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UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of
Louisiana Energy Services
(Claiborne Enrichment Center)

)
)
) Docket No. 70-3070 - ML
) September 5, 1997
)



**CITIZENS AGAINST NUCLEAR TRASH'S
MOTION TO RECONSIDER CLI-97-11 AND
GRANT CANT'S PETITION FOR REVIEW OF LBP-97-3**

INTRODUCTION

Intervenor, Citizens Against Nuclear Trash ("CANT"), hereby requests reconsideration of CLI-97-11 (September 3, 1997), in which the Commission remanded for clarification the Licensing Board's Partial Initial Decision on waste disposal and decommissioning funding issues, LBP-97-3, 45 NRC 99 (1997), without ruling on CANT's Petition for Review of LBP-97-3.¹ CLI-97-11 raises significant questions about one of the very same issues addressed in CANT's Petition for Review of LBP-97-3 -- that the limited and narrow data used by the NRC Staff in the FEIS and relied on by the Board in LBP-97-3 do not support the safety of deep-mine disposal of depleted uranium tails -- and thus demonstrates that CANT has raised a "substantial" question regarding a clear legal error by the Licensing Board. 10 C.F.R. § 2.786. Because CANT has met the standard for obtaining Commission review, the Commission should adhere to its own procedures and grant its petition for review of LBP-97-3. Moreover, CANT is concerned that by remanding this case prior to a full briefing of the issues, the Com-

¹ The Commission also has before it CANT Petition for Review of Order Denying CANT's Waiver Petition (May 8, 1997), and LES' Petition for Partial Review of LBP-97-3 (May 9, 1997).

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mission may deprive CANT of a meaningful opportunity for review, as provided by 10 C.F.R. § 2.786.²

BACKGROUND

On March 7, 1997, following discovery and a hearing, the Licensing Board issued LBP-97-3, its Partial Initial Decision addressing the adequacy of LES' license application and the NRC Staff's Final Environmental Impact Statement ("FEIS") with respect to decommissioning funding for the Claiborne Enrichment Center ("CEC"), a uranium enrichment facility proposed by Louisiana Energy Services ("LES"). Although the Board found that LES' cost estimate for the conversion of depleted uranium hexafluoride ("DUF6") to uranium oxide ("U3O8") was inadequate, it approved the cost estimate in all other respects.

CANT filed a petition for review on those aspects of the Board's decision which approve LES' decommissioning cost estimate. Citizens Against Nuclear Trash's Petition for Partial Review of LBP-97-3 (May 8, 1997) (hereinafter "Petition for Review"). In its petition, CANT argued that the decommissioning cost estimate is based on a decommissioning strategy that is presumptively implausible; that the Board incorrectly refused to consider that the strategy assumed by NRC regulations -- disposal in a licensed geologic repository -- could cost ten times more than LES' estimate; and that given the tremendous uncertainty associated with DUF6 tails disposal, the Board erred in refusing to grant the license unless LES' corporate parents accepted financial responsibility for disposal of the tails. As CANT demonstrated, these are significant legal, factual, and policy issues.

² CANT submits that this motion for reconsideration is not barred by 10 C.F.R. § 2.786(e), which states that petitions for reconsideration of "Commission decisions granting or denying review in whole or in part will not be entertained." CLI-97-11 neither grants nor denies CANT's petition for review, but explicitly states that the Commission has not yet taken action on the pending petitions for review. *Id.* at 1. Thus, § 2.786(e) is inapplicable.

In addition, CANT contended that the NRC Staff's technical analysis and dose estimates supporting LES' cost estimate lack any credible technical basis. In particular, CANT argued that the Board ignored or wrongly discounted substantial evidence submitted by CANT demonstrating that the FEIS is seriously deficient in its analysis of the likely doses resulting from deeper-than-surface disposal, thereby failing to provide an adequate basis for the NRC staff's conclusion that deeper-than-surface disposal is safe without engineered barriers. CANT contended that in attempting to justify deep disposal without engineered barriers, the NRC used a very narrow mix of settings, and then picked and chose data that were not representative of the range of potential conditions. Petition for Review at 6-7. CANT cited testimony identifying several important areas in which distortions or misrepresentation of groundwater data could result in the underestimation of the solubility of uranium by tens, thousands, or millions of times. *Id.* As CANT argued, the net effect of the NRC's biased assumptions in regard to sensitive parameters is that the transport of uranium into the human environment may have been misestimated by millions of times, tens of millions of times, or even more. *Id.* at 7. In reaching its conclusions, the Board also appeared to interpret the term "plausible" to mean "conceivable" rather than "credible," and shifted the burden of proof from LES and the NRC Staff to the Intervenor. *Id.*

The Commission did not make a decision on any of the three pending petitions for review pertaining to decommissioning costs and waste disposal within the standard 30 day period provided by 10 C.F.R. § 2.786(c), but rather extended the period several times as permitted by that regulation. *See* Orders dated June 6 and July 8, 1997. Most recently, the Commission issued an order extending the period for consideration of the three petitions until "further notice." Order (August 7, 1997).

