



Sam Shakir
President & CEO

10 CFR 70.17

June 17, 2009
AES-O-NRC-09-00064-0

ATTN: Document Control Desk
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

AREVA Enrichment Services LLC
Eagle Rock Enrichment Facility
NRC Docket No: 70-7015

SUBJECT: Request for Exemption from 10 CFR 70.4, 10 CFR 70.23(a)(7), 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4, and 10 CFR 40.32(e) Requirements Governing "Commencement of Construction"

On December 30, 2008, as revised on April 23, 2009, AREVA Enrichment Services, LLC (AES) submitted a License Application to construct and operate the Eagle Rock Enrichment Facility (EREF) to the U.S. Nuclear Regulatory Commission (NRC). Under the current regulations in 10 CFR 70, AES may not engage in certain site-related activities prior to the NRC issuance of the Materials License or the completion of the NRC's environmental review under 10 CFR 51.

Pursuant to 10 CFR 70.17(a), AES hereby submits a request for an exemption from the regulations in 10 CFR 70.4 and 70.23(a)(7). In addition, pursuant to 10 CFR 30.11, and 10 CFR 40.14, AES is requesting an exemption from the applicable provisions of 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4, and 10 CFR 40.32(e) as those provisions apply to the licensing of the EREF. AES is seeking an exemption that would allow AES to commence certain activities prior to the NRC's completion of its environmental review under 10 CFR 51 and the NRC's issuance of a Materials License for the EREF under 10 CFR 70. The exemption request is the same as the exemption approved by the NRC on May 8, 2009, for the GE-Hitachi Global Laser Enrichment LLC, because AES and GE-Hitachi Global Laser Enrichment LLC are both requesting that the definition of construction as defined by 10 CFR 50 and 10 CFR 51 be applied to the activities on their respective sites.

NRC approval of the exemption would permit AES, like 10 CFR 50 Licenses and GE-Hitachi Global Laser Enrichment, to undertake construction of facilities and construction activities that are not subject to NRC regulation or are not safety-related. The activities would be those that

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are not considered construction activities under the definition of construction currently provided in 10 CFR 50.2 and 10 CFR 51.4. The exemption request covers the following activities and facilities:

- Clearing the site
- Site grading and erosion control
- Excavating the site including rock blasting and removal
- Installing parking areas
- Constructing the storm water detention pond
- Constructing highway access roadways and site roads
- Installing utilities (e.g., temporary and permanent power) and storage tanks
- Installing fences for investment protection (not used to implement the Physical Security Plan)
- Installing construction buildings, offices (including construction trailers), warehouses and guardhouses.

The request for exemption, provided in the enclosure, concludes that the requested exemption from 10 CFR 70.4, 10 CFR 70.23(a)(7), 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4 and 10 CFR 40.32(e), is authorized by law, will not endanger life or property or the common defense and security, and is in the public interest. Accordingly, AES respectfully requests that the NRC grant the requested exemption.

Following NRC approval of the exemption request, AES will supplement its Environmental Report to distinguish between the environmental impacts of the construction activities covered by the NRC approved exemption and construction activities which will not be undertaken until after issuance of a license by the NRC. This supplement will facilitate the NRC staff's separation of the environmental impacts of construction activities covered by the NRC approved exemption and construction activities undertaken after an NRC license is issued to be consistent with the ESP/COL-ISG-004, "Interim Staff Guidance on the Definition of Construction and on Limited Work Authorizations (LWA)."

If you have any questions, or require additional information, regarding your review and acceptance of this exemption request, please contact Mr. Stan Day at (860) 917-7590 or email stan.day.ext@areva.com.

