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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
Louisiana Energy Services, L.P.	)	Docket No. 70-3070-ML
	)	
(Claiborne Enrichment Center)	)	
	)	

NRC STAFF'S RESPONSE TO
"FIRST SUPPLEMENT TO CONTENTIONS ON THE
CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATION
FOR THE CLAIBORNE ENRICHMENT CENTER"
FILED BY CITIZENS AGAINST NUCLEAR TRASH

INTRODUCTION

On January 18, 1994, Intervenor Citizens Against Nuclear Trash ("CANT") filed its "First Supplement to Contentions on the Construction Permit/Operating License Application for the Claiborne Enrichment Center" ("Supplemental Contentions"), containing CANT's Supplemental Contentions T, U, and W. On January 31, 1994, Applicant Louisiana Energy Services ("LES") filed its answer to CANT's first supplement.[1] Pursuant to 10 C.F.R. § 2.714(c), the NRC staff ("Staff") hereby files its answer to CANT's Supplemental Contentions.

[1] "Answer of LES to CANT's Contentions T, U And W," ("Applicant's Answer" or "App. Ans."), dated January 31, 1994.

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BACKGROUND

On January 31, 1991, LES filed an application for a license to construct and operate the Claiborne Enrichment Center ("CEC"), a uranium enrichment facility to be constructed near Homer, Louisiana. On May 21, 1991, the Commission published a notice in the *Federcl Register*, whereby it noted, *inter alia*, that it had received the application and provided a Notice of Hearing and Commission Order with respect thereto.[2] The Notice further provided that, pursuant to statutory enactments,[3] a single adjudicatory hearing would be held to consider the licensing of the facility, in accordance with the rules of procedure set forth in 10 C.F.R. Part 2, Subpart G (and, to the extent that classified information becomes involved, Subpart I).[4] On May 23, 1991, an Atomic Safety and Licensing Board was established to preside over the proceeding; and on June 20, 1991, a petition for leave to intervene was filed by CANT.[5]

On July 16, 1991, the Licensing Board issued a Memorandum and Order in which it, *inter alia*, granted CANT's petition and permitted it to file contentions. CANT filed its contentions on October 3, 1991. By Memorandum and Order of December 19, 1991, the

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[2] "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; Louisiana Energy Services, L.P.; Claiborne Enrichment Center," 56 Fed. Reg. 23,310 (May 21, 1991).

[3] *See* Section 193 of the Atomic Energy Act of 1954, as amended, as amended by the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Pub. L. 101-575), 42 U.S.C. §§ 2243(b) (1990).

[4] 56 Fed. Reg. 23,310-311 (May 21, 1991).

[5] In addition, on June 27, 1991, the State of Louisiana, Department of Environmental Quality ("DEQ"), filed a request for leave to participate as an interested state agency under the provisions of 10 C.F.R. § 2.715(c); that request was granted by the Licensing Board's Memorandum and Order of July 16, 1991, at 6-7. No contentions have been filed by the Louisiana DEQ.

Licensing Board admitted Contentions B, H, I, J, K, L, M, and Q, and admitted CANT as a party to the proceeding.[6] On November 24, 1993, the Staff announced the availability of the Draft Environmental Impact Statement ("DEIS") (NUREG-1484) regarding the proposed construction and operation of the CEC.[7]

DISCUSSION

I. Principles Governing the Admission of Contentions.

It is well established that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. *See, e.g., Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), *aff'd sub nom. BPI v. Atomic Energy Commission*, 502 F. 2d 424, 429 (D.C. Cir. 1974).

Pursuant to 10 C.F.R. § 2.714(b)(1), a petitioner (or intervenor) is required to file a "list of the contentions which petitioner seeks to have litigated in the hearing." The contentions must satisfy the requirements of 10 C.F.R. § 2.714(b)(2), which provides that each contention "must

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[6] Limitations on the admitted contentions are described in the Licensing Board's Order. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332 (1991).

[7] 58 Fed. Reg. 62,148 (November 1993).

consist of a specific statement of the issue of law or fact to be raised or controverted." In addition, the rule requires that the following information must be provided for each contention:

> (i) A brief explanation of the bases of the contention.
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> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
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> (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

See generally, Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991).

