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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S PETITION FOR REVIEW OF LBP-96-25

Richard G. Bachmann
Eugene Holler
Counsel for NRC Staff

December 23, 1996

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.786 of the Commission's regulations, the staff of the Nuclear Regulatory Commission (Staff) hereby petitions the Commission for review of *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-25, 44 NRC ___ (slip op., December 3, 1996). For the reasons set forth below, the Staff's petition for review should be granted as it demonstrates the existence of substantial questions with respect to the considerations set forth in the Commission's regulations at 10 C.F.R. § 2.786(b)(4).

BACKGROUND

In this combined construction permit-operating license proceeding, Louisiana Energy Services, L.P. (LES) seeks a 30-year materials license to possess and use byproduct, source, and special nuclear material to enrich uranium using a gas centrifuge process at the proposed Claiborne Enrichment Center (CEC) to be constructed in Claiborne Parish, Louisiana. Citizens Against Nuclear Trash (CANT) opposes issuance of the license and, after establishing standing

and proposing several admissible contentions, was granted leave to intervene and admitted as a party to the proceeding. On December 3, 1996, the Atomic Safety and Licensing Board (Board) designated to preside over the proceeding issued a partial initial decision, LBP-96-25, resolving three of these contentions.[1] The Board sustained Contentions J.4 and K, dealing with LES's environmental report (ER), by deciding that the Staff's final environmental impact statement (FEIS) did not adequately address the need for the facility and the no-action alternative.[2] LBP-96-25, slip op. at 3, 181-182. The Board also sustained Contention Q which challenged LES's financial qualifications to construct and operate the CEC. *Id.*

DISCUSSION

A petition for review must raise at least one of the following kinds of substantial questions to merit Commission consideration:

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

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[1] In its first partial initial decision, the Board resolved three safety contentions in favor of the applicant. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996); *petition for review granted in part and denied in part*, CLI-96-8, 44 NRC___(slip op., October 2, 1996); *motion for partial reconsideration pending.*

[2] In Contentions J.4 and K, CANT challenged the adequacy of LES's ER for failing to demonstrate that there is a need for the facility, and for failing to include any discussion of the no-action alternative, respectively. LBP-96-25, slip op. at 4, 94. The Board decided that it "need not separately address the adequacy of the Applicant's treatment of the need issue in the ER," and, regarding Contention K, that "the contention also is deemed to challenge the sufficiency of the Staff's treatment in the FEIS of that same alternative." *Id.* at 30-34 (footnote omitted), 93-94. Although the Commission's Hearing Order (*See* n.3) obligates the Board to ensure the agency's compliance with the National Environmental Policy Act (NEPA) independent of CANT's environmental contentions, whether or not the admitted contentions, can be read to include the environmental impact statement and its treatment of need, and the no-action alternative, is a separate matter.

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

10 C.F.R. § 2.786(b)(4); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Service Operations, Parks Township, Pennsylvania), CLI-95-4, 41 NRC 248, 250-251 (1995).

This proceeding, which concerns the licensing of the CEC, is subject to the specific regulatory requirements identified in a Commission Hearing Order.[3] The Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575 (104 Stat. 2834) (1990), amended the Atomic Energy Act (AEA) section 11v definition of "production facility." 42 U.S.C. § 2014v. The effect of the amendment was to remove, with one exception not pertinent here, the licensing of a uranium enrichment facility, such as the CEC, from the provisions of the AEA applicable to facilities such as nuclear power plants. Section 5 of Pub. L. No. 101-575 further amended the AEA with respect to the licensing of uranium enrichment facilities by adding a new section 193, 42 U.S.C. § 2243. The principal effect of section 193 of the AEA is to make licensing of uranium enrichment facilities a single step process with a license issued under the provisions of the AEA pertaining to source material (sec. 63) and special nuclear material (sec. 53) rather than the provisions pertaining to a nuclear reactor or other production facility.[4] In its Hearing Order for this proceeding, the Commission identified

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[3] "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;" (Hearing Order) 56 Fed. Reg. 23,310 (May 21, 1991).

