IN RESPONSE, PLEASE
REFER TO: M971218B

MEMORANDUM FOR: John F. Cordes, Acting Director
Office of Commission Appellate Adjudication

FROM: John C. Hoyle, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 3:30 P.M., THURSDAY, DECEMBER 18, 1997, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-97-257 - Louisiana Energy Services - Financial Qualifications Aspects of Petitions for Review of LBP-96-25

The Commission approved an order addressing a finding of the Licensing Board in LBP-96-25 that Louisiana Energy Services (LES) lacks the necessary financial qualifications to construct the proposed Claiborne Enrichment Center (CEC). That finding had been appealed to the Commission by both LES and the NRC staff.

The Commission approved the proposed order reversing the Board decision on financial qualifications and finding LES financially qualified. The order also imposed certain license conditions that require LES to fulfill financial commitments it has made in this proceeding.

(Subsequently, on December 18, 1997 the Secretary signed the attached Order.)

Attachment: As stated

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
EDO
OGC
CIO
CFO
OCAA
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-17

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the matter of	)	
Louisiana Energy Services, L.P.	)	Docket No. 70-3070-ML

(Claiborne Enrichment Center))
_____)
)

CLI-97-

MEMORANDUM AND ORDER
(RESOLVING FINANCIAL QUALIFICATIONS)

In this decision, the Commission considers appeals by Louisiana Energy Services (LES) and the NRC staff challenging an Atomic Safety and Licensing Board finding that LES lacked financial qualifications to construct the proposed Claiborne Enrichment Center (CEC) near Homer, Louisiana. See LBP-96-25, 44 NRC 331, 375-404 (1996).[1] The sole intervenor, Citizens Against Nuclear Trash (CANT), opposes the appeals. An amicus curiae, the Nuclear Energy Institute, supports the appeals. For the reasons given below, we reverse the Board decision on financial qualifications and find LES financially qualified. We also impose certain license conditions that require LES to fulfill financial commitments it has made in this proceeding.

I. BACKGROUND

LES seeks an NRC license to construct and operate a uranium enrichment facility using a gas centrifuge process. The license would be for a term of 30 years. This is the first license application for a privately owned enrichment facility that the Commission has considered. Other domestic enrichment facilities have been operated exclusively by the Department of Energy and were not initially licensed by the NRC.

A. Statutory Scheme

In the late 1980's, Congress became aware of LES's interest in constructing and operating a privately owned enrichment facility and, in an attempt to "simplify and expedite the licensing process for uranium enrichment facilities[,]" amended the Atomic Energy Act (AEA). See 136 Cong. Rec. S17660, S17661 (October 27, 1990) (comments of Senator J. Bennett Johnston). The procedural changes effectuated by the amendments were significant. If the AEA had been left unaltered, the application would have been subject to the full-scale licensing requirements of 10 C.F.R. Part 50 applicable to nuclear power reactors. However, because "a uranium enrichment facility is far less hazardous than a nuclear reactor[,]" a different licensing scheme seemed "justified." See 136 Cong. Rec. H11922, H11924 (Oct. 23, 1990)(comments of Representative Miller). Accordingly, Congress amended the AEA to provide that enrichment facilities will be licensed pursuant to the NRC's source and special nuclear material regulations, but subject to additional restrictions not applicable to other materials licenses. See Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, Pub. L. No. 101-575, § S(e), 104 Stat. 2834 (amending the AEA by adding a new Section 193, 42 U.S.C. § 2243). Specifically, the amendments provide that such facilities are to be licensed pursuant to sections 53 and 63 of the AEA, 42 U.S.C. §§ 2073 and 2093.

The practical effect of the new legislation was to require a single on-the-record adjudicatory hearing for construction and operation, rather than separate hearings that would have been required for licensing pursuant to Part 50. However, as in reactor licensing, and unlike materials licensing, the adjudicatory hearing must be held prior to construction and operation. See AEA § 193(b), 42 U.S.C. 2243(b).

B. This Proceeding

At the time the Commission received the LES application (in 1991), it did not have in place regulations specifically addressing the licensing of enrichment facilities in accordance with the new legislation. Therefore, the Commission published a Notice of Hearing and a Commission Order setting forth special standards by which LES's application would be judged and instructions for the hearing. 56 Fed. Reg. 23,310 (May 21, 1991). The Commission directed the Licensing Board to apply particular regulations, including Part 70's general requirements for the approval of licenses, which include provisions on financial qualifications (10 C.F.R. § 70.23(a)(5)). See id. at 23,310. The Commission also directed that the LES licensing proceeding be conducted pursuant to 10 C.F.R. Part 2, Subparts G and I. See id.

