

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

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Docket No. 70-3103

ASLBP No. 04-826-01-ML

NRC STAFF RESPONSE TO PETITION ON BEHALF OF NUCLEAR INFORMATION
AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR REVIEW OF THIRD PARTY
PARTIAL INITIAL DECISION ON SAFETY-RELATED CONTENTIONS

Lisa B. Clark
Margaret J. Bupp
Counsel for NRC Staff

June 22, 2006

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND	1
DISCUSSION	6
I. Legal Standard Applicable to Commission Review	6
II. The Intervenors' Original DOE Cost Estimate Contention is Moot	7
III. The Board Did Not Err in Finding the Near-Surface Disposal Strategy Plausible	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS

ADMINISTRATIVE DECISIONS

Commission:

Duke Energy Corporation
(McGuire Nuclear Station, Units 1 and Units 2;
Catawba Nuclear Station, Units 1 and 2)
CLI-02-28, 56 NRC 373 (2002) 8

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
CLI-97-11, 46 NRC 49 (1997) 11

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
CLI-04-25, 60 NRC 223 (2004) 3

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
CLI-05-05, 61 NRC 22, (2005) 3

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
CLI-05-20, *slip op.* at 1 (2005) 4, 9, 10

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
CLI-06-15, 64 NRC __, *slip op.* (2006) 10

Public Service Company of New Hampshire
(Seabrook Station, Units 1 and 2)
CLI-78-14, 7 NRC 952 (1978) 9

Atomic Safety and Licensing Board:

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
LBP-04-14, 60 NRC 40 (2004) 2, 3

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
LBP-05-13, 61 NRC 235 (2005) 4

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
LBP-06-08, 63 NRC __ 4, 5

Louisiana Energy Services, L.P.
(Clairborne Enrichment Center)
LBP-06-15, 63 NRC __, (2006) passim

Memorandum and Order
(Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions
fn. 15 (August 4, 2005) 8

MISCELLANEOUS

“Notice of Receipt of Application for License: Notice
of Availability of Applicant’s Environmental Report;
Notice of Consideration of Issuance of License; and
Notice of Hearing and Commission Order”
CLI-04-03, 59 NRC 10, 69 Fed. Reg. 5873 (February 6, 2004) 2

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INITIAL DECISION ON SAFETY-RELATED CONTENTIONS

INTRODUCTION

On June 12, 2006, intervenors Nuclear Information and Resource Service and Public Citizen ("NIRS/PC") filed a petition for review of the Atomic Safety and Licensing Board's ("Board") Third Partial Initial Decision (Safety-Related Contentions) issued May 31, 2006.¹ NIRS/PC's Petition argues that the Commission should overturn the Board's determination that NIRS/PC cannot challenge the sufficiency of the DOE cost estimate for dispositioning depleted uranium hexafluoride (UF₆) and the Board's determination that LES has shown a plausible strategy for near-surface disposal of depleted UF₆. For the reasons set forth below, the NRC Staff ("Staff") submits that the Intervenor's challenge to the DOE cost estimate is now moot, and that the Board did not err with regard to its finding on the existence of a plausible strategy for near-surface disposal of depleted UF₆.

BACKGROUND

On December 12, 2003, Louisiana Energy Services, L.P. (LES) applied for a license from the NRC under 10 C.F.R. Parts 30, 40, and 70 to possess and use byproduct, source, and

¹ *Louisiana Energy Services, L.P. (National Enrichment Facility)*, LBP-06-15, 63 NRC __, May 31, 2006 ("Third PID").

special nuclear material in a gas centrifuge uranium enrichment facility, the National Enrichment Facility (NEF), to be constructed and operated near Eunice, New Mexico.² Notice of the NRC's receipt and consideration of the LES NEF license application was published in the *Federal Register* on February 6, 2004. "Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order," CLI-04-03, 59 NRC 10, 69 Fed. Reg. 5873 (February 6, 2004) ("Notice of Hearing").

As a by-product of the enrichment process, the NEF will generate uranium hexafluoride (UF₆) tails, which will require deconversion and disposal at a licensed facility. See Staff Exhibit 49-M at 10-10 to 10-11. LES submitted two strategies for dispositioning the tails: a preferred private strategy, under which LES would transfer the tails to a private facility for deconversion after which the waste would be disposed of at an appropriate licensed facility; and an alternative DOE strategy, under which LES would transfer the tails to DOE for deconversion and disposal. See Third PID at 39. NIRS/PC challenged the plausibility of LES's strategy and its cost estimates, which are needed to establish a baseline for decommissioning funding required by the NRC's regulations.

