RAS 7704

April 30, 2004
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3103
	)	
(National Enrichment Facility)	)	
	)	

NRC STAFF RESPONSE TO REQUEST OF THE NEW MEXICO ATTORNEY GENERAL FOR HEARING AND PETITION FOR LEAVE TO INTERVENE

INTRODUCTION

In response to the Notice of Hearing published by the Commission on January 30, 2004,[1] the New Mexico Attorney General ("AG"), on April 5, 2004, filed a request for leave to intervene as a party in the hearing to be held before the Atomic Safety and Licensing Board on the application submitted by Louisiana Energy Services, L.P. ("LES") to construct and operate a centrifuge enrichment facility in Eunice, New Mexico.[2] Thereafter, in response to a Board Order requesting additional filings by the petitioners[3], the AG filed a supplemental petition on April 23,

[1] On January 30, 2004, the Commission issued an Order, thereby noticing receipt of the application and consideration of the license application, and a notice of hearing. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-03, 60 NRC____ (2004), "Notice of Receipt of Application For License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order." 69 Fed. Reg. 5,873 (February 6, 2004).

[2] *See* "The New Mexico Attorney General's Request for Hearing and Petition for Leave to Intervene."

[3] Memorandum and Order (Initial Prehearing Order) April 15, 2004. In that order, the Board directed petitioners to file supplements which identify each proposed contention as technical, environmental or miscellaneous. In addition, the Board directed the AG and the other petitioner representing the State - the New Mexico Environmental Department ("NMED") - to examine the contentions filed by the other and determine which, if any, were substantively the same. In its supplemental filing, the AG stated that it wished to adopt one contention advanced by NMED, identified as contention 5e.

2004.[4] As discussed below, the AG[5] has standing to participate in the hearing as a representative of the State of New Mexico[6] but has failed to advance an admissible contention. Accordingly, the AG should not be admitted as a party to this proceeding.[7]

BACKGROUND

On December 15, 2003, LES filed an application for a license to possess and use source, byproduct and special nuclear material and to enrich natural uranium to a maximum of five percent U-235 by the gas centrifuge process. Pursuant to the Atomic Energy Act and the Commission's regulations at 10 C.F.R. § 70.23a, a hearing on the application is required. Accordingly, the Commission issued an order noticing receipt of the application and consideration of the license application, and of the hearing. In that order, the Commission, among other matters, directed that the hearing in this proceeding will be subject to the recently-revised provisions in 10 C.F.R. Part 2, and provided a broad overview of the requirements regarding the admissibility of contentions that

[4] *See* "Supplemental Request of the New Mexico Attorney General for Hearing and Petition for Leave to Intervene" ("Petition").

[5] The AG states that it is an elected state official with the authority to appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent the state when required by the public interest. Petition at 1-2.

[6] The New Mexico Environmental Department ("NMED") filed a separate petition to intervene on March 24, 2004, in which it stated that it is an agency of the State of New Mexico, has the authority to serve as agent for the State in matters of environmental management in which the United States is a party, and has been designated by the Governor of the State as the single representative for the State in this hearing. The Staff responded to the NMED's petition in a filing on April 19, 2004. *See* "NRC Staff Response to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene."

[7] Although the AG has not proffered an admissible contention, and thus, should not be admitted as a party to this proceeding, the Staff has taken the position that the contention of NMED that the AG seeks to adopt is admissible. While adoption of a contention of another party is not sufficient to confer party status to the AG, the Staff does not object to the AG's participation in the hearing on that specific contention, pursuant to 10 C.F.R. § 2.315(c), as an interested governmental participant. *See*, *generally, Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996), *see also, generally, Pacific Gas & Electric Co.* (Diablo Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002).

may be proffered by petitioners. In its Order, the Commission also addressed specific issues which could be raised in the hearing, noting that a number of Commission decisions had been issued in the course of a previous enrichment facility licensing proceeding which could be relied upon as precedent.[8]

DISCUSSION

In order to be admitted as a party in a hearing, a petitioner must establish standing by showing that it has a distinct, redressable interest in the action subject to the proceeding. When the petitioner is a State, however, the Commission's regulations provide that the standing requirements need not be addressed when the facility subject to the proceeding is located within the State's boundaries. 10 C.F.R. § 2.309(d)(2). The AG has represented that it has statutory authority to represent the state of New Mexico in this proceeding. Accordingly, the AG has adequately established standing.