On this appeal, we consider CANT's Contention Q, which asserted that LES is not financially qualified to build and operate the CEC. All parties agreed that the applicant was subject to the financial qualification provisions of Part 70. However, the Licensing Board determined that the financial qualification provisions of Part 70 "crie[d] out for additional clarification or interpretation." LBP-96-25, 44 NRC at 384. Thus, the Board looked to Part 50's provisions on financial qualifications, which are more detailed than Part 70's, especially with respect to "newly formed entities" such as LES. Tracing the regulatory history of the Part 50 and Part 70 rules in great detail, the Board concluded that the history "fully supports a parallel construction of those regulations in terms of the showing necessary to establish" financial qualifications. Id. at 392. Therefore, the Board applied the detailed Part 50 standards to this proceeding.

The Board then determined that LES had failed to meet the Part 50 criteria for newly formed entities because it had failed to provide concrete funding commitments. Specifically, the Board noted that LES's limited and general partners do not have the financial ability to fund the construction costs of the CEC and none of the corporate affiliates of LES's limited or general partners have provided such commitments. Nor, ruled the Board, had LES identified any lending banks that will provide funding. Therefore, the Board concluded that LES had failed to demonstrate that it is financially qualified. See LBP-96-25, 44 NRC at 396-404.

II. ANALYSIS

The central focus of the financial qualifications controversy is whether the LES license application is deficient because it does not contain firm commitments for funding construction and operation of the CEC similar or identical to those typically required for commercial power reactors under Part

50. The Board found as a matter of law that a funding plan such as LES's, filed pursuant to Part 70, is deficient if it does not meet the Part 50 financial qualification regulations. We disagree.

As we discuss in detail below, we find it inconsistent with the express language of the applicable financial qualification regulations in Part 70 and their regulatory history to hold that in every case a Part 50-type "commitments" requirement must be met as a prerequisite to licensing. We conclude that the Part 70 financial qualification regulations contemplate a case-by-case inquiry to determine whether an applicant "appears to be financially qualified." See 10 C.F.R. § 70.23(a)(5). Here, LES's financial plan, combined with financial commitments LES has made to the NRC in this proceeding, the nature of LES's proposed facility and our regulatory oversight program, give us a reasonable degree of confidence that if LES is able to move forward at all on the facility, it will have sufficient resources for safe construction and operation.

A. Must a Part 70 Applicant Meet Part 50 Financial Qualification Standards?

The Board determined that the financial qualification regulations of Part 50 and Part 70 have the same basic meaning and accordingly the Board found that it was required to apply strictly the particular criteria that appear only on the face of Part 50. In our view, the language and history of Part 70, along with the Notice and Commission Order establishing the LES proceeding, compel the opposite result -- the NRC is not required as a matter of law to apply the strict financial qualification provisions of Part 50 to all Part 70 license applications. Instead, Part 70 calls for a case-by-case inquiry into whether the applicant "appears to be financially qualified" to take safety measures necessary to assure that activities under the license will not create undue risk to public health and safety.

1. Express Language

The starting point in construing an NRC regulation is, of course, its "language and structure." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988). Here, while the Board found that the Part 70 and Part 50 financial qualification regulations have "substantially the same meaning," it is immediately obvious that the express language of the Part 70 and Part 50 financial qualification regulations is quite different. The Part 70 financial qualification regulations, 10 C.F.R. § 70.23(a)(5) and the note following section 70.22(a)(8), are brief paragraphs. They contain no specific criteria or standards for determining whether an application is adequate. They contemplate that the provisions will not be applicable to every Part 70 application, and that even where they are applicable, the Commission may or may not require the applicant to file financial information.

Specifically, the financial qualification provisions of Part 70 apply only "[w]here the nature of the proposed activities is such as to require consideration by the Commission." 10 C.F.R. § 70.23(a)(5).[(2)] If applicable, section 70.23(a)(5) merely states that a license will be issued if the applicant "appears to be financially qualified." The language of the note following section 70.22(a)(8) is similarly unspecific. It states that when the applicant's financial qualifications are to be considered, "the Commission may request the applicant to submit information with respect to [its] financial qualifications." (Emphasis added).