Sincerely,



Sam Shakir
President and CEO, AES

Enclosure: Request for Exemption from 10 CFR 70.4, 10 CFR 70.23(a)(7), 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4, and 10 CFR 40.32(e) Requirements Governing "Commencement of Construction"

References:

- 1) S. Shakir (AES) Letter to the U.S. Nuclear Regulatory Commission, Application for a Uranium Enrichment Facility License Under 10 CFR 70, "Domestic Licensing of Special Nuclear Material," dated December 30, 2008.
- 2) S. Shakir (AES) Letter to the U.S. Nuclear Regulatory Commission, Revision 1 to License Application for the Eagle Rock Enrichment Facility, dated April 23, 2009.
- 3) D. Dorman (NRC) Letter to A. Kennedy (GE-Hitachi Global Laser Enrichment LLC), Approval of GE-Hitachi Exemption Request related to Commencement of Construction, dated May 8, 2009.
- 4) T. Orr (GE-Hitachi Global Laser Enrichment) Letter to the U.S. Nuclear Regulatory Commission, GE-Hitachi Global Laser Enrichment LLC Request for Exemption from 10 CFR 70.4 and 70.23(a)(7) Requirements Governing "Commencement of Construction," dated December 8, 2008.
- 5) W. Burton (NRC) Memorandum to E. Hackett (NRC), Transmittal of Final Interim Staff Guidance – Notice of Availability of the Final Interim Staff Guidance ESP/COL-ISG-004 on the Limited Work Authorization, dated February 23, 2009.

cc: Breeda Reilly, NRC Senior Project Manager
Gloria Kulesa, NRC Senior Project Manager

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**Request for Exemption from 10 CFR 70.4, 10 CFR 70.23(a)(7), 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4, and 10 CFR 40.32(e) Requirements Governing
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Introduction

On December 30, 2008 (Ref. 1), as revised on April 23, 2009 (Ref. 2), AREVA Enrichment Services, LLC (AES) submitted a License Application to construct and operate the Eagle Rock Enrichment Facility (EREF) to the U.S. Nuclear Regulatory Commission (NRC). Under the current regulations in 10 CFR 70, AES may not engage in certain site-related activities prior to the NRC issuance of the Materials License or the completion of the NRC's environmental review under 10 CFR 51.

In particular, Section 193 of the Atomic Energy Act of 1954, as amended (AEA), among other things, prohibits "construction" of a uranium enrichment facility prior to completion of mandatory hearings and issuance of the license. In keeping with Section 193, 10 CFR 70.23(a)(7) provides that an applicant may not commence construction of a uranium enrichment facility until the Director of Nuclear Material Safety and Safeguards makes certain findings pursuant to 10 CFR 51. Both 10 CFR 70.4 and 10 CFR 70.23(a)(7), however, define "commencement of construction" to include various activities that have since been removed by the Commission from that definition in the context of 10 CFR 50 and 10 CFR 51. The activities currently prohibited by 10 CFR 70.4 and 10 CFR 70.23(a)(7) include "any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site."

The purpose and rationale for the changes to 10 CFR 50 and 10 CFR 51 (which allow, among other things, a broader range of site-related activities to be conducted without any NRC approval) are directly applicable to facilities to be licensed under 10 CFR 70, such as the planned EREF. Therefore, AES is seeking an exemption that would simply conform the requirements governing AES site-related activities to those now in place for 10 CFR 50 facilities, and would allow AES to commence such activities prior to the NRC's completion of its environmental review under 10 CFR 51 and the NRC's issuance of a Materials License for the EREF under 10 CFR 70.

Under 10 CFR 30.11, 40.14, 51.6, and 70.17, NRC may grant an exemption to the regulations if the exemption is authorized by law, will not endanger life or property or the common defense and security, and is in the public interest. 10 CFR 70.17(a) states that:

"The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest."

In addition, because 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4 and 10 CFR 40.32(e) contain provisions identical to those of 10 CFR 70.4 and 70.23(a)(7), AES also seeks exemptions from those regulations, pursuant to 10 CFR 30.11 and 40.14, insofar as those provisions apply to the licensing of the EREF.

