NUCLEAR REGULATORY COMMISSION ISSUANCES

December 1997

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judges (ALJ), the Directors' Decisions (DD), and the Decisions on Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.
COMMISSIONERS

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

B. Paul Cotter, Jr., Chief Administrative Judge, Atomic Safety & Licensing Board Panel
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of

ST. MARY'S MEDICAL CENTER

O1 Docket No. 3-97-022

December 11, 1997

NRC: ENFORCEMENT OF SUBPOENAS

An NRC subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena’s issuance. United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Construction Products Research Inc., 73 F.3d 464, 469-71 (2d Cir.), cert. denied, 117 S. Ct. 294 (1996).

NRC: AUTHORITY TO INVESTIGATE

The NRC may begin an investigation “merely on suspicion that the law is being violated, or even just because it wants assurances that it is not.” United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

NRC: ENFORCEMENT OF SUBPOENAS

The NRC’s subpoena power is essentially analogous to the broad subpoena powers accorded to a grand jury. Powell, 379 U.S. at 57; Morton Salt Co., 338 U.S. at 642-43; Oklahoma Press Co. v. Walling, 327 U.S. 186, 209 (1946).
NRC: AUTHORITY TO INVESTIGATE (SUBPOENAS)

The instant subpoenas clearly identify the general area of investigation by the NRC — the termination of a named individual — but also limit the demand for document production to two clearly defined areas; accordingly, the subpoenas are not “vague and indefinite.”

NRC: ENFORCEMENT OF SUBPOENAS

Petitioners have not alleged that the subpoenas are unduly burdensome, which would require showing that “compliance would threaten normal operation of its business.”

NRC: ENFORCEMENT OF SUBPOENAS

The subpoenas clearly identify the area of investigation and the scope of document production; the area of inquiry is within the jurisdiction of the NRC; and the subpoenas are not unduly burdensome; accordingly, the subpoenas will be enforced.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a joint motion by six individual employees (“Petitioners”) of the St. Mary’s Medical Center in Evansville, Indiana, who each seek to quash a subpoena issued by the Office of Investigations (“OI”). The hospital joins the motion. For the reasons stated below, we deny the Petitioners’ joint motion and enforce the subpoenas.

II. FACTUAL BACKGROUND

St. Mary’s Medical Center is a hospital located in Evansville, Indiana, and holds an NRC license, issued under 10 C.F.R. Part 30, which authorizes the use of byproduct materials in the hospital’s nuclear medicine program. On or about April 10, 1997, the hospital terminated an employee who worked in administering that program. Subsequently, OI developed information indicating that the hospital may have terminated the employee in retaliation for raising safety concerns, a potential violation of 42 U.S.C. § 5851 and 10 C.F.R. § 30.7. When an OI investigator informally spoke to one of the former employee’s
supervisors in an attempt to schedule an interview, that individual claimed that the hospital had terminated the former employee "for cause." But both this individual and other hospital employees rejected OI requests for interviews and refused to speak further with OI investigators. Accordingly, on September 5, 1997, OI issued the six subpoenas in question here and served them on the hospital’s attorney.

The six subpoenas are directed to: the hospital’s Director of Human Services, who is responsible for personnel records at the hospital; two of the terminated employee’s supervisors, the Director of Radiology and the Nuclear Medicine Supervisor; and three co-workers of the terminated employee, including a Nuclear Medical Technician, a part-time consultant and Radiation Safety Officer, and a part-time Nuclear Medical Assistant. Each of the six subpoenas recites that the respective individual has been subpoenaed “to testify in the matter of [the terminated employee] and St. Mary’s Medical Center.” The subpoena also directs each individual “to provide any and all documents related to the performance or termination of [the terminated employee].”

On October 10, 1997, the Petitioners filed their joint motion, seeking to quash the subpoenas. First, after correctly quoting the subpoenas, the Petitioners allege that “[t]he subpoenas provide no additional information as to what specifically the NRC seeks nor do the subpoenas or any other document . . . put the [Petitioners] on notice of the specific allegations or charges being investigated by the NRC.” Memorandum in Support of Motion to Quash (“Memo”) at 1. Second, the Petitioners allege that they are entitled to “written notice of the specific claims asserted against [the hospital]” but that the NRC has not provided that notice, id. at 2, although the Petitioners fail to cite any case for the proposition that written notice is required. Finally, Petitioners argue that the subpoenas violate their Fourth Amendment rights because they “are too indefinite in scope to be enforceable. There is no specific description, limiting what is requested as to time and subject. The scope of each subpoena is limitless.” Memo at 2, citing United States v. Morton Salt Co., 338 U.S. 632 (1950), and Donovan v. Lone Steer Inc., 464 U.S. 408 (1984).