On September 3, 1997, the Commission issued CLI-97-11. The Commission did not grant or deny any of the three pending petitions for review, but rather stated that before taking

action on the petitions, it required "clarification of one issue" decided by the Board in LBP-97-3 relating to the technical basis for LES' decommissioning funding estimate. *Id.* at 1, 3-4.

Before proceeding to its questions, the Commission observed that:

[t]he migration of U3O8 from a deep-mine disposal site depends critically on the characteristics of groundwater at the site. As part of its analysis, the staff used groundwater characteristics from an actual near-surface site to calculate solubilities and migration of waste radionuclides from two hypothetical deep-disposal sites. Based on these results, the staff then estimated potential dose impacts from the deep disposal of U3O8 via radiological exposure pathways (e.g., drinking water, irrigated crops, and fish), and found them within regulatory limits.

Id. at 2. The Commission then quoted portions of CANT's petition which challenged as "seriously deficient" the staff's technical analysis, and charged that the staff "used a very narrow mix of settings, and then picked and chose data that were not representative of the range of potential conditions." *Id.*, quoting Petition for Review at 6.

The Commission observed that the Board "rejected CANT's effort to discredit the feasibility of deep mine disposal" and that "[t]he Board noted that no particular mine has been selected or identified as a potential deep-disposal site so that exact characteristics of groundwater in a potentially acceptable deep disposal facility are not available for analysis." *Id.* at 3. The Commission also noted the staff's citation of "data that establish the range of potential values likely to be found for each sensitive parameter in deep groundwater at the hypothetical geological settings," and observed that the Board had approved the Staff's use of a single set of values taken from near-surface data for sensitive parameters, given that the near-surface values fell within the expected range for deep groundwater parameters. *Id.* at 3.

The Commission then expressed confusion as to whether the Board:

found it plausible that a deep mine with the exact near-surface values chosen for each sensitive parameter used by the staff would be available, or if the Board simply found it plausible that there is a mine in the U.S. with characteristics falling within the expected range.

Id. at 3. Noting its belief that the second phrase was most "likely" to describe the Board's view, the Commission ordered the Board to "discuss why it found that the staff's dose impact calculations can be taken as representative of disposal in mines with groundwater characteristics that differ from the staff's single set of values." Id. at 3-4. In posing these questions, the Commission noted that the Board has not identified the effect, if any, that varying the values within the expected range would have on dose impacts, or cited any analysis that would support such a conclusion. Id. at 4.

In conclusion, the Commission stated that it did not expect the remand to unduly delay the ultimate resolution of the adjudication; that it expects the Board to be able to decide the remanded issue by November 17, 1997, and that the Board is "free to solicit further affidavits or other pleadings from the parties." Id. at 4.

ARGUMENT

RATHER THAN REMANDING, THE COMMISSION SHOULD GRANT CANT'S PETITION FOR REVIEW.

In CLI-97-11, the Commission indicates that it has not yet decided whether to grant any of the petitions for review which have been pending since early May. Id. at 1. Yet, CLI-97-11 clearly demonstrates that the Commission has reached the conclusion that CANT has met the standard for obtaining review of LBP-97-3, at least with respect to whether the Licensing Board clearly erred in upholding the adequacy of the NRC Staff's technical basis for Louisiana Energy Services' ("LES") decommissioning cost estimate. In fact, CLI-97-11 repeats one of the very concerns raised in CANT's Petition for Review: that in attempting to justify the safety of deep-mine disposal, the Board approved the NRC Staff's use of unacceptably narrow and arbitrary settings and data that were not appropriately representative of the range of potential conditions. See Petition for Review at 6-7. CLI-97-11 specifically expresses concern about the Board's failure to consider a range of data, noting the Commis-

sion's inability to find any basis in the record for a conclusion that the NRC Staff's analysis "can be taken as representative of disposal in mines with groundwater characteristics that differ from the staff's single set of values." CLI-97-11 at 4.

By raising these fundamental questions about the basis for the Licensing Board's approval of the plausibility of LES' decommissioning strategy and remanding them to the Board for further explanation, the Commission showed the existence of a "substantial question" with respect to whether the Licensing Board clearly erred. See § 2.786(b)(4)(i). Although the decision on whether to grant a petition for review is discretionary, that discretion is limited by the standards which the Commission itself has set in order to ensure a meaningful and fair review process.³ Under fundamental principles of administrative law, the Commission must adhere to its own procedures and grant CANT's petition for review. Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir. 1986).

Moreover, neither of the decisions cited by the Commission in CLI-97-11 supports a departure from the regulations to order a remand in this case. In both Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-10, 42 NRC 1, 2 (1995) and Ralph L. Tetrick (Denial of Application for Reactor License), CLI-97-5, 45 NRC 355, 356 (1997), decisions were remanded to the Licensing Board for initial development of the record regarding new factual information, a circumstance which is not present here.⁴

³ Indeed, in proposing the discretionary review process, the Commission itself recognized the "need" to "establish standards for taking review." Proposed Rule, Options and Procedures for Direct Commission Review of Licensing Board Decisions, 55 Fed. Reg. 42,947, 42,948 (October 24, 1990).

