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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	)	Docket No. 70-3070-ML
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	ASLBP No. 91-641-02-ML
	)	
Claiborne Enrichment Center	)	(Special Nuclear Materials License)
	)	

REPLY BY CITIZENS AGAINST NUCLEAR TRASH ("CANT") TO THE ANSWERS FILED BY APPLICANT AND STAFF OPPOSING CANT'S MOTION TO CONSOLIDATE FOR HEARING CONTENTION B (DECOMMISSIONING FUNDING PLAN DEFICIENCIES) AND CONTENTION Q (FINANCIAL QUALIFICATIONS) WITH NEPA ISSUES

I.

INTRODUCTION

Intervenor, Citizens Against Nuclear Trash ("CANT"), has moved to consolidate for hearing Contention B (Decommissioning Funding Plan Deficiencies) and Contention Q (Financial Qualifications), with Contention J (Inadequate Assessment of Costs Under NEPA). Presently, Contentions B and Q are to be heard as part of the technical hearing scheduled to commence on July 18, 1994. Contention J is be heard in the environmental hearing to be scheduled for 1995.

As discussed in CANT's original motion, because all of these contentions raise over-lapping issues, their litigation will involve testimony on the same subjects by the same experts. Thus, in order to avoid conflicting testimony and res judicata problems, and in order to conserve CANT's resources, litigation of these issues should be consolidated.

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Neither Applicant nor Staff have sufficiently countered CANT's arguments for consolidation. In fact, the Staff acknowledges the overlapping nature of Contention B and Contention J (see Staff Answer at 7)[1], and concedes that CANT may well have to call its witnesses to testify twice if there is no consolidation (see Staff Answer at 8). And contrary to what Applicant suggests, it is obvious that there will be confusion, delay, and inefficiency if there is no consolidation.

Without a consolidation, the same witnesses will be called to Louisiana twice to testify on overlapping issues, which will be an incredible strain on CANT's resources. As discussed more fully below, without a consolidation significant delay is sure to ensue as the parties engage in arguments over res judicata issues at every turn, and the Board will be required to sift through the record from the first hearing to resolve these disputes. Applicant fails to address the fact that the minimal delay that might ensue as a consequence of the Board simply hearing two contentions at the second, rather than the first hearing, would more than compensate for the significant delay that is virtually guaranteed to ensue if there is no consolidation.[2]

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[1] "NRC Staff's Answer Opposing Motion By CANT to Consolidate For Hearing Contention B and Contention Q with NEPA Issues" filed on May 11, 1994.

[2] With respect to the issue of delay, it should be noted that Applicant, not CANT, has been the chief architect of delay throughout these proceedings, frequently taking close to a year or more to provide requested information. (See, e.g., Applicant's March 31, 1992 response to the Staff's March 21, 1991 Request For Additional Information.)

In short, it would be far more efficient, less confusing, and would ultimately entail less delay to consolidate for hearing Contentions B and Q with the NEPA issues. Scheduling is a matter of Licensing Board discretion, and in the instant case it is appropriate for the Board to exercise its discretion and grant CANT's motion for consolidation. See, e.g., Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179 (1978).

II.

DISCUSSION

A. Contentions B, Q, and J overlap.

CANT's Contention B, as admitted and characterized by the Licensing Board, charges that LES's decommissioning funding plan "does not contain reasonable estimates for decommissioning nor does it adequately describe the underlying decommissioning strategy." Memorandum and Order (Ruling on Contentions) at 10 (December 19, 1991); Citizens Against Nuclear Trash's Contentions on the Construction Permit/Operating Licensing Application for the Claiborne Enrichment center at 3 (October 1991).

CANT's Contention Q, as admitted by the Licensing Board, asserts that LES "has not demonstrated that it is financially qualified to build and operate the CEC" because LES's partners are

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Furthermore, Applicant's suggestion that CANT should have filed this motion for consolidation two years ago is totally without merit. (See Applicant's Answer at 4.) Two years ago CANT had not developed its case, did not know who its witnesses would be, and did not know which issues would survive summary disposition motions -- and thus could not have foreseen the logic of requesting this consolidation.

not fully committed to fund the building and operation of the plant. Id. at 49-50.

CANT's Contention J asserts that Louisiana Energy Services' ("LES") Environmental Report ("ER"):

> does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the CEC. Moreover, the benefit-cost analysis fails to demonstrate that there is a need for the facility. . . . On the whole, the costs of the project far out weigh the benefits of the proposed action.

CANT Contentions at 35. The bases for this contention include the facts that LES has failed to provide sufficient data regarding its decommissioning cost estimates, and that there is no demonstrated need for the facility.

CANT's arguments as set forth in Contentions B, Q, and J should be litigated together because they overlap and will involve the presenting of evidence on many of the same factual issues.