For the reasons discussed below, AES' request for exemption from 10 CFR 70.4, 10 CFR 70.23(a)(7), 10 CFR 30.4, 10 CFR 30.33(a)(5), 10 CFR 40.4 and 10 CFR 40.32(e), is authorized by law, will not endanger life or property or the common defense and security, and is in the public interest. Accordingly, AES respectfully requests that the NRC grant the requested exemption. This exemption would permit AES, like 10 CFR 50 licensees and GE-Hitachi Global Laser Enrichment LLC, to undertake construction of facilities and construction activities that are not subject to NRC regulation or that are not safety-related.

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The Requested Exemption is Authorized By Law

The justification for the AES exemption request is essentially the same as that proffered by GE-Hitachi Global Laser Enrichment LLC in their December 8, 2008 (Ref. 4) exemption request.

The requested exemption is authorized by law because there is no statutory prohibition on its issuance. On May 8, 2009 (Ref. 3), the NRC's approval of the same exemption request for GE-Hitachi Global Laser Enrichment LLC, stated:

"NRC staff agrees that the proposed exemption is authorized by law because the Atomic Energy Act of 1954, as amended, contains no provisions excluding the early construction of activities that are outside the nexus of NRC regulatory authority. In addition, the Commission's authority under the National Environmental Policy Act does not include activities that are outside of its jurisdiction. NRC also agrees that the definition of construction in 10 CFR Part 50 does not constitute an unlawful segmentation of environmental impacts, because the single Federal action would not include private actions for which NRC has no regulatory authority."

In particular, Sections 193(b)(1) and (2) of the AEA state, among other things, that:

- (1) In General. - The Commission shall conduct a single adjudicatory hearing on the record with regard to the licensing of the construction and operation of a uranium enrichment facility....
- (2) Timing. - Such hearing shall be completed and a decision issued before the issuance of a license for such construction and operation.

Source: 42 U.S.C. 2243(b)(1) and (2) (2006).

While Section 193 requires a hearing and issuance of a license before uranium enrichment facility construction activities can commence, the AEA does not define the meaning or scope of the term "construction."

As discussed in the Statements of Consideration accompanying the rule changes for 10 CFR 50 licenses, "the term construction is not defined anywhere in the AEA or in the legislative history of the AEA." Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register. 57,416, 57,425 (Oct. 9, 2007). The Commission also stated that "[i]nstead of expressly defining the term in the AEA, Congress entrusted the [NRC] with the responsibility of determining what activities constitute construction." Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,427.

The NRC has defined the term in its regulations in varying ways over the years and has most recently narrowed the definition of "construction" under 10 CFR 50. In promulgating the new definition of work that can be performed without any prior NRC approval under 10 CFR 50, the Commission revised its view of its AEA-derived jurisdiction over certain activities. Specifically, the Commission concluded that its jurisdiction does not extend to site activities that lack a nexus to radiological health and safety or common defense and security. Moreover, the Commission concluded that the National Environmental Policy Act of 1969 (NEPA) cannot be construed to

expand the Commission's authority over such activities. In fact, in adopting the 10 CFR 50 rule changes, the Commission stated:

"The NRC does not believe that the NRC's proposed redefinition of "construction" constitutes unlawful "segmentation" which results in non-compliance with NEPA... . NRC's redefinition reflects its reconsideration of the proper regulatory jurisdiction of the agency, and properly divides what was considered a single Federal action into private action for which the NRC has no statutory basis for regulation, and the Federal action (licensing of construction activities with a reasonable nexus to radiological health and safety or common defense and security, for which no other regulatory approach is acceptable) which will require compliance with NEPA."

"The NRC does not possess statutory authority to regulate activities that do not have an impact upon radiological health and safety or common defense and security... "). Thus, the NRC has expressly acknowledged that it lacks regulatory jurisdiction to license or circumscribe the "private" activities that are the subject of this exemption request. Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,420.

Accordingly, because there is no statutory prohibition on the requested exemption (and indeed not granting the exemption would result in the NRC licensing activities beyond its jurisdiction), it is authorized by law and should be granted.