III. ANALYSIS

A. Applicable Statutes and Regulations

In section 161c of the Atomic Energy Act (“AEA”) of 1954, as amended, Congress explicitly provided that the NRC

is authorized . . . to make such studies and investigations, obtain such information . . . as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations
or orders issued thereunder. For such purposes, the Commission is authorized . . . by subpoena to require any person to appear and testify, or to appear and produce documents, or both at any designated place.

42 U.S.C. § 2201(c) (emphasis added). Section 11s of the AEA, in turn, defines “person” as “(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group . . . and (2) any legal successor, representative, agent, or agency of the foregoing.” 42 U.S.C. § 2014(s).

In addition, section 211 of the Energy Reorganization Act (“ERA”) of 1974, as amended, provides specific guidelines for the protection of workers in nuclear-related activities. Specifically,

[n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . [inter alia] (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, . . . (D) commenced, caused to be commenced, or is about to commence or cause to be commenced . . . a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended; . . . or (F) assisted or participated . . . in such a proceeding . . . or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.


The Commission has adopted regulations implementing section 161 of the AEA and section 211 of the ERA for each area of licensing activities that it regulates.¹ The regulation implementing employee protection for activities under Part 30 is found at 10 C.F.R. § 30.7, which prohibits “[d]iscrimination by a Commission licensee . . .” 10 C.F.R. § 30.7(a). “Discrimination includes [but is not limited to] discharge and other actions that relate to compensation, terms, conditions, or privileges of employment.” Id.

(1) [P]rotected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either [the AEA or the ERA] . . . or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes . . . or under these requirements if the employee has identified the alleged illegality to the employer;

¹Section 30.7, like 10 C.F.R. § 50.7 and the other regulations governing employee protection, were adopted under both section 161 of the AEA and section 211 of the ERA. See Five Star Products, Inc., CLI-93-23, 38 NRC 169, 177 n.2 (1993).
(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements . . .

10 C.F.R. § 30.7(a)(1).

B. Agency Subpoena Case Law

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena’s issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 469-71 (2d Cir.), *cert. denied*, 117 S. Ct. 294 (1996) (enforcing NRC subpoena); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989) (enforcing NRC subpoena); *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 645 (7th Cir. 1995); *Five Star Products*, CLI-93-23, 38 NRC at 178. The NRC may begin an investigation “merely on suspicion that the law is being violated, or even just because it wants assurances that it is not.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *Construction Products Research, supra*, 73 F.3d at 470; *United States v. Oncology Services Corp.*, 60 F.3d 1015, 1019 (3d Cir. 1995) (enforcing NRC subpoena). In short, an agency’s subpoena power is essentially analogous to the broad subpoena powers accorded to a grand jury. *Powell*, 379 U.S. at 57; *Morton Salt Co.*, 338 U.S. at 642-43; *Oklahoma Press Co. v. Walling*, 327 U.S. 186, 209 (1946).

C. Discussion

In the joint motion, Petitioners raise only one challenge to the subpoenas: that of vagueness or indefiniteness. However, this challenge approaches the frivolous. The subpoenas, on their face, clearly identify not only the general area of investigation by the agency — the termination of a named individual — but also limit the demand for document production to two clearly defined areas — documents related to that individual’s “performance or termination.” We cannot see how much more clearly the subpoena could define the target of the inquiry or the records required to be produced. It is true that there is no time frame expressed in the subpoena. But the employee was only terminated on one occasion — as far as we are aware — and the joint motion does not allege that production of her personnel file and related records (along with any other related
documents) would be unduly burdensome. Moreover, federal district courts in Indiana have enforced subpoenas of this nature that had no greater precision were far more burdensome. See, e.g., EEOC v. Gladieux Refinery, Inc., 631 F. Supp. 927 (N.D. Ind. 1986).