In contrast to the general language of the Part 70 financial qualification regulations, the Part 50 financial qualification regulations are far more detailed and comprehensive. They contain several paragraphs of requirements. See 10 C.F.R. § 50.33(f)(1-4). They also contain no equivalent of Part 70's "appears to be financially qualified" language but instead require every applicant at the construction stage to submit financial information demonstrating that it actually "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs." 10 C.F.R. § 50.33(f)(1). Depending on the type of application and stage of the proceeding, additional information may be required. See 10 C.F.R. § 50.33(f)(2-4). If the applicant is a newly formed entity, for example, it must include information in its application showing (a) its relationship to its stockholders, (b) its ability to meet contractual obligations (proposed or incurred) and (c) any other information the Commission may find pertinent. 10 C.F.R. § 50.33(f)(3)(I-iii). In addition to the detail in Part 50 itself, Appendix C to that Part provides further guidance as to the type of financial information that will satisfy the Part 50 financial regulations.

The fact that the Part 70 and Part 50 financial qualification provisions are written so differently is significant. Had the Commission intended the Part 50 standards and criteria to apply to all Part 70 applicants filing financial information, as the Board apparently believed, the regulations would have either restated the Part 50 criteria or incorporated them by reference.[(3)] Part 70 does neither. Its shorter, more flexible language instead allows a less rigid, more individualized approach to determine whether an applicant has demonstrated that it is financially qualified to construct and operate an NRC-licensed facility.

2. Regulatory History

The regulatory history of the Part 70 and Part 50 regulations on financial qualifications supports the interpretation that a Part 70 applicant's financial qualifications should be judged on an individualized basis and not necessarily pursuant to the same standards and criteria as appear in Part 50.

The Commission's authority for reviewing license applicants' financial qualifications rests on section 182a of the Atomic Energy Act of 1954, as amended. 42 U.S.C. 2232(a). That section gives the Commission discretion to determine by rule or regulation the information that is necessary to determine if a license applicant is financially qualified. See New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93 (1st Cir. 1978). Pursuant to this authority, in 1956 the Commission promulgated the original Part 50 and Part 70 financial qualification regulations. See 21 Fed. Reg. 355 (Jan. 19, 1956) and 21 Fed. Reg. 764 (Feb. 3, 1956).

After 1956, the most significant change in financial qualification regulations came in 1968, when the Commission amended section 50.33 to include explicit criteria and associated guidance (Appendix C) for reactor license applicants to demonstrate financial qualifications pursuant to Part 50. 33 Fed.

Reg. 9704 (July 4, 1968). Before this change the wording of the Part 50 and Part 70 financial qualification provisions was essentially the same. See LBP-96-25, 44 NRC at 386-87. Neither Part specified the particular information necessary to establish the financial qualifications of an applicant. See Id.

The Licensing Board placed great weight on the similarity in language of the two provisions prior to 1968 and minimized the effect of the later changes. The Board concluded that because in 1968 the critical language of the two Parts' provisions was "nearly identical," they had the same basic meaning and required the same showing to demonstrate financial qualifications. LBP-96-25, 44 NRC at 391-392. As support for this finding, the Board cites a 1966 NRC Director of Regulation's response to a congressional inquiry, in which the Director stated that the Commission applied "the same principles of financial analysis" to all license applications.(4)

But additional statements in that same congressional response undermine rather than support the conclusion that the information or level of commitments required was the same for Part 70 and Part 50 applicants. The Director of Regulation's response stated that:

> our regulations do not prescribe the detailed or specific criteria or standards against which the applicant's financial qualifications will be judged, because of the variability in the significance of specific financial factors and indicators which exist in the financial arrangements involved in each case. In all cases we employ conventional principles of financial analysis in evaluating the financial qualifications of applicants. We are exploring, however, the feasibility of setting forth in the regulations general standards that must be met and describing in the regulations the kinds of documents and information to be furnished in various types of cases (e.g., applicants that are newly formed entities).

JCAE letter at 348. This discussion suggests that although the same general principles may have been applied to all applications in 1966, the specific criteria and standards that were applied varied from case to case.