For instance -- and contrary to Applicant's assertions (see Applicant's Answer at 10-12) -- Contentions J and Q overlap in the factual issues that they raise. Both of these contentions involve the factual question of whether there is a market or need for the enriched uranium to be produced by the CEC.[3] Need, financial

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[3] LES's statement that "[a]s a general matter, Applicant is unaware of a requirement for an analysis of the 'need for the facility' under NEPA" is curious. Logic dictates that the reasoning from cases finding such a requirement for nuclear power plants be extended to uranium enrichment facilities as well. Those cases have held that the principle "benefit" of a facility for purposes of NEPA is the service the facility will offer. Thus, whether the service is "power" or "enriched uranium" there must be a demonstrated need for the service for the project to pass muster under NEPA's cost-benefit analysis.

qualifications, and safety are all related. The purpose of the financial qualifications requirement is safety of operation of the proposed facility. The operation can only be viable if investors are fully committed to the project for the long term. But if there is no need for the facility, the project will not attract and retain the investors it needs throughout the life of the facility.

As Applicant admits, "[u]nder Contencion Q Applicant must show that it is able to fund the building and operation of the facility . . . ." (See Applicant's Answer at 12.) However, without a demonstrated need for the proposed facility, it is specious to assert that financial institutions would fund the proposal in the first place, and further, that LES could attract and retain

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> The courts have found an additional requirement for a cost-benefit analysis in which the need for the proposed action, the satisfaction of which is the benefit side of the scale, is weighed against its environmental costs.

United States Energy Research and Development Administration Project Management Corporation Tennessee Valley Authority, (Clinch River Breeder Reactor Plant), CLI-76-13, 4 N.R.C. 67, 76 (1976) (emphasis added). See also, Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (C.A.D.C. 1971). The NRC has repeatedly held that an applicant must demonstrate "a genuine need" for its facility and that this need determination is an "essential element" in approval of a license. Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 352 (1975). See also, Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 90 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-422, 6 NRC 33, 90 (1977); United States Energy Research and Development Administration Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 77 (1976); Duke Power Company (Catawba Nuclear Station Units 1 and 2), ALAB-355, 4 NRC 397, 405 (1976); and Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, RAI-74-2, 159, 175 (1974).

investors (new partners) to replace the current LES partners who have admitted that they do not intend to remain in the partnership.

Indeed, LES admits that it cannot identify a single lending bank that is committed to funding the Claiborne Enrichment Center ("CEC"), assumes that "the past relationship" of parent companies of the LES partners will somehow translate into funding for the CEC, acknowledges that new, as yet unidentified, investors may be required for the project, and admits that "specific sources of equity and debt" cannot be identified at this time.[4] When all of this uncertainty is then considered in light of the fact that there is no need for the facility, the alleged financial qualifications of LES entirely dissipate.

In short, LES's suggestion that financial information about "the applicant" is entirely separate from financial information about the "facility" is without merit. (See Applicant's Answer at 9.) The Staff's Safety Evaluation Report ("SER") clearly links financial issues pertaining to operation of the facility with financial issues pertaining to the applicant. The SER repeatedly discusses financial qualifications in terms of the "estimated market" for the CEC's enrichment services, and "expected revenues" to be generated by the CEC:

> The primary financial risk of the CEC project is the price in the domestic and international market for enrichment services . . . . the decision to continue will depend on a comparison of future incremental construction and O & M costs to the expected revenues generated from enrichment sales.

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[4] See "Applicant's Response to Intervenor's 3/24/94 Interrogatories" at 9-11.

SER at 13-4 and 13-5. Accordingly, the overlap between Contention J (which encompasses the need for and benefits of the facility) and Contention Q (financial qualifications) is significant and inextricable.[5]

Like Contention Q, Contention B also has significant overlap with Contention J, and in fact, Contention B is incorporated into Contention J as one of its bases (basis # 3). As asserted in Contention B, LES has not provided enough information on which a reasonable decommissioning cost estimate can be based. Thus, it is impossible to determine how much money LES should set aside for a decommissioning fund, as required by NRC decommissioning funding regulations. 10 C.F.R. § 70.25. LES's failure to provide adequate information on decommissioning costs is a factual issue which must

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[5] Aside from the fact that Contentions J and Q involve overlapping issues, it should also be noted that discovery on Financial Qualifications is ongoing, not "ended" as asserted by LES. See LES's Answer at 2. In fact, a motion to compel LES to respond to CANT's Contention Q interrogatories is currently pending. See "Motion by Citizens Against Nuclear Trash ("CANT") to Compel Louisiana Energy Services ("LES") to Respond to Interrogatories Q-4 and Q-5 of CANT's 3/24/94 Interrogatories" filed on May 2, 1994.

Furthermore, LES has only recently agreed to give CANT access to financial data under terms set forth in a protective order (approved by the Board and received by CANT on April 28, 1994) which will require CANT's witnesses to travel to a site of LES's choosing and take notes (not copy) such data, all of which will take considerable time.

Finally, LES's complaint about the timeliness of CANT's discovery is an unwarranted red herring. Discovery is untimely when it is sought outside the deadlines set by the Board. That has not happened in this case.