Furthermore, the cases cited by the Petitioners do not support their claim of “vagueness.” As noted above, Morton Salt provides administrative agencies with broad subpoena powers. As we have noted, the subpoenas give Petitioners adequate notice of the scope of the agency’s investigation: the job performance and termination of the named former employee. Moreover, as noted in both Morton Salt and Construction Products Research, the NRC can review this employee’s termination simply for “assurance” that the hospital did not violate an NRC regulation when it terminated the employee. In fact, the subpoenas reviewed in Construction Products Research sought exactly the same kind of material at issue in this case for exactly the same reasons. Likewise, Donovan v. Lone Steer, 464 U.S. 408 (1984), does not support Petitioners’ claim. In that case, the Supreme Court enforced an agency subpoena for payroll and sales records, holding that entry onto the grounds of the target company in order to serve the subpoena did not constitute an illegal search and seizure under the Fourth Amendment. The Supreme Court distinguished that case from an earlier case (which the Petitioners quote but misattribute to Lone Steer) in which the Court required a warrant for an administrative “search” on the nonpublic areas of a business.

In sum, we find no support for the Petitioners’ claim that the OI subpoenas are vague and indefinite. The subpoenas clearly notify the Petitioners that the NRC is conducting an inquiry into the termination of a named employee. That inquiry is within the jurisdiction of the NRC. The Petitioners have not alleged any other defect with the subpoenas or that the subpoenas are unduly burdensome. Accordingly, the joint motion to quash will be denied.

IV. CONCLUSION

For the reasons stated above, the joint motion to quash is denied. The six subpoenas are hereby enforced. Because the return date originally set forth in the subpoenas has passed, we establish a new enforcement date 21 days from

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2 In order to show that the “subpoena is excessively burdensome, [the hospital] must show that compliance would threaten the normal operation of its business.” Quad/Graphics, 63 F.3d at 648, citing EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313 (7th Cir. 1981).
the date of this Order. The Office of Investigations may reschedule that date in
negotiations with the subpoenaed employees.
It is SO ORDERED.

For the Commission

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland
this 11th day of December 1997.
The Commission reverses the Atomic Safety and Licensing Board’s decision on financial qualifications, LBP-96-25, 44 NRC 331 (1996), and finds Louisiana Energy Services financially qualified to construct and operate the Claiborne Enrichment Center. The Commission also imposes certain license conditions that require LES to fulfill financial commitments it has made in this proceeding.

STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES

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).

FINANCIAL QUALIFICATIONS: MATERIALS LICENSE

The shorter, more flexible language of Part 70, as compared to Part 50, 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.
FINANCIAL QUALIFICATIONS: MATERIALS LICENSE

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.

FINANCIAL QUALIFICATIONS: MATERIALS LICENSE


FINANCIAL QUALIFICATIONS: MATERIALS LICENSE

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).

FINANCIAL QUALIFICATIONS: MATERIALS LICENSE

The health and safety risks associated with uranium enrichment by gas centrifuge are less than with operation of nuclear reactors.

FINANCIAL QUALIFICATIONS: MATERIALS LICENSE

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).

LICENSE CONDITIONS: APPROPRIATENESS

It is appropriate for the Commission to impose commitments made by an applicant in the course of a licensing proceeding as license conditions. See, e.g., Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 154-58 & 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).
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). 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 1980s, 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 (Oct. 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

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 336-75. 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.
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, § 5(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 “cried[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, gives 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). 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

\[1\] 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.
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. 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 qual-
ifications 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 Pol-
lution 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
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

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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).
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 391-92. 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

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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

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5LBP-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).
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 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

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⁶ See, e.g., 56 Fed. Reg. 23,310, 23,312 (May 21, 1991) (specifically requiring application of the creditor regulations in section 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 Co. 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 378-80.

At this time, none of the LES partners have agreed to fund any portion of the project. Similarly, no financial lending institution has agreed to fund any portion of the project. But the LES financial plan is not based on prelicensing 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% of the project costs. The other 60 to 70% 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

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10 Final Environmental Impact Statement for the Construction and Operation of Claiborne Enrichment Center, Homer, Louisiana, NUREG-1484, U.S. NRC, Staff Exhibit 2, Vol. 1, at 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 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

(Continued)
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. LES, however, has promised that it will not go forward unless it has a minimum of 30 to 40% equity contribution from its limited partners. If LES attempts to add a new partner, it will have to obtain a license amendment 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. 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. 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. 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

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13LBP-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.

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

15SER, 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).
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. 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.