On July 19, 2004, the Board issued a Memorandum and Order admitting certain NIRS/PC contentions, designated as either environmental or safety contentions, and, therefore, admitted NIRS/PC as a party to the proceeding. *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004). Among the admitted contentions were two safety-related contentions relevant to the NIRS/PC Petition for Review and one additional safety-related contention related to the issues to be reviewed: NIRS/PC EC-3/ TC-1, contending

² This proceeding has a long and complex procedural history, which has been recounted elsewhere, including in LBP-06-15. See *Louisiana Energy Services, L.P.*, LBP-06-15, *slip op.* at 3-31. Thus, the Staff will summarize only the most pertinent portions of the procedural background here.

that LES does not have a plausible strategy for disposal of depleted UF₆ ("DUF₆"); NIRS/PC EC-5/TC-2, contesting the sufficiency of LES's estimate for the costs of decommissioning and its decommissioning funding plan; and NIRS/PC EC-6/TC-3, challenging the costs and feasibility of LES's plan to manage and dispose of depleted uranium produced at the NEF as low-level waste at a near-surface disposal site. In admitting EC-3/TC-1, the Board referred to the Commission the question of whether depleted uranium should be categorized as low-level waste under the waste classification system in 10 C.F.R. Part 61. *Id.* at 67. After accepting review of the issue³, on January 18, 2005, the Commission found that depleted uranium is properly categorized as low-level radioactive waste. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-05, 61 NRC 22, 36 (2005).

After LES filed a cost estimate for the DOE deconversion option, NIRS/PC submitted an amendment to contention EC-5/TC-2 challenging the sufficiency of the estimate. Specifically, NIRS/PC alleged insufficiencies in the cost estimate, labeled Bases A-F, related to: (A) disposal of depleted uranium at Envirocare; (B) the costs of dispositioning hydrofluoric acid ("HF"); (C) future DOE operations, maintenance, and decontamination and decommissioning costs; (D) the capital costs to be assessed by DOE; (E) costs associated with potential storage of depleted uranium from the NEF by DOE; and (F) the inclusion of a contingency factor in the DOE cost estimate. Motion on Behalf of Intervenors for Extension of Time Under 10 C.F.R. § 2.307(a) and for Admission of Supplemental and Additional Late-Filed Contentions Under 10 C.F.R. § 2.309(c), at 30-35 (July 5, 2005). In response, the Board found that, consistent with section 3113 of the USEC Privatization Act, 42 U.S.C. § 2297h-11, the Secretary of Energy has exclusive jurisdiction to determine pricing for disposal of depleted uranium, thus rendering NIRS/PC's proposed amendment outside the scope of the proceeding. Memorandum and

³ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004).

Order (Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions) at 21 (August 4, 2005). Therefore, the Board did not admit NIRS/PC's proposed amendment to contention EC-5/TC-2. *Id.*

The Board held an evidentiary hearing on the admitted environmental contentions in Hobbs, New Mexico from February 7-10, 2005, and on June 8, 2005, issued a partial initial decision on those contested issues heard at the evidentiary hearing. *Louisiana Energy Services*, LBP-05-13, 61 NRC 235 (2005). The partial initial decision found that the Staff and LES had carried their respective burdens of proof and, therefore, the NIRS/PC claims regarding the sufficiency of the Environmental Report and the Environmental Impact Statement could not be sustained. NIRS/PC appealed the partial initial decision to the Commission, alleging various errors, including that it should have been permitted to challenge the adequacy of the Staff's environmental review of impacts of waste disposal. *Petition on Behalf of NIRS/PC for Review of First partial Initial Decision on Environmental Contentions ("Petition for Review")* (June 23, 2005). On October 19, 2005, the Commission issued a decision remanding additional issues for consideration by the Board, including the adequacy of the Staff's waste impacts analysis in its environmental impact statement that is the subject of the current *Petition for Review*. *Louisiana Energy Services*, CLI-05-20, *slip op.* at 1 (Oct. 19, 2005).

The Board held evidentiary hearings on the remaining contested issues, including the contentions at issue here and the remanded waste impacts issue, in October 2005 and February 2006. On March 3, 2006, the Board issued a second partial initial decision on the remanded waste impacts issue, finding that the Staff had met its burden and found that the Final Environmental Impact Statement for the proposed facility is adequate with respect to the analysis of impacts of near-surface waste disposal. *Louisiana Energy Services*, LBP-06-08, 63 NRC ___ (2006) ("Second PID"). In reaching its decision, the Board recognized that the

Commission had previously determined that under existing regulations depleted uranium is appropriately categorized as Class A low-level waste. *Id.* at 265.