In addition to establishing standing, a petitioner must proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). As explained in the Commission Order, that regulation requires that contentions include: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. The AG has proffered two technical contentions, five

[8] These decisions are: *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-92-7, 37 NRC 93 (1992); *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997); and *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998).

environmental contentions and two miscellaneous contentions. In addition, the AG has stated that it wishes to adopt contention 5e as proposed by NMED. With regard to that contention, the Staff in its earlier filing responding to the NMED petition stated that it was admissible as proposed. Each of the other contentions proposed by the AG will be addressed separately below.

I. Technical Contentions:

> Contention i: The manner in which the disposal security will be calculated is not at all clear.
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> Basis: LES states that "LES will provide decommissioning funding assurance for disposition of depleted tails at a rate in proportion to the amount of accumulated tails onsite up to the maximum amount of the tails as described in Section 10.3, Tails Disposition." LES Application, 10.2-1. LES states also: "The surety methods adopted by LES will provide an ultimate guarantee that decommissioning costs will be paid in the event LES is unable to meet its decommissioning obligations at the time of decommissioning." LES Application, 10.2-1. From these statements if seems that (1) funding would apply only to the tails accumulated onsite, even if other tails are in process of storage offsite and have not been disposed of, (2) funding would be based on the average cost of disposal of maximum production, even though unit disposal costs will probably be higher if production is lower, (3) funding would apply only at the time of decommissioning, even though the need to dispose of tails exists throughout the operating life, and (4) decommissioning the plant before the end of its 30-year operating life could leave tails disposal underfunded because funding had met only the present value of a disposal obligation 30 years in the future. The State seeks the opportunity to present these shortcomings.

The regulation requiring financial assurance for decommissioning provides that LES, as an applicant for an enrichment facility, must provide a funding plan that includes a cost estimate for decommissioning and the method of assuring funds. 10 C.F.R. § 70.25(e). Funding may be provided by one of two means: either (1) prepayment by deposit into a segregated account prior to the start of operations, or (2) a surety method, insurance or other guarantee method. § 70.25(f). If the surety method is used, the regulations require that the surety method (1) be open-ended or, if written for a specified period of time, be subject to requirements regarding renewal and expiration, (2) be payable to a trust established to pay decommissioning costs with a trustee acceptable to the Commission, and (3) remain in effect until the license is terminated. *Id*.

LES, in its application, states that it will utilize a surety method to comply with these requirements. National Enrichment Facility Safety Analysis Report ("NEF SAR") Vol 5 at 10.2.1.[9] While the application indicates that finalization of the specific financial instruments has not been accomplished, it states that they will contain the following attributes:

> The surety method will be open-ended or, if written for a specified term, such as five years, will be renewed automatically unless 90 days or more prior to the renewal date, the issuer notifies the NRC, the trust to which the surety is payable, and LES of its intention not to renew. The surety method will also provide that the full face amount be paid to the beneficiary automatically prior to the expiration without proof of forfeiture if LES fails to provide a replacement acceptable to the NRC within 30 days after receipt of notification of cancellation
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> The surety method will be payable to a trust established for decommissioning costs. The trustee and trust will be ones acceptable to the NRC. For instance, the trustee may be an appropriate State or Federal government agency or an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency.

The surety method will remain in effect until the NRC has terminated the license. *Id*.

LES also states in the application that LES will update the decommissioning cost estimate, and the associated funding levels, over the life of the facility to take into account changes resulting from inflation or site-specific factors such as changes in facility conditions or expected decommissioning procedures. *Id*. at 10.2.2. The updating is also to include adjustments based on the amount of accumulated tails at the site. *Id*. In accordance with the regulations in 10 C.F.R. § 70.25(e), the updating will occur approximately every three years. *Id*.