Section 2.714 was amended by the Commission on August 11, 1989. 54 Fed. Reg. 33,168 (Aug. 11, 1989), as corrected, 54 Fed. Reg. 39,728 (Sept. 28, 1989). Under the revised rule, an intervenor must provide a "clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention." *Palo Verde, supra,* 34 NRC at 155-56. The Commission has summarized the revised rule as follows:

> These sections demand that all Petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected.

Id. at 155; *see also* 54 Fed. Reg. at 33,168.

In accordance with these requirements, a Licensing Board must refuse to admit any contention (1) if the contention and supporting material fail to meet the requirements of 10 C.F.R. § 2.714(b), or (2) if the contention, should it be proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief. *See* 10 C.F.R. § 2.714(d)(2); *Shoreham*, *supra*, 34 NRC at 167. Further, if a contention fails to meet any one of the specific requirements of 10 C.F.R. § 2.714(b)(2)(i), (ii), and (iii), it must be rejected. *Palo Verde, supra,* CLI-91-12, 34 NRC at 155.

In this regard, it has been held that the purposes of the basis requirements of 10 C.F.R. § 2.714(b)(2) are (1) to assure that the contention in question raises a matter appropriate for adjudication in a particular proceeding, (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion, and (3) to put the other parties sufficiently on notice of the issues so that they know generally what they will have to defend against or oppose. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991); *Peach Bottom, supra,* 8 AEC at 20-21.

While the revised rule supersedes, in part, the prior standards governing the admissibility of a contention, those standards otherwise remain in effect. Therefore, prior Commission case law, to the extent that it does not conflict with the amendments, is applicable. *See Palo Verde,*

supra, 33 NRC at 400.[8] Thus, to the extent it has not been superseded, the *Peach Bottom* decision remains relevant -- and requires that a contention be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
>
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
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> (3) it is nothing more than a generalization regarding the Intervenor's view of what applicable policies ought to be;
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> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
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> (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21; *accord*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982).

Contentions filed later than fifteen days prior to the first prehearing conference may be accepted by the Licensing Board based upon a balancing of the five factors identified in 10 C.F.R. § 2.714(a)(i)-(v). 10 C.F.R. §2.714(b); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-89-91, 16 NRC 1364, 1366-67 (1982). These factors are:

> (i) Good cause, if any, for failure to file on time.
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> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
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> (iv) The extent to which the petitioner's interest will be represented by existing parties.

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[8] The Commission indicated that the 1989 amendments to 10 C.F.R. § 2.714, do not constitute a substantial departure from existing practice in licensing cases. 54 Fed. Reg. at 33,170-71.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

These five factors are not equally weighted, nor do all of them have to be evaluated favorably to the proponent of a late-filed contention in order for the contention to be accepted. Good cause for late filing has been described as the most significant. *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). Late-filed contentions filed on subsequent NRC environmental review documents are subject to the late-filed criteria in 10 C.F.R. § 2.714(a)(i)-(v). *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154 (1993). Further, late-filed contentions filed on subsequent NRC environmental review documents are also subject to prior Commission case law regarding late filed contentions, *e.g.*, *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983). 54 Fed. Reg. at 33,172.

II. The Admissibility of CANT's Supplemental Contentions.

CANT presents 3 late-filed contentions, numbered T, U, and W, which it seeks to litigate in this proceeding. The following discussion presents the Staff's views with respect to the admissibility of each of CANT's late-filed contentions in accordance with the above principles.

CONTENTION T. CEC Design Relies on Use of Illegal CFC.

> The design of the CEC is invalid because it relies for cooling purposes on the use of trichlorofluoromethane ($CFC1_3$) (also known as "Freon R-11" or "CFC-11"), an ozone-depleting chemical which the Environmental Protection Agency has banned after January 1, 1996. Thus, LES must either be barred from constructing the plant with the use of CFC-11 as a coolant or substitute a new, legal coolant for CFC-11 in the design of the plant. Any substitute coolant chosen by LES should be identified in an amended Final Safety Analysis Report ("FSAR"), with an explanation of how or whether the new coolant affects other factors in the plant's design, such an centrifuge design, calculations of expected uranium emissions, and the type of lubricants that must be used.