Even if the financial qualification criteria applicable to both Part 70 and Part 50 applicants were the same prior to 1968, the 1968 rule change specifying requirements for reactor applicants but not materials applicants had the effect of breaking any link that existed. Starting then, Part 50 (but not Part 70) imposed particular criteria and standards, including (eventually) the advance commitments for new entities that the Board stressed in its opinion below. Essentially ignoring the 1968 rule change, the Board concluded that "the essence of the Part 70 and Part 50 regulations with respect to construction financing and the standard the Commission must apply in granting a license under these Parts has not significantly changed since the initial issuance of the regulations." LBP-96-25, 44 NRC at 391 (emphasis added). But the standard that the Commission must apply changed significantly after 1968 for Part 50 applicants. Prior to that time both Part 50 and Part 70 permitted a considerable case-by-case flexibility. After the 1968 changes, a Part 50 applicant (but not a Part 70 applicant) was bound to supply various pieces of information required by the regulation. See 10 C.F.R. § 50.33(f)(1997).

Over the years after 1968 further changes to Part 50 financial qualification regulations indicate that the Commission was continuing to look at what information should be required by blanket rule, versus what information should be requested on a case-by-case basis. In its discussion of the regulatory history, the Board briefly referred to several amendments to Part 50 in the years after 1968. See LBP-96-25, 44 NRC at 391. The net effect of these changes was to add what is now section 50.33(f), requiring particular information from newly formed entities, and to exclude public utility applicants for an operating license from the financial qualification requirements.(5) Neither the Board nor the parties cited any affirmative statements in the regulatory history of the post-1968 rule changes to support the Board's theory that the Part 50 requirements must be applied equally to Part 70 applicants.

For these reasons, we conclude that the regulatory history supports a case-by-case analysis of financial qualifications under Part 70. However, we by no means suggest that the Commission is precluded from applying Part 50 standards to a Part 70 applicant if particular circumstances warrant this approach. The general language of Part 70 leaves the Commission free to review the reasonableness of an applicant's financial plan in light of all relevant circumstances. In some cases this review might lead the Commission to apply any or all of the criteria imposed by Part 50.

3. Notice of Hearing and Commission Order

Nothing in the Notice and Commission Order setting forth the particular standards and criteria to apply to the LES license application compels us to apply the Part 50 standards to Part 70 license applicants. We did not specifically address the issue of financial qualifications in the Notice. However, we directed the Board to apply 10 C.F.R. § 70.23, the general provision on requirements for the approval of special nuclear material licenses, which includes the financial qualifications requirements in section 70.23(a)(5). For certain other licensing requirements, we specifically directed that Part 50 standards be applied.(6) Our Hearing Order's silence as to Part 50 financial qualification standards supports the position we take today -- that we are not bound as a matter of law to apply Part 50 financial qualification provisions to LES's Part 70 application.

B. Does the Applicant "Appear to be Financially Qualified"?

We turn next to the issue of whether in the circumstances of this case LES "appears to be financially qualified" to engage in the "proposed activities" for which it is seeking a license. 10 C.F.R. § 70.23(a)(5). As we have stated in other contexts, "[t]he fundamental purpose of the financial qualifications provision of ... section [182a of the AEA] is the protection of public health and safety and the common defense and security." 33 Fed. Reg. 9704 (July 4, 1968).

LES's financial plan addresses its financial qualifications both to construct and to operate the CEC, and both were fully litigated before the Board. But once the Board found that LES was not financially qualified to construct the CEC, it never decided whether LES met the financial qualification standards for operation. See LBP-96-25, 44 NRC at 404. As LES seeks a combined license in our proceeding, we consider both aspects of financial qualifications

together. The Commission has examined the record compiled below and finds that LES appears to be financially qualified to construct and operate the CEC.[7]

1. LES's Financial Plan for Construction and Operation

LES has described its plan "as a venture project, where the decision to go forward is constantly reassessed."[8] LES has four general partners responsible for the overall management, operation, and control of the business and seven limited partners who will contribute equity but have no management control of the business.[9] Although LES itself is a newly formed entity, the parents and corporate affiliates of its partners have extensive experience at building gas centrifuge enrichment plants overseas, and construction and operation of nuclear and other large industrial facilities in the U.S.[10] LES drafted its financial plan relying on this experience. See Applicant's Brief in Support of Its Petition for Review of LBP-96-25 at 24 (Mar. 13, 1997) (hereinafter LES Brief on Appeal).

At this time, none of the LES partners have entered contractual commitments to provide funding for the CEC project. Similarly, no financial lending institution has agreed to fund any portion of the project. But the LES financial plan is not based on pre-licensing funding commitments from either the LES partners or lending institutions. LES candidly points out that its plan, in part, is to use the license itself to encourage investment in the project.