Is essence, therefore, LES has stated that it will set up a funding mechanism as contemplated by the Commission's regulations. Compliance with Commission regulations is all that is required of applicants; therefore, any contention which amounts to asserting that the Commission's requirements are not adequate must be rejected. It has long been established that

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[9] The LES application consists of a Safety Analysis Report ("NEF SAR"), which contains five volumes, an Environmental Report ("NEF ER") containing three volumes, an Emergency Plan consisting of one volume, and the Fundamental Nuclear Material Control Plan consisting of one volume.

NRC adjudications are not the proper forum for challenging applicable requirements or the basic structure of the agency's regulatory process. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 179 (1998); *citing, Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). However, this is what the AG is seeking to the extent that it desires an opportunity to present shortcomings in the surety method LES states it will use. For this reason, the contention should be rejected.

In addition, the AG's stated concerns with regard to the surety mechanism are vague, unparticularized and without any foundation and should be rejected on that basis. First, the AG states that it seems that funding would apply only to the tails accumulated onsite even if other tails are stored offsite. Petition at 3. This conclusion is unsupported and contrary to Commission practice and regulations. Under the Commission's regulations, specifically § 70.38(j)(1), LES must certify the disposition of all licensed material, including accumulated wastes as the final step in decommissioning. Thus, the regulations contemplate that the licensee is responsible for final disposition of all material as part of decommissioning.

Secondly, the AG speculates that funding will be based on the average cost of disposal at maximum production while unit disposal costs would probably be higher if production is lower. Petition at 3. The AG, however, provides no foundation for this assumption, or any basis for concluding that even if this were true it would provide a basis for concluding that funding would be inadequate. Obviously, the decommissioning cost used for determining funding requirements is based on estimates of costs which have numerous variables. The fact that the estimate will not be exact is to be expected and is the reason for the use of mechanisms such as contingency factors and periodic adjustments in the funding estimate, both of which are part of the LES

application.[10] Indeed, the Commission regulations relating to decommissioning were recently amended to address this issue by requiring that the cost estimates which are the basis for decommissioning funding plans be adjusted at intervals not to exceed three years. 68 Fed. Reg. 57,327, *revising* 10 C.F.R. § 70.25(e). With respect to that requirement, the Commission stated that periodic adjustments were needed to ensure that financial assurance obtained by licensees would not become insufficient because of changing circumstances such as higher waste disposal costs or inflation. 68 Fed. Reg. at 57,332.

The AG goes on to state that funding would apply only at the time of decommissioning, even though the need to dispose of tails exists throughout the operating life of the facility. It is not clear, however, why the AG considers this a defect in the application. If the tails are disposed of during operations, the costs of disposal would be operating expenses and therefore would not come out of funds set aside for decommissioning. Presumably, this would serve to preserve the funds which have been set aside for decommissioning and will ultimately be available to remediate the facility and any tails left for disposal. LES has premised its decommissioning cost in the application on the disposition of all tails expected to be produced during the life of the facility. NEF SAR Vol. 5, 10.3. Thus, LES must provide assurance that sufficient funding is available, pursuant to 10 C.F.R. § 70.25(e), to cover the contingency that no tails are disposed of during operation. If, as LES represents, the tails will be disposed of during operation, the decommissioning cost would be expected to decrease.

Finally, the AG posits that if the facility is decommissioned before the end of its 30-year license term, decommissioning will be underfunded because it is based on the present value of an obligation 30 years in the future. Petition at 3. Again, the AG provides no basis for this conclusion.

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[10] LES has included a 10% contingency factor in the decommissioning cost estimate ,NEF SAR Vol.5, Table 10.1-2, and states that it will update the decommissioning cost estimate over the life of the facility to account for changes from, for example, inflation. *Id*. at 10.2.2.