[4] Prior to section 193, a uranium enrichment facility would have been licensed as a production facility under AEA Chapter 10 which includes restrictions on foreign ownership, (continued...)

the requirements generally governing the issuance of byproduct, source, and special nuclear material licenses as well as special standards and instructions that govern the licensing of the CEC. *See* 56 Fed. Reg. at 23,313. As discussed below, the Board rejected some relevant evidence and applied the regulations and policy appropriate to the licensing of a 10 C.F.R. Part 50 facility rather than those applicable to a materials license as required by the statutes and the Hearing Order governing this proceeding.

A. The Board Erred in Finding the FEIS Discussion of Need Inadequate.

The Board applied the wrong law in determining that the actual benefit of the project is not accurately represented by LES in the ER and the Staff in the FEIS.[5] LBP-96-25, slip op. at 90-91. The Board relied on reactor licensing decisions holding that "'need for power' is a shorthand expression for the 'benefit' side of the cost-benefit balance which NEPA [National Environmental Policy Act] mandates for a proceeding considering the licensing of a nuclear plant." *Id.* at 31 n.5. While the regulatory guide for nuclear power station environmental reports confirms that the primary benefits of a nuclear station are those inherent in the value of generated electricity delivered to consumers (Reg. Guide 4.2 at 8-1), the regulatory guide for commercial uranium enrichment facilities environmental reports imposes no such limitation regarding the benefits to be considered and urges the applicant to compare the "aggregate benefits" against the "aggregate costs" (Reg. Guide 4.9 at 4.9-25). The Board cites no materials licensing cases, nor is the Staff aware of any, that support the proposition that "need" is the

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[4](...continued)
domination, or control (sec. 103), the need for an antitrust review (sec. 105), and the need to license operators (sec. 107).

[5] The FEIS describes need for the facility in terms of an additional domestic supplier using more efficient and secure production methods. FEIS at 1-5 through 1-9.

primary benefit to be considered in striking the cost-benefit balance for materials license environmental cost-benefit analyses. Thus, this decision presents a substantial question of law and policy meriting Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

Further, in finding that the FEIS discussion of need was inadequate and in sustaining Contention J.4, the Board rejected relevant evidence. The Board reasoned that price competition (low cost separative work units (SWUs)) was the "principal benefit against which the costs of the facility are weighed" in striking the NEPA cost-benefit balance. LBP-96-25, slip op. at 46. Accordingly, the Board addressed supply and demand of the uranium enrichment market, and LES's price competitiveness, to reach its conclusion that the project will have little, if any, effect on price competition in the enrichment services market. *Id.* at 34-90. The Board erred in ignoring the applicant's evidence regarding diversity of producers and security of supply. *See, e.g.*, Testimony of LES witnesses at 12-13, ff Tr. 383. The Board's failure to consider competition and security of supply as factors in determining need for the CEC caused it to reach an erroneous conclusion regarding the description of the need for the CEC in the FEIS and merits Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(i). In sum, the Staff's discussion of need in the FEIS was not inadequate and the Board's decision that it was raises substantial questions of law and policy regarding how "need" is to be considered in an environmental impact statement (EIS) for materials license applications.

B. The Board Erred in Finding the FEIS Discussion of the No-Action Alternative Inadequate.

The Board's requirement that an EIS must tabulate and discuss anew impacts adequately discussed for other alternatives is a departure from established law. The Board found that the FEIS failed to adequately address the numerous impacts avoided in the no-action alternative,

such as those to surface and ground water and air quality, and the elimination of depleted uranium tails. LBP-96-25, slip op. at 96-101. Although the Board finds no fault with the FEIS's discussion of these matters as negative impacts of licensing the CEC, the Board would have the FEIS separately list and discuss these same matters as impacts avoided in not licensing the CEC (the no-action alternative) rather than stating that the impact is avoided and referring to the detailed discussion of the impact in another part of the FEIS. The Board's decision places form over substance. The purpose of the FEIS, as the Board notes, is to allow the agency to take a hard look at the environmental consequences of its action. *Id.* at 16, *citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) and *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). The FEIS discussion of the no-action alternative meets this standard and the Staff's treatment of the alternative in the FEIS is adequate. The requirements set by the Board for discussing the no-action alternative go well beyond what is required to meet the standard, and therefore merit Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