Even though LES cannot now point to financial backing, LES has promised repeatedly that it will not proceed with the project unless it obtains advanced funding commitments. In its appellate brief, for example, LES emphasized that under the financial plan "[t]here is no scenario in which construction of the CEC could commence before funding is fully committed." LES Brief on Appeal at 27 n.29.

The financial plan contemplates that before construction begins the limited partners of LES will contribute the desired equity (the limited partners will obtain funding from their corporate parents and affiliates). The LES plan relies on equity contributions of 30 to 40 percent of the project costs. The other 60 to 70 percent of funding for the project will likely come from major lending institutions.[11]

To facilitate the arrangement of this debt financing and the eventual commitment of its corporate parents, LES has stated that it "will not proceed with the project unless it has in place enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment." LES Brief on Appeal at 27. According to the testimony below, the advance contracts will be long term, for a duration of 5 years, and will be at prices sufficient to cover both the construction and operating costs incurred during the term of the contract, but they will not cover the remaining construction costs or costs of continuing operation after these initial contracts expire.[12]

Because there are no advance equity commitments, it is possible that one or all of the limited partners affiliated with domestic utilities will withdraw from the project before contributing any funds for construction or operation.[13] LES, however, has promised that it will not go forward unless it has a minimum of 30 to 40 percent equity contribution from its limited partners. If LES attempts to add a new partner, it will have to obtain a license amendment[14] and ensure that the new limited partner contributes any deficiency in equity. On the other hand, if no new partner is brought in and some or all of the current partners cover the void in funds by each contributing a larger share, no amendment is necessary, but these partners will be held to the financing terms of the present plan and any condition the Commission places on the license.

In sum, if a smaller number of existing partners contribute the necessary equity, no new issue would be raised about the terms of funding the project under the current plan, and if it turns out that the existing partners cannot themselves contribute the equity, the project cannot go forward unless new partners are brought in to cover the deficiency in equity.

As a practical matter LES must obtain sufficient commitments from its parents or affiliates, existing or new, to attract debt financing for the project. The current parents and their affiliates are entities of substantial net worth and there seems to be no dispute that the parents are capable of contributing the necessary equity for the project to go forward.[15] However, as the Board found, at this time the parents and other corporate affiliates of LES's general and limited partners are not responsible for the indebtedness or obligations of the LES partnership. LBP-96-25, 44 NRC at 402 n.30. Because it is LES's worth that the commercial lenders will look to when determining whether to provide financing, the commercial lenders will rely on the financial capability of affiliated companies only to the extent such entities have committed to guarantee the loan or otherwise legally committed themselves to a project. LBP-96-25, 44 NRC at 402 n.31. Therefore, if the corporate parents do not commit themselves to this project, either by making themselves legally liable, or by making LES a partnership of sufficient worth, LES will not be able to obtain the necessary debt financing to proceed under the terms of its plan and as a result would not construct the CEC.

The Licensing Board did not question LES's hard construction cost estimate for the facility, $816 million.[16] The Board stated that "[n]either the method by which the Applicant estimated the CEC construction costs nor the reasonableness of the Applicant's cost estimates is disputed." LBP-96-25, 44 NRC at 396 (citation omitted).

Finally, LES's financial plan projects that operating costs and debt amortization will be covered by operating revenue with sufficient profits to cover contingencies during operation after full production is reached. Prior to full production, contingencies will be covered by insurance, indemnification agreements, reserves, or additional capital draws on the equity investors. The permanent debt estimate to complete the plant includes coverage for a debt service reserve fund and working capital from lenders.[17]

2. Financial Qualification Review Determination

Under the circumstances of this case we determine that LES "appears to be financially qualified" to construct and operate the CEC in a safe manner. Our determination rests on several factors. First, LES's financial plan and its commitments not to proceed absent adequate funds provide considerable assurance that if the project goes forward, sufficient funds will be available. Second, the possibility that underfunding will lead to a health, safety, or a common defense or security risk is extremely unlikely in light of the extensive and detailed technical review applicants such as LES must undergo to ensure safe construction and operation. See, e.g., Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996). Third, the health and safety risks associated with uranium enrichment by gas centrifuge are less than with operation of nuclear reactors.[18] Finally, in the end, NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements. See All Chemical Isotope Enrichment, Inc., LBP-90-26, 32 NRC 30 (1990) (Licensing Board sustained the staff's revocation of construction permits of a licensee that had failed to disclose its true financial condition during the original licensing proceeding).