As the basis for Contention T, CANT asserts that coolant in a uranium enrichment plant serves the essential function of carrying away the heat generated within each enrichment centrifuge and that CFC-11 has been selected as the refrigerant at CEC. CANT asserts that EPA has accelerated the schedule for banning CFC-11 to January 1, 1996 and that the CEC cannot be licensed because its design and operation is based on the use of a substance that will be illegal before the plant begins operation. In its supporting basis, CANT further asserts that if LES chooses a substitute coolant, it should be required to amend its FSAR and explain any design changes required, and any changes in the uranium emissions from the plant, that may be necessary because of the use in the centrifuges of a refrigerant with different physical and chemical properties.

In support of its late filing of this contention, CANT relies on, among other things, the fact that EPA did not issue its public notice of the acceleration of the ban on CFC-11 until December 10, 1993.

The Staff opposes the admission of this contention. First, Contention T is not timely filed in that CANT has been on notice of LES's intention to substitute an alternative coolant for

chlorofluorocarbons (CFCs) prior to plant operation since the FSAR first issued. In its original FSAR issued on January 1, 1991, LES states, "[i]t is anticipated that before operation of the facility, a suitable substitute for CFCs, ... will be commercially available and could be used at the facility." (Emphasis added).[9] Thus, CANT has had notice since at least January 31, 1991, that LES anticipated that a substitute for the CFCs used in the design of the plant could be used before operation of the facility and is without good cause for filing this contention after the original deadline date for contentions. The late-filed contention should be rejected pursuant to 10 C.F.R. § 2.714(a)(1).[10]

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[9] This statement appears on the original page 2.1-11, of the FSAR, issued on January 31, 1991, and has remained unchanged through the current revision of the FSAR. The Clean Air Act Amendments of 1990, Pub.L. 101-549, ban the production of class I substances, including CFC-11, by January 1, 2000. 42 U.S.C. § 7671c(b). As explained in Applicant's Answer, the effect of the EPA ban cited by CANT is to accelerate the Clean Air Act ban by four years. App. Ans. at 10.

[10] Of the five factors identified in 10 C.F.R.§ 2.714(a)(1) for assessing the admissibility of late-filed contentions, the preeminent factor has long been recognized as factor (i), good cause for failure to file on time. Although the regulations call for a balancing test, it has been held that where a petitioner or intervenor fails to show good cause for filing a late petition or contention, the other four factors must weigh heavily in its favor in order for a petition or contention to be granted. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983), *citing Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982). Of the remaining four, factors (ii) and (iv) are accorded less weight than factors (iii) and (v). *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245(1986). In this case, CANT has not shown why the information that was available much earlier in the FSAR regarding the substitution of CFCs could not have been acted on previously. Conceding that factors (ii) and (iv) may weigh in favor of admitting the contention, factors (i), (iii) and (v) weigh in favor of rejecting the contention. As discussed in the Staff's Response *infra*, CANT's showing in support of factor (iii), regarding the illegality of using CFC-11 after January 1, 1996, is without a factual basis and CANT's assertions in support of factor (v) that a substitute coolant may cause a change in the design of the plant or the amount of emissions to the environment is vague and nonspecific.

Second, the Staff opposes the admission of this contention on the grounds that it appears to be premised on a misunderstanding of the EPA's Notice of Final Rulemaking, Protection of Stratospheric Ozone, 58 Fed. Reg. 65,018 (December 10, 1993). The Environmental Protection Agency rule cited by CANT does not ban the "use" of CFC-11 after January 1, 1996, as CANT asserts. The EPA rule cited by CANT merely accelerates the date after which the "production" of certain CFCs will be banned.[11] The contention that the CEC design relies on the "use" of CFC-11 which will be illegal after January 1, 1996, therefore, is without a factual basis. As such, it should be rejected under 10 C.F.R. 2.714(b)(2)(ii).

Third, the Staff opposes the admission of this contention on the grounds that it appears to be premised on a misunderstanding of how the plant's systems are to operate. The basis for CANT's Contention T indicates that the CFC refrigerant is used as a coolant in the CEC centrifuges. Supplemental Contentions at 3. The description of the CEC utility and support systems in the FSAR shows that CANT's basis for the contention is factually incorrect regarding the use of CFCs at the CEC. The design of the CEC is such that CFC-11 is not used in the centrifuges. Water from the Machine Cooling Water System, not CFC-11, is the heat transfer fluid used in the centrifuge jacket coils to control the temperature within a specific range in order to maximize isotope separation efficiency. *See* FSAR § 6.4.6.2. Although CFC refrigerant is used in the Main Plant Cooling Water System to cool the water from the Machine Cooling Water System (*See* FSAR § 6.4.6.1.1), the water from the Machine Cooling Water System is pumped to the centrifuges in closed cooling loops. *See* FSAR § 6.4.6.2.1. Thus, there is no direct interface between a cooling system using CFC refrigerant and the centrifuges.