The Board issued its Third PID on May 30, 2006.⁴ In its Third PID, the Board ruled with respect to the acceptability of the cost estimates for LES's proposed dispositioning strategies, and found that although it was a "plausible strategy" upon which cost estimates might be based, the cost estimate provided by LES was not "sufficiently reliable" to form the basis for the dispositioning part of the decommissioning cost estimate required by the regulations. Third PID at 42. The Board then turned to the issue that is the subject of the Petition for Review: the disposition strategy based on the DOE cost estimate. In the Third PID, the Board provided additional explanation of its earlier ruling on the admissibility of NIRS/PC's amended contention challenging the sufficiency of the DOE cost estimate. Specifically, the Board reiterated that: "Neither an intervenor nor an applicant/licensee (nor seemingly the NRC) has the authority to challenge or direct DOE's estimates of the fees it will charge to a uranium enrichment facility that requests DOE to disposition its [depleted uranium] waste." Third PID at 41.

With respect to the plausibility of the strategy for near-surface disposal of depleted uranium, NIRS/PC had argued that such disposal would not likely be acceptable under 10 C.F.R. Part 61 if DUF₆ is not considered low level waste. See Third PID at 10, 92. In the Third PID, the Board relied on the Commission's earlier determination that, under current regulation, depleted uranium is, in fact, properly categorized as Class A low-level waste, and therefore, is eligible for near-surface disposal. *Id.* at 93-94. The only question remaining for the Board's determination was whether near-surface disposal of depleted uranium would also meet 10 C.F.R. Part 61, Subpart C performance objectives. *Id.* at 94. The Board noted that the Envirocare site is already licensed by the State of Utah, an agreement state, to accept Class A

⁴ The Board also held a mandatory hearing on uncontested issues in Hobbs, New Mexico on March 6, 2006. Only the Staff and LES were parties to that portion of the licensing proceeding.

low-level waste, i.e., depleted uranium, in the quantities to be produced at the NEF. Third PID at 95. As an agreement state, the State of Utah had licensed the Envirocare facility after determining that near-surface disposal of depleted uranium would meet the state analog to 10 C.F.R. Part 61, including the performance requirements set out in subpart C. *Id.* Based on this, and on testimony confirming that there will be no volume restrictions placed on Depleted uranium disposed of at Envirocare, the Board found that near-surface disposal at Envirocare is a plausible strategy. *Id.* at 96.

NIRS/PC filed its petition for review on June 12, 2006.⁵ The Petition argues that the Board erred in rejecting its challenge to the sufficiency of the DOE cost estimate and in finding that LES has presented a plausible strategy for disposal of Depleted uranium. As explained further below, with regard to the Intervenors' claim of error regarding the Board's acceptance of the DOE cost estimate, the Staff respectfully submits that the contention on the DOE cost estimate is now moot. The Staff also respectfully submits that the Board's ruling with regard to the plausibility of near surface disposal should be upheld.

DISCUSSION

I. Legal Standard Applicable to Commission Review

The Commission's regulations in 10 C.F.R. § 2.342(b)(4) provide that the Commission may, in its discretion, grant a petition for review upon consideration of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

⁵ LES has filed a separate petition for review of the Third PID. "Applicant's Petition for Review of LBP-06-15," June 15, 2006. The Staff will respond to the LES petition separately.

- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

As discussed further below, the contention central the NIRS/PC's argument that the Board erred in finding that the DOE cost estimate may not be challenged as a matter of law is now moot, and, therefore, the contention proposed by NIRS/PC challenging the sufficiency of the cost estimate need not be remanded to the Board for further consideration. However, NIRS/PC has not shown that the Board erred in its finding that LES has presented a plausible option for near-surface disposal of Depleted uranium, and the Board's decision on this issue should be affirmed.

II. The Intervenor's Original DOE Cost Estimate Contention is Moot

The Intervenor argued that the Board erred in concluding that the DOE cost estimate for dispositioning DUF₆ coming from the NEF could not be challenged and have sought a remand of the issue to the Board for further consideration. However, even assuming their argument is correct, there is no basis to remand this issue because intervening events have rendered the issue moot.