LES's financial strategy provides reasonable assurance that financial difficulties, should they arise, will not lead to safety problems. Under LES's financing plan construction will not even begin until the necessary funding is fully committed. It is reasonable to assume that the advance funding commitments will cover costs of construction, because the hard construction cost estimate provided by LES is reasonable. See page 24, supra. This indicates that LES understands its funding commitment and has seriously considered the factors that will contribute to the expense of the project it is undertaking. It is also an indication that LES will be in a position to recognize promptly any unforeseen difficulty that may escalate the project's costs, allowing it time to take steps to maintain its financial qualifications. In view of LES's reasonable construction cost estimate and its advance funding commitment, we see little or no risk that lack of financing might lead to construction of an unsafe plant.

As for operation, the NRC staff emphasized LES's commitment that "operations will not begin until firm supply contracts with utility customers are in place." SER, Staff Exhibit 1 at page 13-2 ¶ 13.2.3. These contracts will be at "prices sufficient to cover both construction and operating costs, including a return on investment." LES Brief on Appeal at 27. If LES cannot attract investors at reasonable interest rates, so that it can keep prices low enough to obtain contracts for at least the first several years of operation, or if for other reasons its price is too high to attract customers in the first place, it cannot begin construction or operation. If LES never begins operation, there is no risk whatever to public health and safety.

We recognize that LES's commitment to obtain the advance contracts does not guarantee sufficient financial resources for the full 30 years of operation, because the advance contracts would cover only the period for which the initial long-term contracts are in place. But obtaining advance contracts will result in LES establishing itself as a market participant, a status which will help in the future to secure financing and new contracts, and it will provide LES a return on its investment for the term of the contracts. Any return on investment could be used to further solidify LES's financial position. Moreover, LES has developed a reasonably sophisticated financial plan that projects sufficient operating funds for the CEC over the course of time.[19] And, of course, during the entire course of operation, the Commission's inspection and enforcement tools provide further assurance that operation will not jeopardize public health and safety.[20]

In short, we find that LES "appears to be financially qualified." CANT's arguments to the contrary essentially amount to a contention that the CEC is not a good investment. CANT maintains that LES's plan to finance construction and operation is inadequate because investors will not be found at reasonable interest rates to finance full capacity, "[a]nd substantially higher interest rates make it unlikely that the project will be feasible."[21] According to CANT, at less than full capacity LES will need to charge too high a price for enriched uranium to cover its fixed costs and remain viable and will not be able to market its enriched uranium even to its utility partners, because the price will be so high that it will be rejected by the Public Utility Commissions which regulate these partners. See CANT FOF at 51-54; CANT Brief on Appeal at 51. Thus, CANT concludes that LES must attempt to build "a larger facility (i.e., at LES's projected maximum output of 1.5 million SWU's)." CANT FOF at 53.

CANT's prediction of economic doom for the LES venture may or may not be borne out. But if CANT is correct and the project proves a failure in the marketplace, the lack of economic success will have no adverse effect on the public health and safety or the common defense and security. Under the commitments LES has made to the Commission, if the market does not allow LES to raise sufficient capital for construction or to obtain the promised advance purchase contracts, LES will not build or operate the CEC.

3. Conditions on any LES License

LES has made several financial commitments in its pleadings before the Commission and Licensing Board when explaining the nature of its financing plan. In particular, LES has promised unequivocally not to proceed with the project in the absence of sufficient advance funding commitments (equity and debt) and advance purchase contracts. See LES Brief on Appeal at 25-27; LES Financial Plan at page D-11. We think it appropriate to impose these two commitments as license conditions, an approach we have taken in other litigated cases. See, e.g., Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 154-158 & n.139 (1995); cf. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 109-10 (1996)(requiring LES to amend Emergency Plan and Safety Analysis Report to reflect litigation commitment).

Accordingly, LES must meet the following conditions prior to constructing or operating the CEC facility:

1. Construction of the CEC shall not commence before funding is fully committed. Of this full funding (equity and debt), LES must have in place before constructing the associated capacity:(a) a minimum of equity contributions of 30 percent of project costs from the parents and affiliates of the LES partners (e.g., in escrow, on deposit, etc.); and (b) firm commitments ensuring funds for the remaining project costs.
2. LES shall not proceed with the project unless it has in place long term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts.

III. CONCLUSION

For the foregoing reasons, the Licensing Board's ruling on financial qualifications in LBP-96-25 (44 NRC at 375-404) is reversed and LES's financial qualifications are approved. LES must meet the financial qualifications conditions set out in this opinion.

IT IS SO ORDERED.