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. Finally, in the end, NRC

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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).


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 House Comm. on Interior & Insular Affairs, 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 125.
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 p. 308, infra. 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 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 that 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. And, of course, during the entire course of

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operation, the Commission’s inspection and enforcement tools provide further assurance that operation will not jeopardize public health and safety.\textsuperscript{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.”\textsuperscript{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 that 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. \textit{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 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., \textit{Curators of the University of Missouri, CLI-95-1}, 41 NRC 71, 154-58 \& n.139 (1995); \textit{cf. Louisiana Energy Services, L.P. (Claiborne Energy Services, L.P.)} (Claiborne

\textsuperscript{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 §1, ¶1.6 at p. 1-9.

\textsuperscript{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% 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.

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% 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

JOHN C. HOYLE
Secretary of the Commission

Dated at Rockville, Maryland, this 18th day of December 1997.
Atomic Safety and Licensing Boards Issuances

ATOMIC SAFETY AND LICENSING BOARD PANEL

B. Paul Cotter, Jr.,* Chief Administrative Judge
James P. Gleason,* Deputy Chief Administrative Judge (Executive)
Frederick J. Shon,* Deputy Chief Administrative Judge (Technical)

Members

Dr. George C. Anderson
Charles Bechhoefer*
Peter B. Bloch*
G. Paul Bollwerk III*
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Dr. Richard F. Cole*
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Thomas S. Moore*
Dr. Peter A. Morris
Thomas D. Murphy*
Dr. Richard R. Parizek
Dr. Harry Rein
Lester S. Rubenstein
Dr. David R. Schink
Dr. George F. Tidey

*Permanent panel members
On December 5, 1997, the Staff of the Nuclear Regulatory Commission notified the Presiding Officer that it had issued the Safety Evaluation Report (SER) for the proposed Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, attached a copy of the SER, and stated that it “had decided to issue a license to HRI in 30 days.” Issuance of the SER completed the hearing file for the captioned proceeding originally noticed for hearing on December 21, 1994. 10 C.F.R. § 1231 (1997).

Because this proceeding has been held in abeyance for 2 years while the hearing file was being completed, the Presiding Officer is now allowing the Petitioners to amend their hearing requests on the basis of any new information found in the SER, the Final Environmental Impact Statement (FEIS) released

\footnote{The SER may be found at \texttt{http://www.nrc.gov/opa/reports/hriser.htm}.}
in February 1997, and other documents exchanged between the Applicant and
the NRC Staff.

Amended hearing requests shall adhere strictly to the requirements of 10
C.F.R. § 2.1205(e) and should address the determinations the Presiding Officer
is required to make by 10 C.F.R. § 2.1205(h) in deciding whether to admit a
petitioner as a party to this proceeding.

On December 15, 1997, Petitioners ENDAUM and SRIC faxed to the
Presiding Officer a Notice of Resubmission of Second Amended Request and
Motion to Amend. In response to the notice and Memorandum and Order of
September 19, 1997, these materials shall be treated as filed effective December
18, 1997. These Petitioners may amend that filing in accordance with this
Memorandum and Order.

By letter dated October 3, 1997, Counsel for Eastern Navajo Allottees
Association declared his intent to file a petition to intervene in this proceeding at
such time as the NRC Staff completed its review of the HRI license application.
Such a petition, if filed, would be late under the provisions of 10 C.F.R.
§ 2.1205(d) and (k) and would therefore be required to meet the late-filed criteria
of 10 C.F.R. § 2.1205(l)(1)(i) and (ii).

Order

For all the foregoing reasons, it is, this 18th day of December 1997,
ORDERED

1. That Petitioners’ amended hearing requests shall be received by the
Presiding Officer and those on the official service list by close of business,
Friday, January 16, 1998;

2. That Applicant Hydro Resources, Inc., shall have its response to the
amended hearing requests in the hands of the Presiding Officer and those on the
official service list by close of business, Friday, February 6, 1998; and

3. That the NRC Staff shall have its response to the amended hearing
requests in the hands of the Presiding Officer and those on the official service
list by close of business, Friday, February 20, 1998.2