As noted above, LES has already stated that changes in costs, such as those from inflation, will be accounted for by periodic adjustments in the fund.

> Contention ii: The bases for LES's cost estimates are suspect and the actual cost of disposing of tails will exceed the $5.50 per KgU estimated by LES.
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> Basis: LES presents four sources of cost estimates: (1) a 1997 study by Lawrence Livermore National Laboratory (LLNL), (2) the 2002 Uranium Disposition Services (UDS) contract with DOE to provide deconversion services, (3) information from Urenco, an LES partner, and (4) costs submitted by LES to NRC in connection with the Louisiana license application. LES Application, 10.3-1 to 10.3-3 and Table 10.3-1. It should be noted that data from two of the four sources, UDS and Urenco, are withheld as proprietary; LES gives only DOE's estimate of the costs under the UDS contract. LES Application, 10.3-2. The DOE, however, has previously been directed by Congress to carry our nuclear waste disposal and has failed to perform as directed (e.g., commercial spent fuel disposal under the Nuclear Waste Policy Act of 1982). Additionally, the DOE has consistently failed to estimate the costs of disposal and related activities with any accuracy.
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> Basis: With respect to the potential for deconversion and burial of the waste, no deconversion plant exists in the United States, the cost estimates for its construction are likely inaccurate, the time and cost of using a closed uranium mine for disposal are seriously underestimated, and the legality of burying low level waste in such a mine is uncertain.
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> Basis: The LLNL estimates were based on a much higher production rate than planned by LES and do not represent actual market prices. LES Application, 10.3-2. Notably, the data presented by LES itself to the NRC concerning the LES Louisiana project shows a total cost of $6.74 per kgU, not $5.50. Nevertheless, LES concludes that it would be "prudent" to project waste disposal costs of $5.50 per kgU. LES Application, 10.3-3.

In this contention the AG postulates reasons why the decommissioning cost estimate could be inaccurate but does not state what numbers would be more representative of the cost. Neither does the AG provide any factual support or expert testimony to establish that the cost estimate is inaccurate except for a reference to the license application filed when facility was to be built in a different location. Clearly, this is insufficient to satisfy the requirements in 10 C.F.R. § 2.309(f)(v), which provide that a contention must:

> Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on with the requestor/petitioner intends to rely to support it position on the issue.

Thus, it is not sufficient to simply give reasons LES's estimate of decommissioning costs "are suspect." Indeed, many of the reasons cited by the AG are merely obvious conditions, such as the absence of a deconversion plant in the United States, which necessarily bring a certain lack of precision into any process of estimating costs. The existence of these conditions do not mean that the LES estimate is unsound - only that the process of estimating the cost may be more difficult. Because this contention fails to show that there exists a "genuine dispute. . . with the applicant. . . on a material issue of fact or law," as required by 10 C.F.R. § 2.309(f)(iv), the contention should be rejected.

II. Environmental Contentions

> Contention i: If LES's proposed Uranium Enrichment Facility is not economically viable, the 90% majority owners, which are foreign entities, may simply abandon their investment.
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> Basis: On December 15, 2003, Louisiana Energy Services (LES), a partnership comprised of Urenco, a European nuclear consortium (70.5% ownership), Westinghouse, which is now owned by British Nuclear Fuels, Ltd. (19.5% ownership), and three U.S. utilities (Exelon, Entergy, and Duke Power), filed its application with the Nuclear Regulatory Commission (NRC) for licensing under the Atomic Energy Act of a uranium enrichment facility to be located near Eunice, in southeastern New Mexico. LES Application, 1.0-1 to -3. With so few ties to the community, much less the country, there is a substantial likelihood that cleanup and dismantlement costs might fall upon the State of New Mexico.