For the Commission

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John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland, this ____ day of December, 1997.

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1. In LBP-96-25, the Board also ruled on various issues arising under the National Environmental Policy Act (NEPA), including the "need" for the facility, the "no-action alternative" and "secondary benefits." See 44 NRC at 336-375. LES and the NRC staff attack these NEPA rulings on appeal, but we defer our decision on the NEPA aspects of LBP-97-25, pending completion of our consideration of two other Board decisions in the LES proceeding: LBP-97-3, 45 NRC 99 (1997)(ruling on waste disposal costs), and LBP-97-8, 45 NRC 367 (1997)(ruling on "environmental justice"). Those two decisions raise additional NEPA questions. We think it prudent to consider all NEPA issues together.

2. In this case, the hearing notice establishing this proceeding was silent as to whether LES must satisfy the financial qualification standards of Part 70, but the staff required the applicant to do so. The Board found the Part 70 financial qualification provisions applicable and no party contests this finding.

3. Although section 70.23, which addresses the requirements for approval of a license, incorporates by reference certain Part 50 licensing standards, it contains no reference to Part 50's financial qualification standards. Footnote 3 to Section 70.23(b) states that the Commission will use the quality assurance program criteria in Appendix B of Part 50 to determine the adequacy of the applicant's program. Section 70.23(a)(5), which addresses financial qualifications, has no similar language. Section 70.22, which provides general requirements for contents of applications, contains a similar incorporation of Part 50 quality assurance standards, but the subsection addressing financial qualifications does not mention Part 50. Compare 10 C.F.R. § 70.22(f) n.2 to the note following section 70.22(a)(8).

4. LBP-96-25, 44 NRC at 388 (quoting letter from Harold W. Price, Director of Regulation, U.S. Atomic Energy Commission, to John T. Conway, Executive Director, Joint Committee on Atomic Energy, Congress of the United States (Nov. 28, 1966), reprinted in Licensing and Regulation of Nuclear Reactors: Hearings Before the Joint Committee on Atomic Energy, 90th Cong. 1st Sess. 347, pt. I, Appendix 12 (1967) (hereinafter JCAE Letter).

5. LBP-96-25, 44 NRC at 391. The Board discussed briefly several changes to section 50.33: in 1982 what is now section 50.33(f)(3) was added requiring newly formed entities to submit additional information, 47 Fed. Reg. 13,750, 13,754 (March 31, 1982), and electric utility applicants for construction permits or operating licenses were excluded from having to meet section 50.33, 47 Fed. Reg. at 13,750-51; and in 1984, the exclusion for construction permit applicants was repealed, 49 Fed. Reg. 35,747, 35,752 (Sept. 12, 1984), corrected 53 Fed. Reg. 24,018 (June 27, 1988).

6. See, e.g., 56 Fed. Reg. 23,310, 23,312 (May 21, 1991) (specifically requiring application of the creditor regulations in § 50.81).

7. The Commission has long held that it has inherent supervisory power to decide any matter itself, rather than remanding an issue to a Board for resolution in the first instance. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 228-29 (1990)(citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977)), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 502 U.S. 899 (1991); United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).

8. Applicant's Response to the Commission's Order of July 8, 1997, at 5 n.7 (Aug. 1, 1997).

9. LES's four general partners are (1) Urenco Investments, Inc.; (2) Claiborne Fuels, L.P.; (3) Claiborne Energy Services, Inc.; and (4) Graystone Corporation. The seven LES limited partners are (1) Louisiana Power and Light Company; (2) Urenco (Investments US) Ltd.; (3) GnV Gesellschaft für nukleare Verfahrenstechnik mbH; (4) UCN Deelnemingen B.V.; (5) Claiborne Energy Services, Inc. (also a general partner); (6) Le Paz, Inc.; and (7) Micogen Limited III, Inc. LBP-96-25, 44 NRC at 378-380.

10. Final Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer, Louisiana, NUREG-1484, U.S. NRC, Staff Exhibit 2 at Vol. 1, page 4-84 through 4-85 (August 1994).

11. Id. at 25, citing CANT Exhibit I-DO-33, entitled "Attachment D: LES Project Financial Plan (Non-Proprietary)" (hereinafter "LES Financial Plan") at D-1 through D-16. See also Safety Evaluation Report for the Claiborne Enrichment Center, Homer, Louisiana, NUREG-1491, U.S. NRC, Staff Exhibit 1 at page 13-1, ¶ 13.2.2 (January 1994) (hereinafter SER, Staff Exhibit 1); Prepared Testimony of James T. Doudiet and W. Howard Arnold at 9, 20-21, 29-32, following Hearing Transcript at 563).