In short, it would be an undue hardship (if not an impossibility) for CANT to fully prepare its case on financial qualifications in time for the July 1994 hearing.

also be litigated in relation to Contention J, because without this information no meaningful assessment can be made of the costs and benefits of the operation, as required by NEPA.

LES asserts that CANT's answers to interrogatories somehow suggest that CANT does not consider Contentions B and J to be intertwined. See Applicant's Answer at 7. On the contrary, although CANT's answers indicate that Contentions B and J are based on separate legal grounds, these answers in no way deny that these contentions share much of the same factual basis. Even the Staff acknowledges this common ground. (See Staff's Answer at 7). In particular, both contentions challenge the adequacy of LES's decommissioning cost estimates. Thus, the overlap between these two contentions could not be more clear.

B. Consolidation of Contentions B, J, and Q would avoid res judicata problems and be far more efficient.

Because the factual issues raised by Contentions B, Q, and J, overlap significantly, CANT intends to use the same witnesses to testify regarding Contentions B and Q that it will use for several bases supporting Contention J.[6] For example, Dr. Arjun Makhijani of Takoma Park, Maryland will testify regarding tails disposal and decommissioning costs as they pertain to Contention B, and is also one of the witnesses preparing joint testimony to be filed in support of Contentions J and Q. Dr. Michael Sheehan of Scapoose, Oregon and Mr. David Osterberg of Mt. Vernon, Iowa are also

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[6] See "Revised List of Witnesses on Technical Issues filed by Citizens Against Nuclear Trash."

preparing joint testimony to be filed in support of Contentions J and Q.

No useful purpose would be served by litigating Contentions B and Q separately from Contention J, and in fact it could hinder the development of a sound record in this case by causing factual conflicts and res judicata problems. For instance, CANT has presently developed a body of information pertaining to decommissioning costs; however, under the scheduling order established by the Board, CANT is entitled to continue discovery on decommissioning costs pursuant to Contention J until October 25, 19 .[7] If Contention B is tried separately from Contention J (in July of 1994), when CANT attempts to submit additional testimony on decommissioning costs at the 1995 hearing, the issue of res judicata will inevitably be raised. In fact, the Staff has clearly put CANT on notice that it will raise the res judicata issue at the 1995 NEPA hearing:

> CANT asserts the issue of decommissioning costs 'must also be litigated in relation to Contention J.' Motion at 4. The Staff disagrees. When a particular issue has been adequately explored and resolved in an early phase of a proceeding, an intervenor may not litigate a similar issue in a subsequent phase of the proceeding unless there are different circumstances which may have a

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[7] The schedule for discovery in this matter is keyed to issuance of the final environmental impact statement ("EIS"), which affords the parties a reasonable time after issuance of the EIS to do final discovery. CANT has a statutory right under NEPA to prepare its case and litigate the environmental issues it has raised, and Applicant's assertion that "no weight" be given to CANT's need and right to continue discovery is therefore entirely inappropriate. (See Applicant's Answer at 20.)

material bearing on the resolution of the issue in the subsequent phase of the proceeding.

Staff Answer at 7 (citation omitted).

If there is no consolidation of Contentions B and Q with Contention J, when the overlapping issues from Contentions B and Q are raised at the 1995 hearing on Contention J, time-consuming arguments about each piece of evidence will ensue, with the parties arguing over whether the new evidence is new, old, and/or precluded by res judicata principles flowing from the 1994 hearing.

In short, the risk of contradictory findings and res judicata problems if Contentions B, Q and J are not consolidated for a single hearing are very real.

Finally, consolidation of the litigation of these issues would be far more efficient. CANT, a non-profit organization of very limited means, seeks to conserve its resources and focus them maximally on the development of a sound record in this case. It would be extremely inefficient and costly for CANT to have to call the same witnesses to Louisiana twice, to testify on the same factual issues.

III.

CONCLUSION

Accordingly, the Board should exercise its discretion and order that Contention B (Decommissioning Funding Plan Deficiencies) and Contention Q (Financial Qualifications) be consolidated for hearing with the NEPA issues at the 1995 hearing.

The 1994 hearing on technical issues would thus include only Contention H (Emergency Planning), Contention L (Online Enrichment

Monitoring), and Contention M (Monitoring of Sampling Ports, Process Valves and Flanges).

Respectfully submitted,

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	)	
Claiborne Enrichment Center	)	(Special Nuclear Materials License)

CERTIFICATE OF SERVICE

I hereby certify that copies of undersigned counsel's "Reply by Citizens Against Nuclear Trash ("CANT") to the Answers Filed by Applicant and Staff Opposing CANT's Motion To Consolidate For Hearing Contention B (Decommissioning Plan Deficiencies) and Contention Q (Financial Qualifications) with NEPA Issues" have been served on the following by deposit in the United States mail, first class, and by facsimile transmission as indicated by an asterisk, on this 18th day of May, 1994, as follows:

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