In this contention, the AG expresses its concern that the owners of the facility may abandon the site if the enterprise is not economically feasible, leaving remediation of the site to the state. It is precisely to prevent this situation from occurring that the Commission has provided that applicants must set aside sufficient funding to cover the costs of decommissioning. As the Commission said when it revised the decommissioning regulations, "[t]he NRC regulations requiring financial assurance for decommissioning are designed to ensure that adequate funding will be available for timely decommissioning by licensees following shutdown of normal operations." 68 Fed. Reg. at 57,328. Addressing the impact on the public, the Commission said, "[f]ailure to provide adequate financial assurance for decommissioning also has equity considerations. The potential public costs involved in cleanup of contaminated facilities where financial assurance is

inadequate must be considered. Equity considerations call for adequate financial assurance so that a licensee's decommissioning costs are borne by the licensee." *Id*. at 57,329. *See* 10 C.F.R. § 70.25.

Thus, the Commission has adopted a regulatory scheme which is designed to provide assurance that the licensee ultimately will be held accountable for remediating the site by requiring that funds be set aside which are sufficient to cover the cost of decommissioning. In this respect, it is important to note that the Commission's decommissioning requirements only require the licensee to ensure that radiological contamination has been remediated to meet the Commission's standards. 10 C.F.R. § 70.38(j); Part 20, subpart E. Because these funds will be available from the time that operations begin, they will be available regardless of when operations cease. Continuing economic viability of the enterprise is therefore not necessary to ensure that decommissioning is adequately funded, and is not considered by the NRC in deciding whether to license an enrichment facility. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997). This contention must, therefore, be rejected.

> Contention ii: The storage of large amounts of depleted uranium tails in steel cylinders, which would remain in outdoor storage on concrete pads for "a few years" poses a distinct environmental risk to New Mexico.
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> Basis: An enrichment plant generates enriched uranium hexafluoride (UF6) as its principal output, LES Application, 1.2-1, and depleted UF6, known as "tails," as a byproduct. LES Application, 3.12-15. The LES facility is intended to operate for 30 years and would generate significant quantities of tails, i.e., a maximum of 234,000 metric tons of depleted UF6 over 30 years. LES Application, 3.12-15. Other enrichment facilities in the United States (e.g., Oak Ridge, Paducah, and Portsmouth), originally built for nuclear weapons production and therefore not licensed by the NRC, have generated large amounts of depleted uranium tails, stored in steel cylinders, which have remained in outdoor storage on concrete pads for decades. LES, itself, recognizes the potential for long-term storage of depleted UF6 not only in its application, but also in its Answer to New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene. See LES Application, 4.13.3.1.1 (stating that "[t]he concrete pad to be initially constructed onsite for the storage of UBC's will only be of a size necessary to hold a few years worth of UBC's"); see also LES's Answer to the New Mexico Environment Department's Request for Hearing and Petition for Leave to Intervene (quoting the same, and adding that the concrete pad would "be expanded only if necessary"). The State seeks the opportunity to explore this factual issue.

In this proposed contention, the AG states that it is concerned about the potential environmental risks to the State of New Mexico posed by onsite storage of the depleted uranium tails for an uncertain period of time. Thus, the AG requests "the opportunity to explore this factual issue." Petition at 6. As discussed more fully below, however, the AG's contention is unduly vague and fails to provide the requisite basis or the necessary specificity for admission into this proceeding. *See* 10 C.F.R. 2.309(f)(1)(v)&(vi).

The AG is correct in asserting that the application reveals that the applicant contemplates the storage of depleted uranium ("DU") on site for some period of time. Because of this, LES has addressed health, safety and environmental issues associated with the manner in which the DU will be stored. Specifically, the application describes the environmental, health and safety aspects of storing DU in uranium byproduct cylinders in open air storage yards. NEF ER Vol. 2, 4.13.3.1.1-4.13.3.1.5. As a necessary part of its review, the Staff will determine whether those provisions are adequate to assure that public health, safety, and the environment are adequately protected before issuing the requested license. While the AG contends that the State of New Mexico will be subject to "distinct environmental risk," the AG fails to provide sufficient information to show that a genuine dispute exists with the applicant regarding this information.