C. The Board Erred in Finding that Secondary Benefits Must Be Excluded from a Materials Licensing FEIS Cost-Benefit Analysis.

The Board's finding that secondary benefits must be excluded from a materials licensing FEIS cost-benefit analysis raises a substantial policy question. The Board found that the Staff's cost-benefit analysis in the FEIS incorrectly includes and heavily relies upon secondary benefits of increased employment and tax revenues in the benefit side of the NEPA cost-benefit analysis or, alternatively, its cost-benefit analysis is inadequate for not explaining why it is now deviating from prior agency practice by including such secondary benefits in its ultimate cost-benefit

analysis.[6] LBP-96-25, slip op. at 106. While the regulatory guide for nuclear power station environmental reports comports with the case law cited by the Board, (Reg. Guide 4.2 at 8-1), the regulatory guide for commercial uranium enrichment facility environmental reports imposes no such limitation regarding the benefits to be considered and urges the applicant to compare the "aggregate benefits" against the "aggregate costs" (Reg. Guide 4.9 at 4.9-25).[7] While it is clear that regulatory guides are not regulations, they do provide guidance as to acceptable modes of conforming to specific regulatory requirements which the Commission has recognized. *See The Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98 (1995); *Petition for Emergency & Remedial Action*, CLI-78-6, 7 NRC 400, 406-407 (1978); *reconsideration denied*,

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[6] The Board asserts that the applicant and the Staff have ignored the intervenor's argument on this point. LBP-96-25, slip op. at 103-104. The intervenor first raised this matter as a proposed finding on the relevant legal standard for the analysis of Contention J.4. CANT's May 26, 1995 Proposed Findings on Contentions J.4 and K at 7. The argument was not part of Contention J.4 as submitted or of any contention as admitted. Further, in its reply to CANT's proposed findings on Contention J.4, the Staff argued that "CANT continues to analogize the CEC to nuclear power plants." Staff's June 26, 1995 Reply at 14-15. In its August 1, 1995 Proposed Form of Decision, the applicant argued that "the power reactor licensing decisions relied upon by Intervenor in support of its 'need' arguments are inapplicable to LES and that the single materials license decision cited by Intervenor supports LES's position on the need for the CEC." LES August 1, 1995 Proposed Form of Decision at 5.

[7] Prior to its revision in January 1975, Regulatory Guide 4.2 urged reactor plant applicants to include items such as local employment and tax revenues on the benefit side of the cost-benefit analysis. Chapter 8 of the regulatory guide was revised to exclude such secondary benefits directly in considering the cost-benefit analysis. However, Regulatory Guide 4.9, although revised in October 1975, continued to urge applicants to include such secondary benefits in the cost-benefit analysis for the licensing of uranium enrichment facilities. *See* Regulatory Guide 4.9 at 4.9-25, 4.9-26. Thus, contrary to the incorrect assertion by the Board, by including the secondary benefits in the cost-benefit balance for the CEC, the Staff was following rather than deviating from prior agency stated practice. *See* LBP-96-25, slip op. at 105-106. Further, Regulatory Guide 4.18 (Standard Format and Content of Environmental Reports for Near-Surface Disposal of Radioactive Waste) issued in June 1983, also urges applicants for materials licenses of this type to include secondary benefits such as tax revenues and employment in the cost-benefit analysis. Regulatory Guide 4.18 at 4.18-15, 4.18-25, and 4.18-26.