The Requested Exemption Will Not Endanger Life or Property or the Common Defense and Security.

The justification for the AES exemption request is essentially the same as that proffered by GE-Hitachi Global Laser Enrichment LLC in their December 8, 2008 (Ref. 4) exemption request.

Section 70.4 currently states that:

"Commencement of construction means any clearing of land, excavation, or other substantial action that would adversely affect the natural environment of a site but does not include changes desirable for the temporary use of the land for public recreational uses, necessary borings to determine site characteristics or other preconstruction monitoring to establish background information related to the suitability of a site or to the protection of environmental values."

AES is requesting an exemption from this provision and from 10 CFR 70.23(a)(7), to the extent required, that parallels the definition of activities excluded from construction as defined in 10 CFR 50.10(a)(2) and 10 CFR 51.4(2) and stated below:

- "(i) Changes for temporary use of the land for public recreational purposes;
- (ii) Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;

- (iii) Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other environmental mitigation measures, and construction of temporary roads and borrow areas;
- (iv) Erection of fences and other access control measures;
- (v) Excavation;
- (vi) Erection of support buildings (such as, construction equipment storage sheds, warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and office buildings) for use in connection with the construction of the facility;
- (vii) Building of service facilities, such as paved roads, parking lots, railroad spurs, exterior utility and lighting systems, potable water systems, sanitary sewerage treatment facilities, and transmission lines; and
- (viii) Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility;
- (ix) Manufacture of a nuclear power reactor under a manufacturing license under subpart F of part 52 of this chapter to be installed at the proposed site and to be part of the proposed facility; or
- (x) With respect to production or utilization facilities, other than testing facilities and nuclear power plants, required to be licensed under Section 104.a or Section 104.c of the Act, the erection of buildings which will be used for activities other than operation of a facility and which may also be used to house a facility (e.g., the construction of a college laboratory building with space for installation of a training reactor)."

The items excluded from 10 CFR 50.10(a)(4) and 10 CFR 51.4(2) are stated in their entirety. Items (ix) and (x) are not applicable to the AES EREF. In addition, item (ii) is addressed in 10 CFR 70.4. AES does not anticipate any activities associated with item (i) above.

The exemption request would permit AES to perform activities prior to receipt of the Materials License that are excluded from the definition of construction in 10 CFR 50.10(a)(4) and 10 CFR 51.4(2) as quoted above. The exemption request would permit AES to perform the activities defined below prior to receipt of the Materials License or completion of the NRC environmental review. However, this exemption request addresses those items that are not considered construction in accordance with the definition of construction described above, and should not be construed to be limited to the actions specified below:

- Clearing the site
- Site grading and erosion control
- Excavating the site including rock blasting and removal
- Installing parking areas
- Constructing the storm water detention pond

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- Constructing highway access and site roadways
- Installing utilities (e.g., temporary and permanent power) and storage tanks
- Installing fences for investment protection (not used to implement the Physical Security Plan)
- Installing construction buildings, offices (including construction trailers), warehouses and guardhouses.

The context in which the 10 CFR 50 rule was developed is limited to prospective nuclear power plants. The rulemaking associated with this regulation simply did not contemplate or address modifications to 10 CFR 70 that would benefit materials licensees. Without apparent intent to do so, the result of the rulemaking was to create an inconsistency between the NRC's definition of "commencement of construction," as that term applies to reactor and materials licensees, notwithstanding the fact that the legal justification underlying the Commission's proposed redefinition of construction applies equally well to facilities licensed under 10 CFR 70. Because the definition of "commencement of construction" is virtually identical in 10 CFR 50 and 10 CFR 70, and because these provisions governing construction activities serve the same purpose, the same logic used by the Commission in the recent change to 10 CFR 50 should be applied to 10 CFR 70 in order to ensure consistency with regard to the scope of the Commission's jurisdiction.