When, as here, the application addresses an issue which a petitioner wishes to contest in a hearing, Commission regulations require the petitioner to examine the application, identify the specific deficiencies it wishes to address, and provide support for its contention that the application is deficient. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132, 134 (1998); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2,3), CLI-99-11, 49 NRC 328, 333 (1999). The hearing on LES's application is not merely a forum "to explore this factual issue" in the absence of the requisite support mandated by the Commission's regulations. In this instance, the AG offers no specific deficiencies in the LES

application, nor does it provide any basis that would support some deficiency in the application. Therefore, the contention must be denied.

> Contention iii: In its current application LES has identified two "plausible" approaches for waste disposal: (1) a plan under which other private investors would construct a "deconversion" plant to change the depleted UF6 into U308, whereupon the U308 would be buried in an exhausted uranium mine, LES Application, 4.13-7 to -8, and (2) a plan under which, pursuant to Section 3113 of the U.S. Enrichment Corporation (USEC) Privatization Act, LES would require the Department of Energy (DOE) to accept for conversion and to dispose of the depleted UF6 as low-level radioactive waste at a price determined by DOE. LES Application, 4.13-7 to -8. Further, NRC's scheduling order dated February 6, 2004 states that a plan to transfer depleted tails to DOE for disposal tails pursuant to Sec. 3113 of the USEC Privatization Act constitutes a "plausible strategy" for dispositioning such waste. 69 Fed. Reg. at 5,877.
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> Basis: Both of these alternative strategies present such large practical difficulties that they are decidedly not plausible: No deconversion plant exists within the United States, and the necessary licenses to bury U3O8 in an abandoned mine may be hard to obtain. As for the DOE option, when tendered depleted tails, DOE must recover "an amount equal to the Secretary's costs, including a pro rata share of any capital costs." USEC Privatization Act, Pub. L. 102-486, Sec. 3113(a)(30). DOE may be unable to estimate its actual costs of disposal, and it may be unable to accomplish disposal as required. DOE would undoubtedly give higher priority to the 740,000 metric tons of existing tails from the DOE, and former DOE plants, which DOE is required to dispose of, in preference to waste from LES. The actual obstacles to disposal are suggested by the January 15, 2004 letter to NRC from Governor Taft of Ohio, who stated that waste from a New Mexico plant would not be allowed in Ohio. Albuquerque Journal, January 17, 2004. In sum, LES may postulate "plausible" strategies, but executing a specific disposal plan may be extremely difficult and costly, which increases the likelihood that the burden will fall upon New Mexico to achieve proper disposal.

In this contention, the AG contends that the "plausible" strategies for disposal of the depleted uranium tails presented by LES in its application might be difficult to achieve, thus, "increasing the likelihood that the burden will fall upon New Mexico to achieve proper disposal." Petition at 7. Again, the AG has failed to provide the necessary specificity and support for admission of this proposed contention.

In the application, LES has described two strategies it considers to be plausible for disposition of the DU generated during the life of the facility. NEF ER Vol. 2, 4.13.3.1.3. This approach is consistent with the Commission's statement, when noticing consideration of the earlier application for an enrichment facility, that the applicant need only present a plausible strategy for

disposition of DU. 56 Fed. Reg. 23,313 (May 21, 1991). The two strategies described by LES are: (1) Private sector conversion of the tails, and (2) Department of Energy conversion of the tails. The AG, however, claims that both of these strategies present "large practical difficulties" in that no deconversion plant currently exists within the United States and that, for a variety of reasons, DOE might not be able to accept the DU in a realistic time frame. Petition at 7.

In presenting this contention, the AG questions the practicality of the strategies presented in the LES application, but fails to advance anything other than the mere speculation that difficulties in disposal exist. With no documentary evidence or expert opinion to support its position, the AG falls short of challenging the plausibility of the strategies proposed. In fact, the AG appears to concede that the strategies are "plausible" but asserts that they may be "extremely difficult and costly". Without presenting more of a basis, this contention must be denied as such bald assertions and mere speculations are simply not enough to satisfy the Commission's contention requirements. *See Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180, *citing Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary analysis to show why the proffered bases support its contention. *See Private Fuel Storage,* 47 NRC at 180.