B. Paul Cotter, Jr., Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 18, 1997

2 In addition to the foregoing paper filings, all potential parties are requested to submit copies of their pleadings
in WordPerfect 6.1 on computer diskette to the Presiding Officer.
Directors’
Decisions
Under
10 CFR 2.206
By a petition dated December 6, 1996, submitted by the Citizens Awareness Network, Inc. (Petitioner or CAN), Petitioner requested evaluation of two enclosed documents relating to the Vermont Yankee Nuclear Power Station (Vermont Yankee facility) operated by the Vermont Yankee Nuclear Power Corporation (Licensee). The first document was a CAN memorandum raising a concern with corrective actions taken by the Licensee in opening the minimum-flow valves at the Vermont Yankee facility to provide residual heat removal pump protection. The second document was a CAN memorandum requesting a review of certain licensee event reports (LERs) submitted by the Licensee. Petitioner requested that the memoranda be evaluated by the NRC to see if enforcement action was warranted based on the information contained therein.

The Director of the Office of Nuclear Reactor Regulation (NRR) issued a Partial Director’s Decision on October 8, 1997, responding to the majority of issues raised by Petitioner. However, three LERs remained open at that time and Petitioner was informed that, upon completion of the NRC Staff evaluation of these remaining LERs, a Final Director’s Decision would be issued. On December 29, 1997, the Director of NRR issued the Final Director’s Decision. The Petitioner’s request was granted in that the NRC Staff has evaluated the three remaining LERs and has concluded that no further enforcement action is warranted.
FINAL DIRECTOR’S DECISION UNDER
10 C.F.R. § 2.206

I. INTRODUCTION

On December 6, 1996, Mr. Jonathan M. Block submitted a petition on behalf of the Citizens Awareness Network, Inc. (CAN or Petitioner), and included two memoranda from CAN. The first memorandum, dated December 5, 1996, reviews information presented by the Vermont Yankee Nuclear Power Corporation (Licensee) at a predecisional enforcement conference held on July 23, 1996, involving the minimum-flow valves in the residual heat removal (RHR) system at the Vermont Yankee Nuclear Power Station (Vermont Yankee facility). The second memorandum, dated December 6, 1996, contains a review of certain licensee event reports (LERs) submitted by the Licensee in the latter part of 1996. The Petitioner requests that the NRC evaluate these documents, pursuant to 10 C.F.R. § 2.206, to determine if enforcement action is warranted on the basis of information contained therein.

On February 12, 1997, the NRC informed the Petitioner in an acknowledgment letter that the petition had been referred to the Office of Nuclear Reactor Regulation (NRR) for the preparation of a Director’s Decision and that action would be taken within a reasonable time regarding the specific concerns raised in the petition. On October 8, 1997, the NRC issued a Partial Director’s Decision that responded to the first memorandum concerning the RHR system and all but three of the LERs listed in the second memorandum. This Final Director’s Decision addresses the NRC Staff’s conclusions regarding the three remaining LERs that were still being evaluated at the time the Partial Director’s Decision was issued.

On November 7, 1997, CAN submitted a letter to the Director of NRR commenting on the Partial Director’s Decision. CAN raised a concern that the Partial Director’s Decision did not adequately address concerns raised in its petition of December 6, 1996. In a response from the NRC Staff dated November 28, 1997, CAN was informed that its letter provided no new or additional information that would warrant a review of the Partial Director’s Decision. In its November 7, 1997 letter, CAN also raised a concern about asserted “systematic mismanagement” at the Vermont Yankee facility and requested certain NRC actions. The Petitioner was informed that this specific concern would be treated as a supplement to the original petition and is addressed in this Final Director’s Decision.
II. DISCUSSION

The NRC Staff’s evaluation of the three remaining LERs and the Petitioner’s supplemental request for action follows.

A. Licensee Event Reports

A CAN memorandum dated December 6, 1996, included with the petition contains a review of several LERs submitted by the Licensee in the latter part of 1996. On the basis of its analysis of the LERs, CAN reaches certain conclusions regarding Licensee performance and actions that it believes should be taken. The Partial Director’s Decision evaluated LERs 96-13, 96-14, 96-19, 96-20, 96-21, 96-22, and 96-25 and provided a response to CAN’s overall conclusions regarding Licensee performance and requested actions. LERs 96-15, 96-18, and 96-23 were still open at the time the Partial Director’s Decision was issued. The Staff has completed its evaluation of these three LERs and its conclusions are presented below.

