

July 3, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
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July 3, 2006 (3:30pm)

BEFORE THE COMMISSION

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 REPLY TO INTERVENOR AND NRC STAFF  
RESPONSES TO APPLICANT'S PETITION FOR REVIEW OF LBP-06-15**

Pursuant to 10 C.F.R. § 2.341(b)(3), Louisiana Energy Services, L.P. ("LES" or "Applicant") hereby replies to the responses to LES's June 15, 2006 petition for review of LBP-06-15 filed on June 26, 2006, by Nuclear Information and Resource Service ("NIRS/PC" or "Intervenors") and the NRC Staff.<sup>1</sup> In doing so, LES offers some clarifications and additional observations in support of its request for Commission review and reversal of LBP-06-15.

**A. The Board's Failure to Apply the Correct Standard Warrants Commission Review**

In its petition for review, LES demonstrated that the Board developed and applied a standard of review that exceeds the "reasonable assurance" standard traditionally used by the NRC in its decommissioning funding assurance reviews. The NRC Staff's response leaves no doubt that the Board erred in the manner described by LES. Indeed, the Staff concluded that "the 'reliability' standard adopted by the Board is inappropriate," and specifically recommended that "the Commission [] take review of the standard and vacate it." Staff Response at 12-13.

As the Staff noted, it may be impossible (or at least highly impractical) for an applicant to obtain a "direct" third-party cost estimate or a "thorough cost analysis" of the type contemplated by the Board, especially where the applicant has yet to commence contractual

<sup>1</sup> See "Response on Behalf of [NIRS/PC] to Applicant's Petition for Review of LBP-06-15" (June 26, 2006) ("NIRS/PC Response"); "NRC Staff Response to Applicant's Petition for Review of LBP-06-15" (June 26, 2006) ("Staff Response").

negotiations with pertinent vendors. *Id.* at 11. By way of example, the Staff noted that Envirocare does not provide cost estimates to potential customers, but instead negotiates individual price agreements. *See id.* at 12. As the Staff put it, "[r]equiring cost estimates from third parties could, in many cases, be an insurmountable obstacle to licensing, which is not what was intended by the regulations."<sup>2</sup> *Id.* The Commission recognized this much early in the proceeding, when it noted that a "plausible strategy" for the disposition of DU "does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements."<sup>3</sup> The Board, however, ignored this fact in imposing an overly rigid "reliability" standard.

NIRS/PC, for their part, do little to challenge the assertion that the Board applied the wrong standard. NIRS/PC aver that "[e]ach decommissioning situation is unique, and that the standards are interpreted with respect to the specific site." NIRS/PC Response at 23. Neither LES nor the Staff disputes the notion that each decommissioning case involves unique considerations.<sup>4</sup> The Staff emphasized that "the licensing process must take into account the different circumstances facing individual applicants." Staff Response at 12. This, however, does not mean that the Board may replace the Commission's time-tested "reasonable assurance" standard with a new, more stringent "reliability" standard. As the Staff observed, the Board's standard "does *not* allow for a flexible, case-by-case evaluation of decommissioning funding estimates, as envisioned by the Commission." *Id.* (citing CLI-04-33).

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<sup>2</sup> As the Staff notes, it reviewed LES's private disposal cost estimate, and determined that the estimate was supported by "documented and reasonable" information. Staff Response at 11-12.

<sup>3</sup> CLI-04-25, 60 NRC 223, 226 (2004).

<sup>4</sup> LES also does not dispute that the prior Commission decommissioning decisions cited by LES and the Staff (*i.e.*, *Seabrook*, *Yankee*, and *Hydro Resources*) involved different factual circumstances than those at issue here. However, in seeking to undermine LES's reliance on those cases, NIRS/PC miss the point. The Commission's application of the "reasonable assurance" standard in each of those cases attests to the standard's inherent flexibility. The Board here severely curtailed that flexibility with its new reliability test.

**B. Commission Reversal of the Board's Rulings Relative to LES's Private Sector Deconversion and Disposal Cost Estimates Is Warranted**

As noted above, the Staff agrees that the Board applied an inappropriate standard in evaluating the adequacy of LES's private sector deconversion and disposal cost estimates. However, the Staff submits that because the Board based its "ultimate approval of LES's decommissioning funding [on] approval of the DOE cost estimate, [] any error of the Board [is] harmless error with respect to the LES proceeding." Staff Response at 5. More specifically, the Staff maintains that the Board's findings as to the adequacy of the private sector disposal strategy are not material because they are "not necessary to determine compliance with the [NRC's ] decommissioning funding requirements." *Id.* at 8. Accordingly, the Staff suggests that the Commission need not take any action with respect to Board's specific determinations as to the adequacy of LES's commercial deconversion and disposal cost estimates.

Under the present circumstances, LES respectfully disagrees with the Staff's conclusion that Commission review of the Board's determinations with respect to the reasonableness of LES's cost estimates is unnecessary or unwarranted. To be sure, insofar as LES has a "plausible strategy" in the DOE option, and has obtained a cost estimate from DOE, LES has met its regulatory obligation. An applicant is not required to demonstrate multiple or alternative means of compliance with NRC regulations.<sup>5</sup> Nor is it the NRC's practice to compel an applicant or licensee to do more than the regulations require.<sup>6</sup> However, the Commission has yet to rule on Intervenors' own petition for review, which asserts that the Board erred by rejecting allegedly timely and admissible NIRS/PC contentions challenging the DOE cost estimate. Further, even after the Commission renders a final determination on that petition, the

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<sup>5</sup> *Cf. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 569 n.10 (1983)* (stating that "Applicants are free to accomplish the same ultimate objectives by different means").