CLI-80-21, 11 NRC 707 (1980). The Board cites no materials licensing cases, nor is the Staff aware of any that support the proposition that secondary benefits should be excluded in striking the ultimate cost-benefit balance for materials license environmental cost-benefit analysis.[8] Further, inclusion of tax base benefits and increased employment on the benefit side of a cost-benefit analysis is not contrary to federal law. *See, e.g., Robinson v. Knebel*, 550 F.2d 422, 426 (8th Cir. 1977). Thus, the Board's decision holding that secondary benefits be excluded from the cost-benefit balance for a uranium enrichment facility raises a substantial question of law and policy meriting Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

F. The Board Erred in Resolving Contention Q.

The Board's resolution of Contention Q raises substantial question of law and policy. In resolving Contention Q, the Board rejected the applicant's assertion that the Commission's Part 70 financial qualifications standard is less prescriptive than the Part 50 standard (LBP-96-25, slip op. at 127, 149-150), and the Staff's assertion that while Appendix C to Part 50 could be used as a guide in determining the financial qualifications of an applicant, not all of its

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[8] The Board relies on the line of cases following *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Station), ALAB-179, 7 AEC 159 (1974) as standing for the proposition that secondary benefits such as taxes and local employment should be noted in the EIS *only for informational purposes* in describing the socioeconomic impact. LBP-96-25, slip op. at 105 n.11. The Appeal Board decision cited by the Board, however, referred to the earlier decision in ALAB-179, and stated: "But the presence of such factors can certainly be taken into account in weighing the potential extent of the socioeconomic impact which the plant might have upon local communities. *Indeed, the Board below recognized this in discounting the socioeconomic impact of plant construction upon the town of Seabrook.*" *Public Service of New Hampshire* (Seabrook Station Units 1 and 2), ALAB-471, 7 NRC 477, 509 n.58, *citing the decision below, 3 NRC at 913* (emphasis in original). This treatment of secondary benefits (*i.e.*, using the secondary benefits for countering socioeconomic impacts to the affected community rather than for informational purposes) is consistent with Regulatory Guide 4.2 which indicates that the secondary benefits "may partially, if not fully, compensate for certain services, as well as external or environmental costs and this fact should be reflected in the designation of the benefit." Regulatory Guide 4.2 at 8-1.

provisions are suitable, particularly application of the provisions in Appendix C dealing with newly formed entities.[9] In its extensive review of the history of the financial qualification regulations (LBP-96-25, slip op. at 130-145), the Board ignores the fact that the Commission could have, but did not, make the changes to the Part 70 regulation that it made to the Part 50 regulation. The Board also ignores the fact that the kind and depth of information in Part 50, Appendix C, by its terms, "is not intended to be a rigid and absolute requirement." 10 C.F.R. Part 50, Appendix C at "General Information." Lastly, the Board ignores the fact that the Commission, in its Hearing Order, could have made the Part 50 regulation applicable, as it did for other aspects of the proceeding, but chose not to do so.[10] As a result of not recognizing a difference between the Part 70 and the Part 50 financial qualification regulations, the Board drew an erroneous conclusion regarding the financial qualification of LES.

The Board also concludes that, even under the standard urged by LES, certain published statements by an official of the applicant's corporate parent demonstrates that LES has failed to demonstrate reasonable assurance of obtaining debt financing. LBP-96-25, slip op. at 180 n.33. The Board cites an interview given by the official, as reported in an industry journal, as

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[9] LBP-96-25, slip op. at 156-157. The Staff asserted that a newly formed entity only needs to show that its corporate affiliates have the capability of providing construction funds and not that the corporate affiliates have committed to provide the funds to the applicant. *Id.* at 127-128.