> Contention iv: Security for disposal costs must be provided.
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> Basis: In its application, LES has requested permission to build a storage pad that will hold 30 years of waste output. LES Application, 4.13-3 to -5. It is clear that, if the waste is accumulated during operations, the disposal cost must be paid at the time decommissioning. Such a cost is exposed to all the risks of other shutdown costs: On shutdown, customers have paid their bills, and the only entity that may be asked to bear these costs is the owner, which forsees no further revenues from the plant and is, in fact, a foreign owner with no attachment to the locality. The situation begs for a determination that security for disposal must be provided.

In essence, this contention is another recitation of the concerns that the AG expressed earlier, in technical contention i, and the Staff's response is the same. It is precisely to prevent this situation from occurring that the Commission has provided that applicants must set aside sufficient funding to cover the costs of decommissioning. *See* 10 C.F.R. § 70.25. Further, as stated above in response to contention i, decommissioning costs include the cost of disposal of all licensed material, including wastes. *Supra* at 6, 10 C.F.R. § 70.38(j)(1). Accordingly, security for disposal costs is inherent in the Commission's regulations. The AG's bare claim to the contrary does not raise any issue for litigation in this proceeding and this contention should be rejected.

> Contention v: LES has not adequately demonstrated the need for its enrichment services for the purposes of the Environmental Impact Statement.
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> Basis: Under the National Environmental Policy Act (NEPA), issuance of a license requires an Environmental Impact Statement (EIS), and the EIS must contain a description of the need for the proposed action. LES's application includes the required Environmental Report, which describes the projected need for additional enrichment services. LES Application, 1.1-1. There is a significant question whether the United States market for enrichment services in the next three decades is large enough to support the proposed facility, given other planned additions to supply. The State seeks the opportunity to contest the proposed need for additional enrichment services of the scale proposed by LES.

In its final environmental contention, the AG seeks to challenge the purported need for the proposed facility as outlined in the LES application. Petition at 8. Once again, while the AG has indicated its disagreement with the applicant on a particular subject matter, the AG has failed to provide a basis for this disagreement. Instead, the AG makes a general assertion that "there is a significant question as to whether the United States market for enrichment services in the next three decades is large enough to support the proposed facility..." The AG offers no documentary evidence or expert opinion challenging the applicant's analysis of need or offering support for its concern about the US market for enrichment services, as required by the Commission's regulations. 10 C.F.R. § 2.309(f)(v),(vi). Without supporting evidence indicating that a factual dispute exists, this contention fails to meet the Commission's requirements for admission and, thus, should be denied.

III. Miscellaneous Contentions:

> Contention i: The State requests the opportunity to explore the definition of a "plausible strategy" for disposal of LES waste.
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> Basis: NRC, as regulator, has stated that it sill require LES to demonstrate a "plausible strategy" for disposal of its waste. The term "plausible strategy" appears in a NRC order referring to a determination by an Atomic Safety and Licensing Board (ASLBP) that deep-mine disposal is a "plausible strategy for handling depleted uranium waste." Order in LES proceeding regarding the Claiborne Enrichment Center (Sept. 19, 1997). The term does not appear in any regulation or statute, and New Mexico is extremely concerned about the potential for future adverse consequences resulting from this ambiguity.

The purpose of this proceeding is to determine whether the proposed action - the construction and operation of an enrichment facility - should be approved. Any litigable contention must, therefore, focus on the license application. *See, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998). Contentions, such as this one, which do not directly controvert the application at issue must be dismissed. *Id., citing Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993). The legal interpretation of terms used by the Commission are not matters which, by themselves, may be the subject of a contention. Rather, such issues will be addressed by adjudicatory boards only as they are material to contentions which raise genuine issues of fact or law regarding the adequacy of the license application.