Because the Commission has already concluded that the above activities have no nexus to radiological health and safety or the common defense and security in the context of a 10 CFR 50 facility and the GE-Hitachi Global Laser Enrichment LLC facility, it is clear that granting an exemption to allow the conduct of such activities at the EREF site would not endanger life or property or the common defense and security.

The NRC's 10 CFR 50 rulemaking made it clear that, under NEPA, pre-construction activities "will be considered in the cumulative impacts analysis" in the EIS. Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,420. AES' Environmental Report addresses the impacts of the planned pre-construction activities at the EREF site and those impacts will be evaluated as part of the overall EIS prepared by the NRC for the facility.

Following NRC approval of the exemption request, AES will supplement its Environmental Report to distinguish between the environmental impacts of the construction activities covered by the NRC approved exemption and construction activities which will not be undertaken until after issuance of a license by the NRC. This supplement will facilitate the NRC staff's separation of the environmental impacts of construction activities covered by the NRC approved exemption and construction activities undertaken after an NRC license is issued to be consistent with the ESP/COL-ISG-004, "Interim Staff Guidance on the Definition of Construction and on Limited Work Authorizations (LWA)" (Ref. 5).

The activities encompassed by the exemption request bear no more nexus to radiological health and safety or the common defense and security for the EREF than they do for a 10 CFR 50 facility or the GE-Hitachi Global Laser Enrichment LLC facility.

On May 8, 2009, the NRC's approval of the same exemption request for GE-Hitachi Global Laser Enrichment, stated:

"NRC staff also agrees that applying the same definition of construction authorized for nuclear power plants, under 10 CFR 50, will not endanger life or property or common defense and security. Under this definition, the only construction permitted to take place are those facilities and activities that fall outside NRC's jurisdiction and are not security- or safety-related."

"NRC's rulemaking amending the definition of construction in 10 CFR Part 50 made conforming changes to the definition of construction in 10 CFR Part 51, which governs NRC's implementation of the National Environmental Policy Act of 1969, as amended. Because granting the exemption is consistent with the definition of construction in 10 CFR Part 51, NRC staff finds that no environmental review of the exemption request is required."

The Requested Exemption Is in the Public Interest

The justification for the AES exemption request is essentially the same as that proffered by GE-Hitachi Global Laser Enrichment LLC in their December 8, 2008 (Ref. 4) exemption request. Finally, the requested exemption is in the public interest. In promulgating the changes to 10 CFR 50, the NRC considered a wide range of comments both in favor of, and opposed to, its proposed regulatory changes. Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,417-25. The NRC noted that neither the EPA or CEQ objected to the rule changes. Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,418. It also noted that power reactor "industry stakeholders ... stated that the business environment, today and in the foreseeable future, requires that new plants applicants minimize the time interval between a decision to proceed with ... construction ... and the start of commercial operation." Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,426. The NRC "agree[d] that the agency's regulatory processes should be revised and optimized to ensure that these stakeholders' needs are met." Source: Limited Work Authorizations for Nuclear Power Plants, 72 Federal Register at 57,426. Comparable considerations apply here.

Construction and operation of the EREF will help achieve an important national objective of national energy security policy long recognized by Congress, the Department of Energy, and other federal agencies. That objective is to assure the availability of diverse *domestic* sources of enriched uranium, in order to lessen dependence on foreign sources and to increase security of supply, through the use of more advanced and energy-efficient technologies than are currently available in the United States. The NRC staff explicitly recognized this important national policy objective in its FEISs for the National Enrichment Facility (NEF) (Ref. 6) and the American Centrifuge Plant (ACP) (Ref. 7) licensing actions, as did the Licensing Board and the Commission in related adjudicatory decisions (Ref. 8).