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[11] *See* 58 Fed. Reg. 65,018, 65,064 (December 10, 1993); App. Ans. at 13, n.5.

See also App. Ans. at 18. The basis that a substitute for CFC coolant could affect centrifuge design or emissions, therefore, is without factual support. As such, it should be rejected under 10 C.F.R. 2.714(b)(2)(ii).

Fourth, CANT's assertion that a substitute coolant may cause a change in the design of the plant or the amount of emissions to the environment is vague and nonspecific. CANT does not identify any specific mechanism whereby the properties of any potential substitutes could result in a change in plant design or in increased emissions. Accordingly, it should be rejected pursuant to 10 C.F.R. 2.714(b)(2).

> CONTENTION U. The DEIS Is Inadequate Because the Nuclear Regulatory Commission Failed to Consult With Other Appropriate Federal Agencies Regarding the Proposed Project, as Required by NEPA.
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> In violation of the National Environmental Policy Act ("NEPA"), the NRC failed to consult other affected or interested federal agencies in preparing the DEIS. Accordingly, the DEIS should be withdrawn, submitted to all appropriate agencies for consultation, and resubmitted to the public for comment at the appropriate time, before further action is taken in the pending licensing proceeding.

In Contention U, CANT challenges the adequacy of the DEIS, based on the alleged failure of the Staff to consult with other appropriate Federal agencies.

In support of its late filing of this contention, CANT relies on, among other things, the fact that it filed its contention within a very short time of having received the DEIS.

The Staff opposes the admission of this contention. First, the Staff has complied with the Commission's regulations in 10 C.F.R. Part 51 which implement NEPA requirements for the NRC. The Notice of Intent published in compliance with the requirements of 10 C.F.R. § 51.26 invited other Federal agencies to submit comments regarding, and participate in, the EIS

scoping process as required by 10 C.F.R. § 51.28. *See* 56 Fed. Reg. 29727 (June 28, 1991). Further, the Staff has complied with the requirements of 10 C.F.R. § 51.74 in providing the DEIS for comment to other Federal agencies, including those enumerated by CANT.[12] While CANT provides a lengthy recitation of potential "consultations" that other agencies might have provided, it nowhere asserts that the Staff has failed to comply with the Commission's regulations in seeking comments from other Federal agencies. Instead, CANT asserts, as a basis for the contention, that consultation should have taken a particular form.

There is no Commission regulatory requirement for the actions that CANT urges, and the contention should therefore be rejected under *Peach Bottom, supra,* 8 AEC at 20, as a challenge to the Commission's regulations or a mere generalization of CANT's view as to what Commission policies ought to be. A contention must be rejected if, among other things, "it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; [or] it is nothing more than a generalization regarding the Intervenor's view of what applicable policies ought to be." *Seabrook Station, supra,* 16 NRC at 1035, *citing Peach Bottom, supra,* 8 AEC at 20-21.

Second, even if Contention U were not an attack on the Commission's regulations, CANT is without good cause for filing late. CANT's reliance on receipt of the DEIS as a necessary prerequisite for identifying this contention is not supported by the facts. In November 1991, the Staff issued the Environmental Impact Statement Scoping Process Summary Report.

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[12] The Commission's regulations further contemplate that the DEIS is to contain an analysis of significant problems and objections raised by interested governmental entities and other persons (10 C.F.R. § 51.71(b)); that the Staff is to request comments on the DEIS (10 C.F.R. § 51.73); that the DEIS is to be distributed, *inter alia*, to the EPA and other Federal, state, and local agencies as appropriate (10 C.F.R. § 51.74(a)); and that the FEIS is to include responses to any comments received on the DEIS (10 C.F.R. § 51.91(a)).