> Contention ii: Financial qualifications of LES must include contractual commitments that will pay for decommissioning and waste disposal, which requires the NRC to determine the actual costs of waste disposal and how it could be adequately financed.
>
> Basis: NRC regulations require that [application for a license will be approved if the Commission determines that] "[w]here the nature of the proposed activities is such as to require consideration by the Commission, that the applicant appears to be financially qualified to engage in the proposed activities in accordance with the regulations in this part." 10 C.F.R. § 70.23(a)(5). Previously, in connection with LES's Louisiana project, NRC explained the application of this test. NRC Decision (Dec. 18, 1997). At that time LES stated that it would not undertake the project unless it had funding commitments from equity and debt investors, which commitments in turn would require the existence of long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, incurred during the term of the contract. NRC ruled that any license would be conditioned on the existence of such funding commitments and contract. In its February 6, 2004 order, NRC gave guidance for the forthcoming

> proceeding, stating that the license condition previously approved "is one way to satisfy the requirements of part 70." 69 Fed. Reg. at 5,878. One difficulty with such a license condition is that it postpones satisfaction of an important requirement until after the proceeding is concluded and leaves in an uncertain state the regulatory determination whether the condition is met. Further, the condition is vaguely stated and inadequate. LES officials have claimed that they have contractual commitments for approximately 50% of the facility's output in the first ten years of production. Meeting with James Ferland and Rod Krich (Feb 9, 2004). However, LES has declined to make its contracts public so that the existence of conditions upon the obligation to pay for enrichment services could be determined, and it is not known how many of such contracts are with affiliates (i.e., LES partners).

In this contention, the AG correctly notes that LES must obtain contractual commitments to fund the construction and operation of the proposed facility. LES specifically addresses this point in the application which states: "LES shall not proceed with the project unless it has in place long-term enrichment contracts (i.e., five years) with prices sufficient to cover both construction and operation costs, including a return on investment, for the entire term of the contracts." NEF SAR Vol. 1, 1.2.2. As noted in the order noticing this hearing, the Commission has ruled that a license condition requiring LES to obtain these same types of funding commitments before construction and operation is one means of satisfying the applicable financial qualification requirements set forth in 10 C.F.R. § 70.22(a)(8) and § 70.23(a)(5). 69 Fed. Reg. at 5,878, *citing Louisiana Energy Services* (Claiborne Enrichment Center) CLI-97-15, 46 NRC 294, 309 (1997).

While it is not clear from the contention what issues the AG seeks to litigate at hearing, the AG appears to be concerned with how the NRC will ensure that LES obtains the necessary funding commitments before the commencement of construction and operation. As indicated above, obtaining contracts which provide adequate funding to ensure safe construction and operation of the facility are necessary to comply with the Commission's financial qualifications requirements. These commitments, therefore, will be subject to the oversight of the NRC Staff. Ultimately, it is the responsibility of the Staff to ensure that the applicant complies with the terms of its license and with NRC requirements. Accordingly, the Staff will require LES to provide it with all contractual commitments and review them to determine whether they provide adequate assurance that LES

will have sufficient funding to construct and operate the facility. The process the Staff uses in conducting its review is not a matter which is within the purview of the licensing boards, but, rather, is subject to oversight by the Commission alone. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06 , slip op. at 11 and n.23 (2004), *citing Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995). Because this contention raises an issue which cannot be adjudicated in this proceeding - the Staff's process for ensuring compliance with the regulatory requirements - it should be rejected.

CONCLUSION

For the reasons stated above, the AG has not advanced an admissible contention. Accordingly, the AG should not be permitted to participate as party to the proceeding. However, the AG may be permitted to participate in the hearing as an interested state under 10 C.F.R. § 2.315(c).

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 30th day of April, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA ENERGY SERVICES, L.P.	)	Docket No. 70-3103
	)	
(National Enrichment Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST OF THE NEW MEXICO ATTORNEY GENERAL FOR HEARING AND PETITION FOR LEAVE TO INTERVENE" in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), by electronic mail as indicated by a double asterisk (**), and by facsimile as indicated by a triple asterisk (***) on this 30th day of April, 2004.

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