<sup>6</sup> *See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-194, 7 AEC 431, 445, 447 n.32 (1974).*

potential for judicial review of that decision remains.<sup>7</sup> Therefore, prudential reasons alone compel LES to seek Commission review and reversal of the Board's adverse cost-related rulings in LBP-06-15.<sup>8</sup>

Additionally, the Staff suggests that "to satisfy the regulatory requirements, including 10 C.F.R. § 70.25(e), LES must demonstrate that it will have sufficient funding to cover the costs of the DOE option." Staff Response at 7-8. The Staff reasons that because LES "did not intend to obtain full funding of the cost of dispositioning [DU] tails until the end of operating life of the NEF," it "did not account for the cost of capital which would be incurred if a private deconversion facility were constructed before the full funding had been acquired by LES." *Id.* at 4. The Staff, however, is postulating a scenario in which the NEF ceases operations prematurely, not at the end of the licensed operating period (as contemplated in the Commission's decommissioning funding rules).

LES maintains that its private sector cost estimate provides an independent basis for complying with the NRC's decommissioning funding requirements. Indeed, the NRC's Safety Evaluation Report reflects independent Staff evaluations and approvals of the private sector and DOE cost estimates. As LES's witness testified, LES's showing of compliance with the Commission's decommissioning financial assurance requirements does not require the computation of a "cost of capital" for building a private deconversion facility.<sup>9</sup> By providing financial assurance in increments on an annual, forward-looking basis -- in accordance with the exemption granted by the Staff -- LES will meet the ultimate objective of the financial assurance

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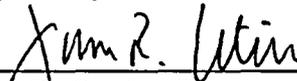
<sup>7</sup> According to a June 28, 2006 Associated Press news wire, a judicial appeal of the NRC's decision to issue a license to LES is "under active consideration" by NIRS/PC.

<sup>8</sup> Moreover, as LES noted in its petition for review, LES has committed to the State of New Mexico to, among other things, utilize a disposal path outside the New Mexico "as soon as possible," to aggressively pursue economically viable paths for DU disposition as soon as they become available, and to enter into good faith discussions with qualified vendors to pursue construction of a private deconversion facility.

<sup>9</sup> See "Supplemental Prefiled Direct Testimony of Rod Krich on Behalf of [LES] Regarding Cost of Cylinder Management and Cost of Capital Issues" (Dec. 29, 2005) at A19-A30.

requirements. That objective is to provide reasonable assurance that, upon permanent cessation of normal operations, sufficient financial assurance is available to decommission the facility in a timely manner.<sup>10</sup> Thus, sufficient funds would be available from LES's financial assurance instrument at the end of operating life to pay for the construction of a deconversion facility, without resorting to borrowed funds for that purpose.<sup>11</sup> Staff witnesses testified that under this scenario, there is no need to account for "cost of capital."

Respectfully submitted,

  
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<sup>10</sup> See LES Exh. 119 ("Financial Assurance for Materials Licensees: Final Rule," 68 Fed. Reg. 57,327 (Oct. 3, 2003)) at 57,328 (stating that the NRC's regulations "are designed to ensure that adequate funding will be available for timely decommissioning by licensees following shutdown of normal operations").

<sup>11</sup> Contrary to Intervenor's suggestion, LES did not alter its private sector DU dispositioning strategy during the licensing proceeding. As the record reflects, LES has always assumed, for the purpose of estimating total DU dispositioning costs, that the NEF will operate for 30 years and then shut down, resulting in the production of approximately 133 million metric tons of depleted uranium. See LES Proposed Findings (Mar. 1, 2006) at ¶¶ 3.23, 3.33-3.34. Moreover, LES's December 2003 license application makes clear that LES consistently has intended to provide financial assurance for DU dispositioning on an incremental basis during the life of NEF. See LES Exh. 83 at 10.2-1, 10.3-1. These assumptions do not preclude LES from building a deconversion facility during the operating period of the NEF. That decision is a business matter and should not be confused with the required financial assurance showing. Further, any deconversion-related expenses incurred by LES during the NEF's operating period would be paid for out of LES's operational budget, not with funds withdrawn from LES's financial assurance instrument.

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Louisiana Energy Services, L.P.	)	ASLBP No. 04-826-01-ML
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "APPLICANT'S REPLY TO INTERVENOR AND NRC STAFF RESPONSES TO APPLICANT'S PETITION FOR REVIEW OF LBP-06-15" in the captioned proceeding has been served on the following by e-mail service, designated by \*\*, on July 3, 2006 as shown below. Additional service has been made by deposit in the United States mail, first class, this 3rd day of July 2006.

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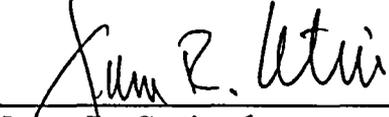
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