The industry has previously conveyed to the NRC the importance of having multiple domestic enrichment facilities - owned by different entities and deploying different enrichment technologies - assuring a diverse and reliable fuel supply (Ref. 9). The need for prompt deployment of additional domestic enrichment capacity is critical given current projections of supply and demand, and the clear need to expand the nation's nuclear infrastructure to accommodate numerous planned new U.S. reactors. Market forecasts indicate that U.S. and global enrichment requirements and base supply will be in close balance after 2010, with a clear risk of supply shortfall after 2013, even with increased Russian commercial sales to Europe,

allowance of some Russian commercial sales to the U.S.(Ref. 10), and the combined output of the proposed NEF and ACP at or above their proposed license capacities (Ref. 11). As a potential domestic provider of enrichment services, AES is seeking to deploy its enrichment technology on a commercial scale before that timeframe to facilitate its entry into the market and to help meet the growing demand for enrichment services. Granting the exemption will allow AES to complete certain, critical on-site activities in parallel with the licensing and hearing processes, and enable it to move to undertake actual construction activities promptly upon receipt of the necessary licensing approval.

On May 8, 2009, the NRC's approval of the same exemption request for GE-Hitachi, stated:

"NRC staff also agrees that the proposed exemption is in the public interest."

Thus, granting the exemption is clearly in the public interest.

Conclusion

For the reasons discussed above, AES' exemption request clearly satisfies the standards set forth in 10 CFR 70.17(a). Accordingly, AES respectfully requests that the exemption be granted.

References:

1. S. Shakir (AES) Letter to the U.S. Nuclear Regulatory Commission, Application for a Uranium Enrichment Facility License Under 10 CFR 70, "Domestic Licensing of Special Nuclear Material," dated December 30, 2008.
2. S. Shakir (AES) Letter to the U.S. Nuclear Regulatory Commission, Revision 1 to License Application for the Eagle Rock Enrichment Facility, dated April 23, 2009.
3. D. Dorman (NRC) Letter to A. Kennedy (GE-Hitachi Global Laser Enrichment LLC), Approval of GE-Hitachi Exemption Request related to Commencement of Construction, dated May 8, 2009.
4. T. Orr (GE-Hitachi Global Laser Enrichment) Letter to the U.S. Nuclear Regulatory Commission, GE-Hitachi Global Laser Enrichment LLC Request for Exemption from 10 CFR 70.4 and 70.23(a)(7) Requirements Governing "Commencement of Construction," dated December 8, 2008.
5. W. Burton (NRC) Memorandum to E. Hackett (NRC), Transmittal of Final Interim Staff Guidance – Notice of Availability of the Final Interim Staff Guidance ESP/COL-ISG-004 on the Limited Work Authorization, dated February 23, 2009.
6. NUREG-1790, Vol. 1, Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico, at 1-2 (June 2005).
7. NUREG- 1834, Environmental Impact Statement for the Proposed American Centrifuge Plant in Piketon, Ohio, Vol. 1, at 1-5 to -6 (Apr. 2006).
8. Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-05-13, 61 NRC 385, 442, aff'd, CLI-05-28, 62 NRC 721,726 (2005).
9. Letter from J. O'Neill and C. Peterson, Shaw Pittman, L.L.P. to M. Lesar, NRC (Nov. 13, 2002) *available at* ADAMS Accession No. ML023250521.
10. *For example*, U.S. Department of Commerce, Office of Public Affairs, Press Release, "United States and Russian Uranium Agreement Reached" (Feb. 1, 2008) (announcing that the U.S. and Russia have signed a long-term suspension agreement governing trade in nuclear fuel), *available at* <http://www.commerce.gov/NewsRoom>.

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11. NUREG-1834 at 1-4 to -5 (including various enrichment demand and supply forecasts cited therein); James C. Cornell, President and CEO, NUKEM, Inc., Global Nuclear Renaissance Summit, Washington, DC: Can Supply Catch Up to High Case Demand? (Dec. 5, 2006) (Presentation materials available at http://www.nukeminc.com/pdfs/JAMES_C_CORNELL_POWER_POINT_FOR_NUCLEAR%20SUMMIT.pdf and http://www.nukeminc.com/pdfs/JAMES_C_CORNELL_SPEECH_TEXT_FOR_NUCLEAR_SUMMIT.pdf (accessed October 16, 2008)).