12. See Hearing Transcript, Testimony James T. Doudiet at 660-61 and 663. The number of advance contracts the CEC will obtain depends on its

production capacity. The CEC has a maximum production capacity of 1.5 million separative work units (SWUs) of enriched uranium per year. After the first phase of construction, LES's production capacity would be 500,000 SWUs. Capacity would be 1 million after the second phase, and 1.5 million at completion. LES Financial Plan at D-11 through D-12; LES Brief on Appeal at 25. LES does not plan to proceed with the first phase of construction or operation unless it has in place enrichment contracts for all, or at least two-thirds (1 million SWUs), of the plant's capacity. Applicant's Proposed Findings of Fact and Conclusions of Law in the form of Concluding Partial Initial Decision at 204 (May 26, 1995)(citing Testimony of Doudiet at Tr. 761). See also LBP-96-25, 44 NRC at 397.

13. LBP-96-25, 44 NRC at 400 n.28; Applicant Response to the Commission Order of July 8, 1997 (Aug. 1, 1997) (discussing Graystone Corporation's request to withdraw from the partnership). Attached to this filing is a Motion for Leave to Extend the Page Limitation Specified in Commission Order Dated July 8, 1997. This motion is granted. The partners have not determined whether to permit Graystone to withdraw from the partnership. Id.

14. See LBP-96-25, 44 NRC at 399 n.27 (citing Testimony of Staff's Witness Wood at 8, following Transcript at 721).

15. SER, Staff Exhibit 2 at 13-3 through 13-4; CANT's Opposition Brief On Appeal of LBP-96-25 at 45 n.46 (Apr. 30, 1997) ("it should be noted that, given their financial strength and relationships with lenders, had the LES parent companies themselves elected to be the entities seeking the license, rather than setting up new, virtually assetless entities to do so, financial qualifications may well not even be an issue in these proceedings") (hereinafter CANT Brief on Appeal).

16. Hard construction costs of the CEC are in 1992 dollars and include the cumulative construction costs of the centrifuges, and owners' costs back to the beginning venture phase. The amount does not include the interest accrued during construction, escalation costs, financing costs and decommissioning costs. These cost estimates are proprietary and as a result were not made public, but are part of the record. LES Project Financial Plan at D-11 through D-13 (compare Project Financial Plan (Proprietary), CANT Exhibit I-DO-33, Attachment E at E-11 through E-13).

17. See LES Project Financial Plan at D-15.

18. When Congress was considering the legislation to amend the AEA to provide that uranium enrichment facilities would be licensed consistent with special nuclear material requirements, and not as nuclear reactors, the Commission informed Congress that nuclear reactors "are entirely different from uranium enrichment facilities in concept, complexity, and degree of risk." Licensing Uranium Enrichment Plants: Oversight Hearing Before the Subcomm. on Energy and the Environment of the Comm. on Interior & Insular Affairs, H.R., 101st Cong., 2d Sess. 13 (1991). Emphasizing this point, the Director of the NRC Office of Nuclear Materials Safety and Safeguards informed Congress that "hazards posed by this process [uranium enrichment] are much less than those potentially represented by nuclear power plants which have large inventories of radionuclides and the stored energy for dispersing them." Id. at 129.

19. LES Financial Plan at page D-1 through D-16; CANT Exhibit I-DO-43, LES Financial Planning Model, proprietary; Prepared Testimony of James T. Doudiet and W. Howard Arnold at 13-19 following Hearing Transcript at 563.

20. If LES's license application is approved, LES will be required to submit annually to the NRC its financial statements, any changes to construction or operating budgets, and any change in ownership. LES Exhibit 1E, LES Claiborne Enrichment Center Proposed License Conditions, Section 1, ¶1.6 at page 1-9.

21. CANT's Proposed Findings of Fact and Conclusions of Law Regarding Contention Q, Financial Qualifications of LES at 45 (May 26, 1995) (hereinafter CANT FOF); CANT Brief on Appeal at 50-51. According to CANT, there are a number of factors that will make it extremely unlikely that LES will be able to attract capital on competitive terms, including a low 30- to 40-percent equity, high decommissioning costs, a highly competitive enrichment market, and foreign currency exchange rates that will affect the ultimate price of centrifuges. CANT Brief on Appeal at 50-51.