1. LER 96-15: “Original B31.1 ANSI Code Section That Required Overpressurization Relief for Isolated Piping Sections Was Not Considered During [the] Original Design”

Certain piping sections that would be isolated after a loss-of-coolant accident (LOCA) were found to lack overpressure protection, contrary to code requirements. The water in this piping could expand because of the high temperatures accompanying a LOCA and exceed the design pressure rating of the piping. CAN asserts that the Licensee failed to take advantage of earlier opportunities to identify this design error when making modifications to the six systems discussed in the LER. CAN is correct in that the LER documented the first discovery of this problem, although modifications had been made to the affected systems earlier. This potential overpressurization problem has been identified at other plants, as evidenced by the issuance of NRC Information Notice 96-49 on August 20, 1996, and NRC Generic Letter (GL) 96-06 on September 30, 1996. The Licensee was aware of events in this area and identified this issue at its site before the generic communications previously referred to were issued. The Licensee’s corrective actions included a design change that provided the required overpressure protection for the affected lines. The change was completed in the 1996 refueling outage conducted during the period of September 6, 1996, to October 30, 1996.

Because the Licensee identified the design deficiency described in this LER by other than routine quality assurance or surveillance activities and has
implemented appropriate corrective actions to resolve the discrepancy, this “old design issue” was not cited in accordance with NRC Enforcement Policy, section VII.B.3.1 The LER was closed in Inspection Report 50-271/97-11.


   CAN asserts that this deficiency had significant adverse safety implications. The reported deficiency consisted of a small gap in the fire barrier installed on a cable tray support. The cable tray contained wiring to support operation of the emergency core cooling system (ECCS). The NRC Staff does not consider CAN’s claim that a fire could have rendered both divisions of the ECCS inoperable credible. The Licensee’s evaluation found that existing fire protection analyses were very conservative and that with the combustible loading and fire detection and suppression equipment in the area, no credible fire threat could challenge the functionality of the “as found” wrapped cable. The Staff agrees with the Licensee’s analysis as documented in the LER and has found that the Licensee acted appropriately to correct the fire barrier deficiency and to prevent similar problems in the future.

   The NRC Staff found that the deficiency described in this LER was a violation of NRC requirements of 10 C.F.R. Part 50, Appendix R, § III.G. However, in accordance with the provisions of NRC Enforcement Policy, section VII.B.4, no notice of violation was issued in this case because the deficiency (1) was identified by the Licensee as part of the corrective actions for a previous issue related to Appendix R, (2) had the same root cause as the previous issue, (3) did not substantially change the safety significance or the character of the regulatory concern arising out of the initial action, and (4) the deficiency was corrected within a reasonable time following identification. The LER was closed in Inspection Report 50-271/97-80.


   The reactor building and refueling floor radiation monitor test procedure did not verify the high alarm contact actuation as required by the Vermont Yankee Technical Specifications. The NRC Staff agrees with CAN that this event presented no significant risk to public health and safety. Considering

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1 General Statement of Policy and Procedures for NRC Enforcement Actions, NUREG-1600 (Enforcement Policy).
that the monitors were verified to be fully functional and were in the condition required by plant Technical Specifications, this specific event appears to have been limited to an inadequate testing methodology. The Licensee’s corrective actions included revising the deficient surveillance test procedure to properly test the high alarm output contacts.

Because the deficiency identified in this LER was of minor safety significance and was identified and corrected by the Licensee, it was treated as a noncited violation in accordance with NRC Enforcement Policy, section VII.B.1. The LER was closed in Inspection Report 50-271/97-08.

B. Supplemental Request for Action

On November 7, 1997, CAN submitted a letter that raised a concern about asserted “systematic mismanagement” at the Vermont Yankee facility and requested that three actions be taken. In its response to the Petitioner, the NRC Staff indicated that this concern would be considered as a supplement to the petition.

The requested actions, along with the NRC Staff’s evaluation, are discussed below.