In that document the Staff summarized all the comments received, including any from interested Federal agencies it had invited to participate in the scoping, and catalogued the issues identified in the scoping process. The Summary Report was sent to CANT, as well as to other participants at the scoping meeting, and was placed in the public document room shortly after its issuance in November 1991.[13] Thus, CANT has had notice since availability of the Summary Report of the degree of the response of other Federal agencies to the Staff invitation to participate. CANT, therefore, is without good cause for filing this contention after the original deadline date for contentions and the late-filed contention should be rejected pursuant to 10 C.F.R. § 2.714(a)(1).[14]

> CONTENTION W. The DEIS Is Inadequate Because It Fails to Address the Impacts, Costs, and Benefits of Ultimate Disposal of DUF6 Tails, or the Cumulative and Generic Impacts of DUF6 Tails Disposal.
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> According to the DEIS, the 3,830 metric tons ("tonnes") of depleted uranium hexafluoride ("DUF6") tails produced annually by the CEC will be converted to triuranium oxide (U3O8). DEIS at 2-31. However, the DEIS contains no information whatsoever regarding the nature and environmental impacts of the process for converting DUF6 to U3O8, or the impacts of permanently disposing of these U3O8 tails. Given this utter lack of

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[13] *See* letter from Charles J. Haughney (NRC) to W. Howard Arnold (LES) (November 15, 1991).

[14] The relative weight to be accorded the five factors identified in 10 C.F.R.§ 2.714(a)(1) for assessing the admissibility of late-filed contentions is discussed *supra* note 10. For Contention U, factor (i) must weigh in favor of rejection in that CANT has not shown why the information that was available much earlier in the Environmental Impact Statement Scoping Process Summary Report (November 1991) regarding the participation of other Federal agencies could not have been acted on previously. Even conceding that factors (ii) and (iv) might weigh in favor of admitting the contention, factors (iii) and (v) must weigh in favor of rejecting the contention because the question of law CANT asserts in support of factors (iii) and (v), is a challenge to the Commission's regulations which, as discussed in the Staff's Response *supra*, must be rejected.

> information, it is also impossible to determine from the DEIS the basis for the NRC's estimate that tails disposal will cost $12.6 million/year. DEIS at 2-31. In any event, the NRC does not even appear to have factored the $12.6 million estimate into its cost-benefit analysis. *See* DEIS § 4.5.
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> Moreover, the NRC has failed to evaluate the cumulative and generic impacts of adding to the huge (and growing) national inventory of DUF6 tails, for which the U.S. government has yet to identify an acceptable means of disposal. The NRC, in consultation with the Department of Energy, should be required to evaluate these impacts before LES can be licensed to produce more DUF6.

As the basis for Contention W, CANT asserts that NEPA requires an EIS to be comprehensive and assess all reasonably foreseeable, cumulative impacts of a proposed project and that the DEIS contains no information about the environmental impacts associated with conversion of DUF6 to U3O8 and with the long term storage of U3O8. CANT also asserts that the DEIS fails to address the cumulative or generic impacts of LES's proposal to add over 10,000 tonnes of DUF6 to the existing national inventory from other uranium enrichment plants.

In support of its late filing of this contention, CANT relies on 10 C.F.R. § 2.714(b)(iii) which provides, in pertinent part, that:

> On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

CANT asserts that "the DEIS is the first time that NRC or LES has specifically identified conversion of DUF6 to U3O8 as the chosen means for disposing of the DUF6 tails at the CEC." Supplemental Contentions at 21 (footnote omitted). CANT claims, therefore, that the DEIS differs significantly from the data and conclusions in the Applicant's environmental report.

CANT's basis for the contention is in effect a comment on the DEIS that the environmental impacts of DUF6 tails disposition and disposal have not been addressed in the DEIS, and as such, the comment will assist the Staff in preparation of the Final Environmental Impact Statement ("FEIS").[15] While the Staff intends to respond to CANT's assertions in the FEIS, that alone does not provide adequate basis for the acceptance of the contention.

Notwithstanding the appropriateness of this issue as a comment on the DEIS, the Staff opposes its admission as a contention. As CANT correctly states, on issues arising under NEPA, the petitioner shall file contentions based on the applicant's environmental report and can amend those contentions or file new contentions based on the DEIS, only if there are data or conclusions in the DEIS or FEIS that "differ significantly from the data or conclusions in the applicant's document." 10 C.F.R. § 2.714(b)(iii). Contrary to CANT's assertion, the information in the DEIS does not differ significantly from the information contained in the Applicant's environmental report.

