evaluating which of those communities are minority or low-income, and by analyzing whether the impacts on such communities are disproportionately high and adverse. Such disparate impact analysis is the NRC's principal tool for advancing environmental justice. LES II, 47 NRC at 100; *Private Fuel Storage, LLC (Independent Spent Fuel Storage Facility)*, CLI-02-20, 56 NRC __ (2002).

The LES recommendations strive to expedite the proceedings while ensuring consideration of all pertinent concerns by reducing the effort to determine the relevant community. Determining the relevant community is the most significant incremental analytical requirement of environmental justice analysis. In materials licensing cases, the NRC evaluates the relevant radius of impacts on a case-by-case basis rather than establishing a presumption of effects based on geographic distance, and normally expects intervenors to show a plausible connection between the project and the alleged impact. LES's proposed 4 mile and 0.6 mile thresholds may simplify preparing the application, but the proposal should not sacrifice this worthwhile NRC longstanding practice of insisting on such a logical connection. Requiring a logical connection between alleged impacts and the project has the additional benefit of promoting expeditious proceedings by preventing adjudication of non-meritorious contentions.

Where there are no significant environmental impacts, detailed analysis has not been required. *See PFS, CLI-02-20*. Similarly, the NRC could consider requiring a showing of environmental impacts above the small and moderate thresholds prior to requiring an analysis-intensive determination of relevant communities. Since the generally applicable environmental effects need to be determined under NEPA anyway, the efforts by the licensee on the environmental report and the staff on the draft EIS to evaluate whether the action meets the threshold test would not be significant. Furthermore, a threshold test of whether the facility presents any high and adverse environmental effects would obviate, in most cases, the need for any effort to determine what is a relevant community and whether that community is minority or low-income. Most material licensing decisions do not involve high and adverse environmental impacts; therefore, such a threshold test would help ensure in-depth environmental justice inquiries are limited to those projects with a real potential for a disproportionate impact. Also, in most material licensing cases, such a threshold test would assist in promoting hearing efficiency

by reducing the litigation of non-meritorious environmental justice contentions through summary disposition, if not sooner in determination of admissibility.

Even if not choosing to adopt a threshold test for environmental justice evaluations, it would be helpful if the Commission would limit the environmental impacts pertinent to environmental justice analysis to those traditional impacts fairly considered to be "environmental" under NEPA jurisprudence, *i.e.*, impacts on the ecology or natural resources that directly impact human health or the environment.¹³ Environmental justice intervenors often raise concerns only remotely related to the environment, such as socioeconomic, religious, cultural and psychological impacts. While NEPA case law and Executive guidance provides that agencies may consider secondary effects and socioeconomic impacts of a project under NEPA, such evaluation is not mandated.¹⁴ As past Commission decision have stated, the NRC lacks the resources, statutory mandate, and expertise to engage in a far-ranging environmental justice review, outside of the direct impacts on human health and the environment. To the extent that the decision in LES II¹⁵ is inconsistent with that in *PFS*¹⁶ and implies that NRC environmental justice analysis must consider impacts that are clearly remote from the environment, the LES II decision should be explicitly overruled.

CONCLUSION

Nuclear utilities support the continuing efforts to provide additional competition to the domestic market for uranium enrichment services. We appreciate the opportunity to submit these comments. If you have any questions or need further information, please contact me at 202-663-8148.

Sincerely,



Shaw Pittman LLP
John H. O'Neill, Jr.
Charles H. Peterson
Counsel for Licensees

¹³ Such focus is not without precedent. *See generally, Environmental Effects Abroad of Major Federal Actions*, Executive Order 12114, § 3-4.

¹⁴ *See e.g., Hanly v. Kleindienst*, 471 F.2d 823, 833 (2d Cir. 1972); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

¹⁵ In the context of environmental justice analysis, LES II discusses the impact on sports-related community events and church services due to relocating a road and the impact on property values.

¹⁶ *PFS*, CLI-02-20, 56 NRC __ (2002) (intertribal grievances are not an environmental impact).

June 13, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
	)	Docket No. 70-3103-ML
Louisiana Energy Services, L.P.)	
	)	ASLBP No. 04-826-01-ML
(National Enrichment Facility))	

AFFIDAVIT OF JOHNNIE M. WHITE

I, Johnnie M. White, being duly sworn, state as follows:

1. I am the Mayor of Eunice, New Mexico. I have been Mayor of Eunice since March of 2006. I have official and personal knowledge of the matters discussed herein.
2. The purpose of this affidavit is to present the City of Eunice's views concerning any legal action that might stay the construction of the proposed National Enrichment Facility ("NEF"). In short, the City of Eunice opposes any such action insofar as it would be detrimental to the economic interests of Eunice.
3. As Mayor, I can attest to the fact that the City of Eunice has strongly supported the NEF project since Louisiana Energy Services, L.P. ("LES") first expressed an interest in bringing its proposed enrichment plant to Eunice. Then, as now, the citizens of Eunice recognized immediately that hosting the NEF would provide a welcome boost to the local economy. That boost will come principally in the form of economic diversification, the creation of new jobs (associated both directly and indirectly with NEF construction and operation), the receipt of additional tax revenues, and the enhancement of local educational programs (e.g., the

public school science curriculum). Given its participation in the recent limited appearance sessions, the Atomic Safety and Licensing Board is no doubt well aware of the overwhelming local support for the NEF that exists within Eunice and Lea County in general.

4. A substantial delay in the construction and operation of the NEF resulting from a stay of license issuance or licensed activities would no doubt cause detriment to Eunice. For one thing, it would forestall realization of the various socioeconomic benefits that will flow from construction and operation of the NEF. Those benefits, which I mentioned briefly above, are discussed in greater detail in the NRC Staff's Final Environmental Impact Statement for the NEF. Thus, any delay will have real monetary and social impacts on the local community.

5. Moreover, there is the concern that a significant delay in facility construction could cause the project to lose the incredible momentum that has carried it forward to date. Based upon discussions with LES representatives in New Mexico, I understand that any major difficulties encountered by LES in achieving key project milestones (including the receipt of an NRC license and the start of construction activities) on schedule could adversely impact its ability to secure project approval. As far as the City of Eunice is concerned, any potential for a complete halt to the project should be avoided if at all possible.

6. For these reasons, I urge the NRC not to impose a stay that would hinder the continued progress of a project that is clearly vital to both the local and national public interest.


Johnnie M. White

Johnnie M. White

Sworn and subscribed to before me this 14th day of June 2006.

Jayce E. Salama

Notary Public

My Commission expires: 12-17-09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 70-3103-ML
)	
Louisiana Energy Services, L.P.	)	ASLBP No. 04-826-01-ML
)	
(National Enrichment Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "APPLICANT'S ANSWER TO NIRS/PC MOTION FOR A STAY OF THE LICENSING BOARD'S THIRD PARTIAL INITIAL DECISION PENDING COMMISSION REVIEW" in the captioned proceeding has been served on the following by e-mail service, designated by **, on June 19, 2006 as shown below. Additional service has been made by deposit in the United States mail, first class, this 19th day of June 2006.

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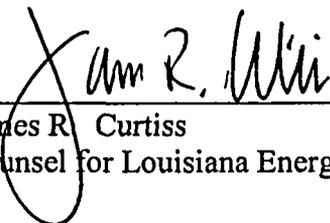
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