⁴ In Georgia Institute of Technology, during the Commission's appellate review of a Board order granting a petition to intervene and admitting contentions, "new information" was introduced that might render one of the contentions "moot." 45 NRC at 2. The Commission vacated the Board's original order and remanded the proceeding for further factual findings. Id. at 3. In Ralph L. Tetrick, the Commission held up its consideration of a petition for review of a reactor operator's test results, after receiving a letter from the licensee regarding the correctness of the operator's answers on the tests. Id. at 356. The Commission found, based on the letter, that resolution of the case required inter-

While there is no question that it is the province of the Licensing Board to develop the record in the first instance, this case presents no new information requiring additional development of the record by the fact-finder. The fact-finder has made its decision and presented it to the Commission; it is now the reviewing body's duty to review the adequacy of the fact-finder's decision.⁵ The Commission's conclusion in CLI-97-11, that the Licensing Board's decision is unclear regarding the basis for its determination that deep mine disposal is safe (and therefore achievable at the cost estimated by LES), raises a substantial question on the merits of CANT's appeal, which should be fully briefed before the Licensing Board is ordered to resolve it.

This motion springs from CANT's fundamental concern that although the outcome of the Commission's remand in CLI-97-11 cannot be predicted at this point, the remand threatens to short-circuit the review process established by 10 C.F.R. § 2.786, and thereby deprive CANT of a meaningful opportunity to seek review of LBP-97-3. It appears that the Commission is treating CANT's ten-page petition for review of LBP-97-3 as a brief on the merits, and is providing the Board with an opportunity to respond to and perhaps defeat the petition before

(continued)

pretation of various technical documents, "some of which may not be in the record." Id. Thus, the Commission remanded the case to the Licensing Board as the principal fact-finder, so that the Licensing Board could assess these new facts. Id.

⁵ Thus, CANT submits it is also inappropriate for the Commission to permit the Board to take additional factual affidavits from the parties. CLI-97-11 at 4. The only conceivable purpose of allowing additional affidavits would be to allow new information into the record. Under such circumstances, the record must be re-opened, and CANT must be accorded the same due process that was afforded in the original hearing: *i.e.*, the right to discovery and time to review documents and otherwise investigate the bases for LES' and the Staff's assertions. Such a process obviously is not contemplated by the Commission, since it expects the Board to respond by November 17. CLI-97-11 at 4.

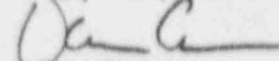
the substantive issues in the case have been fully addressed.⁶ This is utterly inconsistent with the nature and purpose of the Commission's discretionary review process. As the Commission stated in the proposed rule, it has modelled its discretionary review regulations on a "certiorari" system that provides for "short" petitions to be filed within a fixed and relatively brief time. 55 Fed. Reg. at 42,948. The petitions allow the Commission to identify cases presenting a "particular problem" which require "full briefing." *Id.* Clearly, the regulations do not intend that the extremely brief petitions for review permitted by the regulations may be used as the basis for on-the-merits decisions regarding Licensing Board decisions. Such a result would not only fail to serve the Commission's purpose of ensuring the thorough review of "problem" Licensing Board decisions, but would deprive CANT of a meaningful opportunity for review.

⁶ In the short space of the ten pages allowed for its petition for review, CANT was only able to summarize the general nature of its criticisms of the NRC Staff's technical analysis regarding groundwater characteristics and migration of radionuclides. *See* Petition for Review at 6-7. The evidence on these issues is quite specific, detailed, and extensive, addressing numerous parameters and methods of analysis. *See* written and oral testimony of CANT's witness Dr. Arjun Makhijani (Tr. ff. 1081 (March 17, 1995)); CANT's Proposed Findings of Fact and Conclusions of Law Regarding Contentions B and J.3 (May 26, 1995); and CANT's Proposed Reply Findings of Fact and Conclusions of Law Regarding Contentions B and J.3 (June 26, 1995). The Commission's generalized remand does not require the Board to address these issues in any detail. Another example of significant matters ignored in the remand is that, although the Commission asks the Board to address the "plausibility" of a deep-mine disposal site with certain characteristics, it does not address the significant legal question raised by CANT regarding the Board's interpretation of the term "plausible." *See* CANT's Petition for Review at 7.

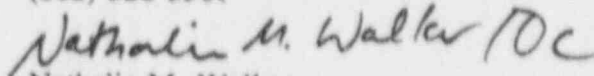
Conclusion

For the foregoing reasons, the Commission should rescind CLI-97-3 and grant CANT's petition for review of LBP-97-3.

Respectfully submitted,



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September 5, 1997

CERTIFICATE OF SERVICE

I, Diane Curran, certify that on September 5, 1997, copies of the foregoing CITIZENS AGAINST NUCLEAR TRASH'S MOTION TO RECONSIDER CLI-97-11 AND GRANT CANT'S PETITION FOR REVIEW OF LBP-97-3 were served by FAX or first-class mail on the following parties, as indicated below:

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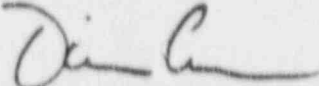
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