In support of its assertion, CANT refers to the Applicant's discussion of tails disposition located at page 4.4-11 of its Environmental Report and characterizes the description therein as "a potential solution" that was "never specifically identified to the public as LES' proposal." *Id.* at 22, n.12. CANT fails to note that at page 4.4-16, the Applicant's environmental report states clearly that the costs of tails disposal "are based on converting DUF6 to U3O8 with subsequent disposal in a facility under cognizance of the NRC." Environmental Report at 4.4-16

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[15] There is an opportunity to address the impact of the DUF6 tails disposition through preparation of the Final Environmental Impact Statement (FEIS). The Commission's ultimate NEPA judgments with respect to the CEC will be made on the basis of the entire record before the Licensing Board. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 195-97 (1975).

(October 1993). This data regarding tails disposal first appeared in the tenth revision to the environmental report, dated May 1993.[16] Thus, contrary to CANT's assertion, it has been on notice since at least the time of the May 1993 revision to the Applicant's environmental report, that LES had specifically identified conversion of DUF6 to U3O8 as the chosen means for disposing of the DUF6 tails at the CEC.

An intervenor must file contentions on the basis of an applicant's environmental report, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in that Staff environmental document. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, slip op. at 85-86 (November 30, 1993). No such showing has been made with Contention W. The information on page 2-31 of the DEIS does not contain any data or conclusions regarding conversion and disposal of DUF6 that differ significantly from the data or conclusions that have been in the Licensee's environmental report since May 1993. Accordingly, there is no good cause for CANT's failure to challenge the data and conclusions in the Licensee's environmental report earlier in this proceeding. The late-filed contention should be rejected pursuant to 10 C.F.R. § 2.714(a)(1).[17]

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[16] Letter from Peter G. LeRoy (LES) to John W.N. Hickey (NRC) (May 10, 1993) forwarding, *inter alia*, the tenth revision to the environmental report.

[17] The Commission has held that:

> Although information regarding the difference between the applicant's environmental report and the staff's environmental review documents is relevant to the "good-cause" factor, section 2.714(b)(2)(iii) neither adds nor removes from consideration any factor to be balanced in the determination of the admissibility of a late-filed contention pursuant to section 2.714(a).

(continued...)

The Staff further opposes as a basis for this contention the estimates of tails disposal costs. LES's provision for financial assurance for the CEC's tails disposition has already been admitted as part of Contention B, Decommissioning Plan Deficiencies. The first basis of Contention B, admitted by the Licensing Board, among other things, asserts that because LES does not have a plan for the offsite disposal of tails, there is no realistic basis for the estimated tails disposal costs. LBP-91-41, *supra*, 34 NRC at 336-37. Thus, there is no reason to admit this issue for litigation as a separate contention.

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[17](...continued)
Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362.

The relative weight to be accorded the five factors identified in 10 C.F.R.§ 2.714(a)(1) for assessing the admissibility of late-filed contentions is discussed *supra* note 10. Regarding factor(i), CANT has not shown why the information that was available much earlier in the environmental report regarding the conversion and disposal of DUF6 could not have been acted on previously. Conceding that factors (ii) and (iv) may weigh in favor of admitting the contention, factors (i), (iii) and (v) weigh in favor of rejecting the contention. CANT's showing in support of factor (iii), as indicated in its expert witness' affidavit, is that the witness intends to testify regarding the inadequacy of the DEIS, a matter which will not be at issue because the FEIS, not the DEIS, will be the basis for the Staff's environmental findings, and CANT's assertion in support of factor (v) is that the factual matters of concern are within the scope of an already admitted contention.

CONCLUSION

For the reasons discussed above, the Staff submits that CANT's Contentions T, U, and W should be rejected.

Respectfully submitted,

Eugene Holler
Counsel for NRC Staff

Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of February, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3070-ML
	)	
(Claiborne Enrichment Center)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'FIRST SUPPLEMENT TO CONTENTIONS ON THE CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATION FOR THE CLAIBORNE ENRICHMENT CENTER' FILED BY CITIZENS AGAINST NUCLEAR TRASH" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of February, 1994:

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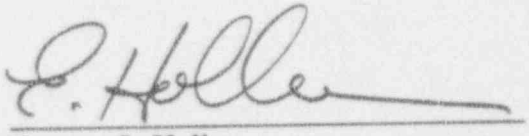

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