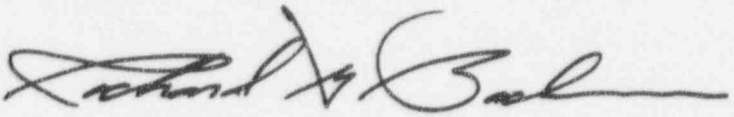
[10] The Commission listed the applicable rules and regulations, and generally excluded Part 50 regulations, in the Hearing Order. 56 Fed. Reg. at 23,313. However, the Commission also determined that one specific Part 50 regulation, 10 C.F.R. § 50.81, would apply to the creation of certain creditor interests. 56 Fed. Reg. 23,312. Further, even if the Commission had applied the 10 C.F.R. § 50.33(f)(3) requirements regarding newly formed entities, that regulation refers to "the legal and financial relationships the entity has *or proposes to have* with its stockholders or owners." 10 C.F.R. § 50.33(f)(3)(i) (emphasis added). Clearly, an entity would not have firm contracts with regard to relationships it *proposed* to have.

indicating the official's apprehension about obtaining the necessary financing and going forward, due to the conditions of the market at the time of the interview. *Id.* This conclusion of the Board, however, goes to the confidence of the applicant regarding the success of its plan, not to the reasonableness of the plan, nor the ability of the applicant to go forward with the plan as required by the Commission's financial regulations under Part 70. Thus, the Board's erroneous conclusion regarding the reasonableness of the applicant's financial plan for obtaining funding presents a substantial question for Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(i).

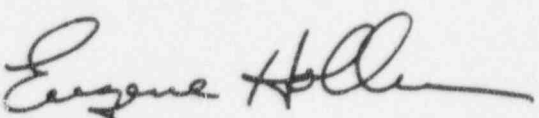
CONCLUSION

As demonstrated above the Board's reliance on reactor plant licensing law and policy resolving Contentions J.4 and Q, and in addressing secondary benefits in a materials license application EIS, raises substantial and important questions meriting Commission review. Accordingly, the Staff's petition for review should be granted pursuant to the Commission's regulations in 10 C.F.R. § 2.786(b)(4).

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff



Eugene Holler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of December, 1996

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR REVIEW OF LBP-96-25" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk this 23rd day of December, 1996:

Thomas S. Moore, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Richard F. Cole
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Ronald Wascom*
Deputy Assistant Secretary
Office of Air Quality &
Radiation Protection
P.O. Box 82135
Baton Rouge, LA 70884-2135

J. Michael McGarry, III, Esq.*
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Robert G. Morgan*
Duke Engineering & Services, Inc.
P.O. Box 1004
Charlotte, NC 28201-1004

Roland J. Jensen*
Louisiana Energy Services, L.P.
2600 Virginia Avenue, N.W.
Suite 608
Washington, DC 20037

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.*
Harmon, Curran, & Spielberg
2001 S Street, N.W., Suite 430
Washington, D.C. 20009-1125

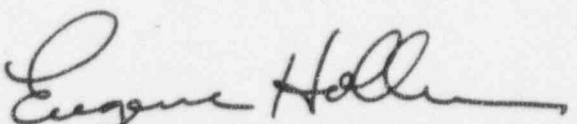
David S. Bailey, Esq.*
Thomas J. Henderson, Esq.
Lawyers' Committee for Civil
Rights Under Law
1450 G Street N.W., Ste. 400
Washington, DC 20005

Marcus A. Rowden, Esq.*
Fried, Frank, Harris
Shriver & Jacobsen
1101 Pennsylvania Avenue, N.W.
Suite 900 South
Washington, DC 20004

Office of the Secretary (16)
ATTN: Docketing and Service Branch
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Nathalie M. Walker, Esq.*
Sierra Club Legal Defense Fund
400 Magazine Street, Ste. 401
New Orleans, LA 70130

Joseph DiStefano, Esq.*
Urenco Investments, Inc.
Suite 610
2600 Virginia Ave., N.W.
Washington, DC 20037



Eugene J. Holler
Counsel for NRC Staff