The Staff originally did not oppose admission of a portion of NIRS/PC's contention challenging the DOE cost estimate. Specifically, the Staff did not oppose admission of the portions of the contention claiming that the DOE cost estimate did not consider the cost of HF disposition and that the DOE cost estimate did not include an appropriate contingency factor. NRC Staff Response to Motion on Behalf of Intervenor Nuclear Information and Research Service and Public Citizen for Admission of Supplemental and Additional Late-Filed Contentions Under 10 C.F.R. § 2.309(c), at 22, (July 20, 2005). In the Board's Memorandum and Order ruling on the admissibility of the contentions challenging the DOE cost estimate, the Board

indicated that certain bases of NIRS/PC's contention were not admissible although proposed basis (F) in support of paragraph (E), which argued that the cost estimate must include a contingency factor, would have been otherwise admissible. Memorandum and Order (Ruling on Motion to Admit Late-Filed Amended and Supplemental Contentions), fn. 15 (August 4, 2005). However, the Board found that all challenges to the DOE cost calculations were outside the scope of the proceeding and so did not admit any portion of the contention. *Id.* at 22.

As a measure of conservatism, the Staff undertook its own review of the sufficiency of the DOE cost estimate, documented in a supplement to the safety evaluation report and admitted to the proceeding as Staff Exhibit 77-M. As part of its review, the Staff requested some additional details and clarification on the cost estimate from DOE. Based on this additional information and on the Staff's review of the information, the Staff found that LES's financial assurance for decommissioning, as premised on the DOE cost estimate, complies with NRC's regulations and provides reasonable assurance of protection for workers, the public and the environment. Staff Ex. 77-M at 5. Significantly, the review ensured that the DOE cost estimate, as utilized by LES, includes a contingency factor of twenty-five percent. *Id.* at 3.

The Intervenors seek remand of its contention challenging the DOE cost estimate to the Board for further consideration. However, based on the Staff's further inquiry and review and the information now included as part of the record of this proceeding, the Staff submits that the only issue raised by the Intervenors which would have been admissible, the question of whether

or not the original DOE estimate included an appropriate contingency factor, is now moot.⁶

Therefore, the Staff respectfully submits that no remand is necessary.⁷

III. The Board Did Not Err in Finding the Near-Surface Disposal Strategy Plausible

NIRS/PC claims that the Board committed two errors in finding that LES has proposed a plausible strategy for near-surface disposal of Depleted uranium. First, NIRS/PC argues that the Board erred in stating that “the Commission has found that, under existing NRC regulations, depleted uranium is appropriately categorized as low-level waste and, further, under a plain reading of 10 C.F.R. § 61.55(a), is deemed Class A waste.” Third PID at 93; Petition at 17. Therefore, according to the Petition, the Board’s determination that LES had presented a plausible strategy is not correct.

However, this issue has already been addressed by the Commission in this licensing proceeding. The Commission, in CLI-05-20, stated that under a plain reading of 10 C.F.R. § 61.55(a), depleted uranium is Class A waste. *Louisiana Energy Services* CLI-05-20,

⁶ The Commission has held that, in the case of a contention of omission, such as the instant claim concerning the inclusion of a contingency factor in the DOE cost estimate, where the omission is cured by a later submission, the contention is moot. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and Units 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002).

⁷ However, should the Commission nevertheless determine to remand the issue to the Board, the Staff notes that it is highly likely that the Board will issue its final decision on the mandatory hearing before the Commission rules on NIRS/PC’s Petition for Review. Following issuance of a favorable final decision from the Board, the Director of Nuclear Materials Safety and Safeguards is instructed by 10 C.F.R. § 2.340(c) to issue the license within 10 days, notwithstanding any petition for review. The Commission, if it remands this contention to the Board, can decide whether it is necessary to suspend the license pending a determination of the issue on remand. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-14, 7 NRC 952 (1978). The Staff submits that, based on information before it, it will not be necessary to suspend the license. In addition, NIRS/PC has applied to the Board for a stay of the Third PID pending Commission review of the instant Petition for Review. Motion on Behalf of Nuclear Information and Resource Service and Public Citizen for Stay of Initial Decision Pending Review, June 12, 2006. In its response to the motion, the Staff argued that the motion should not be granted because: (1) NIRS/PC has not shown that it is likely to succeed on the merits; (2) NIRS/PC has not shown that it will suffer irreparable injury; (3) granting a stay will harm LES; and (4) the public interest would not be served by a stay. With regard to the potential harm to be suffered by NIRS/PC without a stay, the Staff notes that LES does not intend to begin operations until late 2008 or early 2009, giving the Board ample time to resolve any matters still at issue, and that, even if hearings would last into the start of operations, the license condition requiring triennial updates to the decommissioning funding plan provides a mechanism to implement any changes to the plan as the result of further hearings on the cost estimate.