1. An NRC team in conjunction with an outside contractor conduct a review of a second system, the ventilation system.

From May 5 through June 13, 1997, the NRC Staff performed a detailed design inspection of the low-pressure coolant injection and RHR service water systems at the Vermont Yankee facility. The inspection team consisted of a team leader from the NRC and five contractor engineers from Stone & Webster Engineering Corporation. The systems were chosen on the basis of their importance in mitigating design-basis accidents at Vermont Yankee. The purpose of the inspection was to evaluate the capability of the selected systems to perform the safety functions required by the design bases and the consistency of the as-built configuration and system operations with the Final Safety Analysis Report (FSAR). Overall, the inspection team concluded that the two systems were capable of performing their intended safety functions. However, the team identified some issues that indicated potential programmatic concerns extending beyond the two systems that were inspected. Specifically, the team identified the following issues that indicated potential programmatic concerns: (1) several examples which indicated the Licensee’s correction of licensing documentation was not timely; (2) when rendering equipment inoperable for surveillance testing, the Licensee’s practice concerning entry into the limiting condition of operation (LCO) was not consistent with the guidance provided in GL 91-18, “Resolution of Degraded and Nonconforming Conditions”; (3) deviations
from the licensing commitments made in response to GL 89-13, “Service Water System Problems Affecting Safety-Related Equipment”; (4) weaknesses in the development and control of calculations, and the review and approval process for calculations; and (5) weaknesses concerning the Licensee’s translation of design criteria and design bases into detailed operating instructions. The results of this inspection were documented in Inspection Report 50-271/97-201.

By letter dated October 27, 1997, the Licensee provided a schedule and detailed the plans to complete the corrective actions required to resolve the broader programmatic issues listed in the inspection report. In its letter, the Licensee listed several initiatives it has undertaken to improve its performance. These initiatives include: (1) a re-engineering of the corrective action program, (2) a large-scale program to develop design-basis documents for the twenty-three most risk-significant systems, (3) initiation of a design-basis validation program, (4) conversion of the plant’s Technical Specifications to the Standard Technical Specification format, (5) a large-scale instrument setpoint calculation and verification program, (6) a large-scale effort to re-engineer the configuration management program, and (7) creation of a System Engineering Department.

The NRC Staff has concluded that the Licensee’s proposed actions and schedule are acceptable and that the facility may be operated while the Licensee works to resolve these issues. The Staff will continue to follow the Licensee’s progress to improve the facility’s design-basis documentation and implement the initiatives outlined in its October 27, 1997 letter through the normal inspection process. A detailed design inspection by the NRC Staff of an additional safety system is not warranted at this time.

2. NRC with an outside contractor and VY [Vermont Yankee] conduct a review of all backup safety systems to assure adequacy of these systems in order to protect worker and public health and safety.

As stated in the reply to item 1, above, the NRC Staff has conducted a detailed design inspection of two selected systems at the Vermont Yankee facility. The inspection team found the two systems capable of performing their intended design functions. As discussed in item 1, above, the inspection report also documented several issues of programmatic concern. The NRC Staff has determined that the Licensee’s response to these programmatic concerns is acceptable and implementation of the Licensee’s actions will be assessed during followup inspections. Overall, the Staff finds that the detailed design inspection and the followup inspection activities provide adequate assurance of public health and safety and that a design review inspection of additional safety systems is not warranted at this time.
3. Given the lack of thoroughness by the licensee and significant flaws in the FSAR and design basis evaluation, CAN questions Region I staff’s competence to effectively oversee reactors under its authority. We therefore request that the archive of NRC’s oversight failures at VY [Vermont Yankee] be added to the Inspector General’s investigation of complicity and systematic failure to enforce NRC regulations by NRC staff in Region I and Project Directorates.

With regard to this request, CAN’s letter has been forwarded to the Office of the Inspector General.

III. CONCLUSION

The NRC Staff has reviewed the information submitted by the Petitioner. The Petitioner’s request is granted in part in that the NRC Staff has evaluated all of the issues raised in the two memoranda and the supplemental letter provided by the Petitioner to see if enforcement action is warranted on the basis of the information contained therein. In the Partial and the Final Director’s Decision, the NRC Staff has discussed each memorandum and the supplemental letter and described any related enforcement action that was taken. The Petitioner’s supplemental request that the NRC, in conjunction with an outside contractor, conduct additional review of safety systems at the Vermont Yankee facility is denied. With respect to the supplemental request for an investigation of NRC oversight of the Vermont Yankee facility, the Petitioner’s supplemental letter was forwarded to the Office of the Inspector General.

As provided in 10 C.F.R. § 2.206(c), a copy of this Decision will be filed with the Secretary of the Commission for the Commission’s review. This Decision will constitute the final action of the Commission 25 days after issuance, unless the Commission, on its own motion, institutes review of the Decision in that time.

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 29th day of December 1997.