62 NRC at 535. The Board cited the Commission's decision in its Second PID, noting that the issue of proper classification of depleted uranium in the instant proceeding has been settled by the Commission. Second PID, slip op. at 26-27. Although the Commission did note in CLI-05-20 that at the time the Commission's Part 61 waste classification tables were created the Staff did not analyze the impacts of disposal of large quantities of depleted uranium, and the Commission did dictate that the Staff should perform such an analysis, the Commission was clear that such analysis should take place outside the course of the instant proceeding.⁸ *Louisiana Energy Services*, CLI-05-20, 62 NRC at 536. The Commission has been clear that the regulations, as currently in effect, dictate that depleted uranium be classified as Class A low-level radioactive waste. Therefore, the Board's determination was not in error.

The second error alleged by NIRS/PC is that the Board failed to conduct a detailed review to determine whether near-surface disposal of depleted uranium at Envirocare would comply with the performance criteria listed in 10 C.F.R. Part 61, subpart C. Petition at 19. NIRS/PC argues that, while the Board relied on the fact that the State of Utah had licensed Envirocare to accept depleted uranium for near-surface disposal under a scheme complying with the performance criteria in subpart C, the Board instead should have conducted a detailed review of whether or not disposal at Envirocare meets the performance criteria.

Again, the Commission has addressed this question. In the Second PID, the Board addressed this specific question, and determined that the Staff's reliance on Envirocare as a reference site for any site where disposal of depleted uranium would be acceptable under the 10 C.F.R. Part 61, subpart C acceptance criteria was reasonable. Second PID at 45-52. The Board's determination was affirmed on appeal by the Commission in CLI-06-15. *Louisiana*

⁸ The Commission recently affirmed that the Staff's future analysis of impacts from disposal of large quantities of depleted uranium should not affect the instant proceeding. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 64 NRC ___, slip op. at 16 (2006).

Energy Services, L.P., CLI-06-15, *slip op.* at 15-17. The Commission specifically noted that the ultimate disposal site might be Envirocare or another, as yet undetermined site, *id.* at 17, and cautioned that it is inappropriate “to transform *this* proceeding – for a uranium enrichment facility – into the equivalent of a final disposal authorization review for one or more specific near-surface disposal facilities.” *Id.* at 15. Thus, the Commission declined to conduct a Part 61 compliance review because such a review will be performed by the pertinent regulatory authority (either the NRC or an agreement state) prior to a final determination on disposal. *Id.* at 3, 16. Based on this clear guidance from the Commission, NIRS/PC’s claim that the Commission requires a detailed Part 61 compliance analysis is unfounded.⁹

CONCLUSION

Based on the above the Staff respectfully submits that the Board did not err in finding that LES has presented a plausible strategy for near-surface disposal of depleted uranium originating at the proposed NEF, and, therefore, the Board’s finding should be upheld. Further, even if it is assumed that Intervenor’s contention on the DOE cost estimates could have been admitted on the supporting factor the Board found potentially adequate, no remand is necessary because that supporting factor has been mooted by intervening events. For these reasons the Intervenor’s Petition for Review should be denied.

Respectfully submitted,

/RA by Margaret J. Bupp/

Lisa B. Clark
Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of June, 2006

⁹ NIRS/PC also cites to a Commission decision from the licensing proceeding for the Clairborne facility. Petition at 21; *Louisiana Energy Services, L.P.* (Clairborne Enrichment Center), CLI-97-11, 46 NRC 49 (1997). However, this decision does not support the Intervenor’s call for a detailed analysis of compliance with the subpart C acceptance criteria. The Commission decision cited by the Intervenor requests clarification of an earlier Board decision, but in no way requests a detailed analysis under 10 C.F.R. Part 61, Subpart C, as suggested by the Petition. See *id.* at 50-51.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITION ON BEHALF OF NUCLEAR INFORMATION AND RESOURCE SERVICE AND PUBLIC CITIZEN FOR REVIEW OF THIRD PARTY PARTIAL INITIAL DECISION ON SAFETY-RELATED CONTENTIONS" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 22nd day of June, 2006.

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

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

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

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

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

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

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

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

/RA/

Margaret J. Bupp
Counsel for NRC Staff